Regulations Dealing with the Credit and Financial Crisis – Passed and Proposed[1]

By Louis F. Burke

INTRODUCTION

The crisis in the financial markets has forced the Administration to take unprecedented measures in an effort to stabilize the economy. As part of that action, Congress has aggressively implemented legislation focused on four main areas: oversight, forbearance for homeowners, CEO compensation, and equity for the American taxpayer. This Legislation, some of which has passed, and other efforts which are still pending, is summarized below.

PASSED LEGISLATION

Emergency Economic Stabilization Act of 2008 ("EESA")[2]

The EESA is commonly referred to as a "bailout" of the U.S. financial system. It was enacted in 2008 as a response to the subprime mortgage crisis, and authorized the U.S. Secretary of the Treasury to spend up to $700 billion to purchase distressed assets, especially mortgage-backed securities, and to make capital injections into both foreign and domestic banks.[3]

Troubled Asset Relief Program ("TARP")[4]

TARP was enacted in October 2008, as a component of the EESA, to allow the U.S. Department of the Treasury, under the newly created Office of Financial Stability, to purchase or insure up to $700 billion of "troubled" (meaning illiquid, difficult to value assets) from banks and other financial institutions assets. Under TARP, "troubled assets" are defined as:

> (A) residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and
>
> (B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress.

The targeted assets can be collateralized debt obligations, which were sold in the market until 2007.

TARP's enactment was intended to improve the liquidity of these assets by purchasing them using secondary market mechanisms, thus allowing participating institutions to stabilize their

---

[1] This article was prepared for and presented at the 53rd Union Internationale des Avocats Congress in Seville, Spain during the Joint Session on October 30, 2009.
[2] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).
[3] Andrew Clark, *Paulson Abandons Plans to Buy up America's Toxic Mortgage Assets*, THE GUARDIAN, Nov. 13, 2008, http://www.guardian.co.uk/business/2008/nov/13/harry-paulson-banking-rescue-mortgage.
[4] *Id.*

balance sheets and avoid further losses. The goal of TARP is also to increase lending confidence and to encourage banks to resume lending at normal levels.

The EESA requires financial institutions selling assets to TARP to issue equity warrants (a type of security that entitles its holder to purchase shares in the company issuing the security for a specific price), or equity or senior debt securities (for non-publicly listed companies) to the Treasury, which is designed to protect taxpayers by giving the Treasury the possibility of profiting through its new ownership stakes in these institutions.

American Recovery and Reinvestment Act of 2009 ("ARRA")[5]

ARRA was enacted in February 2009, as a measure to improve stimulus to the economy. The ARRA includes federal tax cuts, expansion of unemployment benefits and other social welfare provisions, domestic spending in education, health care, and infrastructure, including the energy sector. The ARRA also includes numerous non-economic recovery related items that are either part of longer term plans (*i.e.* a study of the effectiveness of medical treatments) or desired by Congress (*i.e.* a limitation on executive compensation in federally aided banks which is discussed further below). The ARRA also includes $4 billion in Department of Justice grant funding to enhance state, local, and tribal law enforcement efforts, including the hiring of new police officers, to combat violence against women, and to fight internet crimes against children. ARRA is nominally worth $787 billion and is overall much larger than the Economic Stimulus Act of 2008, which consisted primarily of tax rebate checks.[6]

Section 7001 of the ARRA amended the executive compensation and corporate governance provisions of the EESA to require any entity that has received or will receive financial assistance under TARP to "permit a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the [SEC]," (which requires disclosure to include the compensation discussion and analysis, the compensation tables, and any related material).

Companies that have received financial assistance under TARP are required to provide this separate shareholder vote during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding. The shareholder vote is not binding on the Board of Directors of a TARP recipient, and does not restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.[7]

I. Related SEC Litigation

SEC v. Bank of America:[8] On August 3, 2009, the SEC charged Bank of America Corporation with misleading investors about billions of dollars in bonuses that were being paid to Merrill Lynch & Co. executives at the time of its acquisition of the firm. The SEC alleged that in proxy materials soliciting the votes of shareholders on the proposed acquisition of Merrill, Bank of America stated that Merrill had agreed that it would not pay year-end performance bonuses or

[5] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).
[6] OJP's Information Related to the American Recovery and Reinvestment Act of 2009, Dep't of Justice, http://www.ojp.usdoj.gov/BJA/recoveryact.html (last visited Sept. 10, 2009).
[7] American Recovery and Reinvestment Act of 2009, http://www.sec.gov/divisions/corpfin/guidance/arrainterp.htm (last visited Sept. 10, 2009).
[8] SEC v. Bank of America, No. 09 Civ. 6829, 2009 WL 2842940 (S.D.N.Y. Aug. 25, 2009).

other discretionary compensation to its executives prior to the closing of the merger without Bank of America's consent. In fact, Bank of America had already contractually authorized Merrill to pay up to $5.8 billion in discretionary bonuses to Merrill executives for 2008. According to the SEC's complaint, the disclosures in the proxy statement were rendered materially false and misleading by the existence of the prior undisclosed agreement allowing Merrill to pay billions of dollars in bonuses for 2008. Bank of America agreed to settle the SEC's charges and pay a penalty of $33 million.

CBSX Rule 51.8[9] - Flashing Trading

On December 3, 2008, Chicago Board Options Exchange, Inc. filed with the SEC, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 and Rule 19b-4 thereunder, a proposed rule change to adopt a Trade, Flash and Cancel order type for the CBOE Stock Exchange ("CBSX").[10] On February 4, 2009, the SEC approved the proposed rule change.

The rule change revises CBSX Rule 51.8 by adopting a Trade, Flash and Cancel order type. This is a market or marketable limit order to buy or sell that is to be executed in whole or in part on CBSX immediately and automatically after it is received by the CBSX System without delay for any purpose except that it will be electronically exposed pursuant to Rule 52.6[11] prior to cancellation. Rule 52.6 provides that market or limit orders shall not be executed at a price that would cause a trade-through of a Protected Quotation as defined in SEC Rule 611 of Regulation NMS.[12] Instead, these orders will be "flashed" to CBSX Traders3 for potential execution at a price that would not cause a trade-through. This new order type allows users to send orders to CBSX for execution even when CBSX is not the NBBO without requiring CBSX to seek a NBBO fill for these orders at away trading centers when price improvement on CBSX is not achieved. Thus, users will now be able to seek fills on CBSX while maintaining control over routing.

Amendments to Regulation SHO

On August 4, 2009, the SEC made permanent the proposed amendments contained in Interim Final Temporary Rule 204T, as a Final Rule. These amendments to Regulation SHO (short-sale regulation) under the Securities Exchange Act of 1934 are intended to help address abusive "naked" short selling in all equity securities.

The aim of Rule 204T is to curtail naked short selling and to increase transparency about short sales. Pursuant to Rule 204T, if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency it must immediately purchase or borrow securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the settlement day following the day the participant incurred the fail to deliver position. Failure to

---

[9] Chicago Board Options Exchange Rule 51.8,
http://wallstreet.cch.com/CBOEtools/PlatformViewer.asp?SelectedNode=chp_1_5&manual=/CBOE/rules/cboe-rules/.

[10] Chicago Board Options Exchange Rule 51.8(g)(10),
http://wallstreet.cch.com/CBOEtools/PlatformViewer.asp?SelectedNode=chp_1_5&manual=/CBOE/rules/cboe-rules/.

[11] Chicago Board Options Exchange Rule 52.6,
http://wallstreet.cch.com/CBOEtools/PlatformViewer.asp?SelectedNode=chp_1_5&manual=/CBOE/rules/cboe-rules/.

[12] 17 C.F.R. § 242.611 (2009).

comply with the close-out requirement is a violation of the Rule. In addition, a participant that does not comply with this closeout requirement, and any broker-dealer from which it receives trades for clearance and settlement, will not be able to short sell the security either for itself or for the account of another, unless it has previously arranged to borrow or borrowed the security, until the fail to deliver position is closed out.

I. Related SEC Litigation

SEC v. Hazan Capital Management LLC:[13] On August 5, 2009, the SEC took its first enforcement action for violations of the Commission's rules to prevent abusive "naked" short selling, by charging New York based Hazan Capital Management, LLC, two of its options traders and their broker-dealers with violating the locate and close-out requirements of Regulation SHO. The Commission also charged a supervisor at one of the firms. The firms and individuals agreed to settle the SEC's charges without admitting or denying the findings.

Section 304 ("Clawback Provision") of Sarbanes-Oxley Act

Section 304 or the "clawback" provision of the Sarbanes-Oxley Act ("SOX")[14] relates to the forfeiture of certain bonuses and profits. The Section is meant to deprive corporate executives of money that they earned while their companies were misleading investors.

I. Related SEC Litigation

SEC v. Maynard L. Jenkins:[15] On July 22, 2009, the SEC asked a court to order the former chief executive officer of CSK Auto Corporation to reimburse the company and its shareholders more than $4 million that he received in bonuses and stock sale profits while CSK was committing accounting fraud. It is the first action seeking reimbursement under the SOX "clawback" provision (Section 304) from an individual who is not alleged to have otherwise violated the securities laws.

The SEC's enforcement action charges Maynard L. Jenkins of Scottsdale, Ariz., with violations of the SOX Section 304, and alleges that Jenkins made $2,091,020 in bonuses and $2,018,893 in company stock sales that should have been reimbursed to CSK pursuant to SOX Section 304. The SEC also alleges that, in violation of Section 304, Jenkins failed to reimburse CSK for bonuses, or other incentive-based or equity-based compensation, and profits from the sale of CSK stock he received during the 12-month periods following the filing of each of CSK's fraudulent financial statements. The SEC's complaint does not allege that Jenkins engaged in the fraudulent conduct.

The Credit Card Accountability Responsibility and Disclosure Act of 2009 ("the Credit CARD Act of 2009)[16]

On May 22, 2009, President Obama signed the Credit CARD Act of 2009 in hopes to end practices that many have labeled abusive by the credit card industry. Pursuant to the Act, banks are now required to give consumers at least 45 days of warning before increasing someone's

[13] SEC v. Hazan Capital Management LLC, Adm. File No. 3-1570 (Filed Aug. 5, 2009).
[14] 15 U.S.C. § 7243 (2002).
[15] SEC v. Maynard L. Jenkins, No. CV 09-1510-PHX-JWS (D. Ariz. July 22, 2009).
[16] The Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009).

interest rate, rather than the 15 days that they were required to give before. Consumers are also now given the opportunity to opt out of rate increases by closing their account and paying off the balance at their current rate.[17]

Credit card and home equity loan statements now must be mailed to borrowers at least 21 days before the due date. Previously the law required that banks send out statements 14 days before the due-date of the payment. This move was in response to a controversial practice that some credit card companies were using of delaying sending out statements in hopes that consumers would pay their bills late and generate late fees.

The next set of provisions from the Act will take effect February 22, 2010. At that time, additional regulations will be put in place regarding student credit cards, over-the-limit transactions, and interest rate increases. The final set of provisions will be implemented on August 22, 2010, which will regulate the charges and fees that credit card companies can charge consumers.

PROPOSED AND PENDING LEGISLATION

Corporate and Financial Institution Compensation Act of 2009 (H.R. 3269)[18]

On July 31, 2009, the U.S. House of Representatives passed H.R. 3269, which amends the Securities Exchange Act of 1934 and gives shareholders an advisory vote on executive compensation and allows regulators to ban incentive pay arrangements at financial institutions that could have serious negative effects on economic conditions. H.R. 3269 also sets forth procedures for disclosure and shareholder approval of golden parachute compensation. It also directs the SEC to prescribe standards relating to compensation committees.

Although any shareholder vote is non-binding, in that the board can ignore it, the vote would most likely impact shareholder votes for board of director members at the next shareholder meeting. It also requires bank regulating agencies to prescribe joint regulations that prohibit any compensation structure or incentive-based payment arrangement that would encourage inappropriate risks by financial institutions or their officers or employees that could: (1) threaten the safety and soundness of covered financial institutions; or (2) present serious adverse effects on economic conditions or financial stability.

In conjunction with H.R. 3269, the SEC is currently proposing amendments to its proxy rules under the Securities Exchange Act of 1934 to set forth requirements for U.S. registrants subject to Section 111(e) of the EESA (see below). The SEC has stated that these proposals would not dictate particular compensation decisions, but they would lead companies to analyze how compensation impacts risk taking and the implications for long term corporate health of the behavior they are incenting. The SEC is still considering several proposals, with public comments due by September 8, 2009.

Rule 14a-20 of the Securities Exchange Act[19]

---

[17] Kayce Ataiyero, *Credit Card Accountability Responsibility and Disclosure Act: Summary of New Rules*, CHICAGO TRIBUNE, Aug. 20. 2009, http://www.chicagotribune.com/business/chi-tc-biz-credit-box-0819-0820-aug20,0,2688063.story.

[18] H.R. 3269, 111th Cong. (2009).

[19] Shareholder Approval of Executive Compensation of TARP Recipients, SEC Release No. 34-60218, File No. S7-12-09 (Jul. 1, 2009).

Proposed SEC Rule 14a-20 would help implement the requirement under Section 111(e)(1) of the EESA to provide a separate shareholder vote to approve the compensation of executives. All TARP recipients would be required to provide this separate shareholder vote in proxies solicited during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.

Proposed Rule 14a-20 would clarify that the separate shareholder vote required by Section 111(e)(1) of the EESA would only be required on a proxy solicited for an annual (or special meeting in lieu of the annual) meeting of security holders for which proxies would be solicited for the election of directors. The SEC is accepting comments on this proposed Amendment until September 8, 2009.

Consumer Fairness Protection Agency Act of 2009 (H.R. 3126)[20]

On June 30, 2009, H.R. 3126 was sent to Congress. The proposed legislation would make sweeping changes to the way consumer financial products and services are regulated by establishing the Consumer Financial Protection Agency (the "Agency"), whose mission would be "to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services."

The legislation would provide the Agency with broad authority to issue rules to ensure consumer protection. This authority would include prescribing rules regarding disclosures, sales practices, minimum operational standards, and requirements to offer standard products and services. For example, the Agency would be authorized to prohibit pre-dispute arbitration, propose model mortgage loan disclosure language, and require disclosure allowing consumers to compare financial products or services.

The proposed legislation would authorize the Agency to regulate "consumer financial products or services," defined as "any financial product or service to be used by a consumer primarily for personal, family or household purposes." Because this is a vague and extraordinarily broad mandate, it will likely be the subject of intense debate during the coming months.

SEC Money Market Fund Reform

On June 24, 2009, the SEC voted to propose rule amendments designed to significantly strengthen the regulatory framework for money market funds to increase their resilience to economic stresses and reduce the risks of runs on the funds.

The SEC is currently seeking public comment on proposals, which would require money market funds to maintain a portion of their portfolios in highly liquid investments, reduce their exposure to long-term debt, and limit their investments to only the highest quality portfolio securities. The proposals also would require monthly reporting of portfolio holdings, and allow the suspension of redemptions if a fund "breaks the buck" to allow for the orderly liquidation of fund assets. A money market fund "breaks the buck" when its net asset value falls below $1 per share, meaning investors in that fund will lose money. The proposals are designed to decrease troublesome areas

---

[20] Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009).

of risk, thereby increasing stability and the ability of money market funds to weather future economic storms.[21]

The proposed amendments would, among other things:[22]

- Require that money market funds have certain minimum percentages of their assets in cash or securities that can be readily converted to cash, to pay redeeming investors,
- Shorten the weighted average maturity limits for money market fund portfolios (from 90 days to 60 days),
- Limit money market funds to investing in only the highest quality securities (*i.e.*, eliminate their ability to invest in so-called "Second Tier" securities),
- Require funds to stress test fund portfolios periodically to determine whether the fund can withstand market turbulence,
- Require money market funds to report their portfolio holdings monthly to the SEC and post them on their websites,
- Require funds to be able to process purchases and redemptions at a price other than $1, and
- Permit a money market fund that has "broken the buck" and decided to liquidate to suspend redemptions while the fund undertakes an orderly liquidation of assets.

Public comments are due by September 8, 2009.

Securities Law Enforcement

The SEC has proposed the creation of five national units within the Enforcement Division dedicated to specialized and complex areas of securities law:[23]

1. An Asset Management Unit would focus on Investment Advisors, Investment Companies, Hedge Funds, and Private Equity Funds, and would address issues such as disclosure, valuation, portfolio performance, due diligence and diversification, transactions with affiliates, misappropriation, and conflicts of interest;

2. A Market Abuse Unit would focus on large scale market abuses and complex manipulation schemes by sophisticated parties like institutional traders and market professionals. This Unit would build its own technological tools and screening programs to search for suspicious trading patterns in an increasingly high tech marketplace, focusing on financial products such as equities, debt securities, and derivatives;

3. A Structured and New Products Unit would focus on complex derivatives and financial products like CDS's, CDO's, and securitized products;

4. A Foreign Corrupt Practices Act ("FCPA") Unit would focus on identifying violations of the FCPA, which, among other things, prohibits U.S. companies and individuals from bribing foreign officials to gain or retain business; and

---

[21] Money Market Fund Reform, 74 Fed. Reg. 32688 (proposed Jul 8, 2009) (to be codified at 17 C.F.R. pt. 270 and 274).
[22] *Id.*
[23] SEC's Director of Enforcement Announces New Initiatives, V&E Litigation Update, http://www.vinson-elkins.com/resources/pub_detail.aspx?id=14814 (last visited Sept. 10, 2009).

5. A Municipal Securities and Public Pensions Unit would specialize in the growing municipal securities market, scrutinizing offering and disclosure issues, tax and arbitrage driven activity, unfunded or underfunded liabilities, and "pay-to-play" kickback schemes.

The establishment of these specialized units is aimed to enhance the Enforcement Division's abilities and competence to address and uncover problems in the increasingly highly technical and specialized financial markets.

The aim is also to increase the autonomy of the staff of the Enforcement Division to enable them to act more promptly by decentralizing investigative power while at the same time centralizing the authority to grant tolling agreements. For the most part, the authority to issue formal orders of investigation will be delegated from the SEC itself to the Enforcement Division Director.[24]

The SEC has also proposed the creation of an Office of Market Intelligence to collect, analyze, and monitor the hundreds of thousands of tips, complaints, and referrals that the SEC receives annually. Because the SEC receives far more tips than it can process, this Office will establish risk criteria and priorities to cross-reference tips and focus on only those tips with the "greatest potential for uncovering wrongdoing."[25]

Custody of Funds or Securities of Clients by Investment Advisers

The SEC is currently proposing amendments to the Custody Rule under the Investment Advisers Act of 1940[26] and related forms. The amendments, among other things, would require registered investment advisers that have custody of client funds or securities to undergo an annual surprise examination by an independent public accountant to verify client funds and securities.

In addition, unless client accounts are maintained by an independent qualified custodian (*i.e.*, a custodian other than the adviser or a related person), the adviser or related person must obtain a written report from an independent public accountant that includes an opinion regarding the qualified custodian's controls relating to custody of client assets.

Finally, the amendments would provide the SEC with better information about the custodial practices of registered investment advisers. The amendments are designed to provide additional safeguards under the Advisers Act when an adviser has custody of client funds or securities. The SEC is currently reviewing public comments.

Uptick Rule

On August 17, 2009, the SEC announced that it was seeking public comment for an alternative approach to short selling price test restrictions that would be more effective and easier to implement than the previously proposed price test restrictions currently under consideration.[27]

---

[24] *Id.*

[25] Robert Khuzami, Dir. of Div. of Enforcement, Sec. Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009) (transcript available at http://www.sec.gov/news/speech/2009/spch080509rk.htm).

[26] 17 C.F.R. § 275.206(4)-2 (2009).

[27] SEC Seeks Comment on Alternative Uptick Rule, SEC Release No. 2009-185, Aug. 17, 2009, http://www.sec.gov/news/press/2009/2009-185.htm (last visited Sept. 10, 2009).

The alternative uptick rule would allow short selling only at an increment above the national best bid. As a result, the SEC has decided to reopen the comment period for another 30 days in order to receive input specifically on this alternative.[28]

In April, the SEC proposed two approaches to restricting short selling. One approach would apply on a market-wide and permanent basis, and would implement short sale restrictions based on either the last sale price or the national best bid. The other approach, considered a "circuit-breaker," would apply only to a particular security during severe declines in the price of that security. Once triggered, the circuit breaker would impose a short sale halt or short sale restriction based on either the last sale price or the national best bid.[29]

Unlike the proposals in April, the alternative uptick rule would not require monitoring of the sequence of bids (that is, whether the current national best bid is above or below the previous national best bid), and as a result the alternative uptick rule would be easier to monitor. It also may be possible to implement this approach more quickly and with less cost than the prior proposals. The initial comment period for the April proposals ended on June 19, 2009. The comment period will now be extended for 30 days from the date of publication of an associated notice in the Federal Register (up to September 17, 2009).[30]

CFTC and SEC Joint Action

In March 2008, the SEC and the Commodity Futures Trading Commission ("CFTC") announced an agreement to enhance coordination between the two agencies to establish a closer working relationship. The agreement establishes a permanent regulatory liaison between the agencies, provides for enhanced information sharing, and sets forth several key principles guiding their consideration of novel financial products that may reflect elements of both securities and commodity futures or options.[31]

The agencies also announced their immediate plans to consider two new derivative products under the agreement. Both products would be based on the streetTracks Gold Trust Shares (Gold Shares). One product is an option that would be traded on options exchanges, and the other is a future that would trade on a single stock futures exchange. Under the principles governing the review of novel derivative products, the agencies agree to recognize their mutual regulatory interests and encourage innovation, competition, and commit to share information relating to novel derivative products and act on any related requests in a timely manner.[32]

The SEC and CFTC are also working together on certain ponzi scheme cases. In one case, on January 8, 2009, the SEC with the assistance of the CFTC charged Joseph S. Forte with

---

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] CFTC, SEC Sign Agreement to Enhance Coordination, Facilitate Review of New Derivative Products, CFTC Release No. 5468-08, Mar. 11, 2008,
http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5468-08.html (last visited Sept. 10, 2009).
[32] *Id.*

fraudulently selling an estimated $50 million in securities in the form of limited partnership interests in his firm Joseph Forte LP to as many as 80 investors.[33]

OTC Derivative Market Regulation

On August 11, 2009, the Administration delivered legislative language to Capitol Hill focused on the regulatory reform of over-the-counter (OTC) derivatives. One of the most significant changes in the world of finance in recent decades has been the explosive growth and rapid innovation in the markets for credit default swaps (CDS) and other OTC derivatives. These markets have largely gone unregulated since their inception. Enormous risks built up in these markets – substantially out of the view or control of regulators – and these risks contributed to the collapse of major financial firms in the past year and severe stress throughout the financial system.[34]

Under the Administration's proposed legislation, the OTC derivative markets would be comprehensively regulated for the first time. The legislation would provide for regulation and transparency for all OTC derivative transactions; strong prudential and business conduct regulation of all OTC derivative dealers and other major participants in the OTC derivative markets; and improved regulatory and enforcement tools to prevent manipulation, fraud, and other abuses in these markets.[35]

This legislation is still in the comment stage. On August 20, 2009 the CFTC sent almost 30 pages of suggestions, revisions, and amendments aimed at toughening the proposed legislation.

Changes to Regulation Z (Truth in Lending Act)[36]

On July 23, 2009, the Federal Reserve Board proposed significant changes to Regulation Z (Truth in Lending) intended to improve the disclosures consumers receive in connection with closed-end mortgages and home-equity lines of credit. These changes, offered for public comment, reflect the result of consumer testing conducted as part of the Board's comprehensive review of the rules for home-secured credit. The amendments would also provide new consumer protections for all home-secured credit.[37]

Closed-end mortgage disclosures would be revised to highlight potentially risky features such as adjustable rates, prepayment penalties, and negative amortization. The Board's proposal would also: (1) Improve the disclosure of the annual percentage rate (APR) so it captures most fees and settlement costs paid by consumers; (2) Require lenders to show how the consumer's APR compares to the average rate offered to borrowers with excellent credit; (3) Require lenders to provide final Truth in Lending Act (TILA) disclosures so that consumers receive them at least

[33] CFTC Charges Philadelphia-area Resident with Operating $50 Million Ponzi Scheme, CFTC Release No. 5594-09, Jan. 8, 2009, http://www.cftc.gov/newsroom/enforcementpressreleases/2009/pr5594-09.html (last visited Sept. 10, 2009).
[34] Administration's Regulatory Reform Agenda Reaches New Milestone: Final Piece of Legislative Language Delivered to Capitol Hill, Dep't of Treasury Release No. TG-261, Aug. 11, 2009, http://www.treas.gov/press/releases/tg261.htm (last visited Sept. 10, 2009).
[35] *Id.*
[36] Truth in Lending Act, 15 U.S.C. 1601 (2001).
[37] Fed. Reserve Bd. Release, Jul. 23, 2009, http://www.federalreserve.gov/newsevents/press/bcreg/20090723a.htm (last visited Sept. 10, 2009).

three business days before loan closing; and (4) Require lenders to show consumers how much their monthly payments might increase, for adjustable-rate mortgages.[38]

The rules for home-equity lines of credit would also be revised to change the timing, content, and format of the disclosures that creditors provide to consumers at application and throughout the life of such accounts. Currently, consumers receive lengthy, generic disclosures at application. Under the proposal, consumers would receive a new one-page Board publication summarizing basic information and risks regarding HELOCs at application. Shortly after application, consumers would receive new disclosures that reflect the specific terms of their credit plans. In addition, the Board's proposal would: (1) Prohibit creditors from terminating an account for payment-related reasons unless the consumer is more than 30 days late in making a payment, and (2) Provide additional protections related to account suspensions and credit-limit reductions, and reinstatement of accounts. The comment period is 120 days.[39]

Regulatory Notice 09-34: FINRA Rule Governing Investment Company Securities

As part of the process to develop a new consolidated rulebook, FINRA is currently requesting comment on a proposed FINRA rule regarding the distribution and sale of investment company securities. The proposal is based on NASD Rule 2830, but includes proposed new requirements regarding disclosure of cash compensation.[40]

---

[38] *Id.*
[39] *Id.*
[40] FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Investment Company Securities; Comment Period Expired: August 3, 2009, Regulatory Notice 09-34, http://www.finra.org/Industry/Regulation/Notices/2009/P119014 (last visited Sept. 10, 2009).