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CREDIT AND PAYMENT CARDS IN FOCUS: REGULATORY, ENFORCEMENT, AND LITIGATION RISK UPDATE

The risk of litigation for card issuers has been heightened by a proposed UDAP rule, issued by federal regulators, that breaks new ground by prohibiting a wide range of fees and finance-charge practices on cards. In addition, the Federal Reserve Bank of Boston has made public its study finding redlining by race in the availability of credit in certain communities. The authors suggest proactive strategies that card issuers should take to reduce enforcement and litigation risks.

By Andrew L. Sandler, Molly A. Meegan, and Benjamin P. Saul *

Although turmoil in the subprime mortgage markets continues to demand immediate attention, financial service companies are wise to focus proactively on the next areas of regulatory, enforcement, and litigation risk. Over the past several years, the plaintiffs' bar has extended the theories and tactics they have pursued against mortgage originators and servicers to the credit and payment card industry and its practices. Federal and state regulators and enforcement agencies are increasingly scrutinizing credit and payment card issuers by initiating enforcement actions and lawsuits that challenge the marketing and fee policies and practices of certain card issuers as "unfair and deceptive." Congressional oversight of the card industry also has increased, with numerous bills pending in Congress that, collectively, cover multiple aspects of credit card lending and propose bans or restrictions on a wide-range of card practices, such as universal default, double-cycle billing, and certain payment allocation, fee assessment, and interest rate repricing practices. In addition, the Federal Reserve Board, the Office of Thrift Supervision, and National Credit Union Association (collectively, the "Agencies"), in May 2008, issued a Joint Proposed Unfair and Deceptive Credit Practices Rule (the "Proposed UDAP Rule") that also seeks to prohibit a wide range of card practices. Perhaps most significantly, however, the Federal Reserve Bank of Boston issued a study in February 2008 purporting to find redlining in credit card issuance.

With so much focus on the credit and payment card industry, enforcement and related risks are increasing. This article describes recent trends in regulatory, enforcement, and class action activity (Sections I-III). It also suggests certain areas on which to focus compliance resources, and provides some general risk mitigation strategies for industry participants to consider in light of the increased risks they face (Section IV).

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I. FEDERAL REGULATORY ACTIVITY

Federal regulatory activity has spanned multiple fronts, including traditional enforcement actions, proposed rulemaking, as well as official studies that will likely undergird future putative consumer class actions. The most significant developments include the following.

The CompuCredit Consent Decree

The Federal Trade Commission's most recent enforcement action against the marketers of alleged "fee harvester" or advance fee credit cards was commenced in federal court on June 10, 2008. The lawsuit, filed against CompuCredit Corporation, a marketer of credit products and services, and its wholly owned debt-collection subsidiary, alleges deceptive marketing practices in selling subprime credit cards.[1] On the same day, the Federal Deposit Insurance Corporation issued enforcement actions against CompuCredit and First Bank of Delaware and First Bank & Trust, banks with whom CompuCredit had contracted to market and service credit products.[2] The FDIC also entered into a voluntary Cease and Desist Order with Columbus Bank and Trust, another CompuCredit bank partner.[3]

Both the FTC's complaint and the FDIC's enforcement actions are predicated on substantially similar factual allegations, including the following:

- CompuCredit marketed a Visa credit card with a purported $300 limit to consumers with subprime credit ratings. CompuCredit's marketing materials stated that up-front fees did not apply when, in fact, customers were charged $185 in inadequately disclosed fees (including an annual and monthly maintenance fee, as well as an account opening fee).
- CompuCredit marketed a Visa credit card offering "up to $3,250" in available credit to consumers with slightly higher credit scores without adequately disclosing that half the available credit would be withheld for the first 90 days. During those 90 days, the company monitored consumers' purchases in order to determine whether the credit limit should be reduced based on behavioral credit scoring models.
- CompuCredit and its debt-collection subsidiary marketed a Visa credit card to consumers with charged-off debt that purported to immediately transfer the debt to the new card and to report the debt as paid in full to the credit reporting agencies. In fact, consumers were merely enrolled in a debt-repayment plan and did not receive a Visa card until they paid 25-50% of their charged-off debt.

Based on these factual allegations, the FTC asserted that CompuCredit violated the FTC Act by misrepresenting the amount of credit that would be available immediately to consumers, not disclosing its up-front fees, not disclosing that certain purchases could reduce a consumer's credit limit, and misrepresenting a debt-collection program as a credit card offer. The FTC also alleged that CompuCredit and its debt-collection subsidiary violated the FTC Act and the Fair Debt-Collection Practices Act by misrepresenting a debt-collection program as a credit card offer and using abusive collection practices, including excessive collection calls. The FTC's complaint seeks a permanent injunction that would stop the challenged conduct, and restitution for consumers in the form of credits for certain fees and charges arising from the alleged deceptive marketing practices. The FDIC estimates such credits will exceed $200 million. The FDIC actions also seek civil monetary penalties of $6.2 million against CompuCredit, and $431,000 against First Bank of Delaware and First Bank & Trust combined.

The FDIC's Cease and Desist Order with Columbus Bank and Trust, which arose from allegations substantially similar to those advanced in the other FDIC and FTC actions, calls for the Bank to pay a civil monetary penalty of $2.4 million. It also includes provisions that require card solicitations to contain clear and prominent initial disclosures of all fees, as well as any restrictions that affect a consumer's initial available

[1] *FTC v. CompuCredit Corp.*, FTC Docket No. 062-3212, (N.D. Ga. Jun. 10, 2008).

[2] *In re CompuCredit*, FDIC-08-139b, FDIC-08-140k (Jun. 10, 2008); *In re First Bank of Delaware*, FDIC-07-256b, FDIC-07-257k (Jun. 10, 2008); *In re First Bank & Trust*, FDIC-07-228b, FDIC-07-260k (Jun. 10, 2008).

[3] *In re Columbus Bank and Trust Co.*, FDIC-08-033b, FDIC-08-034k (Jun. 10, 2008).

credit. In addition, it broadly prohibits material misrepresentations related to credit cards and requires that Columbus Bank and Trust maintain adequate systems and controls.

The *CompuCredit* cases are not the first time regulators have focused on advance fee credit cards targeted to subprime borrowers. In 2007, the FTC entered into a $2.2 million settlement with EDebitpay, LLC, another marketer of prepaid debit cards.[4] The FTC alleged that EDebitpay violated the FTC Act by debiting a $150.95 "application and processing" fee from consumers' bank accounts without informed consent or adequate disclosure. The *Columbus Bank and Trust* and *EDebitpay* settlements represented the 60th and 61st enforcement action brought by the FTC in this area in the last decade.

The Proposed UDAP Rule

On May 1, 2008, the Agencies jointly issued for comment a Proposed UDAP Rule addressing certain credit card and overdraft protection practices.[5] The proposed rule came after significant criticism of the federal regulators for not adequately addressing unfair practices in the credit industry. Indeed, at the time the proposed rule was issued, more than 20 different pieces of legislation aimed at reforming the industry were pending in the House and Senate. The Agencies have indicated that they intend to finalize the Rule by the end of the year.

Notably, the Proposed UDAP Rule would prohibit institutions from the following practices:

- Treating a payment as late for any purpose, unless consumers are provided with a reasonable time to make payment.[6]
- Allocating any amounts paid in excess of the minimum monthly payment in one of three defined methods, or a method that is no less beneficial to consumers.[7]
- Increasing the annual percentage rate on outstanding balances, unless one of the following circumstances exists: (1) a variable rate has increased based on an index; (2) a promotional rate has expired; or (3) the minimum payment has not been received within 30 days of the due date.
- Assessing a fee if a consumer exceeds the limit on an account due solely to a hold placed on the available credit, unless the transaction amount would have exceeded the credit limit as well.
- Computing finance charges on outstanding balances based on balances in billing cycles preceding the most recent billing cycle – *i.e.,* "double-cycle billing."[8]
- Charging fees or security deposits for the issuance or availability of credit during the first 12 months of an account – such as account-opening or

[4] *FTC v. EDebitpay, LLC*, No. CV-07-4880 ODW (C.D. Cal. 2007). For other, similar actions, *see FTC v. Platinum Universal, LLC*, No. 03-61987 (2006); *FTC v. 3R Bancorp*, No. 04-7177 (2006).

[5] 73 Fed. Reg. 28,904 (May 19, 2008) (to be codified at 12 C.F.R. pts. 227, 535, and 706). The comment period on the proposed rule closed on August 4, 2008.

[6] The proposed rule, however, would create a safe harbor for institutions that adopt reasonable procedures designed to ensure that periodic statements are mailed or delivered at least 21 days before the payment due date.

[7] The methods are: (1) applying the entire amount first to the balance with the highest annual percentage rate; (2) applying the entire amount equally among the balances; and (3) splitting the amount *pro rata* among the balances. In addition, when an account has a discounted promotional rate balance or a balance on which interest is deferred, institutions: (1) would be required to allocate payment amounts greater than the minimum payment first to balances on which the rate is not discounted or interest is not deferred; and (2) would be prohibited from denying consumers a grace period on purchases solely because they have not paid off a balance at a promotional rate or a balance on which interest is deferred.

[8] Sometimes referred to as "two-cycle average daily balance," double-cycle billing is a method of computing finance charges by which a creditor uses a borrower's average daily balance for both the current and previous billing cycles. For example, consider a borrower with a balance of $500 at the start of the month and an APR of 11.9 percent. Under a one-cycle average daily balance method, if that borrower makes a $200 payment at the end of the month, the finance charge equals $500 (average daily balance) x .119 (APR) x 25 (days in billing cycle) / 365 (days in year), or $4.08. Under the double-cycle method, however, that borrower's previous month's balance is also considered. If, therefore, the same borrower had a starting balance of $1,000 in the previous month and a starting balance of $500 in the current month, the two-cycle average daily balance would be $750, and the borrower's finance charge would equal $750 x .119 x (25 / 365), or $6.11.

membership fees – if those fees or deposits utilize the majority of the credit available on the account.[9]

- Advertising multiple annual percentage rates or credit limits without disclosing in the solicitation the factors that determine whether a consumer will qualify for the lowest annual percentage rate and highest credit limit advertised.

The Proposed UDAP Rule is notable not only for the specific practices it prohibits, but also for the fundamental shift in the regulators' approach that it marks – namely, their departure from merely requiring clear and up-front disclosure of card terms and practices to regulating actual fee practices and payment allocation methods.

Credit Card Redlining and Related Fair Lending Issues

On February 26, 2008, the Federal Reserve Bank of Boston issued Working Paper No. QAU08-1, entitled "Credit Card Redlining."[10] The paper details the results of the Bank's study of the availability of consumer credit to individuals in majority Black communities. It purports to find a negative correlation between access to credit and neighborhood racial composition that remains even after controlling for the effect of socioeconomic factors that typically correlate with the creditworthiness of a consumer. The study marks the first time that redlining has been alleged in connection with the credit card industry.

In its study, the Bank drew on a "unique proprietary" database of credit histories of more than 285,000 people at two separate points in time.[11] The database included information from individual credit reports as well as 2000 Census data including "income decompositions" and average education levels, the FBI's Uniform Crime Reports "to control for community-level effects that might impact credit issuance," and geo-coded information on the location of 25,000 payday lenders "[t]o capture the role of less regulated consumer credit providers."[12] The use of this data, in the opinion of the Bank, permitted it to control for "a wide range of hypothetical lender practices" relating to the evaluation of potential credit applicants on grounds other than race. Thus, the Bank reasoned, it could draw conclusions about whether race, rather than other variables, was affecting credit availability in certain communities.

The conclusions drawn by the study's author mirror those found in the Bank's widely criticized 1992 study of redlining in the mortgage industry.[13] Specifically, the Bank asserts that "in spite of identical scores and identical community characteristics, [an] individual in the Black neighborhood receives less consumer credit . . . than the individual in the White area."[14] The Bank contends that disparities in credit access persist after accounting for differences in socioeconomic characteristics that correlate with creditworthiness. It concludes with the statement that "[t]hough issuers' marketing and underwriting decisions are not fully known, it appears likely that a race variable is included somewhere in the determination of credit availability."[15]

If past is prologue, then, as with the numerous investigations into mortgage origination practices that followed the Bank's 1992 study, the Bank's credit card study will catalyze fair lending investigations into credit card underwriting practices. Indeed, federal enforcement agencies have already shown a willingness to examine fair lending concerns with credit card practices. Two such examples include, the Justice Department's settlements with Associates National Bank (concerning alleged violations under the Equal Credit Opportunity Act for, among other issues, purportedly designating card applicants that used its Spanish-language applications as "Hispanic" and excluding such cardholders from certain promotional benefits, offering less credit to such applicants and requiring higher-credit scores of such applicants relative to similarly situated English-language borrowers)[16] and Fidelity Federal Bank (concerning alleged violations of the ECOA for, among other issues, failing to adequately monitor third-party marketing providers' fair lending compliance,

[9] The proposed rule also would require security deposits and fees that exceed 25 percent of the available credit limit to be paid over the first year of the account, as opposed to an up-front lump sum charged during the first billing cycle.

[10] Ethan Cohen-Cole, Federal Reserve Bank of Boston, Working Paper No. QAU08-1, *Credit Card Redlining* (2008), *available at* http://www.bos.frb.org/bankinfo/qau/wp/2008/qau0801.pdf.

[11] *Id.* at 6.

[12] *Id.* at 6-7.

[13] Alicia H. Munnell et al., Federal Reserve Bank of Boston, Working Paper 92-07, *Mortgage Lending In Boston: Interpreting HMDA Data* (1992).

[14] *Credit Card Study, supra* note 10, at 2.

[15] *Id.* at 3.

[16] Settlement Agreement, *United States v. Associates Nat'l Bank*, (D. Del. filed Mar. 29, 1999), *available at* http://www.usdoj.gov/crt/housing/documents/assocsettle.htm.

discouraging applicants who received public assistance from applying for credit, and denying credit to applicants unable to read and understand English).[17]

In addition to prospective enforcement actions, credit card issuers should expect consumer rights groups and plaintiffs' counsel to use the study to initiate class action litigation.[18] Financial services companies that market cards also should expect the study to trigger scrutiny of their prescreening practices. Although credit card lenders are required to maintain records of prescreening marketing efforts,[19] federal regulators historically have not asked for such data in routine examinations. The Fed, however, has indicated a clear future intent to scrutinize prescreened marketing programs as part of investigations into whether lenders are using these solicitations to circumvent the requirements of the ECOA.[20] This study, moreover, spotlights the prescreening activities of credit card lenders for the regulators: "[G]iven the degree of regulatory scrutiny over the credit decision itself, one suspects that if any disparity exists in the provision of credit, it likely originates in the prescreening (marketing) efforts."[21]

Non-traditional Payment Cards

Although regulators have long focused on credit card marketing and disclosures, more recently they have examined new payment card products. As the gift card industry has grown, so too has enforcement activity associated with it. In 2007, for example, the FTC entered into two consent decrees with issuers of gift cards. In *In re K-Mart Corporation*, the FTC alleged that K-Mart violated Section 5 of the FTC Act.[22] Specifically, the FTC asserted that the retroactive application of dormancy fees, which slowly depleted card balances, was a deceptive trade practice because K-Mart claimed in marketing materials that the cards did not expire, and never clearly disclosed that dormancy fees would be applied retroactively. The FTC also focused on the lack of "clear and prominent" disclosure of dormancy and other fees on the card and promotional materials, objecting to confusing disclosures made in five-point type on the back of a card that was affixed to cardstock.

In *In re Darden Restaurants, Inc.*, the FTC again focused on the retroactive application of dormancy fees to gift cards, and the lack of material disclosures.[23] In that case, although the gift cards did include disclosures about non-activity fees, the disclosures appeared only on the back of a transparent card, and in some cases were obscured by logos printed on the front of the card. Darden was required to disclose "clearly and prominently" all material terms and conditions of any expiration date or fee at the point of sale and before purchase.

In addition to FTC enforcement, the Office of the Comptroller of the Currency has issued guidance on gift card disclosures.[24] OCC-regulated banks that issue gift cards must include specific disclosures on the card relating to expiration dates and monthly maintenance, dormancy, usage, or other fees. Disclosures must also be provided in materials accompanying the card, including the name of the issuing bank, any other fees, procedures to obtain a replacement card, and who bears responsibility for unauthorized use of the card. National banks are warned not to charge monthly service or maintenance fees if they claim a card has no expiration date.

The OCC also has issued guidance addressing payroll and prepaid card systems.[25] In particular, the OCC focused on third-party relationships, warning OCC-regulated banks that they will be held responsible for the practices of third-party issuers that use the bank to gain access to the payment systems. National banks involved in payroll or other prepaid cards are directed to address the adequacy of disclosures, procedures for due diligence of third parties, compliance with the Bank Secrecy and Patriot Acts, appropriate verification of cardholder identity and money-laundering controls, and the potential use of payroll cards to support or facilitate

[17] Settlement Agreement, *United States v. Fidelity Fed. Bank*, (E.D.N.Y. filed Jul. 8, 2002), *available at* http://www.usdoj.gov/crt/housing/documents/fidelitysettle.htm.

[18] Indeed, since the Federal Reserve Bank of Boston published its study of redlining in the mortgage industry, hundreds of suits have been filed alleging marketing, underwriting, and pricing of mortgage loans in violation of federal fair lending laws, including the Fair Housing and Equal Credit Opportunity Acts. Mortgage originators and related parties have paid hundreds of millions, if not more, to settle such cases.

[19] 12 C.F.R. Part 202, § 202.12(7).

[20] *Id.* at Staff Comments.

[21] *Credit Card Study*, *supra* note 10, at 20.

[22] *In re K-Mart Corporation,* FTC Docket No. C-4197 (2007).

[23] *In re Darden Restaurants, Inc.*, FTC Docket No. C-4189 (2007).

[24] OCC BB-2006-34 (Aug. 14, 2006).

[25] OCC Letter No. 2004-6 (May 6, 2004).

payday lending (which is all but prohibited for OCC-regulated banks).

II. STATE ENFORCEMENT ACTIONS

During the past two years, state enforcement agencies have been active in policing the credit and payment card industry. State Attorneys General, acting independently or as part of a coordinated enforcement strategy with other state or federal regulators, have reached multiple settlements with card issuers and related parties.

For example, in *In re First Premier Bank*, the New York Attorney General entered into an Assurance of Discontinuance with First Premier Bank to address alleged unfair and deceptive trade practices.[26] In that case, the First Premier offered cards with credit limits "up to" $2000 at "9.9 APR fixed" when, in fact, most consumers received a $250-300 credit line at a variable rate subject to change at any time for any reason. The settlement, which calls for $4.5 million in consumer redress, also prohibits the alleged unfair and deceptive up-front processing fees, as well as account set-up, participation, annual, late, over-limit, and certain other "junk" fees. First Premier also agreed not to market the subprime cards at issue as "Gold" or "Platinum" cards.

Earlier settlements have focused on a range of other credit card practices. In *In re Trilegiant Corp.*, a direct marketing company entered into a settlement with a multi-state group of Attorneys General and agreed to discontinue the use of "free" trial memberships requiring consumers to opt-out affirmatively, as well as "reward" or "rebate" checks that automatically enrolled consumers in the membership when cashed.[27] In *In re Columbus Bank and Trust Co.*, Columbus Bank and Trust and CompuCredit signed an agreement with the New York Attorney General that prohibited unreasonable activation fees or other advance fees and alleged improper debt-collection techniques.[28] And, in *State v. Capital One Bank*, the bank entered into an agreement with the Minnesota Attorney General prohibiting alleged deceptive advertising of "low" and "fixed" APRs and inadequate disclosure of penalty rates or change-in-terms repricing.[29]

III. TRENDS IN CLASS ACTION LITIGATION

Class action litigation against credit card issuers has focused on the assessment of late fees, repricing as a result of unfair or deceptive late-payment policies, payment allocation processes, and alleged improper debt-collection practices. In addition to the several class action lawsuits against Capital One filed both before and after the Minnesota Attorney General's lawsuit, exemplar class action lawsuits include: *Spark v. MBNA Corp.*, in which MBNA Corp. settled a class lawsuit involving allegations that it failed to disclose limitations on its balance transfer and cash advance promotions;[30] *Schwartz v. Citibank*, in which Citibank settled class action litigation involving allegations it improperly credited card payments, thereby wrongly imposing late charges;[31] and *Henry v. Sears Roebuck & Co.*, in which Sears settled a class action lawsuit concerning allegations that it improperly increased card customers' interest rates.[32] We anticipate that plaintiffs will continue to file similar class action lawsuits, and are especially likely to challenge late, overlimit, and other "junk" fees, as well as "any time for any reason" rate repricing, payment posting and allocation practices, disclosure practices, and collection activities.[33]

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[26] Assurance of Discontinuance, *In re First Premier Bank,* New York Attorney General's Office, (Jul. 23, 2007), *available at* http://www.oag.state.ny.us/press/2007/aug/First%20Premier%20Bank%20Settlement.pdf.

[27] *In re Trilegiant Corp.*, (Dec. 2006) (16 state settlement) (on file with authors).

[28] Assurance of Discontinuance, *In re Columbus Bank and Trust Co.*, New York Attorney General's Office, (Jul. 23, 2007), *available at* http://www.oag.state.ny.us/press/2006/jul/Aspire%20Visa%20Assurance.pdf.

[29] Settlement Agreement, *State v. Capital One Bank* (Feb. 13, 2006) (on file with authors).

[30] Civil Action No. 96-497 (D. Del. filed Oct. 16, 1996).

[31] Civil Action No. 00-CV-75 (C.D. Cal. filed Jan. 4, 2000).

[32] Civil Action No. 98-CV-4110 (N.D. Ill. filed Jul. 6, 1998).

[33] Additional class actions have been filed under section 1681c(g)(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which provides that no more than the last five digits of a credit or debit card number, or the expiration date, may be printed on a receipt provided to the cardholder at the point of the sale or transaction. The statue provides for significant statutory damages. Hundreds of lawsuits have been filed by plaintiffs' lawyers alleging violations of this provision based on the fact that many retailers inadvertently left expiration dates on their receipts, and potential damage awards were projected to run into the billions of dollars given the significant statutory damages permitted in the FCRA. However, on June 3, 2008, President Bush signed federal legislation limiting liability for expiration date violations, significantly reducing the risk these lawsuits pose to card issuers.

As access to mortgage credit has tightened, borrowers are relying increasingly on credit cards to meet their consumer credit needs. Industry data already show growth in the number of credit card delinquencies.[34] These trends, along with heightened regulatory and enforcement scrutiny of the card industry – particularly, the Federal Reserve Bank of Boston study on credit card redlining – portend significant class action activity. Such lawsuits will likely be premised on the same theories that plaintiff's lawyers have developed in subprime mortgage class action lawsuits and will include redlining and other fair lending claims filed against both primary and, as circumstances permit, secondary market participants.

IV. LITIGATION AVOIDANCE STRATEGIES FOR CREDIT AND PAYMENT CARD ISSUERS

With federal regulators expanding their focus from the adequacy of disclosures to actual marketing, billing, and payment processing practices, and state regulators and class action lawyers pursuing lucrative settlements with credit card issuers, the credit and payment card industry faces increasing litigation and enforcement risks.

To diminish these risks, card issuers and related parties should consider the following proactive business and marketing strategies.[35]

- ***Clear and Prominent Disclosure***. The definitive standard for credit card lenders with respect to marketing and sales tactics continues to be clear and prominent disclosure. When a card issuer advertises products "up to" a particular APR, or with a "fixed APR," its disclosures should be comprehensive and understandable. Consumers should be informed of the rates typically received by an applicant, and the circumstances under which the interest rate can be adjusted. Particular attention should be paid to the proposed rule amending the disclosure requirements set forth in the Truth in Lending Act's implementing Regulation Z.[36]

- ***Fee Structure and Practices***. Card issuers should ensure that their fee structure is rational and bears a reasonable relationship to the cost of the products and services provided. Repeat over-limit or late fees should be avoided. Significant advance fees should be limited, and under the Proposed UDAP Rule, should not exceed 25% of available credit unless spread out over time.[37]

- ***Payment Allocation and Repricing Policies***. Payment allocation methods and any repricing of existing balances should comply with the requirements of new Proposed UDAP Rule. Card issuers still using universal default or double-cycle billing should discontinue those practices.

- ***Gift and Payroll Card Products***. To the extent a card issuer is involved in non-traditional payment card products, it should consider issues specific to the product offered. For example, gift card issuers should focus on the adequacy of disclosures, dormancy fees, and no-expiration claims. Payroll cards issuers that offer ancillary products (especially payday lending options) are likely to receive increasing scrutiny due to the demographics of the market serviced and OCC guidance on the topic. Consideration should be given to whether ancillary products are offered on clear terms and can be easily canceled.

- ***Self-testing or Evaluation***. Card issuers should consider a proactive response to the Federal Reserve Bank of Boston study. A self-test or audit can be formulated, pursuant to the attorney-client privilege, to evaluate a lender's risk in this area and to develop an appropriate response.

- ***Prescreening Marketing Campaigns***. All credit card issuers that market through prescreened offers should review their campaigns, as well as the procedures for formulating future campaigns, to minimize the possibility of disparate lending patterns. Lenders may consider proactive marketing to underserved geographic areas, if any. To the

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[34] *See e.g., TransUnion.com Quarterly Credit Card Analysis Notes 4.81 Percent National Increase in Bankcard Debt, Forecasts 0.5 Percent Rise in Delinquency Rate* (Apr. 1, 2008), *available at* http://findarticles.com/p/articles/mi_m4PRN/is_2008_April_1/ai_n24966759.

[35] *See also* Andrew L. Sandler and Anand S. Raman, *Viewpoint: Card Lenders Should Prep for Scrutiny*, Am. Banker, Feb. 28, 2008.

[36] 73 Fed. Reg. 28,886 (May 19, 2008) (to be codified at 12 C.F.R. pt. 226) (seeking limited additional comments to original June 2007 proposal, which modified the format, timing, and content of credit card applications, solicitations, and disclosures made to consumers throughout the life of an account).

footnote continued from previous column...

[37] Under no circumstances for the first year after the account is opened should the fees exceed 50 percent of available credit. 73 Fed. Reg. 28,923 (May 19, 2008) (to be codified at 12 C.F.R. pts 227, 535, and 706).

extent any card issuers are using geo-coding based on foreclosure statistics to quantify risk, the practice should be discontinued.

- ***Third-Party Relationships***. Card issuers must have in place adequate procedures for conducting due diligence of potential third-party partners, as well as systems for monitoring the compliance of such partners with existing fair lending laws or information security concerns. The extent of due diligence, as well as continuing oversight, should bear a reasonable relationship to the risk posed by that relationship. For example, if a third-party vendor has access to sensitive customer information, oversight should be more intense. Likewise, relationships that involve the use of a bank's BIN number will require additional review and should be consistent with safety and soundness concerns and reputational risk.

V. CONCLUSION

Although predatory and fair lending enforcement and regulatory activity has always existed in the credit card context, the direct and indirect economic cost of such activity will increase substantially. Increased federal regulatory scrutiny and enforcement activity is likely. State Attorneys General will continue to work with other state and federal authorities to target alleged abusive lending practices. And, apart from more class actions focused on unfair and deceptive trade practices, private class action litigation alleging redlining in the credit card industry is likely to explode. Fair lending risk management must be a significant priority for all credit card and payment card issuers. ■