

# Consumer Financial Services Alert

An informational newsletter from Goodwin Procter LLP

For more information on any of the content in this issue, please contact any of the following members of our Consumer Financial Services Group:

## Regulatory

Lynne Barr

Margaret Crockett

Agnes Bundy Scanlan

Michael Whalen

## Litigation

Thomas Hefferon

Brooks Brown

James McGarry

David Permut

Joseph Yenouskas

To e-mail any of these attorneys, use *first initial* of first name followed by *last name* followed by *@goodwinprocter.com*. For example, the e-mail address for Lynne Barr would be [lbarr@goodwinprocter.com](mailto:lbarr@goodwinprocter.com). Phone numbers can be obtained at [www.goodwinprocter.com](http://www.goodwinprocter.com)

If you would like anyone else to receive the Consumer Financial Services Alert, please e-mail us at [consumerfinancialservices@goodwinprocter.com](mailto:consumerfinancialservices@goodwinprocter.com) with the e-mail addresses of the new recipients.

## In this Issue:

- Eighth Circuit Holds that Creditors' Mailers Meet FCRA "Firm Offer" Requirements..... 1
- Federal Court Dismisses "Hyper-Technical" TILA Claim ..... 1
- FDIC Issues Guidance on Reducing and Suspending HELOCs ..... 2
- IRS Issues Health Savings Account Q&As ..... 2
- FDIC Issues Interim Final Rule on School Financial Education Programs ..... 2
- FRB Updates its Consumer Compliance Handbook ..... 2
- OCC Updates New Activities Handbook ..... 2
- OCC Releases Annual Survey of Credit Underwriting Practices ..... 3
- Federal Banking Agencies Issue Host State Loan-to-Deposit Ratios ..... 3
- FTC Settles Charges on Payday Loan Lead Generators ..... 3
- FTC Staff Files Comments with HUD on Proposed Amendments to RESPA Regulations ..... 4
- HOPE NOW Adopts Guidelines Aimed at Expediting Foreclosure Prevention..... 4

## ➤ Eighth Circuit Holds that Creditors' Mailers Meet FCRA "Firm Offer" Requirements

In a consolidated appeal, the Eighth Circuit affirmed district court judgments in favor of Countrywide Home Loans, Inc. and Capital One Auto Finance, Inc. in putative class actions asserting violations of the prescreening requirements of the Fair Credit Reporting Act. The appellants contended that FCRA requires that a creditor's prescreened mailing contain material terms of the product offered so that it would qualify as a common law offer, but the Eighth Circuit rejected the argument as inconsistent with the plain language of FCRA. The Eighth Circuit instead held that FCRA is satisfied so long as a creditor honors its firm offer of credit. In so doing, the Court aligned itself with recent decisions from the First and Seventh Circuits, as well as federal district courts, that have reached a similar conclusion.

Goodwin Procter partner Tom Hefferon represented Countrywide. [Click here](#) for a copy of *Poehl v. Countrywide Home Loans, Inc.*, No. 07-2988; *Ludditt-Poehl v. Capital One Auto Finance, Inc.*, No. 07-3249 (8th Cir. June 19, 2008).

## ➤ Federal Court Dismisses "Hyper-Technical" TILA Claim

A federal judge in Alabama dismissed a suit against a lender claiming the three day right of rescission under the Truth in Lending Act should be extended to three-plus years because the notice of right to cancel did not include the actual signing date and the final date on which rescission rights expire. The lender's notice included a statement that plaintiffs had a right to rescind the loan within three business days of the latest of the closing date, the TILA disclosure date, or the notice of right to cancel date, but left blank what the actual last date was. The court held that failure to provide the actual date rescission rights expire may be a hyper-technical violation of TILA,

but that the form “provided the requisite clear and conspicuous notice” of rescission rights and that the technical violation is not sufficient in the Eleventh Circuit to extend the normal three day rescission period to three years. [Click here](#) for a copy of *McMillian v. AMC Mortgage Services, Inc.*, No. 07-0773 (S.D. Ala. Jun. 10, 2008).

➤ **FDIC Issues Guidance on Reducing and Suspending HELOCs**

The FDIC issued guidance to remind FDIC-supervised banks that if, for risk management purposes, they decide to reduce credit limits or suspend advances on HELOCs, certain legal requirements designed to protect consumers must be followed. The guidance includes best practices for working with borrowers, where possible, to minimize hardships that may result from such reductions or suspensions. [Click here](#) for the guidance.

➤ **IRS Issues Health Savings Account Q&As**

The IRS issued health savings account Q&As for employers and employees concerning eligible individuals, high deductible health plans, contributions, distributions, prohibited transactions, establishing an HSA and administration. [Click here](#) for the Q&As.

➤ **FDIC Issues Interim Final Rule on School Financial Education Programs**

The FDIC issued an interim final rule amending its regulations to permit state nonmember banks to participate or assist in financial education programs conducted on school premises where, in connection with the program, deposits are received, checks are paid, or money is lent, without the need to submit a branch application to, and receive prior approval from, the FDIC. However, any state nonmember bank that desires to engage in such financial education programs must satisfy certain conditions. The effective date of the interim rule was June 23, 2008 and comments must be received by July 23, 2008. [Click here](#) for the rule.

➤ **FRB Updates its Consumer Compliance Handbook**

The FRB updated its Consumer Compliance Handbook. The update contains a new chapter covering Section 5 of the Federal Trade Commission Act and the joint statement on unfair or deceptive acts and practices by state-chartered banks issued by the FRB and the FDIC. It also corrects a statement in the chapter on Regulation CC regarding general exception notices. [Click here](#) for a link to the handbook.

➤ **OCC Updates New Activities Handbook**

The OCC updated its *Activities Permissible for a National Bank* publication which covers permissible national bank activities covering the areas of general activities, compliance, fiduciary activities, insurance and annuity activities, preemption, securities activities, technology and electronic activities, and investment activities. The OCC also published its *Significant Legal, Licensing, and Community Development Precedents*, a document containing 2007 precedents regarding

branching, consulting and financial advice, corporate governance, finder activities, leasing, lending, other general activities, compliance, fiduciary activities, preemption, derivatives, technology and electronic activities, electronic commerce, investments, enforcement actions and regulations. These precedents have been incorporated into the most recent issue of *Activities Permissible for a National Bank*. [Click here](#) for the activities publication and [here](#) for the 2007 precedents.

➤ **OCC Releases Annual Survey of Credit Underwriting Practices**

The OCC released its 14th annual *Survey of Credit Underwriting Practices* and reported that commercial and retail underwriting standards tightened after four consecutive years of eased underwriting standards. The survey includes examiner observations and assessments of credit underwriting standards at the 62 largest national banks and covers the 12-month period ending March 31, 2008. [Click here](#) for the survey.

➤ **Federal Banking Agencies Issue Host State Loan-to-Deposit Ratios**

The federal banking agencies issued the host state loan-to-deposit ratios that they will use to determine compliance with Section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which prohibits a bank from establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production. [Click here](#) for the ratios.

➤ **FTC Settles Charges on Payday Loan Lead Generators**

Two payday loan lead generators have agreed to settle FTC charges that their Internet advertising stated payday loan costs and repayment periods without disclosing APR information as federal law requires. The settlements require the generators to disclose APR information in similar payday loan advertisements in the future and to comply in all other respects with the Truth in Lending Act and Regulation Z. According to the FTC's complaints, the generators stated loan costs on their websites – a \$20 fee for a \$100 loan, for example – but failed to disclose the APR. For a typical 14-day pay period, consumers who obtained payday loans advertised by one of the generators would pay an APR from 260% to 521% or higher, and 782% for loans advertised by the other. [Click here](#) for the FTC press release that includes links to the complaints and settlement agreements.

➤ **FTC Staff Files Comments with HUD on Proposed Amendments to RESPA Regulations**

The FTC authorized its staff to file comments with HUD concerning proposed amendments to regulations implementing the Real Estate Settlement Procedures Act. In its comments, the FTC staff states that some of the proposed amendments could help consumers better understand and compare loan terms and closing costs. However, the FTC staff believes that some of the changes may have the unintended consequence of further complicating the already complex mortgage process. The FTC staff believes consumers would benefit most if the federal government undertook a comprehensive effort to reform federal mortgage loan disclosures. FTC staff also recommends that HUD reconsider its proposed expansion of the definition of “required use” of services that affiliated businesses provide, believing that the expanded definition could prevent consumers from benefiting from lower prices that can result from bundling related services. [Click here](#) for the FTC’s press release and [here](#) for the FTC’s comments.

➤ **HOPE NOW Adopts Guidelines Aimed at Expediting Foreclosure Prevention**

HOPE NOW, the industry alliance of mortgage lenders, servicers, investors, and counselors, announced that its servicer members have agreed to a uniform set of guidelines that are designed to expedite the process of preventing foreclosures. The guidelines establish a common set of principles on the possible foreclosure prevention alternatives, including loan modifications, repayment plans, partial claims, and temporarily suspending monthly payments. The guidelines also include procedures to keep homeowners informed about the status of their request to their servicer for help. [Click here](#) for the guidelines.

---

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP or its attorneys. Additionally, the foregoing discussion does not constitute tax advice. Any discussion of tax matters contained in this publication is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code or promoting, marketing or recommending to another party any transaction or matter. © 2008 Goodwin Procter LLP. All rights reserved.