peirsonpatterson,llp
Attorneys at Law
Arlington Office

2310 W. Interstate 20, Suite 100
Arlington, Texas 76017-1868

Telephone: 918-461-5500
Fax: 817-856-6060

RULES AND AMENDMENTS TO REGULATION Z

OCTOBER 1, 2009

In an effort to protect consumers from unfair and abusive lending practices, the Federal Reserve Board of Governors (the "Board") published a final rule on July 30, 2008 amending Regulation Z, the implementing regulation of the Truth in Lending Act and the Home Ownership and Equity Protection Act ("HOEPA"). Amendments concerning initial disclosures, which went into effect on July 30, 2009, are not addressed in this paper. However, amendments to HOEPA, the creation of a new category of loan referred to as higher priced mortgage loans ("HPML"), and various consumer protections will go into effect on October 1, 2009, and will be discussed in more detail below.

NEW REGULATIONS AFFECTING HOEPA LOANS (§226.32)
Effective October 1, 2009, any loan described by §226.32 (a "HOEPA" loan) will be subject to two major changes pertaining generally to 1) assessing a consumer's ability to repay the contemplated loan and, 2) restrictions on pre-payment penalties.

Assessing a Consumer's Ability to Repay a HOEPA Loan:

Under the new §226.32(a)(4), a creditor is prohibited from extending a HOEPA loan to a consumer based solely on the value of the proposed collateral, without regard to the consumer's ability to repay the loan. The old rule prohibited a creditor from engaging in a "pattern or practice" of extending HOEPA loans without regard to a consumer's ability to repay (engaging in a "pattern or practice" of extending such loans without regard to repayment ability created a presumption of non-compliance). The new rule has removed the "pattern or practice" qualification and makes verification of repayment ability at the time of consummation an affirmative requirement and amends the presumption of non-compliance to a presumption of compliance based on a finite set of underwriting considerations (as opposed to the old rule which allowed the creditor to rely upon any relevant factors).[1]

---

[1] 73 Fed. Reg. 44543 (July 30, 2008).

Under §226.32, a creditor is presumed to be in compliance with the regulation if three processes are completed in making the determination to extend a HOEPA loan. First, the creditor must verify the consumer's ability to repay the proposed loan based upon reasonably reliable, written third-party documentation evidencing the consumer's income and assets (a creditor is allowed to assess based on current and reasonably expected income, employment, and assets other than the proposed collateral) and the consumer's current and simultaneous financial obligations. A creditor may no longer rely upon a consumer's statement of income and assets. Second, the creditor must assess the consumer's repayment ability using the largest payment of principal and interest scheduled in the first seven years following loan consummation and must take into account the consumer's current financial obligations and all mortgage related obligations such as expected property taxes and creditor-required mortgage insurance. Third, in assessing the consumer's ability to repay a contemplated HOEPA loan, a creditor must take into account one of the following: (i) the consumer's debt-to-income ratio or (ii) the income the consumer will have after paying debt obligations. The final rule does not provide quantitative thresholds for either of these two factors.
The presumption created by following these three procedures is not conclusive and can be rebutted by showing the creditor disregarded the ability to repay despite completing the three processes.[2] If a creditor fails to follow or properly complete one of the three processes, compliance with the rule will be based on all facts and circumstances, with no presumption of compliance or violation.[3] Further, there is no presumption of compliance available for loans in which the regular periodic payments for the first seven years would cause the principal balance to increase or for loans with a term of less than seven years wherein the regular periodic payments, when aggregated, do not fully amortize the outstanding principal balance.[4]

New §226.34(a)(4)(ii)(B) creates a limited affirmative defense for a creditor that fails to properly assess, verify and document a consumer's ability to repay. Under this defense, the burden is on the creditor to prove that non-compliance with the rule was immaterial. The creditor must show if it had relied on the amount of verifiable assets as provided by the new rule, the decision to extend credit and the specific loan terms would not have been different.

Prepayment Penalties and HOEPA Loans:

HOEPA loans originated under the prior §226.32(d)(7) were allowed to include a prepayment penalty only if the prepayment penalty term was not more than five years from consummation, the penalty did not apply if the loan was refinanced with the same lender or an affiliate, the borrower's debt-to-income ratio at consummation did not exceed 50%, and the penalty was not prohibited under other applicable law. Effective October 1, 2009, HOEPA loans will be subject to new regulations pertaining to prepayment penalty provisions.

---

[2] *Id*. at 44549.
[3] *Id*.
[4] *Id*.

Pursuant to new §226.32(d)(7), prepayment penalties included in HOEPA loans are regulated depending upon the specific loan's variable or fixed rate feature. If payments under the loan can change (either up or down) during the four year period following consummation, the loan shall not include a prepayment penalty. If payments under the loan are fixed, a prepayment penalty is allowed but the penalty term is limited to a maximum of two years after loan consummation. If otherwise allowed, a prepayment penalty provision shall not be applicable if at consummation the borrower's debt-to-income ratio (including amount owed under the mortgage) exceeds fifty percent (a creditor must verify the consumer's income in accordance with §226.34(a)(4)(ii)). Further, a prepayment penalty is not allowed based upon a refinance with the same lender or an affiliate. [5]

A HOEPA loan that does not comply with the prepayment penalty provisions found in §226.32(d)(7) violates TILA Section 129, 15 U.S.C. 1639, and is subject to a three year right of rescission.[6]

HIGHER PRICED MORTGAGE LOANS

Definition of Higher Priced Mortgage Loans and Types of Transactions Covered:

Unlike a HOEPA loan, an HPML encompasses a broad range of subprime mortgages because of its coverage and lower rate thresholds. A higher priced mortgage loan ("HPML") is defined as a "consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for loans secured by a first lien on a dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on a dwelling."[7] Coverage extends to closed-end first and second lien mortgages secured by a consumer's principal dwelling (not second homes or investment properties) and includes purchases, refinances, closed-end home equity loans, and construction-to-permanent loans.[8] However, initial construction loans, temporary or bridge loans with a term of 12 months or less, reverse mortgages, and HELOCs are excluded.[9]

Definition of APOR and how to apply the HPML Threshold Test:

Instead of using yields on Treasury securities as required for HOEPA loans, an HPML's index is tied to an average prime offer rate ("APOR"). An APOR is an "annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics."[10] Under the final rule, the Board is required to make APOR rates available to the public for a "wide variety of

---

[5] *Id*. at 44551.
[6] *Id.*
[7] *Id.*; (12 C.F.R. §226.35(a)(1)).
[8] *Id.* at 44537.
[9] *Id.* at 44537-44603; (12 C.F.R. §226.35(a)(3)).
[10] *Id.*; (12 C.F.R. §226.35(2)).

transactions" in a table format and publish them on a weekly basis on the internet.[11] The calculation of APORs is based on Freddie Mac's Primary Mortgage Market Survey (PMMS) which, the Board determined, is the best source for collecting such data for fixed and variable-rate mortgages.[12] The Board's fixed and adjustable rate tables on the FFIEC's website, along with its methodology for determining and calculating the APOR, may be viewed at http://www.ffiec.gov/ratespread/newcalc.aspx and at http://www.ffiec.gov:80/ratespread/newcalchelp.aspx. When applying the HPML's threshold test, the final APR must be compared to the APOR for a comparable transaction (the Board's APOR table will assist in identifying a comparable transaction) as of the date the loan's interest rate is locked. If the locked interest rate is reset, the lender should use the last date the interest rate is locked. If the final APR exceeds the APOR for a comparable transaction by the thresholds mentioned above, the loan is an HPML.[13]

HPML Consumer Protections:

According to 12 C.F.R. 226.35(b), an HPML is subject to the following restrictions or consumer protections:

- Repayment ability -- A lender must not extend credit based on the value of the consumer's collateral without regard to the consumer's repayment ability as of the date of closing (see 12 C.F.R. §226.34(a)(4) which also applies to HPMLs in regard to a consumer's repayment ability in the Federal Register at http://edocket.access.gpo.gov/2008/pdf/E8-16500.pdf).
- Prepayment Penalties -- A loan may not include a penalty described by Sec. 226.32(d)(6) unless:
    - the loan is otherwise permitted by law, including Sec. 226.32(d)(7) if the loan is a mortgage transaction described in Sec. 226.32(a); and
    - under the terms of the loan –
        - the penalty will not apply after the two-year period following consummation;
        - the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor, and
        - the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation.
- Escrows --[14]
    - Failure to Escrow for Property Taxes and Insurance -- Unless a loan is exempt, a lender may not extend a loan secured by a first lien on a principal dwelling unless an escrow account is established before consummation for payment of property taxes and premiums for mortgage-related insurance required by the creditor, such

[11] *Id*. at 44613; 12 C.F.R. §226.35(a)(2).
[12] *Id*. at 44603, 44535.
[13] *Id*. at 44613.
[14] The final rules on escrows in §226.35(b)(3) are effective for covered loans for which a creditor receives an application on or after April 1, 2010. However, for covered loans secured by manufactured homes, the final rule applies to applications received by the lender on or after October 1, 2010. *Id.* at 44605; See Official Staff Commentary, §226.1(d)(5)-1.

as insurance against loss of or damage to property, or against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss.

- o Exemptions for loan secured by shares in a cooperative and for certain condominium units
  - (A) Escrow accounts need not be established for loan secured by shares in a cooperative; and
  - (B) Insurance premiums described above need not be included in escrow accounts for loans secured by condominium units, where the condominium association has an obligation to the condominium unit owners to maintain a master policy insuring condominium units.
- o Cancellation -- A creditor or servicer may permit a consumer to cancel the escrow account required above only in response to a consumer's dated written request to cancel the escrow account that is received no earlier than 365 days after consummation.
- o Definition of Escrow Account – For purposes of this section, "escrow account" shall have the same meaning as in 24 C.F.R. 3500.17(b) as amended.

- Evasion; open-end credit -- In connection with credit secured by a consumer's principal dwelling that does not meet the definition of open-end credit in 12 C.F.R. §226.2(a)(20), a creditor shall not structure a home-secured loan as an open-end plan to evade the requirements of this section (12 C.F.R. §226.35).[15]

Presumptions of Compliance:

Under 12 C.F.R. §226.34(a)(4)(iii), a lender is presumed to have complied with the consumer protections as set forth in Sections 12 C.F.R. §226.35 and 12 C.F.R. §226.34 if the lender:

- Verifies the consumer's repayment ability as provided in 12 C.F.R. §226.34(a)(4)(ii);
- Determines the consumer's repayment ability using the largest payment of principal and interest scheduled in the first seven years following consummation and taking into account current obligations and mortgage-related obligations as defined in 12 C.F.R. §226.34(a)(4)(i); and
- Assesses the consumer's repayment ability taking into account at least one of the following:
  - the ratio of total debt obligations to income, or
  - the income the consumer will have after paying debt obligations.
- The above presumptions of compliance are not available for the following transactions for which:
  - the regular periodic payments for the first seven years would cause the principal balance to increase; or

[15] *Id*. 44603, 44604; (12 C.F.R. §226.35(b)).

- the term of the loan is less than seven years and the regular periodic payments when aggregated do not fully amortize the outstanding principal balance.[16]

An HPML must be reported under HMDA:

Reporting HPML price data is required under Regulation C which implements the Home Mortgage Disclosure Act (HMDA). HMDA was amended to conform with Regulation Z's new definition of HPML and becomes effective on October 1, 2009 for loan applications taken on or after that date and for all loans that close on or after January 1, 2010 (regardless of their application dates).[17] Accordingly, the HMDA rate spread reporting test is now identical to the HPML threshold test mentioned above.[18] Lenders are no longer required to report the rate spread between the APR and the yield on Treasury securities of comparable maturity if the spread is equal to or greater than 3.0 percentage points for a first lien or 5.0 percentage points for a subordinate-lien. Instead, under the final rule, lenders must now report "the spread between the loan's APR and a survey-based estimate of APRs currently offered on prime mortgage loans of a comparable type if the spread is equal to or greater than 1.5 percentage points for a first-lien loan (or 3.5 percentage points for a subordinate-lien loan)."[19] The new HMDA Rate Spread Calculator is available online at http://www.ffiec.gov/hmda/doc/spec2009.doc. For additional information regarding amendments to HMDA, the Federal Register may be viewed in its entirety at http://edocket.access.gpo.gov/2008/E8-25320.htm.

<u>NEW RULES APPLICABLE TO MORTGAGE LOAN ADVERTISEMENTS</u>

Open-End Home Equity Advertisements (§226.16):

As amended, §226.16 of Reg. Z modifies the existing "clear and conspicuous" standard for credit advertisements related to open-end home equity plans and imposes new regulations regarding the advertisement of certain promotional terms for those loans.

Under the modified "clear and conspicuous" standard, there is no promulgated format that must be adhered to, but when an advertisement for an open-end home equity extension of credit includes certain "triggering terms", additional disclosures must be given in close proximity and equal prominence to the triggering term or terms. Generally, as long as the additional disclosures are immediately next to, or directly above or below the triggering term, in equal print size, without any intervening text or graphical displays, the close proximity and equal prominence standard will be satisfied. Specific distinctions apply to various types of media. For example, visual advertisements (other than television) are subject to the general rules set out above, internet advertisements must include a direct link that directs a consumer to required disclosures, television advertisements must not obscure the required disclosures and they must be displayed

[16] *Id*. 44603.
[17] Fed. Reg. 63329 (October 24, 2008).
[18] *Id*. 63334.
[19] *Id.*

such that they can be read by a consumer, and radio advertisements must broadcast the disclosures at a speed and volume sufficient to be comprehended.

The following is a general overview of certain triggering terms and the additional disclosures required. The specific regulations often apply distinct rules to the various types of advertisements (television, print, radio, internet, etc.); each rule and applicable commentary should be reviewed for a more detailed analysis.

● Discounted and Premium Rates (§226.16(d)(2)) – If an advertisement for a variable-rate open-end home equity loan states an initial annual percentage rate that is not based on the index and margin used to make later adjustments, the advertisement must also state the period of time the initial rate will be in effect and a reasonably current annual percentage rate that would have been in effect using the index and margin; official commentary to this section provides a safe harbor for determining a "reasonably current" index and margin: for direct mail advertisements, the index and margin in effect within sixty days before mailing; for electronic and printed advertisements, the index and margin in effect within 30 days before release of the advertisement.

● Balloon Payments (§226.16(d)(3)) – If an advertisement makes any statement about a minimum periodic payment, and that payment will result in a balloon payment, the advertisement must disclose the balloon payment feature; this disclosure is subject to the "close proximity" and "equal prominence" standard.

● Tax Implications (§226.16(d)(4)) – If an advertisement makes an affirmative statement that a consumer can obtain an extension of credit that is greater than the fair market value of the dwelling, the advertisement must state the interest on the portion of credit that is greater than the fair market value of the dwelling is not deductible for Federal income tax purposes and the consumer should consult a tax advisor for information regarding tax deductibility of the interest; the additional disclosures required by this section do not apply of the advertisement merely implies an extension of credit greater than the fair market value of the dwelling is available.

● Promotional Rates and Payments (§226.16(d)(6)) – If an advertisement states any promotional rate or payment (as defined in §226.16(d)(6)(i)) additional disclosure of the following in a clear and conspicuous manner, in equal prominence and in close proximity, is required:

- the period of time in which the promotional rate or payment will apply

- if the advertisement states a promotional rate – any annual percentage rate that will apply under the plan; if the loan product is a variable rate transaction, the APR stated is subject to the accuracy standards found in§226.5(b) or §226.16(b)(1)(ii), as applicable;

- if the advertisement states a promotional payment – the amounts and time periods of the promotional payment that will apply under the plan; if the loan product is a variable rate transaction, payments that will be

determined based on application of an index and margin shall be disclosed based on a reasonably current index and margin.

Closed-End Credit Secured by a Dwelling (§226.24):

New provisions and amendments to §226.24 will become effective October 1, 2009, and were created for the general purposes of: modifying the existing "clear and conspicuous" standard, amending the existing regulations and commentary to ensure advertisements for closed-end credit secured by a dwelling adequately disclosing all rates and payments that will apply over the term of a loan and the time periods for which all rates and payments will apply, and prohibit seven specific acts in connection with advertisements for such loans.

● Clear and Conspicuous Standard (§226.24(b)) – New §226.24(b) imposes a clear and conspicuous standard for all disclosures required by §226.24. The rule does not prescribe any specific format, but as with the new regulations pertaining to open-end home equity loan advertisements, certain "triggering terms" require additional disclosures be provided in the advertisement, in equal prominence and close proximity.

● Advertisement of Rate of Finance Charge (§226.24(c)) - Advertisements for closed-end credit secured by a dwelling may not state a rate other than the annual percentage rate, except that a simple annual rate (the rate at which interest is accruing) that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate. An advertisement for a discounted variable-rate loan that states a reduced or discounted simple annual rate must state, in equal prominence and close proximity, the term during which the discounted rate will apply and the annual percentage rate that will apply to the loan balance after the initial discounted rate expires.

● Triggering Terms Requiring Additional Disclosures (§226.24(d)) – If an advertisement includes, or implies, statements pertaining to an amount or percentage of down payment, the number of payments or period of repayment, the amount of any payment or the amount of any finance charge, the advertisement must also state (as applicable) the amount or percentage of down payment, the number of payments or period of repayment (including any applicable balloon payment), the amount of any payment and the amount of any finance charge.

● Disclosure or Rates and Payments (§226.24(f)) – If an advertisement states a simple annual rate of interest and more than one simple annual rate will apply over the term of the loan, the advertisement must also state each rate that will apply during the term of the loan (if the loan has a variable-rate feature, each rate disclosed must be computed based on a reasonably current index and margin), the time period during which each rate will apply and the annual percentage rate of the loan (if the loan is a variable-rate product, the computation of the annual percentage rate will be subject to the accuracy requirements of §§226.17(c) and 226.22). If an advertisement states the amount of any payment, the advertisement must also state the amount of each payment that will apply during the term of the loan including any balloon payment (variable-rate loan payments

must be computed based on a reasonably current index and margin), the period during which each payment amount will apply, and the fact that the specific loan payments disclosed do not include amounts for taxes and insurance (if applicable) and that the actual payment obligation will be more than the disclosed amounts.

The disclosures required by this section are subject to the clear and conspicuous standard, but do not apply to a mailed application or a banner/pop-up electronic advertisement that is linked to an application. Alternative disclosures are provided for television and radio advertisements in §226.24(g): such advertisements must either include clear and conspicuous disclosure of the additional "triggered" disclosures required by §226.24(d)(2) or by indicating in the advertisement the annual percentage rate of the offered product and notice the rate may increase, if applicable, along with a telephone number where a consumer can call to obtain further information pertaining to the cost of the loan.

● <u>Tax Implication Disclosures (§226.24(h))</u> – If a written or internet advertisement states an extension of credit greater than the fair market value of the dwelling may be available, the advertisement must also state the interest on the loan portion that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes and state the consumer should consult a tax adviser for further information.

● <u>Specific Prohibited Acts (§226.24(i))</u> – Advertisements for credit secured by a dwelling are prohibited from using or employing the following acts or practices:

● <u>Misleading Use of the Term "Fixed" to Refer to Rates or Payments in a Variable-rate Transaction</u> – If an advertised loan product contains a variable-rate feature such that the payment will increase, the term "Adjustable Rate Mortgage", "Variable Rate Mortgage" or "ARM" must be used before the use of the term "fixed" and must be as conspicuous as the term "fixed"; each use of the term "fixed" must be accompanied by an equally prominent statement of the term during which the rate or payment is fixed and the fact that the rate or payment may increase thereafter.

● <u>Using Misleading Comparisons</u> – An advertisement can not make any comparison between actual and hypothetical credit payments or rates and any payment or rate that will be available under the advertised loan for a period less than the full loan term unless, in a clear and conspicuous manner, all rates and payments applicable throughout the term of the loan, and the corresponding time period each will apply, are disclosed; variable rates and payments must be computed based on a reasonably current index and margin.

● <u>Using Misrepresentations About Government Endorsements</u> – An advertisement can not state or imply an extension of credit is offered or otherwise endorsed by any governmental entity if it is not.

● Employing a Misleading Use of the Current Lender's Name – A prospective lender may not use the name of a consumer's current lender in an advertisement unless the advertisement discloses in equal prominence the name of the creditor making the advertisement and clearly and conspicuously states the prospective creditor is not associated with, or acting on behalf of, the consumer's current lender. This prohibition does not apply if the advertisement is sent by, or on behalf of, the current lender.

● Employing Misleading Claims of Debt Elimination – An advertisement can not make any misleading claim that the mortgage product offered will eliminate debt or result in a waiver or forgiveness of existing loan obligations to another lender.

● Misleading Use of the Term "Counselor" – A for-profit mortgage broker or creditor can not use the term "counselor" to refer to employees or agents that are involved in offering, origination or selling mortgages.

● Misleading Use of Foreign-Language Advertisements – All required disclosures and related trigger terms must be provided in the same language in an advertisement.

NEW CONSUMER PROTECTIONS APPLICABLE TO CREDIT SECURED BY A CONSUMER'S PRINCIPAL DWELLING

Prohibited Acts or Practices in Connection with Credit Secured by a Consumer's Principal Dwelling (§226.36):

Under the final rule, 12 C.F.R. § 226.36 contains additional new consumer protections and applies to all mortgage loans, with the exception of HELOCs, if secured by the consumer's principal dwelling.[20] Section 36 consumer protections are as follows:

● Mortgage broker defined --The term "mortgage broker" means a person, other than an employee of a creditor, who for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person. The term includes a person meeting this definition, even if the consumer credit obligation is initially payable to such person, unless the person provides the funds for the transaction at consummation out of the person's own resources, out of deposits held by the person, or by drawing on a bona fide warehouse line of credit.

● Misrepresentation of value of consumer's dwelling -- Coercion of appraiser. In connection with a consumer credit transaction secured by a consumer's principal dwelling, no creditor or mortgage broker, and no affiliate of a creditor or mortgage broker shall directly or indirectly coerce, influence, or otherwise encourage an appraiser to misstate or misrepresent the value of such dwelling.

[20] Fed. Reg. 44563 (July 30, 2008); 12 C.F.R. 226.36.

Examples of actions that violate the above paragraph include:

- implying to an appraiser that current or future retention of the appraiser depends on the amount at which the appraiser values a consumer's principal dwelling;
- excluding an appraiser from consideration for future engagement because the appraiser reports a value of a consumer's principal dwelling that does not meet or exceed a minimum threshold;
- telling an appraiser a minimum reported value of a consumer's principal dwelling that is needed to approve the loan;
- failing to compensate an appraiser because the appraiser does not value a consumer's principal dwelling at or above a certain amount; and
- conditioning an appraiser's compensation on loan consummation.

Examples of actions that do not violate the above paragraph include:

- ✓ asking an appraiser to consider additional information about a consumer's principal dwelling or about comparable properties;
- ✓ requesting an appraiser provide additional information about the basis for a valuation;
- ✓ requesting an appraiser correct factual errors in a valuation;
- ✓ obtaining multiple appraisals of a consumer's principal dwelling, so long as the creditor adheres to a policy of selecting the most reliable appraisal, rather than the appraisal that states the highest value;
- ✓ withholding compensation from an appraiser for breach of contract or substandard performance of services as provided by contract; and
- ✓ taking action permitted or required by applicable federal or state statute, regulation, or agency guidance.

● <u>When extension of credit prohibited</u> -- In connection with a consumer credit transaction secured by a consumer's principal dwelling, a creditor who knows, at or before loan consummation, of a violation of the misrepresentation of value of consumer's dwelling restriction mentioned above in connection with an appraisal shall not extend credit based on such appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling.

● <u>Appraiser defined</u> -- As used in this paragraph, an appraiser is a person who engages in the business of providing assessments of the value of dwellings. The term "appraiser" includes persons that employ, refer, or manage appraisers and affiliates of such persons.

● <u>Servicing practices</u> -- In connection with a consumer credit transaction secured by a consumer's principal dwelling, no servicer shall—

- fail to credit a payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in §226.36(c)(2) of this section;
- impose on the consumer any late fee or delinquency charge in connection with a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within any applicable grace period; or
- fail to provide, within a reasonable time after receiving a request from the consumer or any person acting on behalf of the consumer, an accurate statement of the total outstanding balance that would be required to satisfy the consumer's obligation in full as of a specified date.
- if a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.

● For purposes of this paragraph, the terms "servicer" and "servicing" have the same meanings as provided in 24 CFR 3500.2(b), as amended.[21]

●12 C.F.R. §226.36 does not apply to a home equity line of credit subject to 12 C.F.R. §226.5(b).

Effective October 1, 2009, the preceding amendments to HOEPA-loan guidelines, creation of the HMPL regulations, and the strengthening of advertising rules present creditors with new compliance challenges. A thorough review of the new regulations and commentary will be necessary for any creditor originating these loans or engaging in any type of advertising related to the offering of extensions of credit that will be secured by a dwelling, whether such extension of credit is a home equity product or otherwise.

By: Jennifer Swearingen, PeirsonPatterson, LLP, and

Aaron Polasek, Brown, Fowler & Alsup

[21] Id.