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Congressional Agenda Could Accelerate Banking Agency Rules on Unfair Credit Card Practices and Consumer Disclosures – Understanding the New Rules

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Under legislation recently introduced in Congress, credit card issuers could experience tighter restrictions much sooner than an expected mid-2010 deadline on certain practices found to be unfair by Federal banking agencies under the Federal Trade Commission Act (“FTC Act”).¹ The legislation, entitled the Credit Cardholders’ Bill of Rights Act of 2009 (“Cardholders’ Bill of Rights”)² signals Congress’ general dissatisfaction with the timing of the effective date and certain other aspects of the joint, final rule (“UDAP Regulations”) recently issued by the Board of Governors of the Federal Reserve System (“Board”), the Office of Thrift Supervision (“OTS”), and the National Credit Union Administration (“NCUA”) (collectively, the “Agencies”).³

The UDAP Regulations, finalized just one month before introduction of the Cardholders’ Bill of Rights in Congress, interpret the body of law under the FTC Act on what constitutes unfair or deceptive acts or practices (“UDAPs”), specifically as they pertain to banks, savings associations, and Federal credit unions⁴ (collectively, the “Banks”).⁵ This article provides a summary of the recent actions taken by the Agencies to revise certain regulations and discusses the implications of such actions for

members of the financial services industry.

The recent revisions adopted by the Agencies (collectively, “Recent Revisions”):

- prohibit five specific UDAPs engaged in by Banks in connection with credit card accounts (by amending existing UDAP regulations);⁶
- improve disclosures received by consumers with credit cards and other revolving credit plans (by amending Regulation Z);⁷ and
- address depository institutions’ disclosure practices relating to overdrafts (by amending Regulation DD).⁸

The Board also approved a proposed rule amending Regulation E and is soliciting public comments on the rule governing overdraft fees and debit holds for deposit accounts (the “Proposed Rule”).⁹ Compliance with the UDAP Regulations and amendments to Regulation Z must occur by July 1, 2010; compliance with amendments to Regulation DD must occur by January 1, 2010; and the comment period for the Proposed Rule amending Regulation E will close on March 30, 2009. Interestingly, many of

the revisions to the final rules are incorporated in the Cardholders' Bill of Rights, which is expected to become effective 90 days after its enactment. This means that the 18-month implementation period for compliance with the new rules affecting credit card issuers, originally thought to be solidified by the Recent Revisions, may be significantly accelerated by the pending legislation.

UDAP Regulations

The UDAP Regulations implement the Agencies' rulemaking authority under Section 5 of the FTC Act to identify and prevent unfair or deceptive acts or practices engaged in by Banks.¹⁰ Under the FTC Act, an act or practice is *unfair* when it:

- causes or is likely to cause substantial injury to consumers;
- is not reasonably avoidable by consumers themselves; and
- is not outweighed by countervailing benefits to consumers or to competition.¹¹

An act or practice is *deceptive* when:

- there is a representation or omission of information;
- that is likely to mislead consumers acting reasonably under the circumstances; and
- that information is material to consumers.¹²

The standards for determining whether an act or practice is unfair or deceptive are mutually exclusive, *i.e.*, an act or practice violates the FTC Act when it is either unfair or deceptive, or both.

UDAP analyses under the FTC Act have long been implemented by the various Federal banking agencies.¹³ The Board, FDIC, and OCC are each required, under Section 5 of the FTC Act, to establish a division of consumer affairs to identify and prevent UDAPs engaged in by the institutions they regulate. Thus, while the UDAP

standards underlying the Recent Revisions are not novel, a significant feature of the Recent Revisions is that UDAP standards, previously applied retroactively on a case-by-case basis through enforcement actions, are now being imposed prospectively¹⁴ through the regulation of identified acts and practices engaged in by Banks. Enforcement of the new regulations remains the responsibility of the institutions' primary Federal banking regulators, including the OCC and the FDIC,¹⁵ even though only the Board, OTS, and NCUA issued the joint rule.

To Whom Do the UDAP Regulations Apply?

The UDAP Regulations apply to banks, savings associations, and Federal credit unions, collectively "Banks". While the UDAP Regulations will most notably impact issuers of credit cards due to the prospective prohibitions and related requirements on prevailing practices, the significance of the UDAP Regulations with regard to all other acts and practices engaged in by Banks must not be overlooked. Specifically, the UDAP Regulations contain five explicit rules, as discussed below, that are based on prohibitions on acts or practices relating to credit card accounts; however, for all other acts or practices engaged in by Banks, the Agencies expressly retain the right to enforce the FTC Act on a case-by-case basis. Therefore, the UDAP Regulations, and consequently the UDAP analysis performed in enforcing such regulations, have widespread application.

What Are the Significant Aspects of the UDAP Regulations?

The Agencies have identified five specific practices in the credit card industry and declared such practices to be unfair and therefore unlawful under the FTC Act. In finding such practices unlawful, the Agencies have developed rules and related requirements that effectively ban the practices. These five new credit card rules, contained in Subpart C of the UDAP Regulations, are summarized as follows:¹⁶

(1) Time to Make Payments. Banks are prohibited from treating a payment on a consumer credit card account as late for any purpose unless the consumer has been provided a reasonable amount of time to make the payment. A safe harbor has been established for Banks that transmit periodic statements at least 21 days before the payment due date, which allows 7 days for the consumer to receive the statement, 7 days for the consumer to review it, and 7 days for the Bank to receive payment.

(2) Allocation of Payments In Excess of Minimum Payment. When different annual percentage rates apply to different balances on a consumer credit card account, Banks are required to allocate any amount paid in excess of the minimum payment either (i) by applying the entire amount to the balance with the highest annual percentage rate first; or (ii) by splitting the amount *pro rata* among the balances.

(3) Interest Rates Increases. Banks are required to disclose, at the time of account opening, the interest rates that will apply to each category of transactions on the account, and are prohibited from increasing such rates unless an exception applies. After the first year following account opening, Banks can increase rates for new¹⁷ transactions if they comply with a new 45-day advance notice requirement under Regulation Z. Upon providing 45-days notice, Banks can also increase variable rates linked to an index or interest rates when a consumer is delinquent for more than 30 days.

(4) Balance Computation Method of Two-Cycle Billing. Banks are prohibited from engaging in two-cycle billing, which is the practice of assessing finance charges on consumer credit card balances for days in prior billing cycles when such charges are imposed as a result of the loss of a grace period. When a consumer pays the entire account balance one month, but does not do so for the following month, two-cycle billing occurs where interest for the second month is calculated using the account balance for days in both the previous

and current billing cycle.

(5) Financing of Security Deposits and Fees. Focusing in particular on subprime credit cards that offer low credit limits in connection with high service fees, Banks are prohibited from charging to a consumer's credit card account security deposits and fees for the issuance or availability of credit that constitute a majority of the initial credit limit in the first year, and are prohibited from charging more than 25 percent of the initial credit limit in the first month. If fees and security deposit charges exceed 25 percent of the available credit (but constitute less than a majority of the initial credit limit in the first year), repayment must be spread evenly over at least the first six months.

What Should Consumer Credit Providers Be Doing Now?

Consumer credit providers must act now to start planning for the implementation of changes required by the UDAP Regulations to ensure compliance by the July 1, 2010 effective date. In light of recent developments, *i.e.*, with the change in Administration and the pending Cardholders' Bill of Rights, consumer credit providers should be prepared to address the possibility of an accelerated effective date and/or modifications to the rules. For now, the eighteen-month delay until the effective date reflects the Agencies' recognition that Banks will need time to make major adjustments to their systems and in tailoring current practices. The Agencies do not intend for the new credit card rules to apply to acts or practices preceding the effective date. That is, the UDAP Regulations and the underlying UDAP analysis "should have no bearing on whether or not acts or practices restricted or prohibited under [the UDAP Regulations] are unfair or deceptive before the effective date."¹⁸

Regulation Z – Truth in Lending

The Truth in Lending Act ("TILA") was enacted to increase consumer awareness of the cost of credit. Three main goals served by TILA, which is

implemented by Regulation Z, include:

- ensuring credit terms are disclosed in a meaningful way so that consumers can compare them both readily and knowledgeably;
- protecting consumers against inaccurate and unfair billing and credit card practices; and
- implementing a system of uniform disclosures which allows consumers to understand key lending terms and all costs associated with the same.

To Whom Does Regulation Z Apply?

Regulation Z generally¹⁹ applies to any individual or business that offers or extends credit when four conditions are met:

- the credit is offered or extended to consumers;
- the offering or extension of credit is done regularly;
- the credit is subject to a finance charge or is payable by a written agreement in more than four installments; and
- the credit is primarily extended for personal, family, or household purposes.²⁰

What Are the Significant Aspects of the Recent Revisions?

Regulation Z disclosures differ depending on whether consumer credit is an open-end (revolving) plan or close-end (installment) loan. The revisions focus primarily on open-end plans that are not secured by a home – principally, general purpose and retail credit card plans. The goal of the amendments to Regulation Z is to improve the effectiveness of the disclosures that creditors provide to consumers at the application stage and throughout the life of an account. Accordingly, the changes cover format, timing, and content requirements for the five main types

of open-end credit disclosures governed by Regulation Z. The following outlines significant changes under each of the five categories:

(1) Applications and Solicitations.

Both format and substantive changes are required by the Recent Revisions to make application and solicitation disclosures more meaningful and easier for consumers to understand. Substantive changes under the Recent Revisions include:

- disclosing the reason for and duration of penalty rates;
- simplifying variable rate disclosures;
- providing a description of when a grace period is offered; and
- referencing consumer education materials on the Board's website.

(2) Account-opening Disclosures.

The Recent Revisions require cost disclosures provided at account opening to be more conspicuous and easier to read by mandating that certain key terms be present in a summary table format. Below is an example of the type of summary table that creditors will be expected to provide:

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	8.99% introductory APR for one year. After that, your APR will be 14.99% . This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	15.99% This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	21.99% This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	28.99% This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. How Long Will the Penalty APR Apply?: If your APRs are increased for any of these reasons, we may keep them at this higher level indefinitely.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than \$1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at http://www.federalreserve.gov/creditcard .

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. Based on your initial credit limit of \$250, your initial available credit will be only about \$187 (or about \$172 if you choose to have an additional card). You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.
<ul style="list-style-type: none"> • Annual Fee • Account Set-up Fee • Participation Fee • Additional Card Fee • Account Maintenance Fee on Closed Accounts 	<ul style="list-style-type: none"> \$30 \$30 (one-time fee) \$30 annually (\$2.50 per month) \$15 annually (if applicable) \$30 annually (\$2.50 per month on closed accounts with an outstanding balance of \$30 or more)
Transaction Fees	
<ul style="list-style-type: none"> • Balance Transfer • Cash Advance • Foreign Transaction 	<ul style="list-style-type: none"> Either \$5 or 3% of the amount of each transfer, whichever is greater (maximum fee: \$100). Either \$5 or 3% of the amount of each cash advance, whichever is greater. 2% of each transaction in U.S. dollars.
Penalty Fees	
<ul style="list-style-type: none"> • Late Payment • Over-the-Credit Limit • Returned Payment 	<ul style="list-style-type: none"> \$29 if balance is less than or equal to \$1,000; \$35 if balance is more than \$1,000 \$29 \$35

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

(3) Periodic Statement Disclosures.

The Recent Revisions include the following changes to periodic statement disclosures:

- grouping interest charges and fees separately and itemizing the former by transaction type (*e.g.*, purchases, cash advances, etc.);
- eliminating the requirement to disclose an “effective APR”; and
- disclosing the effect of making only the minimum payment.

(4) Changes in Account Terms.

Creditors will have to provide a 45-day advance notice, as opposed to the 15-day notice that was previously required, before changing any key account terms, including increasing interest rates due to default, delinquency, or as a penalty. In addition to increasing the time period required for an advance notice, the Recent Revisions also expand the circumstances under which consumers receive such notice.

(5) Advertising Provisions.

The Recent Revisions amend advertisement provisions to ensure that consumers fully understand the credit terms offered. For example, the Recent Revisions limit the use of the term “fixed” to refer to a rate only if a time period is specified for which the rate is fixed and the rate will not increase for any reason during that time. This marks a difference from current practices under which creditors often advertise a rate as “fixed” but reserve the right to change it at any time for any reason.

What Should Consumer Credit Providers Be Doing Now?

Consumer credit providers must start planning now for the implementation of changes required by Regulation Z to ensure compliance by the July 1, 2010 deadline. Because pending legislation also covers aspects of the Recent Revisions amending Regulation Z, consumer

credit providers should be prepared to address the possibility of an accelerated effective date and/or modifications to the rules. For the time being, an 18-month period is deemed by the Agencies to be necessary for implementation, as creditors will find themselves significantly revising many of their form disclosure documents to comply with the Recent Revisions. To ease the compliance burden, model disclosure forms are included in the Recent Revisions and are available on the Board’s website.²¹ It is likely that creditors will find many of the new disclosure requirements to be overly prescriptive and will certainly be sensitive to the costs of system changes that will invariably accompany compliance efforts.

Regulation DD – Truth in Savings

The Truth in Savings Act (“TISA”), implemented by Regulation DD, assists consumers in comparing deposit accounts principally through the disclosure of fees, interest rates, and other relevant account terms. Similar to Regulation Z, the goal is to provide uniform disclosures so that consumers may meaningfully compare deposit accounts. The latest series of revisions to Regulation DD pertain to practices related to overdrafts.²²

To Whom Does Regulation DD Apply?

Regulation DD applies to depository institutions except for credit unions,²³ and covers accounts held by consumers at such depository institutions.

What Are the Significant Aspects of the Recent Revisions?

The Recent Revisions require all depository institutions²⁴ to disclose overdraft fees and non-sufficient funds fees on their periodic statements. Currently, Regulation DD only requires institutions that *advertise* or *promote* the payment of overdraft fees to provide such disclosures. The revisions further add format requirements to make aggregate fee disclosures

more effective and noticeable to consumers.

In addition to fee disclosures, the Recent Revisions require that an account balance disclosed to a consumer through any automated system (*e.g.*, ATM, Internet site, or telephone system) must exclude additional amounts provided pursuant to a discretionary overdraft service or line of credit, or funds transferred from a linked account. The rationale is to ensure that consumers are not confused about the available amount of funds in their account. Additional amounts, however, may be included in a second balance as long as the institution prominently states that the balance includes such amounts.

What Should Depository Institutions Be Doing Now?

Under the final rule, Banks will have until January 1, 2010 to implement the system changes necessary to satisfy the new disclosure requirements under Regulation DD, which is shorter than the implementation period provided for compliance with the UDAP Regulations and amendments to Regulation Z. While credit unions are specifically exempt from the scope of depository institutions governed under Regulation DD, because the NCUA is required to promulgate substantially similar regulations covering credit unions within 90 days of the effective date of the Board's rules,²⁵ credit unions should also expect similar changes and look ahead to the implementation process.

Regulation E – Electronic Fund Transfers

Regulation E implements the Electronic Fund Transfer Act (the "EFT Act"),²⁶ which establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. Examples of the types of transactions covered by the EFT Act and regulation include transfers initiated through an automated teller machine, point-of-sale terminal, automated clearinghouse, telephone bill-payment plan, or remote banking service. The primary purpose of Regulation E is to protect individual consumers engaging in

electronic fund transfers.

To Whom Does Regulation E Apply?

Regulation E, issued by the Board pursuant to its authority under the EFT Act, applies to any electronic fund transfer that authorizes a financial institution²⁷ to debit or credit a consumer's account. Regulation E applies to financial institutions as well as to certain persons engaged in such transfers.²⁸

What Are the Significant Aspects of the Proposed Rule?

The Board is soliciting comments on all features of its Proposed Rule, the significant aspects of which include:

(1) Scope of Applicable Transactions. The Proposed Rule focuses on overdraft fees and charges assessed by financial institutions only with regard to ATM withdrawals and point-of-sale debit card transactions. Consumer testing and public commentaries have shown that consumers benefit from having checks and preauthorized electronic transfers paid, and would most likely prefer it, since the payment of overdrafts for these transactions may enable consumers to avoid possible adverse consequences (*e.g.*, merchant fees, late payment fees, and negative reporting to credit agencies) that might result if such items were returned unpaid. Similar adverse consequences do not exist with regard to declined ATM withdrawals and one-time debit card transactions. Furthermore, consumers may be more likely to pay important bills, *e.g.*, significant household expenses like utilities and rent, using checks and preauthorized electronic fund transfers, and to use debit cards for discretionary purchases.

(2) Opt-out versus Opt-in for Overdraft Services. The Board offers up for comment a choice between requiring consumers to either opt-out or opt-in to a financial institution's overdraft service before the institution can impose a fee or charge for paying an overdraft on an ATM withdrawal or a one-time debit card transaction.

- *An Opt-out Proposal:* A financial institution would be prohibited from imposing a fee or charge for paying an overdraft on an ATM withdrawal or a point-of-sale debit transaction unless the consumer is given an initial notice and a reasonable opportunity to opt out of the service, and the consumer does not opt out. There is a proposed safe harbor period of 30 days as a reasonable opt-out period.
- *An Opt-in Proposal:* A financial institution would be prohibited from assessing a fee or charge for paying an overdraft on an ATM withdrawal or a point-of-sale debit transaction unless the consumer affirmatively consents, or opts in, to the service.

(3) Debit holds. The Proposed Rule prohibits financial institutions from assessing a fee or charge for paying an overdraft if the overdraft would not have occurred but for a debit hold placed in a consumer's account, provided that the amount of the hold exceeds the actual transaction amount. The Proposed Rule would not apply to transactions in which the amount of the hold equals or is less than the actual amount of the transaction. The scope of this provision is limited to debit card transactions in which the actual transaction amount can generally be determined by the merchant or other payee within a short period of time after the institution authorizes the transaction. A safe harbor is proposed, which would permit a financial institution to assess an overdraft fee or charge to the consumer's account in connection with a debit hold if the institution has adopted procedures and practices designed to remove the hold within a reasonable period of time (under the safe harbor proposal, two hours is deemed reasonable).

What Are Implications of the Proposed Rule?

Significant operational and compliance issues are associated with the Proposed Rule, especially as it pertains to the partial opt-out and opt-in

proposals. As such, public comments are solicited for all aspects of the Proposed Rule. For example, partial opt-out (or opt-in) requirements may be problematic because current systems for overdraft payments are automated and many systems are programmed to either pay overdrafts for all transaction types or pay overdrafts for none. Moreover, current systems may not be set up to identify and pay overdrafts for only certain transaction types (*e.g.*, checks and ACH) but not others (*e.g.*, ATM and point-of-sale debit card transactions).

One proposal responding to the operational difficulties associated with a partial opt-out (or opt-in) program is to have a final rule that would expressly permit financial institutions to condition the payment of *any* overdrafts on the consumer's affirmative consent to the institution's payment of *all* overdrafts, including those resulting from ATM withdrawals and one-time debit card transactions. A concern expressed by the Agencies, however, is that consumers may potentially be compelled to opt in to an institution's overdraft service covering all transaction types if they want their checks and preauthorized transfers for important payments to be covered. Comments are also solicited for this proposed solution, which would address the operational challenges associated with implementing a partial opt-out (or opt-in) program that may treat one set of transactions (*e.g.*, paying overdrafts for checks) differently from another (*e.g.*, paying overdrafts for point-of-sale debits).

Conclusion

While the Recent Revisions and Proposed Rule are designed to increase consumer protection, their effects may be even more far-reaching. The cost of implementing the new measures mandated by the revisions may lead to the unintended consequence of having financial institutions re-evaluate decisions on whom to extend credit to, and possibly restricting lending as a result. In a market where individuals, businesses, and even institutions are struggling to obtain credit, the timing of the revisions may

ultimately increase the cost and decrease the availability of credit.

The full impact of the Recent Revisions is yet to be seen as compliance is not required until January and July of 2010, subject of course to the potential enactment of the Cardholders' Bill of Rights or other similar legislation that could accelerate implementation of and/or modify the rules. If the Cardholders' Bill of Rights is signed

into law, a conceivable possibility given President Obama's support of credit card reform during his presidential campaign,²⁹ credit card issuers may be forced to quickly overhaul their operations in order to comply with an accelerated compliance date or increased prohibitions. Consequently, pursuing measures *now* to prepare for an accelerated compliance date may no longer be an option but instead a regulatory necessity for many issuers of credit.



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¹ 15 U.S.C. §§ 41-58, as amended.

² The Senate bill, S. 235, introduced by U.S. Senators Charles Schumer and Mark Udall on January 14, 2009, is based on U.S. Representative Carolyn Maloney's bill, H.R. 5244, known as the "Credit Cardholders' Bill of Rights Act of 2008," which was passed by the House in the 110th Congress, but failed to gain sufficient votes in the Senate. On January 22, 2009, Representative Maloney reintroduced the bill in the House as H.R. 627. The legislation proposes more comprehensive and restrictive limitations on credit card practices than the UDAP Regulations, and is expected to take effect 90 days after its enactment, thereby imposing an accelerated implementation timeline for compliance by credit card issuers. The text of the Senate bill (S.235) is available at <http://www.thomas.gov/cgi-bin/query/z?c111:S.235>, and the text of the House bill (H.R.627) is available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.627>. The authors expect to follow up shortly with an article discussing the key provisions of the pending legislation.

³ 74 Fed. Reg. 5498 (Jan. 29, 2009). Two other Federal banking agencies - the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC"), were consulted by the Agencies prior to issuance of the proposed rules but were not directly involved in promulgating the regulations. The FTC Act vests rulemaking authority (with regard to UDAPs engaged in by banks, savings and loan institutions, and Federal credit unions) with the Board, Federal Home Loan Bank Board (predecessor to OTS), and the National Credit Union Administration Board. See 15 U.S.C. § 57a(f)(1). However, the FTC Act allocates enforcement responsibility for regulations promulgated thereunder among the primary Federal banking regulators, which include the OCC and FDIC. See 15 U.S.C. § 57a(f)(2).

⁴ The Agencies recognize that state-chartered credit unions are within the FTC's jurisdiction and are not within the authority granted to the NCUA under the FTC Act. While such entities are not subject to the UDAP Regulations, they are still subject to the UDAP standards implemented by the FTC, upon which the Agencies' guidance is based.

⁵ 15 U.S.C. § 57a(f). Specifically, the Board, OTS, and NCUA have placed their final rules in parts 227, 535, and 706, respectively, of title 12 of the Code of Federal Regulations. See 74 Fed. Reg. 5498 (Jan. 29, 2009).

⁶ 74 Fed. Reg. 5498 (Jan. 29, 2009).

⁷ 74 Fed. Reg. 5244 (Jan. 29, 2009).

⁸ 74 Fed. Reg. 5584 (Jan. 29, 2009).

⁹ 74 Fed. Reg. 5211 (Jan. 29, 2009).

¹⁰ 15 U.S.C. § 57a(f). A closer look at the UDAP analysis underlying the new credit card rules and methodology for case-by-case enforcement of UDAPs is the subject of another Paul Hastings article, entitled "UDAP Crackdown – A Closer Look At The UDAP Analysis Underlying New Credit Card Rules."

¹¹ 15 U.S.C. § 45(n).

¹² Unlike the standards for finding an act or practice unfair, which are codified in Section 5(n) of the FTC Act, the standards for finding an act or practice deceptive are embodied in FTC guidance. See, e.g., FTC Policy Statement on Deception (Oct. 14, 1983) (available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>); see also, *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).

¹³ See Board and FDIC, *Unfair or Deceptive Acts or Practices by State-Chartered Banks* (Mar. 11, 2004) (available at <http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf>); OCC Advisory Letter 2002-3, *Guidance on Unfair or Deceptive Acts or Practices* (Mar. 22, 2002) (available at <http://www.occ.treas.gov/ftp/advisory/2002-3.doc>); and FDIC Supervisory Insights, *From The Examiner's Desk: Unfair and Deceptive Acts and Practices: Recent FDIC Experience*, at 21-31 (Winter 2008) (available at http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin08/si_win08.pdf).

¹⁴ Such standards have thus far been generally applied retroactively on a case-by-case basis through enforcement actions. Note however, that the Agencies' regulation of UDAPs and consumer credit practices is not new. See 12 C.F.R. Parts 227, 535, and 706. Present UDAP prohibitions on consumer credit practices are extremely limited in scope, relating to contract provisions, cosigner rights, and late charges based on earlier late charges. The final rule supplements these existing provisions.

¹⁵ 15 U.S.C. § 57a(f)(2).

¹⁶ It is important to note that while the new rules under the UDAP Regulations currently have a mid-2010 deadline for compliance, pending legislation may not only accelerate the effective date but may also modify the content of such rules.

¹⁷ Note that under the new rules, Banks are prohibited from increasing interest rates on "protected balances," which are amounts owed (*i.e.*, already existing) for a category of transactions to which an increased APR is applied.

¹⁸ 74 Fed. Reg. 5498 (Jan. 29, 2009).

¹⁹ 12 C.F.R. § 226.3 explicitly exempts certain transactions from Regulation Z requirements. 74 Fed. Reg. 5244, 5456.

²⁰ 74 Fed. Reg. 5244, 5450 (see § 226.2(c)(1)). If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge; is not payable by a written agreement in more than four installments; or if the credit card is to be used for business purposes. 74 Fed. Reg. 4244, 5450 (see § 226.1(c)(2)).

²¹ Links to the Model Forms for Regulation Z are available at <http://www.federalreserve.gov/newsevents/press/bcreg/20081218a.htm>.

²² *Id.*

²³ 12 C.F.R. § 230.1(c). Credit unions are governed by substantially similar regulations issued by the NCUA. See 12 C.F.R. Part 707. TISA requires the NCUA to promulgate regulations substantially similar to those promulgated by the Board within 90 days of the effective date of the Board's rules. 12 U.S.C. § 4311(b).

²⁴ *Id.*

²⁵ 12 U.S.C. § 4311(b).

²⁶ 15 U.S.C. §§ 1601 and 1693 *et seq.* The proposed rulemaking in May 2008 was carried out pursuant to the Board's authority under the FTC Act. See 73 Fed. Reg. 28904 (May 19, 2008).

²⁷ As defined in Regulation E, "financial institution" means a bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services. 12 C.F.R. § 205.2(i). Note that addressing overdrafts under the Board's EFT Act authority would cause the rule to apply to all depository institutions, including state-chartered credit unions, which would not have been covered by the NCUA's authority under the FTC Act. See 15 U.S.C. § 57a(f).

²⁸ 12 C.F.R. § 205.3.

²⁹ Furthermore, the Cardholders' Bill of Rights appears to have widespread support in the U.S. House of Representatives, as evidenced by its forty-two cosponsors which include House Financial Services Committee Chairman Barney Frank.