

# Modern Consumer Law

## *2016 Statutory Supplement*

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## Assignment 2: Who is a Consumer?

### Problem 2.1

#### Iowa Code §714.16, Consumer Frauds.

##### 1. Definitions:

*a.* The term “*advertisement*” includes the attempt by publication, dissemination, solicitation, or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise.

*b.* “*Buyer*”, as used in subsection 2, paragraph “*h*”, means the person to whom the water system is being sold, leased, or rented.

[Subparts c-e are omitted]

*f.* “*Deception*” means an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts.

[Subparts g-h are omitted]

*i.* The term “*merchandise*” includes any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services.

*j.* The term “*person*” includes any natural person or the person’s legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesperson, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof.

*k.* The term “*sale*” includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit.

[Subparts l-m are omitted]

*n.* “*Unfair practice*” means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces.

2. *a.* The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise or the solicitation of

contributions for charitable purposes, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

It is deceptive advertising within the meaning of this section for a person to represent in connection with the lease, sale, or advertisement of any merchandise that the advertised merchandise has certain performance characteristics, accessories, uses, or benefits or that certain services are performed on behalf of clients or customers of that person if, at the time of the representation, no reasonable basis for the claim existed. The burden is on the person making the representation to demonstrate that a reasonable basis for the claim existed.

A retailer who uses advertising for a product, other than a drug or other product claiming to have a health related benefit or use, prepared by a supplier shall not be liable under this section unless the retailer participated in the preparation of the advertisement; knew or should have known that the advertisement was deceptive, false, or misleading; refused to withdraw the product from sales upon the request of the attorney general pending a determination of whether the advertisement was deceptive, false, or misleading; refused upon the request of the attorney general to provide the name and address of the supplier; or refused to cooperate with the attorney general in an action brought against the supplier under this section.

“Material fact” as used in this subsection does not include repairs of damage to or adjustments on or replacements of parts with new parts of otherwise new merchandise if the repairs, adjustments or replacements are made to achieve compliance with factory specifications and are made before sale of the merchandise at retail and the actual cost of any labor and parts charged to or performed by a retailer for any such repairs, adjustments and parts does not exceed three hundred dollars or ten percent of the actual cost to a retailer including freight of the merchandise, whichever is less, providing that the seller posts in a conspicuous place notice that repairs, adjustments or replacements will be disclosed upon request. The exemption provided in this paragraph does not apply to the concealment, suppression or omission of a material fact if the purchaser requests disclosure of any repair, adjustment or replacement.

## **Problem 2.2**

### 15 U.S.C. §1602, Definitions and Rules of Construction.

(i)The adjective “consumer”, used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

### 15 U.S.C. §1603, Exempted Transactions.

This subchapter does not apply to the following:

- (1) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.
- (2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.
- (3) Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer and other than private education loans (as that term is defined in section 1650(a) of this title), in which the total amount financed exceeds \$50,000.
- (4) Transactions under public utility tariffs, if the Bureau determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.
- (5) Transactions for which the Bureau, by rule, determines that coverage under this subchapter is not necessary to carry out the purposes of this subchapter.
- (6) Repealed. Pub. L. 96–221, title VI, §603(c)(3), Mar. 31, 1980, 94 Stat. 169.
- (7) Loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 [20 U.S.C. 1070 et seq., 42 U.S.C. 2751 et seq.].

### 12 C.F.R. §1026, Supplement I—Official Staff Interpretations

#### Section 1026.3—Exempt Transactions

##### *3(a) Business, commercial, agricultural, or organizational credit.*

1. *Primary purposes.* A creditor must determine in each case if the transaction is primarily for an exempt purpose. If some question exists as to the primary purpose for a credit extension, the creditor is, of course, free to make the disclosures, and the fact that disclosures are made under such circumstances is not controlling on the question of whether the transaction was exempt. (See comment 3(a)-2, however, with respect to credit cards.)

##### *2. Business purpose purchases.*

i. *Business-purpose credit cards—extensions of credit for consumer purposes.* If a business-purpose credit card is issued to a person, the provisions of the regulation do not apply, other than as provided in §§1026.12(a) and 1026.12(b), even if extensions of credit for consumer purposes are occasionally made using that business-purpose credit card. For example, the

billing error provisions set forth in §1026.13 do not apply to consumer-purpose extensions of credit using a business-purpose credit card.

ii. *Consumer-purpose credit cards—extensions of credit for business purposes.* If a consumer-purpose credit card is issued to a person, the provisions of the regulation apply, even to occasional extensions of credit for business purposes made using that consumer-purpose credit card. For example, a consumer may assert a billing error with respect to any extension of credit using a consumer-purpose credit card, even if the specific extension of credit on such credit card or open-end credit plan that is the subject of the dispute was made for business purposes.

3. *Factors.* In determining whether credit to finance an acquisition—such as securities, antiques, or art—is primarily for business or commercial purposes (as opposed to a consumer purpose), the following factors should be considered:

i. *General.*

A. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be business purpose.

B. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.

C. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.

D. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.

E. The borrower's statement of purpose for the loan.

ii. *Business-purpose examples.* Examples of business-purpose credit include:

A. A loan to expand a business, even if it is secured by the borrower's residence or personal property.

B. A loan to improve a principal residence by putting in a business office.

C. A business account used occasionally for consumer purposes.

iii. *Consumer-purpose examples.* Examples of consumer-purpose credit include:

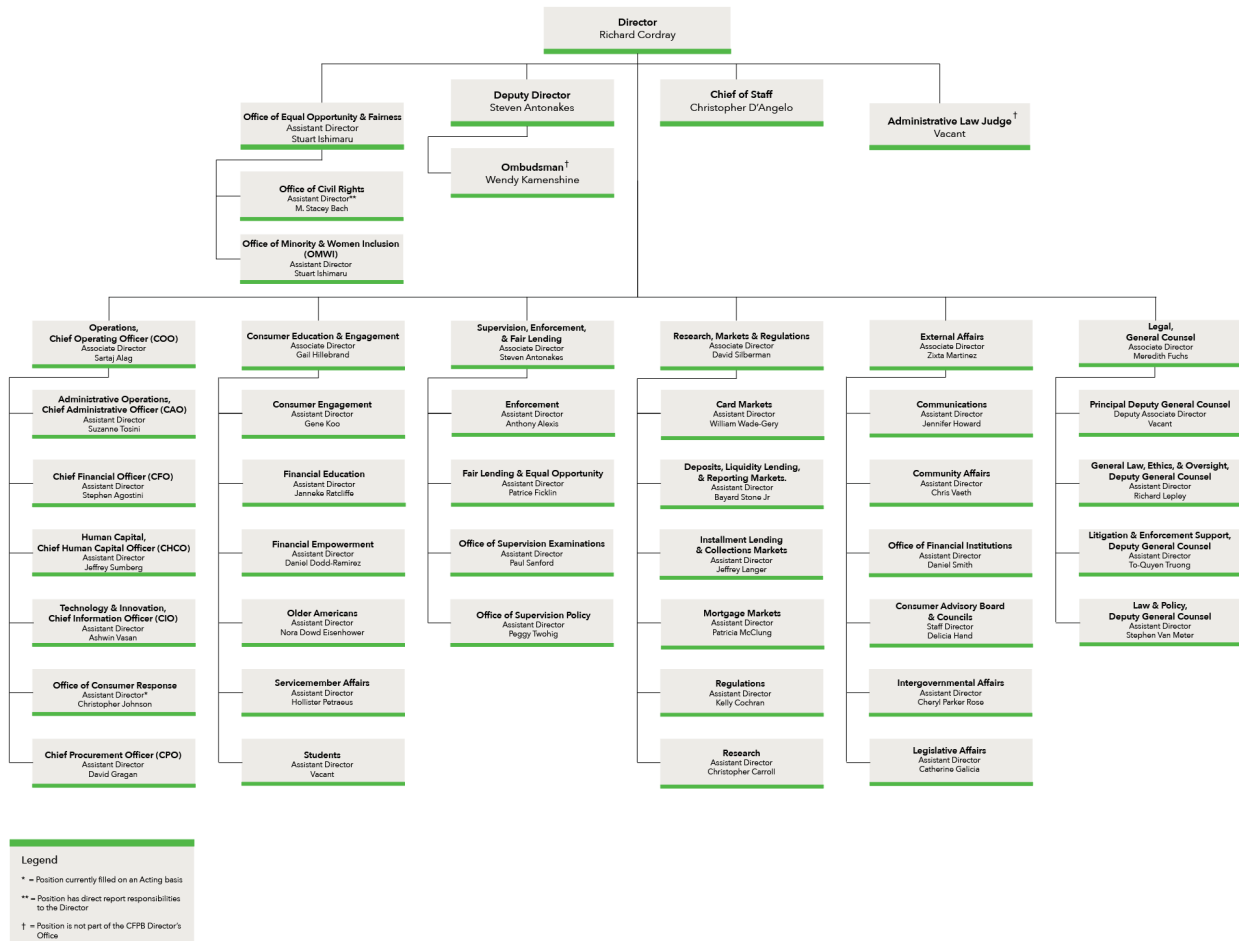
A. Credit extensions by a company to its employees or agents if the loans are used for personal purposes.

B. A loan secured by a mechanic's tools to pay a child's tuition.

C. A personal account used occasionally for business purposes.

## Problem 2.3

[http://files.consumerfinance.gov/f/201506\\_cfpb\\_org-chart.png](http://files.consumerfinance.gov/f/201506_cfpb_org-chart.png)



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## Assignment 3: Who is a Consumer?

### Problem 3.2

12 U.S.C. §25b, State law preemption standards for national banks and subsidiaries clarified.

(a) Definitions. For purposes of this section, the following definitions shall apply:

(1) National bank. The term “national bank” includes—

(A) any bank organized under the laws of the United States; and

(B) any Federal branch established in accordance with the International Banking Act of 1978.

(2) State consumer financial laws. The term “State consumer financial law” means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.

(3) Other definitions. The terms “affiliate”, “subsidiary”, “includes”, and “including” have the same meanings as in section 3 of the Federal Deposit Insurance Act [12 USCS §1813].

(b) Preemption standard.

(1) In general. State consumer financial laws are preempted, only if—

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than this title.

(2) Savings clause. This title and section 24 of the Federal Reserve Act (12 U.S.C. 371) do not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank).

(3) Case-by-case basis.

(A) Definition. As used in this section the term “case-by-case basis” refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms.

(B) Consultation. When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.

(4) Rule of construction. This title does not occupy the field in any area of State law.

(5) Standards of review.

(A) Preemption. A court reviewing any determinations made by the Comptroller regarding preemption of a State law by this title or section 24 of the Federal Reserve Act (12 U.S.C. 371) shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.

(B) Savings clause. Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal laws.

(6) Comptroller determination not delegable. Any regulation, order, or determination made by the Comptroller of the Currency under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.

(c) Substantial evidence. No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding

regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996).

(d) Periodic review of preemption determinations.

(1) In general. The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of Federal law preempts a State consumer financial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter. After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination. Any such notice of a proposal to amend a determination and the subsequent resolution of such proposal shall comply with the procedures set forth in subsections (a) and (b) of section 5244 of the Revised Statutes of the United States (12 U.S.C. 43 (a), (b)).

(2) Reports to Congress. At the time of issuing a review conducted under paragraph (1), the Comptroller of the Currency shall submit a report regarding such review to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate. The report submitted to the respective committees shall address whether the agency intends to continue, rescind, or propose to amend any determination that a provision of Federal law preempts a State consumer financial law, and the reasons therefor.

(e) Application of State consumer financial law to subsidiaries and affiliates. Notwithstanding any provision of this title or section 24 of Federal Reserve Act (12 U.S.C. 371), a State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.

(f) Preservation of powers related to charging interest. No provision of this title shall be construed as altering or otherwise affecting the authority conferred by section 5197 of the Revised Statutes of the United States (12 U.S.C. 85) for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of “interest” under such provision.

(g) Transparency of OCC preemption determinations. The Comptroller of the Currency shall publish and update no less frequently than quarterly, a list of preemption determinations by the Comptroller of the Currency then in effect that identifies the activities and practices

covered by each determination and the requirements and constraints determined to be preempted.

(h) Clarification of law applicable to nondepository institution subsidiaries and affiliates of national banks.

(1) Definitions. For purposes of this subsection, the terms “depository institution”, “subsidiary”, and “affiliate” have the same meanings as in section 3 of the Federal Deposit Insurance Act [12 USCS §1813].

(2) Rule of construction. No provision of this title or section 24 of the Federal Reserve Act (12 U.S.C. 371) shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank).

(i) Visitorial powers.

[(1)] In general. In accordance with the decision of the Supreme Court of the United States in *Cuomo v. Clearing House Assn., L. L. C.* (129 S. Ct. 2710 (2009)), no provision of this title which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.

(j) Enforcement actions. The ability of the Comptroller of the Currency to bring an enforcement action under this title or section 5 of the Federal Trade Commission Act [15 USCS §45] does not preclude any private party from enforcing rights granted under Federal or State law in the courts.

#### 12 U.S.C. §5513, Review of Bureau regulations.

(a) Review of Bureau regulations. On the petition of a member agency of the Council, the Council may set aside a final regulation prescribed by the Bureau, or any provision thereof, if the Council decides, in accordance with subsection (c), that the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.

(b) Petition.

(1) Procedure. An agency represented by a member of the Council may petition the Council, in writing, and in accordance with rules prescribed pursuant to subsection (f), to stay the effectiveness of, or set aside, a regulation if the member agency filing the petition—

(A) has in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system of the United States; and

(B) files the petition with the Council not later than 10 days after the date on which the regulation has been published in the Federal Register.

(2) Publication. Any petition filed with the Council under this section shall be published in the Federal Register and transmitted contemporaneously with filing to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

(c) Stays and set asides.

(1) Stay.

(A) In general. Upon the request of any member agency, the Chairperson of the Council may stay the effectiveness of a regulation for the purpose of allowing appropriate consideration of the petition by the Council.

(B) Expiration. A stay issued under this paragraph shall expire on the earlier of—

(i) 90 days after the date of filing of the petition under subsection (b); or

(ii) the date on which the Council makes a decision under paragraph (3).

(2) No adverse inference. After the expiration of any stay imposed under this section, no inference shall be drawn regarding the validity or enforceability of a regulation which was the subject of the petition.

(3) Vote.

(A) In general. The decision to issue a stay of, or set aside, any regulation under this section shall be made only with the affirmative vote in accordance with subparagraph (B) of 2/3 of the members of the Council then serving.

(B) Authorization to vote. A member of the Council may vote to stay the effectiveness of, or set aside, a final regulation prescribed by the Bureau only if the agency or department represented by that member has—

(i) considered any relevant information provided by the agency submitting the petition and by the Bureau; and

(ii) made an official determination, at a public meeting where applicable, that the

regulation which is the subject of the petition would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.

(4) Decisions to set aside.

(A) Effect of decision. A decision by the Council to set aside a regulation prescribed by the Bureau, or provision thereof, shall render such regulation, or provision thereof, unenforceable.

(B) Timely action required. The Council may not issue a decision to set aside a regulation, or provision thereof, which is the subject of a petition under this section after the expiration of the later of—

(i) 45 days following the date of filing of the petition, unless a stay is issued under paragraph (1); or

(ii) the expiration of a stay issued by the Council under this section.

(C) Separate authority. The issuance of a stay under this section does not affect the authority of the Council to set aside a regulation.

(5) Dismissal due to inaction. A petition under this section shall be deemed dismissed if the Council has not issued a decision to set aside a regulation, or provision thereof, within the period for timely action under paragraph (4)(B).

(6) Publication of decision. Any decision under this subsection to issue a stay of, or set aside, a regulation or provision thereof shall be published by the Council in the Federal Register as soon as practicable after the decision is made, with an explanation of the reasons for the decision.

(7) Rulemaking procedures inapplicable. The notice and comment procedures under section 553 of title 5, United States Code, shall not apply to any decision under this section of the Council to issue a stay of, or set aside, a regulation.

(8) Judicial review of decisions by the council. A decision by the Council to set aside a regulation prescribed by the Bureau, or provision thereof, shall be subject to review under chapter 7 of title 5, United States Code [5 USCS §§701 et seq.].

(d) Application of other law. Nothing in this section shall be construed as altering, limiting, or restricting the application of any other provision of law, except as otherwise specifically provided in this section, including chapter 5 and chapter 7 of title 5, United States Code [5 USCS §§500 et seq. and 701 et seq.], to a regulation which is the subject of a petition filed under this

section.

(e) Savings clause. Nothing in this section shall be construed as limiting or restricting the Bureau from engaging in a rulemaking in accordance with applicable law.

(f) Implementing rules. The Council shall prescribe procedural rules to implement this section.

12 U.S.C. §5552, Preservation of enforcement powers of States.

(a) In general.

(1) Action by State. Except as provided in paragraph (2), the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law. A State regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law (except as provided in paragraph (2)), and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.

(2) Action by State against national bank or Federal savings association to enforce rules.

(A) In general. Except as permitted under subparagraph (B), the attorney general (or equivalent thereof) of any State may not bring a civil action in the name of such State against a national bank or Federal savings association to enforce a provision of this title.

(B) Enforcement of rules permitted. The attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State against a national bank or Federal savings association in any district court of the United States in the State or in State court that is located in that State and that has jurisdiction over the defendant to enforce a regulation prescribed by the Bureau under a provision of this title and to secure remedies under provisions of this title or remedies otherwise provided under other law.

(3) Rule of construction. No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the authority of a State attorney general or State regulator to enforce such Federal law.

(b) Consultation required.

(1) Notice.

(A) In general. Before initiating any action in a court or other administrative or regulatory proceeding against any covered person as authorized by subsection (a) to enforce any provision of this title, including any regulation prescribed by the Bureau under this title, a State attorney general or State regulator shall timely provide a copy of the complete complaint to be filed and written notice describing such action or proceeding to the Bureau and the prudential regulator, if any, or the designee thereof.

(B) Emergency action. If prior notice is not practicable, the State attorney general or State regulator shall provide a copy of the complete complaint and the notice to the Bureau and the prudential regulator, if any, immediately upon instituting the action or proceeding.

(C) Contents of notice. The notification required under this paragraph shall, at a minimum, describe—

(i) the identity of the parties;

(ii) the alleged facts underlying the proceeding; and

(iii) whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by the Bureau, a prudential regulator, or another Federal agency.

(2) Bureau response. In any action described in paragraph (1), the Bureau may—

(A) intervene in the action as a party;

(B) upon intervening—

(i) remove the action to the appropriate United States district court, if the action was not originally brought there; and

(ii) be heard on all matters arising in the action; and

(C) appeal any order or judgment, to the same extent as any other party in the proceeding may.

(c) Regulations. The Bureau shall prescribe regulations to implement the requirements of this section and, from time to time, provide guidance in order to further coordinate actions with the State attorneys general and other regulators.

(d) Preservation of State authority.

(1) State claims. No provision of this section shall be construed as altering, limiting, or affecting the authority of a State attorney general or any other regulatory or enforcement



agency or authority to bring an action or other regulatory proceeding arising solely under the law in effect in that State.

(2) State securities regulators. No provision of this title shall be construed as altering, limiting, or affecting the authority of a State securities commission (or any agency or office performing like functions) under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or authority.

(3) State insurance regulators. No provision of this title shall be construed as altering, limiting, or affecting the authority of a State insurance commission or State insurance regulator under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator.

12 U.S.C. §5563, Hearings and adjudication proceedings.

(a) In general. The Bureau is authorized to conduct hearings and adjudication proceedings with respect to any person in the manner prescribed by chapter 5 of title 5, United States Code [5 USCS §§500 et seq.] in order to ensure or enforce compliance with—

(1) the provisions of this title, including any rules prescribed by the Bureau under this title; and

(2) any other Federal law that the Bureau is authorized to enforce, including an enumerated consumer law, and any regulations or order prescribed thereunder, unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding and only to the extent of such limitation.

(b) Special rules for cease-and-desist proceedings.

(1) Orders authorized.

(A) In general. If, in the opinion of the Bureau, any covered person or service provider is engaging or has engaged in an activity that violates a law, rule, or any condition imposed in writing on the person by the Bureau, the Bureau may, subject to sections 1024, 1025, and 1026 [12 USCS §§5514, 5515, and 5516], issue and serve upon the covered person or service provider a notice of charges in respect thereof.

(B) Content of notice. The notice under subparagraph (A) shall contain a statement of the facts constituting the alleged violation or violations, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist should issue against the covered person or service provider, such hearing to be held not earlier than 30 days nor later than 60 days after the date of service of such notice, unless an earlier or a later date is set by the Bureau, at the request of any party so served.

(C) Consent. Unless the party or parties served under subparagraph (B) appear at the hearing personally or by a duly authorized representative, such person shall be deemed to have consented to the issuance of the cease-and-desist order.

(D) Procedure. In the event of consent under subparagraph (C), or if, upon the record, made at any such hearing, the Bureau finds that any violation specified in the notice of charges has been established, the Bureau may issue and serve upon the covered person or service provider an order to cease and desist from the violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the covered person or service provider to cease and desist from the subject activity, and to take affirmative action to correct the conditions resulting from any such violation.

(2) Effectiveness of order. A cease-and-desist order shall become effective at the expiration of 30 days after the date of service of an order under paragraph (1) upon the covered person or service provider concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as the order is stayed, modified, terminated, or set aside by action of the Bureau or a reviewing court.

(3) Decision and appeal. Any hearing provided for in this subsection shall be held in the Federal judicial district or in the territory in which the residence or principal office or place of business of the person is located unless the person consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code [5 USCS §§500 et seq.]. After such hearing, and within 90 days after the Bureau has notified the parties that the case has been submitted to the Bureau for final decision, the Bureau shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection. Unless a petition for review is timely filed in a court of appeals of the United States, as provided in paragraph (4), and thereafter until the record in the proceeding has been filed as provided in paragraph (4), the Bureau may at any time, upon such notice and in such manner as the Bureau shall determine proper, modify, terminate, or set aside any such order. Upon filing of the record as provided, the Bureau may modify, terminate, or set aside any such order with permission of the court.

(4) Appeal to court of appeals. Any party to any proceeding under this subsection may obtain a review of any order served pursuant to this subsection (other than an order issued with the consent of the person concerned) by the filing in the court of appeals of the United States for the circuit in which the principal office of the covered person is located, or in the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the

date of service of such order, a written petition praying that the order of the Bureau be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Bureau, and thereupon the Bureau shall file in the court the record in the proceeding, as provided in section 2112 of title 28 of the United States Code. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of paragraph (3) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the Bureau. Review of such proceedings shall be had as provided in chapter 7 of title 5 of the United States Code [5 USCS §§701 et seq.]. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court of the United States, upon certiorari, as provided in section 1254 of title 28 of the United States Code.

(5) No stay. The commencement of proceedings for judicial review under paragraph (4) shall not, unless specifically ordered by the court, operate as a stay of any order issued by the Bureau.

(c) Special rules for temporary cease-and-desist proceedings.

(1) In general. Whenever the Bureau determines that the violation specified in the notice of charges served upon a person, including a service provider, pursuant to subsection (b), or the continuation thereof, is likely to cause the person to be insolvent or otherwise prejudice the interests of consumers before the completion of the proceedings conducted pursuant to subsection (b), the Bureau may issue a temporary order requiring the person to cease and desist from any such violation or practice and to take affirmative action to prevent or remedy such insolvency or other condition pending completion of such proceedings. Such order may include any requirement authorized under this subtitle [12 USCS §§5561 et seq.]. Such order shall become effective upon service upon the person and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2), shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the Bureau shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the person, until the effective date of such order.

(2) Appeal. Not later than 10 days after the covered person or service provider concerned has been served with a temporary cease-and-desist order, the person may apply to the United States district court for the judicial district in which the residence or principal office or place of business of the person is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the

administrative proceedings pursuant to the notice of charges served upon the person under subsection (b), and such court shall have jurisdiction to issue such injunction.

(3) Incomplete or inaccurate records.

(A) Temporary order. If a notice of charges served under subsection (b) specifies, on the basis of particular facts and circumstances, that the books and records of a covered person or service provider are so incomplete or inaccurate that the Bureau is unable to determine the financial condition of that person or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that person, the Bureau may issue a temporary order requiring—

(i) the cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1).

(B) Effective period. Any temporary order issued under subparagraph (A)—

(i) shall become effective upon service; and

(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of—

(I) the completion of the proceeding initiated under subsection (b) in connection with the notice of charges; or

(II) the date the Bureau determines, by examination or otherwise, that the books and records of the covered person or service provider are accurate and reflect the financial condition thereof.

(d) Special rules for enforcement of orders.

(1) In general. The Bureau may in its discretion apply to the United States district court within the jurisdiction of which the principal office or place of business of the person is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such court shall have jurisdiction and power to order and require compliance herewith.

(2) Exception. Except as otherwise provided in this subsection, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order.

(e) Rules. The Bureau shall prescribe rules establishing such procedures as may be necessary to carry out this section.

12 U.S.C. §5565, Relief available.

(a) Administrative proceedings or court actions.

(1) Jurisdiction. The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

(2) Relief. Relief under this section may include, without limitation—

- (A) rescission or reformation of contracts;
- (B) refund of moneys or return of real property;
- (C) restitution;
- (D) disgorgement or compensation for unjust enrichment;
- (E) payment of damages or other monetary relief;
- (F) public notification regarding the violation, including the costs of notification;
- (G) limits on the activities or functions of the person; and
- (H) civil money penalties, as set forth more fully in subsection (c).

(3) No exemplary or punitive damages. Nothing in this subsection shall be construed as authorizing the imposition of exemplary or punitive damages.

(b) Recovery of costs. In any action brought by the Bureau, a State attorney general, or any State regulator to enforce any Federal consumer financial law, the Bureau, the State attorney general, or the State regulator may recover its costs in connection with prosecuting such action if the Bureau, the State attorney general, or the State regulator is the prevailing party in the action.

(c) Civil money penalty in court and administrative actions.

(1) In general. Any person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection.

(2) Penalty amounts.

(A) First tier. For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty may not exceed \$5,000 for each day during which such violation or failure to pay continues.

(B) Second tier. Notwithstanding paragraph (A), for any person that recklessly engages in a violation of a Federal consumer financial law, a civil penalty may not exceed \$25,000 for each day during which such violation continues.

(C) Third tier. Notwithstanding subparagraphs (A) and (B), for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed \$1,000,000 for each day during which such violation continues.

(3) Mitigating factors. In determining the amount of any penalty assessed under paragraph (2), the Bureau or the court shall take into account the appropriateness of the penalty with respect to—

(A) the size of financial resources and good faith of the person charged;

(B) the gravity of the violation or failure to pay;

(C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;

(D) the history of previous violations; and

(E) such other matters as justice may require.

(4) Authority to modify or remit penalty. The Bureau may compromise, modify, or remit any penalty which may be assessed or had already been assessed under paragraph (2). The amount of such penalty, when finally determined, shall be exclusive of any sums owed by the person to the United States in connection with the costs of the proceeding, and may be deducted from any sums owing by the United States to the person charged.

(5) Notice and hearing. No civil penalty may be assessed under this subsection with respect to a violation of any Federal consumer financial law, unless—

(A) the Bureau gives notice and an opportunity for a hearing to the person accused of the violation; or

(B) the appropriate court has ordered such assessment and entered judgment in favor of the Bureau.

## Assignment 4: Solicitation

### Problem 4.1

#### 16 C.F.R. §429.1, The Rule.

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

“You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.”

The seller may select the method of providing the buyer with the duplicate notice of cancellation form set forth in paragraph (b) of this section, *provided however*, that in the event of cancellation the buyer must be able to retain a complete copy of the contract or receipt. Furthermore, if both forms are not attached to the contract or receipt, the seller is required to alter the last sentence in the statement above to conform to the actual location of the forms.

(b) Fail to furnish each buyer, at the time the buyer signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned either “NOTICE OF RIGHT TO CANCEL” or “NOTICE OF CANCELLATION,” which shall (where applicable) contain in ten point bold face type the following information and statements in the same language, e.g., Spanish, as that used in the contract.

## Notice of Cancellation

[enter date of transaction]

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(Date)

You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to *[Name of seller]*, at *[address of seller's place of business]* NOT LATER THAN MIDNIGHT OF *[date]*.

I HEREBY CANCEL THIS TRANSACTION.

(Date) \_\_\_\_\_

(Buyer's signature) \_\_\_\_\_

(c) Fail, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(d) Include in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this section including specifically the buyer's right to cancel the sale in accordance with the provisions of this section.



(e) Fail to inform each buyer orally, at the time the buyer signs the contract or purchases the goods or services, of the buyer's right to cancel.

(f) Misrepresent in any manner the buyer's right to cancel.

(g) Fail or refuse to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to: (i) Refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(h) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(i) Fail, within 10 business days of receipt of the buyer's notice of cancellation, to notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods.

## **Problem 4.2**

### 16 C.F.R. §310.3, Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer consents to pay for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by §310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment. In the case of debt relief services, the seller or telemarketer must make the disclosures required by §310.3(a)(1) before the consumer enrolls in an offered program.

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer<sup>1</sup>;

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods

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<sup>1</sup> For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. §1643;

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); and

(viii) In the sale of any debt relief service:

(A) the amount of time necessary to achieve the represented results, and to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the time by which the debt relief service provider will make a bona fide settlement offer to each of them;

(B) to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the amount of money or the percentage of each outstanding debt that the customer must accumulate before the debt relief service provider will make a bona fide settlement offer to each of them;

(C) to the extent that any aspect of the debt relief service relies upon or results in the customer's failure to make timely payments to creditors or debt collectors, that the use of

the debt relief service will likely adversely affect the customer's creditworthiness, may result in the customer being subject to collections or sued by creditors or debt collectors, and may increase the amount of money the customer owes due to the accrual of fees and interest; and

(D) to the extent that the debt relief service requests or requires the customer to place funds in an account at an insured financial institution, that the customer owns the funds held in the account, the customer may withdraw from the debt relief service at any time without penalty, and, if the customer withdraws, the customer must receive all funds in the account, other than funds earned by the debt relief service in compliance with §310.4(a)(5)(i)(A) through (C).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

- (i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;
- (ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;
- (iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;
- (iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;
- (v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;
- (vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;
- (vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;
- (viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. §1643;
- (ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the

specific steps the customer must take to avoid the charge(s); or

(x) Any material aspect of any debt relief service, including, but not limited to, the amount of money or the percentage of the debt amount that a customer may save by using such service; the amount of time necessary to achieve the represented results; the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors or debt collectors or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt; the effect of the service on a customer's creditworthiness; the effect of the service on collection efforts of the customer's creditors or debt collectors; the percentage or number of customers who attain the represented results; and whether a debt relief service is offered or provided by a non-profit entity.

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z, or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E. Such authorization shall be deemed verifiable if any of the following means is employed:

Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature<sup>2</sup>;

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

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<sup>2</sup> For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§310.3(a), (c) or (d), or §310.4 of this Rule.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system

for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;  
or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

16 C.F.R. §310.4, Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report

from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. §1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5)

(i) Requesting or receiving payment of any fee or consideration for any debt relief service until and unless:

(A) The seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer;

(B) The customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector; and

(C) To the extent that debts enrolled in a service are renegotiated, settled, reduced, or otherwise altered individually, the fee or consideration either:

(1) Bears the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service; or

(2) Is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the

time the debt was enrolled in the service and the amount actually paid to satisfy the debt.

(ii) Nothing in §310.4(a)(5)(i) prohibits requesting or requiring the customer to place funds in an account to be used for the debt relief provider's fees and for payments to creditors or debt collectors in connection with the renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of a debt, provided that:

(A) The funds are held in an account at an insured financial institution;

(B) The customer owns the funds held in the account and is paid accrued interest on the account, if any;

(C) The entity administering the account is not owned or controlled by, or in any way affiliated with, the debt relief service;

(D) The entity administering the account does not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service; and

(E) The customer may withdraw from the debt relief service at any time without penalty, and must receive all funds in the account, other than funds earned by the debt relief service in compliance with §310.4(a)(5)(i)(A) through (C), within seven (7) business days of the customer's request.

(6) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(7) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(7)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) Obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;



(B) Obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(7)(i)(A) of this section; and,

(C) Make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(7)(i) of this section, the seller or telemarketer must:

(A) At a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) Obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(7)(ii)(A) of this section; or

(8) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

*(b) Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with §310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) That person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) That person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller:

(i) Has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature<sup>3</sup> of that person; or

(ii) Has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(v) Initiating any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for compliance with the call abandonment safe harbor in §310.4(b)(4)(iii), unless:

(A) In any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

(i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;

(ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and

(iv) Includes such person's telephone number and signature<sup>4</sup>; and

(B) In any such call to induce the purchase of any good or service, or to induce a charitable

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<sup>3</sup> For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

<sup>4</sup> For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made, the seller or telemarketer:

(i) Allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and

(ii) Within two (2) seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures required by §310.4(d) or (e), followed immediately by a disclosure of one or both of the following:

(A) In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request pursuant to §310.4(b)(1)(iii)(A) at any time during the message. The mechanism must:

(1) Automatically add the number called to the seller's entity-specific Do Not Call list;

(2) Once invoked, immediately disconnect the call; and

(3) Be available for use at any time during the message; and

(B) In the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request pursuant to §310.4(b)(1)(iii)(A). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

(1) Automatically adds the number called to the seller's entity-specific Do Not Call list;

(2) Immediately thereafter disconnects the call; and

(3) Is accessible at any time throughout the duration of the telemarketing campaign; and

(iii) Complies with all other requirements of this part and other applicable federal and state laws.

(C) Any call that complies with all applicable requirements of this paragraph (v) shall not be deemed to violate §310.4(b)(1)(iv) of this part.

(D) This paragraph (v) shall not apply to any outbound telephone call that delivers a

prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with §310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to §310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating §310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with §310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to §310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with §310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to §310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating §310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating §310.4(b)(1)(iv) if:

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

(ii) The seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) Whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed<sup>5</sup>; and

(iv) The seller or telemarketer, in accordance with §310.5(b)-(d), retains records establishing compliance with §310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

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<sup>5</sup> This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

- (1) The identity of the charitable organization on behalf of which the request is being made; and
- (2) That the purpose of the call is to solicit a charitable contribution.

16 C.F.R. §310.5, Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

- (1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;
- (2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;
- (3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;<sup>6</sup>
- (4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and
- (5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by §310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by §310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section.

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<sup>6</sup> For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with §310.5(a)(3) of this Rule.

When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with §310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this section.

### **Problem 4.3**

#### 15 U.S.C. §7707(b), Effect on other laws.

##### (b) State law.

(1) In general. This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

(2) State law not specific to electronic mail. This Act shall not be construed to preempt the applicability of—

(A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or

(B) other State laws to the extent that those laws relate to acts of fraud or computer crime.

#### 15 U.S.C. §7702(2)(A), Definitions.

##### (2) Commercial electronic mail message.

(A) In general. The term “commercial electronic mail message” means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).

#### 15 U.S.C. §7702(17), Definitions.

##### (17) Transactional or relationship message.

(A) In general. The term “transactional or relationship message” means an electronic mail message the primary purpose of which is—

(i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(iii) to provide—

(I) notification concerning a change in the terms or features of;

(II) notification of a change in the recipient’s standing or status with respect to; or

(III) at regular periodic intervals, account balance information or other type of account statement with respect to,

a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

(B) Modification of definition. The Commission by regulation pursuant to section 7711 of this title may modify the definition in subparagraph (A) to expand or contract the categories of messages that are treated as transactional or relationship messages for purposes of this chapter to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this chapter.



## Assignment 5: Advertising

### Problem 5.2

16 C.F.R. §251.1, The guide.

(a) *General.*

(1) The offer of “Free” merchandise or service is a promotional device frequently used to attract customers. Providing such merchandise or service with the purchase of some other article or service has often been found to be a useful and valuable marketing tool.

(2) Because the purchasing public continually searches for the best buy, and regards the offer of “Free” merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.

Representative of the language frequently used in such offers are “Free”, “Buy 1-Get 1 Free”, “2-for-1 Sale”, “50% off with purchase of Two”, “1¢ Sale”, etc. (Related representations that raise many of the same questions include “\_\_\_ Cents-Off”, “Half-Price Sale”, “1/2 Off”, etc. See the Commission’s “Fair Packaging and Labeling Regulation Regarding ‘Cents-Off’ and Guides Against Deceptive Pricing.”)

(b) *Meaning of “Free”.*

(1) The public understands that, except in the case of introductory offers in connection with the sale of a product or service (See paragraph (f) of this section), an offer of “Free” merchandise or service is based upon a regular price for the merchandise or service which must be purchased by consumers in order to avail themselves of that which is represented to be “Free”. In other words, when the purchaser is told that an article is “Free” to him if another article is purchased, the word “Free” indicates that he is paying nothing for that article and no more than the regular price for the other. Thus, a purchaser has a right to believe that the merchant will not directly and immediately recover, in whole or in part, the cost of the free merchandise or service by marking up the price of the article which must be purchased, by the substitution of inferior merchandise or service, or otherwise.

(2) The term *regular* when used with the term price, means the price, in the same quantity, quality and with the same service, at which the seller or advertiser of the product or service has openly and actively sold the product or service in the geographic market or trade area in which he is making a “Free” or similar offer in the most recent and regular course of business, for a reasonably substantial period of time, i.e., a 30-day period. For consumer products or services which fluctuate in price, the “regular” price shall be the lowest price at which any substantial sales were made during the aforesaid 30-day period. Except in the case of

introductory offers, if no substantial sales were made, in fact, at the “regular” price, a “Free” or similar offer would not be proper.

(c) *Disclosure of conditions.* When making “Free” or similar offers all the terms, conditions and obligations upon which receipt and retention of the “Free” item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of “Free” merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset. However, mere notice of the existence of a “Free” offer on the main display panel of a label or package is not precluded provided that (1) the notice does not constitute an offer or identify the item being offered “Free”, (2) the notice informs the customer of the location, elsewhere on the package or label, where the disclosures required by this section may be found, (3) no purchase or other such material affirmative act is required in order to discover the terms and conditions of the offer, and (4) the notice and the offer are not otherwise deceptive.

(d) *Supplier’s responsibilities.* Nothing in this section should be construed as authorizing or condoning the illegal setting or policing of retail prices by a supplier. However, if the supplier knows, or should know, that a “Free” offer he is promoting is not being passed on by a reseller, or otherwise is being used by a reseller as an instrumentality for deception, it is improper for the supplier to continue to offer the product as promoted to such reseller. He should take appropriate steps to bring an end to the deception, including the withdrawal of the “Free” offer.

(e) *Resellers’ participation in supplier’s offers.* Prior to advertising a “Free” promotion, a supplier should offer the product as promoted to all competing resellers as provided for in the Commission’s “Guides for Advertising Allowances and Other Merchandising Payments and Services.” In advertising the “Free” promotion, the supplier should identify those areas in which the offer is not available if the advertising is likely to be seen in such areas, and should clearly state that it is available only through participating resellers, indicating the extent of participation by the use of such terms as “some”, “all”, “a majority”, or “a few”, as the case may be.

(f) *Introductory offers.*

(1) No “Free” offer should be made in connection with the introduction of a new product or service offered for sale at a specified price unless the offeror expects, in good faith, to discontinue the offer after a limited time and to commence selling the product or service

promoted, separately, at the same price at which it was promoted with the “Free” offer.

(2) In such offers, no representation may be made that the price is for one item and that the other is “Free” unless the offeror expects, in good faith, to discontinue the offer after a limited time and to commence selling the product or service promoted, separately, at the same price at which it was promoted with a “Free” offer.

(g) *Negotiated sales*. If a product or service usually is sold at a price arrived at through bargaining, rather than at a regular price, it is improper to represent that another product or service is being offered “Free” with the sale. The same representation is also improper where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

(h) *Frequency of offers*. So that a “Free” offer will be special and meaningful, a single size of a product or a single kind of service should not be advertised with a “Free” offer in a trade area for more than six months in any 12-month period. At least 30 days should elapse before another such offer is promoted in the same trade area. No more than three such offers should be made in the same area in any 12-month period. In such period, the offeror’s sale in that area of the product in the size promoted with a “Free” offer should not exceed 50% of the total volume of his sales of the product, in the same size, in the area.

(i) *Similar terms*. Offers of “Free” merchandise or services which may be deceptive for failure to meet the provisions of this section may not be corrected by the substitution of such similar words and terms as “gift”, “given without charge”, “bonus”, or other words or terms which tend to convey the impression to the consuming public that an article of merchandise or service is “Free”.

### **Problem 5.3**

#### **16 C.R.F. §610.4, Prevention of deceptive marketing of free credit reports.**

(a) For purposes of this section:

(1) *AnnualCreditReport.com* and 877-322-8228 means the Uniform Resource Locator address “AnnualCreditReport.com” and toll-free telephone number, 877-322-8228. These are the locator address and toll-free telephone number currently used by the centralized source. If the locator address or toll-free telephone number changes in the future, the new address or telephone number shall be substituted within a reasonable time.

(2) *Free credit report* means a file disclosure prepared by or obtained from, directly or indirectly, a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act), that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a

product or service subject to cancellation.

(3) *General requirements for disclosures.* The disclosures covered by paragraph (b) of this section shall contain only the prescribed content and comply with the following requirements:

(i) All disclosures shall be prominent;

(ii) All disclosures shall be made in the same language as that principally used in the advertisement;

(iii) Visual disclosures shall be easily readable; in a high degree of contrast from the immediate background on which it appears; in a format so that the disclosure is distinct from other text, such as inside a border; in a distinct type style, such as bold; and parallel to the base of the advertisement or screen;

(iv) Audio disclosures shall be delivered in a slow and deliberate manner and in a reasonably understandable volume and pitch;

(v) Program-length television, radio, or Internet-hosted multi-media advertisement disclosures shall be made at the beginning, near the middle, and at the end of the advertisement; and

(vi) Nothing contrary to, inconsistent with, or that undermines the required disclosures shall be used in any advertisement in any medium, nor shall any audio, visual, or print technique be used that is likely to detract significantly from the communication of any disclosure.

(b) *Medium-specific disclosures.* All offers of free credit reports shall prominently include the disclosures required by this section.

(1) *Television advertisements.*

(i) All advertisements for free credit reports broadcast on television shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(ii) The disclosure shall appear at the same time in the audio and visual part of the advertisement. The visual disclosure shall be at least 4% of the vertical picture height and appear for a minimum of four seconds.

(2) *Radio advertisements.* All advertisements for free credit reports broadcast on radio shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(3) *Print advertisements.* All advertisements for free credit reports in print shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: “THIS NOTICE IS REQUIRED BY LAW”. Immediately below the first line of the disclosure the following language shall appear: “You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law.” Each letter of the disclosure text shall be, at minimum, one-half the size of the largest character used in the advertisement.

(4) *Internet websites.* Any website offering free credit reports must display the disclosure set forth in paragraphs 610.4(b)(4)(i), (ii), and (v) of this section on each page that mentions a free credit report and on each page of the ordering process. This disclosure shall be visible across the top of each page where the disclosure is required to appear; shall appear inside a box; and shall appear in the form specified below:

(i) The first element of the disclosure shall be a header that is centered and shall consist of the following text: “THIS NOTICE IS REQUIRED BY LAW. Read more at FTC.GOV”. Each letter of the header shall be one-half the size of the largest character of the disclosure text required by 610.4(b)(4)(ii). The reference to FTC.GOV shall be an operational hyperlink to ([www.ftc.gov/freereports](http://www.ftc.gov/freereports)), underlined, and in a color that is a high degree of contrast from the color of the other disclosure text and background color of the box;

(ii) The second element of the disclosure shall appear below the header required by paragraph 610.4(b)(4)(i) and shall consist of the following text: “You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law.” The reference to *AnnualCreditReport.com* shall be an operational hyperlink to the centralized source, underlined, and in the same color as the hyperlink to FTC.GOV required in paragraph 610.4(b)(4)(i);

(iii) The color of the text required by paragraphs 610.4(b)(4)(i) and (ii) shall be in a high degree of contrast with the background color of the box;

(iv) The background of the box shall be a solid color in a high degree of contrast from the background of the page and the color shall not appear elsewhere on the page;

(v) The third element of the disclosure shall appear below the text required by paragraph 610.4(b)(4)(ii) and shall be an operational hyperlink to *AnnualCreditReport.com* that appears as a centered button containing the following language: “Take me to the authorized source”. The background of this button shall be the same color as the hyperlinks required by paragraphs 610.4(b)(4)(i) and (ii) and the text shall be in a high degree of contrast to the background of the button;

(vi) Each character of the text in paragraphs 610.4(b)(4)(ii) and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner;

(vii) Each character of the disclosure shall be displayed as plain text and in a sans serif font, such as Arial; and

(viii) The space between each element of the disclosure required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner. The space between the boundaries of the box and the text or button required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at minimum, twice the size of the vertical height of the largest character on the page, including characters in an image or graphic banner.

(5) *Internet-hosted multi-media advertising.* All advertisements for free credit reports disseminated through Internet-hosted multi-media in both audio and visual formats shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW.". Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the ONLY authorized source under federal law." The disclosure shall appear at the same time in the audio and visual part of the advertisement. If the advertisement contains characters, the visual disclosure shall be, at minimum, the same size as the largest character on the advertisement.

(6) *Telephone requests.* When consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement that represents free credit reports are available at the number, consumers must receive the following audio disclosure at the first mention of a free credit report: "The following notice is required by law. You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the only authorized source under federal law."

(7) *Telemarketing solicitations.* When telemarketing sales calls are made that include offers of free credit reports, the call must include at the first mention of a free credit report the following disclosure: "The following notice is required by law. You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the only authorized source under federal law."

## **Problem 5.4**

### 12 C.F.R. §1026.16(b), Advertisement of terms that require additional disclosure.

(1) Any term required to be disclosed under §1026.6(b)(3) set forth affirmatively or negatively in an advertisement for an open-end (not home-secured) credit plan triggers additional disclosures under this section. Any term required to be disclosed under §1026.6(a)(1) or (a)(2) set forth affirmatively or negatively in an advertisement for a home-equity plan subject to the requirements of §1026.40 triggers additional disclosures under this section. If any of the terms that trigger additional disclosures under this paragraph is set forth in an advertisement, the advertisement shall also clearly and conspicuously set forth the following:

- (i) Any minimum, fixed, transaction, activity or similar charge that is a finance charge under §1026.4 that could be imposed.
- (ii) Any periodic rate that may be applied expressed as an annual percentage rate as determined under §1026.14(b). If the plan provides for a variable periodic rate, that fact shall be disclosed.
- (iii) Any membership or participation fee that could be imposed.

(2) If an advertisement for credit to finance the purchase of goods or services specified in the advertisement states a periodic payment amount, the advertisement shall also state the total of payments and the time period to repay the obligation, assuming that the consumer pays only the periodic payment amount advertised. The disclosure of the total of payments and the time period to repay the obligation must be equally prominent to the statement of the periodic payment amount.

### 12 C.F.R. §1026.16(f), Misleading terms.

An advertisement may not refer to an annual percentage rate as “fixed,” or use a similar term, unless the advertisement also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open.

### 12 C.F.R. §1026.57, Reporting and marketing rules for college student open-end credit.

(a) Definitions.

- (1) *College student credit card.* The term “college student credit card” as used in this section means a credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan to any college student.
- (2) *College student.* The term “college student” as used in this section means a consumer who is a full-time or part-time student of an institution of higher education.

(3) *Institution of higher education.* The term “institution of higher education” as used in this section has the same meaning as in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001 and 1002).

(4) *Affiliated organization.* The term “affiliated organization” as used in this section means an alumni organization or foundation affiliated with or related to an institution of higher education.

(5) *College credit card agreement.* The term “college credit card agreement” as used in this section means any business, marketing or promotional agreement between a card issuer and an institution of higher education or an affiliated organization in connection with which college student credit cards are issued to college students currently enrolled at that institution.

(b) *Public disclosure of agreements.* An institution of higher education shall publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card.

(c) *Prohibited inducements.* No card issuer or creditor may offer a college student any tangible item to induce such student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor, if such offer is made:

- (1) On the campus of an institution of higher education;
- (2) Near the campus of an institution of higher education; or
- (3) At an event sponsored by or related to an institution of higher education.

(d) *Annual report to the Bureau.*

(1) Requirement to report. Any card issuer that was a party to one or more college credit card agreements in effect at any time during a calendar year must submit to the Bureau an annual report regarding those agreements in the form and manner prescribed by the Bureau.

(2) Contents of report. The annual report to the Bureau must include the following:

- (i) Identifying information about the card issuer and the agreements submitted, including the issuer’s name, address, and identifying number (such as an RSSD ID number or tax identification number);
- (ii) A copy of any college credit card agreement to which the card issuer was a party that was in effect at any time during the period covered by the report;



(iii) A copy of any memorandum of understanding in effect at any time during the period covered by the report between the card issuer and an institution of higher education or affiliated organization that directly or indirectly relates to the college credit card agreement or that controls or directs any obligations or distribution of benefits between any such entities;

(iv) The total dollar amount of any payments pursuant to a college credit card agreement from the card issuer to an institution of higher education or affiliated organization during the period covered by the report, and the method or formula used to determine such amounts;

(v) The total number of credit card accounts opened pursuant to any college credit card agreement during the period covered by the report; and

(vi) The total number of credit card accounts opened pursuant to any such agreement that were open at the end of the period covered by the report.

(3) *Timing of reports.* Except for the initial report described in this paragraph (d)(3), a card issuer must submit its annual report for each calendar year to the Bureau by the first business day on or after March 31 of the following calendar year.

12 C.F.R. §1026.51(b), Rules affecting young consumers—

1) *Applications from young consumers.* A card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old, unless the consumer has submitted a written application and the card issuer has:

(i) Financial information indicating the consumer has an independent ability to make the required minimum periodic payments on the proposed extension of credit in connection with the account; or

(ii)

(A) A signed agreement of a cosigner, guarantor, or joint applicant who is at least 21 years old to be either secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 or jointly liable with the consumer for any debt on the account; and

(B) Financial information indicating such cosigner, guarantor, or joint applicant has the ability to make the required minimum periodic payments on such debts, consistent with paragraph (a) of this section.

*(2) Credit line increases for young consumers.*

(i) If a credit card account has been opened pursuant to paragraph (b)(1)(i) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless:

(A) At the time of the contemplated increase, the consumer has an independent ability to make the required minimum periodic payments on the increased limit consistent with paragraph (b)(1)(i) of this section; or

(B) A cosigner, guarantor, or joint applicant who is at least 21 years old agrees in writing to assume liability for any debt incurred on the account, consistent with paragraph (b)(1)(ii) of this section.

(ii) If a credit card account has been opened pursuant to paragraph (b)(1)(ii) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless the cosigner, guarantor, or joint accountholder who assumed liability at account opening agrees in writing to assume liability on the increase.

## Assignment 6: Consumer Privacy and Identity Theft

### Problem 6.1

18 U.S.C. §2710, Wrongful disclosure of video tape rental or sale records.

(a) *Definitions.* For purposes of this section—

- (1) the term “consumer” means any renter, purchaser, or subscriber of goods or services from a video tape service provider;
- (2) the term “ordinary course of business” means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;
- (3) the term “personally identifiable information” includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and
- (4) the term “video tape service provider” means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b) *Video tape rental and sale records.*

- (1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).
- (2) A video tape service provider may disclose personally identifiable information concerning any consumer—
  - (A) to the consumer;
  - (B) to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer that—
    - (i) is in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;
    - (ii) at the election of the consumer—
      - (I) is given at the time the disclosure is sought; or

(II) is given in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner; and

(iii) the video tape service provider has provided an opportunity, in a clear and conspicuous manner, for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if—

(i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and

(ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;

(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

(i) the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if

compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) *Civil action.*

(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award—

(A) actual damages but not less than liquidated damages in an amount of \$2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) *Personally identifiable information.* Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) *Destruction of old records.* A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) *Preemption.* The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.

## **Problem 6.2**

### 15 U.S.C. §6809(4), Nonpublic personal information.

(A) The term “nonpublic personal information” means personally identifiable financial information—

- (i) provided by a consumer to a financial institution;
- (ii) resulting from any transaction with the consumer or any service performed for the consumer; or
- (iii) otherwise obtained by the financial institution.

(B) Such term does not include publicly available information, as such term is defined by the regulations prescribed under section 6804 of this title.

(C) Notwithstanding subparagraph (B), such term—

- (i) shall include any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information; but
- (ii) shall not include any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any nonpublic personal information.

### 16 C.F.R. §313.3(n-p), Definitions.

(n)

(1) *Nonpublic personal information* means:

- (i) Personally identifiable financial information; and
- (ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

(2) *Nonpublic personal information* does not include:

- (i) Publicly available information, except as included on a list described in paragraph (n)(1)(ii) of this section; or
- (ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available.

(3) *Examples of lists—*

(i) Nonpublic personal information includes any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information (that is not publicly available), such as account numbers.

(ii) Nonpublic personal information does not include any list of individuals' names and addresses that contains only publicly available information, is not derived, in whole or in part, using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.

(o)

(1) *Personally identifiable financial information* means any information:

(i) A consumer provides to you to obtain a financial product or service from you;

(ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or

(iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.

(2) *Examples—*

(i) *Information included.* Personally identifiable financial information includes:

(A) Information a consumer provides to you on an application to obtain a loan, credit card, or other financial product or service;

(B) Account balance information, payment history, overdraft history, and credit or debit card purchase information;

(C) The fact that an individual is or has been one of your customers or has obtained a financial product or service from you;

(D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;

(E) Any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on, or servicing, a credit account;

(F) Any information you collect through an Internet "cookie" (an information collecting

device from a web server); and

(G) Information from a consumer report.

(ii) *Information not included.* Personally identifiable financial information does not include:

(A) A list of names and addresses of customers of an entity that is not a financial institution; and

(B) Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(p)

(1) *Publicly available information* means any information that you have a reasonable basis to believe is lawfully made available to the general public from:

(i) Federal, State, or local government records;

(ii) Widely distributed media; or

(iii) Disclosures to the general public that are required to be made by Federal, State, or local law.

(2) *Reasonable basis.* You have a reasonable basis to believe that information is lawfully made available to the general public if you have taken steps to determine:

(i) That the information is of the type that is available to the general public; and

(ii) Whether an individual can direct that the information not be made available to the general public and, if so, that your consumer has not done so.

(3) *Examples—*

(i) *Government records.* Publicly available information in government records includes information in government real estate records and security interest filings.

(ii) *Widely distributed media.* Publicly available information from widely distributed media includes information from a telephone book, a television or radio program, a newspaper, or a web site that is available to the general public on an unrestricted basis. A web site is not restricted merely because an Internet service provider or a site operator requires a fee or a password, so long as access is available to the general public.

(iii) *Reasonable basis—*



(A) You have a reasonable basis to believe that mortgage information is lawfully made available to the general public if you have determined that the information is of the type included on the public record in the jurisdiction where the mortgage would be recorded.

(B) You have a reasonable basis to believe that an individual's telephone number is lawfully made available to the general public if you have located the telephone number in the telephone book or the consumer has informed you that the telephone number is not unlisted.

16 C.F.R. §313.10(a)(1), Limits on disclosure of non-public personal information to nonaffiliated third parties.

(a)

(1) Conditions for disclosure. Except as otherwise authorized in this part, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless:

(i) You have provided to the consumer an initial notice as required under §313.4;

(ii) You have provided to the consumer an opt out notice as required in §313.7;

(iii) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and

(iv) The consumer does not opt out.

**Problem 6.3**

Cal. Penal Code §528.5, Impersonation through Internet Web site or by other electronic means proscribed; Punishment.

(a) Notwithstanding any other provision of law, any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense punishable pursuant to subdivision (d).

(b) For purposes of this section, an impersonation is credible if another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated.

(c) For purposes of this section, "electronic means" shall include opening an e-mail account or an account or profile on a social networking Internet Web site in another person's name.

(d) A violation of subdivision (a) is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(e) In addition to any other civil remedy available, a person who suffers damage or loss by reason of a violation of subdivision (a) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief pursuant to paragraphs (1), (2), (4), and (5) of subdivision (e) and subdivision (g) of Section 502.

(f) This section shall not preclude prosecution under any other law.

## Assignment 7: Credit Reporting

### Problem 7.1

15 U.S.C. §1681c, Requirements relating to information contained in consumer reports.

(a) *Information excluded from consumer reports.* Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

- (1) Cases under title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.
- (2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.
- (3) Paid tax liens which, from date of payment, antedate the report by more than seven years.
- (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.
- (5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.
- (6) The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless—
  - (A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer; or
  - (B) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.

(b) *Exempted cases.* The provisions of paragraphs (1) through (5) of subsection (a) of this section are not applicable in the case of any consumer credit report to be used in connection with—

- (1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of \$150,000 or more;
- (2) the underwriting of life insurance involving, or which may reasonably be expected to

involve, a face amount of \$150,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$75,000, or more.

*(c) Running of reporting period.*

(1) In general. The 7-year period referred to in paragraphs (4) and (6) of subsection (a) of this section shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.

(2) Effective date. Paragraph (1) shall apply only to items of information added to the file of a consumer on or after the date that is 455 days after September 30, 1996.

*(d) Information required to be disclosed.*

(1) Title 11 information. Any consumer reporting agency that furnishes a consumer report that contains information regarding any case involving the consumer that arises under title 11 shall include in the report an identification of the chapter of such title 11 under which such case arises if provided by the source of the information. If any case arising or filed under title 11 is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal.

(2) Key factor in credit score information. Any consumer reporting agency that furnishes a consumer report that contains any credit score or any other risk score or predictor on any consumer shall include in the report a clear and conspicuous statement that a key factor (as defined in section 1681g(f)(2)(B) of this title) that adversely affected such score or predictor was the number of enquiries, if such a predictor was in fact a key factor that adversely affected such score. This paragraph shall not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, but only to the extent that such company is engaged in such activities.

*(e) Indication of closure of account by consumer.* If a consumer reporting agency is notified pursuant to section 1681s-2(a)(4) of this title that a credit account of a consumer was voluntarily closed by the consumer, the agency shall indicate that fact in any consumer report that includes information related to the account.

(f) *Indication of dispute by consumer.* If a consumer reporting agency is notified pursuant to section 1681s-2(a)(3) of this title that information regarding a consumer who 1 was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information.

(g) *Truncation of credit card and debit card numbers.*

(1) In general. Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

(2) Limitation. This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

(3) Effective date. This subsection shall become effective—

(A) 3 years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and

(B) 1 year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

(h) *Notice of discrepancy in address.*

(1) In general. If a person has requested a consumer report relating to a consumer from a consumer reporting agency described in section 1681a(p) of this title, the request includes an address for the consumer that substantially differs from the addresses in the file of the consumer, and the agency provides a consumer report in response to the request, the consumer reporting agency shall notify the requester of the existence of the discrepancy.

(2) Regulations.

(A) Regulations required. The Bureau shall, 2 in consultation with the Federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission, 2 prescribe regulations providing guidance regarding reasonable policies and procedures that a user of a consumer report should employ when such user has received a notice of discrepancy under paragraph (1).

(B) Policies and procedures to be included. The regulations prescribed under subparagraph

(A) shall describe reasonable policies and procedures for use by a user of a consumer report—

(i) to form a reasonable belief that the user knows the identity of the person to whom the consumer report pertains; and

(ii) if the user establishes a continuing relationship with the consumer, and the user regularly and in the ordinary course of business furnishes information to the consumer reporting agency from which the notice of discrepancy pertaining to the consumer was obtained, to reconcile the address of the consumer with the consumer reporting agency by furnishing such address to such consumer reporting agency as part of information regularly furnished by the user for the period in which the relationship is established.

## **Problem 7.2**

### 15 U.S.C. §1681b, Permissible purposes of consumer reports.

a) *In general.* Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

- (i) in connection with a business transaction that is initiated by the consumer; or
- (ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of title 42 for use to set an initial or modified child support award.

(6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.] or the Federal Credit Union Act [12 U.S.C. 1751 et seq.], or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

*(b) Conditions for furnishing and using consumer reports for employment purposes.*

(1) *Certification from user.* A consumer reporting agency may furnish a consumer report for employment purposes only if—

(A) the person who obtains such report from the agency certifies to the agency that—

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) 1 of this title.

(2) *Disclosure to consumer.*

(A) *In general.* Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) *Application by mail, telephone, computer, or other similar means.* If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application—

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) 1 of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) *Scope.* Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—



(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

*(3) Conditions on use for adverse actions.*

(A) *In general.* Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) 1 of this title.

*(B) Application by mail, telephone, computer, or other similar means.*

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification—

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse

action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Bureau under section 1681g(c)(3) 1 of this title.

(C) *Scope.* Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) *Exception for national security investigations.*

(A) *In general.* In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that—

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will—

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) *Notification of consumer upon conclusion of investigation.* Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made—

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) *Delegation by head of agency or department.* For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) *Definitions.* For purposes of this paragraph, the following definitions shall apply:

(i) *Classified information.* The term “classified information” means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) *National security investigation.* The term “national security investigation” means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) *Furnishing reports in connection with credit or insurance transactions that are not initiated by consumer.*

(1) *In general.* A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if—

(A) the consumer authorizes the agency to provide such report to such person; or

(B)

(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section;

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and

(iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.

(2) *Limits on information received under paragraph (1)(B).* A person may receive pursuant to paragraph (1)(B) only—

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) *Information regarding inquiries.* Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) *Reserved.*

(e) *Election of consumer to be excluded from lists.*

(1) *In general.* A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) *Manner of notification.* A consumer shall notify a consumer reporting agency under paragraph (1)—

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) *Response of agency after notification through system.* Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall—

(A) inform the consumer that the election is effective only for the 5-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) *Effectiveness of election.* An election of a consumer under paragraph (1)—

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency—

(i) subject to subparagraph (C), during the 5-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

*(5) Notification system.*

(A) *In general.* Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall—

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency—

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) *Establishment and maintenance as compliance.* Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

*(6) Notification system by agencies that operate nationwide.* Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) *Certain use or obtaining of information prohibited.* A person shall not use or obtain a consumer report for any purpose unless—

- (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and
- (2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) *Protection of medical information.*

(1) *Limitation on consumer reporting agencies.* A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 1681c(a)(6) of this title) about a consumer, unless—

(A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;

(B) if furnished for employment purposes or in connection with a credit transaction—

(i) the information to be furnished is relevant to process or effect the employment or credit transaction; and

(ii) the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or

(C) the information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devices, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 1681c(a)(6) of this title.

(2) *Limitation on creditors.* Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (other than medical information treated in the manner required under section 1681c(a)(6) of this title) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.

*(3) Actions authorized by Federal law, insurance activities and regulatory determinations.*

Section 1681a(d)(3) of this title shall not be construed so as to treat information or any communication of information as a consumer report if the information or communication is disclosed—

(A) in connection with the business of insurance or annuities, including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners (as in effect on January 1, 2003);

(B) for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996, or referred to under section 1179 of such Act,<sup>1</sup> or described in section 6802(e) of this title; or

(C) as otherwise determined to be necessary and appropriate, by regulation or order, by the Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).

*(4) Limitation on redisclosure of medical information.* Any person that receives medical information pursuant to paragraph (1) or (3) shall not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

*(5) Regulations and effective date for paragraph (2).*

(A) *Regulations required.* The Bureau may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.

*(6) Coordination with other laws.* No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality.



15 U.S.C. §1681e(d), Compliance procedures.

*(d) Notice to users and furnishers of information.*

- (1) Notice requirement. A consumer reporting agency shall provide to any person—
  - (A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or
  - (B) to whom a consumer report is provided by the agency; a notice of such person's responsibilities under this subchapter.

15 U.S.C. §1681m, Requirements on users of consumer reports.

*(a) Duties of users taking adverse actions on basis of information contained in consumer reports.*

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

- (1) provide oral, written, or electronic notice of the adverse action to the consumer;
- (2) provide to the consumer written or electronic disclosure—
  - (A) of a numerical credit score as defined in section 1681g(f)(2)(A) of this title used by such person in taking any adverse action based in whole or in part on any information in a consumer report; and
  - (B) of the information set forth in subparagraphs (B) through (E) of section 1681g(f)(1) of this title;
- (3) provide to the consumer orally, in writing, or electronically—
  - (A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
  - (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
- (4) provide to the consumer an oral, written, or electronic notice of the consumer's right—
  - (A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (3), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

*(b) Adverse action based on information obtained from third parties other than consumer reporting agencies.*

(1) *In general.* Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

*(2) Duties of person taking certain actions based on information provided by affiliate.*

(A) *Duties, generally.* If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall—

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) *Action described.* An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) *Information described.* Information referred to in subparagraph (A)—

(i) except as provided in clause (ii), is information that—

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include—

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) *Reasonable procedures to assure compliance.* No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) *Duties of users making written credit or insurance solicitations on basis of information contained in consumer files.*

(1) *In general.* Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that—

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) *Disclosure of address and telephone number; format.* A statement under paragraph (1) shall—

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Bureau, by rule, in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration.

(3) *Maintaining criteria on file.* A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) *Authority of Federal agencies regarding unfair or deceptive acts or practices not affected.* This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) *Red flag guidelines and regulations required.*

(1) *Guidelines.* The Federal banking agencies, the National Credit Union Administration, the Federal Trade Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title—

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time

(during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures—

- (i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;
- (ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or
- (iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) *Criteria.*

(A) *In general.* In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) *Inactive accounts.* In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) *Consistency with verification requirements.* Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31.

(4) *Definitions.* As used in this subsection, the term “creditor”—

(A) means a creditor, as defined in section 1691a of this title, that regularly and in the ordinary course of business—

- (i) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction;
- (ii) furnishes information to consumer reporting agencies, as described in section 1681s-2 of this title, in connection with a credit transaction; or

(iii) advances funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person;

(B) does not include a creditor described in subparagraph (A)(iii) that advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person; and

(C) includes any other type of creditor, as defined in that section 1691a of this title, as the agency described in paragraph (1) having authority over that creditor may determine appropriate by rule promulgated by that agency, based on a determination that such creditor offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft.

(f) *Prohibition on sale or transfer of debt caused by identity theft.*

(1) *In general.* No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 1681c–2 of this title has resulted from identity theft.

(2) *Applicability.* The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) *Rule of construction.* Nothing in this subsection shall be construed to prohibit—

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) *Debt collector communications concerning identity theft.* If a person acting as a debt collector (as that term is defined in subchapter V of this chapter) on behalf of a third party that is a creditor or other user of a consumer report is notified that any information relating to a debt that the person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall—

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

*(h) Duties of users in certain credit transactions.*

(1) *In general.* Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) *Timing.* The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) *Exceptions.* No notice shall be required from a person under this subsection if—

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) of this section in connection with the transaction.

(4) *Other notice not sufficient.* A person that is required to provide a notice under subsection (a) of this section cannot meet that requirement by providing a notice under this subsection.

(5) *Content and delivery of notice.* A notice under this subsection shall, at a minimum—

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge;

(D) include the contact information specified by that consumer reporting agency for

obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 1681a(p) of this title); and

(E) include a statement informing the consumer of—

(i) a numerical credit score as defined in section 1681g(f)(2)(A) of this title, used by such person in making the credit decision described in paragraph (1) based in whole or in part on any information in a consumer report; and

(ii) the information set forth in subparagraphs (B) through (E) of section 1681g(f)(1) of this title.

(6) *Rulemaking.*

(A) *Rules required.* The Bureau shall prescribe rules to carry out this subsection.

(B) *Content.* Rules required by subparagraph (A) shall address, but are not limited to—

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) *Compliance.* A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) *Enforcement.*

(A) *No civil actions.* Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.



(B) *Administrative enforcement.* This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

### **Problem 7.3**

15 U.S.C. §1681g(c), Disclosures to consumers.

(c) *Summary of rights to obtain and dispute information in consumer reports and to obtain credit scores.*

(1) *Commission summary of rights required.*

(A) *In general.* The Commission 2 shall prepare a model summary of the rights of consumers under this subchapter.

(B) *Content of summary.* The summary of rights prepared under subparagraph (A) shall include a description of—

(i) the right of a consumer to obtain a copy of a consumer report under subsection (a) of this section from each consumer reporting agency;

(ii) the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge under section 1681j of this title;

(iii) the right of a consumer to dispute information in the file of the consumer under section 1681i of this title;

(iv) the right of a consumer to obtain a credit score from a consumer reporting agency, and a description of how to obtain a credit score;

(v) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency without charge, as provided in the regulations of the Bureau prescribed under section 211(c) 1 of the Fair and Accurate Credit Transactions Act of 2003; and

(vi) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency described in section 1681a(w) 1 of this title, as provided in the regulations of the Bureau prescribed under section 1681j(a)(1)(C) of this title.

(C) *Availability of summary of rights.* The Commission 2 shall—

(i) actively publicize the availability of the summary of rights prepared under this paragraph;

(ii) conspicuously post on its Internet website the availability of such summary of rights; and

(iii) promptly make such summary of rights available to consumers, on request.

(2) *Summary of rights required to be included with agency disclosures.* A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section—

(A) the summary of rights prepared by the Bureau under paragraph (1);

(B) in the case of a consumer reporting agency described in section 1681a(p) of this title, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours;

(C) a list of all Federal agencies responsible for enforcing any provision of this subchapter, and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general (or the equivalent thereof) to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from the file of a consumer, unless the information is outdated under section 1681c of this title or cannot be verified.

15 U.S.C. §1681g(f), Disclosures to consumers.

(f) *Disclosure of credit scores.*

(1) *In general.* Upon the request of a consumer for a credit score, a consumer reporting agency shall supply to the consumer a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender, and a notice which shall include—

(A) the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the credit reporting agency for a purpose related to the extension of credit;

(B) the range of possible credit scores under the model used;

(C) all of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which shall not exceed 4, subject to paragraph (9);

(D) the date on which the credit score was created; and

(E) the name of the person or entity that provided the credit score or credit file upon which the credit score was created.

(2) *Definitions.* For purposes of this subsection, the following definitions shall apply:

(A) *Credit score.* The term “credit score”—

(i) means a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a “risk predictor” or “risk score”); and

(ii) does not include—

(I) any mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information, including the loan to value ratio, the amount of down payment, or the financial assets of a consumer; or

(II) any other elements of the underwriting process or underwriting decision.

(B) *Key factors.* The term “key factors” means all relevant elements or reasons adversely affecting the credit score for the particular individual, listed in the order of their importance based on their effect on the credit score.

(3) *Timeframe and manner of disclosure.* The information required by this subsection shall be provided in the same timeframe and manner as the information described in subsection (a) of this section.

(4) *Applicability to certain uses.* This subsection shall not be construed so as to compel a consumer reporting agency to develop or disclose a score if the agency does not—

(A) distribute scores that are used in connection with residential real property loans; or

(B) develop scores that assist credit providers in understanding the general credit behavior of a consumer and predicting the future credit behavior of the consumer.

(5) *Applicability to credit scores developed by another person.*

(A) *In general.* This subsection shall not be construed to require a consumer reporting agency that distributes credit scores developed by another person or entity to provide a further explanation of them, or to process a dispute arising pursuant to section 1681i of this title, except that the consumer reporting agency shall provide the consumer with the name

and address and website for contacting the person or entity who developed the score or developed the methodology of the score.

(B) *Exception.* This paragraph shall not apply to a consumer reporting agency that develops or modifies scores that are developed by another person or entity.

(6) *Maintenance of credit scores not required.* This subsection shall not be construed to require a consumer reporting agency to maintain credit scores in its files.

(7) *Compliance in certain cases.* In complying with this subsection, a consumer reporting agency shall—

(A) supply the consumer with a credit score that is derived from a credit scoring model that is widely distributed to users by that consumer reporting agency in connection with residential real property loans or with a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer and predictions about the future credit behavior of the consumer; and

(B) a statement indicating that the information and credit scoring model may be different than that used by the lender.

(8) *Fair and reasonable fee.* A consumer reporting agency may charge a fair and reasonable fee, as determined by the Bureau, for providing the information required under this subsection.

(9) *Use of enquiries as a key factor.* If a key factor that adversely affects the credit score of a consumer consists of the number of enquiries made with respect to a consumer report, that factor shall be included in the disclosure pursuant to paragraph (1)(C) without regard to the numerical limitation in such paragraph.

## Assignment 8: Credit Discrimination

### Problem 8.1

#### 15 U.S.C. §1691(a)(1), Scope of prohibition.

(a) *Activities constituting discrimination.* It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

#### 15 U.S.C. §1691a(d), Definitions; rules of construction.

(d) The term “credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

#### 12 C.F.R. §1002.2, Definitions.

For the purposes of this regulation, unless the context indicates otherwise, the following definitions apply.

(a) *Account* means an extension of credit. When employed in relation to an account, the word use refers only to open-end credit.

(b) *Act* means the Equal Credit Opportunity Act (title VII of the Consumer Credit Protection Act).

(c) *Adverse action.*

(1) The term means:

- (i) A refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered;
- (ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor’s accounts; or
- (iii) A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

(2) The term does not include:

- (i) A change in the terms of an account expressly agreed to by an applicant.

(ii) Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account;

(iii) A refusal or failure to authorize an account transaction at point of sale or loan, except when the refusal is a termination or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts, or when the refusal is a denial of an application for an increase in the amount of credit available under the account;

(iv) A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or

(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.

(3) An action that falls within the definition of both paragraphs (c)(1) and (c)(2) of this section is governed by paragraph (c)(2) of this section.

(d) Age refers only to the age of natural persons and means the number of fully elapsed years from the date of an applicant's birth.

(e) *Applicant* means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of §1002.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

(f) *Application* means an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested. The term application does not include the use of an account or line of credit to obtain an amount of credit that is within a previously established credit limit. A completed application means an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral). The creditor shall exercise reasonable diligence in obtaining such information.

(g) *Business credit* refers to extensions of credit primarily for business or commercial (including agricultural) purposes, but excluding extensions of credit of the types described in §1002.3(a)-(d).

(h) *Consumer credit* means credit extended to a natural person primarily for personal, family,

or household purposes.

(i) *Contractually liable* means expressly obligated to repay all debts arising on an account by reason of an agreement to that effect.

(j) *Credit* means the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.

(k) *Credit card* means any card, plate, coupon book, or other single credit device that may be used from time to time to obtain money, property, or services on credit.

(l) *Creditor* means a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates. For purposes of §1002.4(a) and (b), the term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. A person is not a creditor regarding any violation of the Act or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction. The term does not include a person whose only participation in a credit transaction involves honoring a credit card.

(m) *Credit transaction* means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).

(n) *Discriminate against an applicant* means to treat an applicant less favorably than other applicants.

(o) *Elderly* means age 62 or older.

(p) *Empirically derived and other credit scoring systems—*

(1) A credit scoring system is a system that evaluates an applicant's creditworthiness mechanically, based on key attributes of the applicant and aspects of the transaction, and that determines, alone or in conjunction with an evaluation of additional information about the applicant, whether an applicant is deemed creditworthy. To qualify as an empirically derived, demonstrably and statistically sound, credit scoring system, the system must be:

(i) Based on data that are derived from an empirical comparison of sample groups or the population of creditworthy and noncreditworthy applicants who applied for credit within a reasonable preceding period of time;

(ii) Developed for the purpose of evaluating the creditworthiness of applicants with respect to the legitimate business interests of the creditor utilizing the system (including, but not limited to, minimizing bad debt losses and operating expenses in accordance with the creditor's business judgment);

(iii) Developed and validated using accepted statistical principles and methodology; and

(iv) Periodically revalidated by the use of appropriate statistical principles and methodology and adjusted as necessary to maintain predictive ability.

(2) A creditor may use an empirically derived, demonstrably and statistically sound, credit scoring system obtained from another person or may obtain credit experience from which to develop such a system. Any such system must satisfy the criteria set forth in paragraph (p)(1)(i) through (iv) of this section; if the creditor is unable during the development process to validate the system based on its own credit experience in accordance with paragraph (p)(1) of this section, the system must be validated when sufficient credit experience becomes available. A system that fails this validity test is no longer an empirically derived, demonstrably and statistically sound, credit scoring system for that creditor.

(q) *Extend credit* and *extension of credit* mean the granting of credit in any form (including, but not limited to, credit granted in addition to any existing credit or credit limit; credit granted pursuant to an open-end credit plan; the refinancing or other renewal of credit, including the issuance of a new credit card in place of an expiring credit card or in substitution for an existing credit card; the consolidation of two or more obligations; or the continuance of existing credit without any special effort to collect at or after maturity).

(r) *Good faith* means honesty in fact in the conduct or transaction.

(s) *Inadvertent error* means a mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid such errors.

(t) *Judgmental system of evaluating applicants* means any system for evaluating the creditworthiness of an applicant other than an empirically derived, demonstrably and statistically sound, credit scoring system.



(u) *Marital status* means the state of being unmarried, married, or separated, as defined by applicable state law. The term “unmarried” includes persons who are single, divorced, or widowed.

(v) *Negative factor or value*, in relation to the age of elderly applicants, means utilizing a factor, value, or weight that is less favorable regarding elderly applicants than the creditor’s experience warrants or is less favorable than the factor, value, or weight assigned to the class of applicants that are not classified as elderly and are most favored by a creditor on the basis of age.

(w) *Open-end credit* means credit extended under a plan in which a creditor may permit an applicant to make purchases or obtain loans from time to time directly from the creditor or indirectly by use of a credit card, check, or other device.

(x) *Person* means a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(y) *Pertinent element of creditworthiness*, in relation to a judgmental system of evaluating applicants, means any information about applicants that a creditor obtains and considers and that has a demonstrable relationship to a determination of creditworthiness.

(z) *Prohibited basis* means race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant’s income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any state law upon which an exemption has been granted by the Board.

(aa) *State* means any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

12 C.F.R. §1002.6(b), Rules concerning evaluation of applications.

*(b) Specific rules concerning use of information—*

(1) Except as provided in the Act and this regulation, a creditor shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants.

(2) *Age, receipt of public assistance.*

(i) Except as permitted in this paragraph, a creditor shall not take into account an applicant’s age (provided that the applicant has the capacity to enter into a binding contract) or whether an applicant’s income derives from any public assistance program.

(ii) In an empirically derived, demonstrably and statistically sound, credit scoring system, a creditor may use an applicant's age as a predictive variable, provided that the age of an elderly applicant is not assigned a negative factor or value.

(iii) In a judgmental system of evaluating creditworthiness, a creditor may consider an applicant's age or whether an applicant's income derives from any public assistance program only for the purpose of determining a pertinent element of creditworthiness.

(iv) In any system of evaluating creditworthiness, a creditor may consider the age of an elderly applicant when such age is used to favor the elderly applicant in extending credit.

(3) *Childbearing, childrearing.* In evaluating creditworthiness, a creditor shall not make assumptions or use aggregate statistics relating to the likelihood that any category of persons will bear or rear children or will, for that reason, receive diminished or interrupted income in the future.

(4) *Telephone listing.* A creditor shall not take into account whether there is a telephone listing in the name of an applicant for consumer credit but may take into account whether there is a telephone in the applicant's residence.

(5) *Income.* A creditor shall not discount or exclude from consideration the income of an applicant or the spouse of an applicant because of a prohibited basis or because the income is derived from part-time employment or is an annuity, pension, or other retirement benefit; a creditor may consider the amount and probable continuance of any income in evaluating an applicant's creditworthiness. When an applicant relies on alimony, child support, or separate maintenance payments in applying for credit, the creditor shall consider such payments as income to the extent that they are likely to be consistently made.

(6) *Credit history.* To the extent that a creditor considers credit history in evaluating the creditworthiness of similarly qualified applicants for a similar type and amount of credit, in evaluating an applicant's creditworthiness a creditor shall consider:

(i) The credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable;

(ii) On the applicant's request, any information the applicant may present that tends to indicate the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness; and

(iii) On the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse that the applicant can demonstrate accurately reflects the applicant's creditworthiness.

(7) *Immigration status.* A creditor may consider the applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment.

(8) *Marital status.* Except as otherwise permitted or required by law, a creditor shall evaluate married and unmarried applicants by the same standards; and in evaluating joint applicants, a creditor shall not treat applicants differently based on the existence, absence, or likelihood of a marital relationship between the parties.

(9) *Race, color, religion, national origin, sex.* Except as otherwise permitted or required by law, a creditor shall not consider race, color, religion, national origin, or sex (or an applicant's or other person's decision not to provide the information) in any aspect of a credit transaction.

## **Problem 8.2**

### 15 U.S.C. §1691(d)(6), Scope of prohibition.

(d) *Reason for adverse action; procedure applicable; "adverse action" defined.*

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

### 15 U.S.C. §1691a, Definitions; rules of construction.

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

(c) The term "Bureau" means the Bureau of Consumer Financial Protection.

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

(e) The term “creditor” means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term “person” means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.

### **Problem 8.3**

#### **15 U.S.C. §1691, Scope of prohibition.**

(a) *Activities constituting discrimination.* It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant’s income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) *Activities not constituting discrimination.* It shall not constitute discrimination for purposes of this subchapter for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor’s rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant’s age or of whether the applicant’s income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Bureau;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Bureau, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value;

- (4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant; or
- (5) to make an inquiry under section 1691c-2 of this title, in accordance with the requirements of that section.

(c) *Additional activities not constituting discrimination.* It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

- (1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;
  - (2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or
  - (3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau;
- if such refusal is required by or made pursuant to such program.

(d) *Reason for adverse action; procedure applicable; “adverse action” defined.*

- (1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.
- (2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—
  - (A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or
  - (B) giving written notification of adverse action which discloses (i) the applicant’s right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.
- (3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.

(6) For purposes of this subsection, the term “adverse action” means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

*(e) Copies furnished to applicants.*

(1) *In general.* Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant’s application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant’s request for credit or the application is incomplete or withdrawn.

(2) *Waiver.* The applicant may waive the 3 day requirement provided for in paragraph (1), except where otherwise required in law.

(3) *Reimbursement.* The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.

(4) *Free copy.* Notwithstanding paragraph (3), the creditor shall provide a copy of each written appraisal or valuation at no additional cost to the applicant.

(5) *Notification to applicants.* At the time of application, the creditor shall notify an applicant in writing of the right to receive a copy of each written appraisal and valuation under this subsection.

(6) *Valuation defined.* For purposes of this subsection, the term “valuation” shall include any estimate of the value of a dwelling developed in connection with a creditor’s decision to provide credit, including those values developed pursuant to a policy of a government

sponsored enterprise or by an automated valuation model, a broker price opinion, or other methodology or mechanism.

12 C.F.R. §1002.8, Special purpose credit programs.

(a) *Standards for programs.* Subject to the provisions of paragraph (b) of this section, the Act and this regulation permit a creditor to extend special purpose credit to applicants who meet eligibility requirements under the following types of credit programs:

- (1) Any credit assistance program expressly authorized by federal or state law for the benefit of an economically disadvantaged class of persons;
- (2) Any credit assistance program offered by a not-for-profit organization, as defined under section 501(c) of the Internal Revenue Code of 1954, as amended, for the benefit of its members or for the benefit of an economically disadvantaged class of persons; or
- (3) Any special purpose credit program offered by a for-profit organization, or in which such an organization participates to meet special social needs, if:
  - (i) The program is established and administered pursuant to a written plan that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program; and
  - (ii) The program is established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

(b) *Rules in other sections—*

- (1) *General applicability.* All the provisions of this regulation apply to each of the special purpose credit programs described in paragraph (a) of this section except as modified by this section.
  - (2) *Common characteristics.* A program described in paragraph (a)(2) or (a)(3) of this section qualifies as a special purpose credit program only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis; however, all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this regulation.
- (c) *Special rule concerning requests and use of information.* If participants in a special purpose credit program described in paragraph (a) of this section are required to possess one or more

common characteristics (for example, race, national origin, or sex) and if the program otherwise satisfies the requirements of paragraph (a) of this section, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.

(d) *Special rule in the case of financial need.* If financial need is one of the criteria under a special purpose credit program described in paragraph (a) of this section, the creditor may request and consider, in determining an applicant's eligibility for the program, information regarding the applicant's marital status; alimony, child support, and separate maintenance income; and the spouse's financial resources. In addition, a creditor may obtain the signature of an applicant's spouse or other person on an application or credit instrument relating to a special purpose credit program if the signature is required by federal or state law.

#### **Problem 8.4**

##### 15 U.S.C. §1691a(e), Definitions; rules of construction.

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

##### 12 C.F.R. §1002.2(l), Definitions.

(l) Creditor means a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates. For purposes of §1002.4(a) and (b), the term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. A person is not a creditor regarding any violation of the Act or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction. The term does not include a person whose only participation in a credit transaction involves honoring a credit card.

##### 12 C.F.R. §1002.4, General rules.

(a) *Discrimination.* A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.

(b) *Discouragement.* A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.



(c) *Written applications.* A creditor shall take written applications for the dwelling-related types of credit covered by §1002.13(a).

(d) *Form of disclosures—*

(1) *General rule.* A creditor that provides in writing any disclosures or information required by this regulation must provide the disclosures in a clear and conspicuous manner and, except for the disclosures required by §§1002.5 and 1002.13, in a form the applicant may retain.

(2) *Disclosures in electronic form.* The disclosures required by this part that are required to be given in writing may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.). Where the disclosures under §§1002.5(b)(1), 1002.5(b)(2), 1002.5(d)(1), 1002.5(d)(2), 1002.13, and 1002.14(a)(2)(i) accompany an application accessed by the applicant in electronic form, these disclosures may be provided to the applicant in electronic form on or with the application form, without regard to the consumer consent or other provisions of the E-Sign Act.

(e) *Foreign-language disclosures.* Disclosures may be made in languages other than English, provided they are available in English upon request.

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## Assignment 9: Unfair or Deceptive Acts or Practices

### Problem 9.1

15 U.S.C. §45, Unfair methods of competition unlawful; prevention by Commission.

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade.

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4) (A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief. Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure.

(1) (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Definition of unfair acts or practices. The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

Mass. Genl. Law. §93A, Regulation of business practices for consumers protection.  
Section 1. *Definitions.*

The following words, as used in this chapter unless the text otherwise requires or a different meaning is specifically required, shall mean?

(a) “Person” shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) “Trade” and “commerce” shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security as defined in subparagraph (k) of section four hundred and one of chapter one hundred and ten A and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

(c) “Documentary material” shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) “Examination of documentary material”, the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material.

### *Section 2. Unfair practices; legislative intent; rules and regulations.*

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

### *Section 3. Exempted transactions.*

Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States.

For the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions.

#### Section 4. *Actions by attorney general; notice; venue; injunctions.*

Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice. The action may be brought in the superior court of the county in which such person resides or has his principal place of business, or the action may be brought in the superior court of Suffolk county with the consent of the parties or if the person has no place of business within the commonwealth. If more than one person is joined as a defendant, such action may be brought in the superior court of the county where any one defendant resides or has his principal place of business, or in Suffolk county. Said court may issue temporary restraining orders or preliminary or permanent injunctions and make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such method, act, or practice. If the court finds that a person has employed any method, act or practice which he knew or should have known to be in violation of said section two, the court may require such person to pay to the commonwealth a civil penalty of not more than five thousand dollars for each such violation and also may require the said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorneys' fees. If the court finds any method, act, or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery as defined in section two, the court may issue such orders or judgments as may be necessary to restore any person who has suffered any ascertainable loss of any moneys or property, real or personal, or up to three but not less than two times that amount if the court finds that the use of the act or practice was a willful violation of said section two, a civil penalty to be paid to the commonwealth of not more than five thousand dollars for each such violation, and also may require said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorneys fees.

At least five days prior to the commencement of any action brought under this section, except when a temporary restraining order is sought, the attorney general shall notify the person of his intended action, and give the person an opportunity to confer with the attorney general in person or by counsel or other representative as to the proposed action. Such notice shall be given the person by mail, postage prepaid, to his usual place of business, or if he has no usual place of business, to his last known address.

Any district attorney or law enforcement officer receiving notice of any alleged violation of this

chapter or of any violation of an injunction or order issued in an action brought under this section shall immediately forward written notice of the same together with any information that he may have to the office of the attorney general.

Any person who violates the terms of an injunction or other order issued under this section shall forfeit and pay to the commonwealth a civil penalty of not more than ten thousand dollars for each violation. For the purposes of this section, the court issuing such an injunction or order shall retain jurisdiction, and the cause shall be continued, and in such case the attorney general acting in the name of the commonwealth may petition for recovery of such civil penalty.

*Section 5. Assurance of discontinuance of unlawful method or practice.*

In any case where the attorney general has authority to institute an action or proceeding under section four, in lieu thereof he may accept an assurance of discontinuance of any method, act or practice in violation of this chapter from any person alleged to be engaged or to have been engaged in such method, act or practice. Such assurance may, among other terms, include a stipulation for the voluntary payment by such person of the costs of investigation, or of an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved buyers, or both. Any such assurance of discontinuance shall be in writing and be filed with the superior court of Suffolk county. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest. Evidence of a violation of such assurance shall be prima facie evidence of a violation of section two in any subsequent proceeding brought by the attorney general.

*Section 6. Examination of books and records; attendance of persons; notice.*

(1) The attorney general, whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter, may conduct an investigation to ascertain whether in fact such person has engaged in or is engaging in such method, act or practice. In conducting such investigation he may (a) take testimony under oath concerning such alleged unlawful method, act or practice; (b) examine or cause to be examined any documentary material of whatever nature relevant to such alleged unlawful method, act or practice; and (c) require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material. Such testimony and examination shall take place in the county where such person resides or has a place of business or, if the parties consent or such person is a nonresident or has no place of business within the commonwealth, in Suffolk county.



(2) Notice of the time, place and cause of such taking of testimony, examination or attendance shall be given by the attorney general at least ten days prior to the date of such taking of testimony or examination.

(3) Service of any such notice may be made by (a) delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (b) delivering a duly executed copy thereof to the principal place of business in the commonwealth of the person to be served; or (c) mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(4) Each such notice shall (a) state the time and place for the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; (b) state the statute and section thereof, the alleged violation of which is under investigation and the general subject matter of the investigation; (c) describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded; (d) prescribe a return date within which the documentary material is to be produced; and (e) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

(5) No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

(6) Any documentary material or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same; provided, however, that such material or information may be disclosed by the attorney general in court pleadings or other papers filed in court.

(7) At any time prior to the date specified in the notice, or within twenty-one days after the notice has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a

protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county. This section shall not be applicable to any criminal proceeding nor shall information obtained under the authority of this section be admissible in evidence in any criminal prosecution for substantially identical transactions.

*Section 7. Failure to appear or comply with notice.*

A person upon whom a notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth. Any person who fails to appear, or with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this chapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject to any such notice, or knowingly conceals any relevant information, shall be assessed a civil penalty of not more than five thousand dollars.

The attorney general may file in the superior court of the county in which such person resides or has his principal place of business, or of Suffolk county if such person is a nonresident or has no principal place of business in the commonwealth, and serve upon such person, in the same manner as provided in section six, a petition for an order of such court for the enforcement of this section and section six. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

*Section 8. Habitual violation of injunctions.*

Upon petition by the attorney general, the court may for habitual violation of injunctions issued pursuant to section four order the dissolution, or suspension or forfeiture of franchise of any corporation or the right of any individual or foreign corporation to do business in the commonwealth.

*Section 9. Civil actions and remedies; class action; demand for relief; damages; costs; exhausting administrative remedies.*

(1) Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-

five C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section. Notwithstanding any other provision to the contrary, if the court finds any method, act or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery as defined in

section two, and if the court finds for the petitioner, recovery shall be in the amount of actual damages.

(3A) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as herein provided. The demand requirements and provision for tender of offer of settlement provided in paragraph (3) shall also be applicable under this paragraph, except that no rights to equitable relief shall be created under this paragraph, nor shall a person asserting a claim hereunder be able to assert any claim on behalf of other similarly injured and situated persons as provided in paragraph (2).

(4) If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action; provided, however, the court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section.

*[There is no paragraph (5).]*

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

(7) The court may upon motion by the respondent before the time for answering and after a hearing suspend proceedings brought under this section to permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate regulatory board or officer providing adjudicatory hearings to complainants if the respondent's evidence indicates that:

(a) there is a substantial likelihood that final action by the court favorable to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme that regulates or covers the actions or transactions complained of by the petitioner established and administered under law by any state or federal regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) that said regulatory board or officer has a substantial interest in reviewing said transactions or actions prior to judicial action under this chapter and that the said regulatory board or officer has the power to provide substantially the relief sought by the petitioner and the class, if any, which the petitioner represents, under this section.

Upon suspending proceedings under this section the court may enter any interlocutory or temporary orders it deems necessary and proper pending final action by the regulatory board or officer and trial, if any, in the court, including issuance of injunctions, certification of a class, and orders concerning the presentation of the matter to the regulatory board or officer. The court shall issue appropriate interlocutory orders, decrees and injunctions to preserve the status quo between the parties pending final action by the regulatory board or officer and trial and shall stay all proceedings in any court or before any regulatory board or officer in which petitioner and respondent are necessarily involved. The court may issue further orders, injunctions or other relief while the matter is before the regulatory board or officer and shall terminate the suspension and bring the matter forward for trial if it finds (a) that proceedings before the regulatory board or officer are unreasonably delayed or otherwise unreasonably prejudicial to the interests of a party before the court, or (b) that the regulatory board or officer has not taken final action within six months of the beginning of the order suspending proceedings under this chapter.

(8) Except as provided in section ten, recovering or failing to recover an award of damages or other relief in any administrative or judicial proceeding, except proceedings authorized by this section, by any person entitled to bring an action under this section, shall not constitute a bar to, or limitation upon relief authorized by this section.

*Section 10. Notice to attorney general; injunction; prima facie evidence.*

Upon commencement of any action brought under section nine or section eleven, the clerk of the court shall mail a copy of the bill in equity to the attorney general and, upon entry of any judgment or decree in the action, the clerk of the court shall mail a copy of such judgment or decree to the attorney general.

Any permanent injunction or order of the court made under section four shall be prima facie evidence in an action brought under section nine or section eleven that the respondent used or employed an unfair or deceptive act or practice declared unlawful by section two.

*Section 11. Persons engaged in business; actions for unfair trade practices; class actions; damages; injunction; costs.*

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person

who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether by way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Such person, if he has not suffered any loss of money or property, may obtain such an injunction if it can be shown that the aforementioned unfair method of competition, act or practice may have the effect of causing such loss of money or property.

Any persons entitled to bring such action may, if the use or employment of the unfair method of competition or the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs.

A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as hereinafter provided, with provision for tendering by the person against whom the claim is asserted of a written offer of settlement for single damages, also as hereinafter provided. No rights to equitable relief shall be created under this paragraph, nor shall a person asserting such claim be able to assert any claim on behalf of other similarly injured and situated persons as provided in the preceding paragraph. The provisions of sections ninety-five to one hundred and ten, inclusive, of chapter two hundred and thirty-one, where applicable, shall apply to a claim under this section, except that the provisions for remand, removal and transfer shall be controlled by the amount of single damages claimed hereunder.

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice was a willful or knowing violation of said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence regardless of the existence or nonexistence of insurance

coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The respondent may tender with his answer in any such action a written offer of settlement for single damages. If such tender or settlement is rejected by the petitioner, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner, then the court shall not award more than single damages.

If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action.

In any action brought under this section, in addition to the provisions of paragraph (b) of section two, the court shall also be guided in its interpretation of unfair methods of competition by those provisions of chapter ninety-three known as the Massachusetts Antitrust Act.

No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth. For the purposes of this paragraph, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth.

## **Problem 9.2**

15 U.S.C. §45, Unfair methods of competition unlawful; prevention by Commission.

[see Problem 9.1]

12 U.S.C. §5531, Prohibiting unfair, deceptive, or abusive practices.

(a) *In general.* The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) *Rulemaking.* The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

(c) *Unfairness.*

(1) *In general.* The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) *Consideration of public policies.* In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(d) *Abusive.* The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of—

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

(e) *Consultation.* In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.



(f) *Consideration of seasonal income.* The rules of the Bureau under this section shall provide, with respect to an extension of credit secured by residential real estate or a dwelling, if documented income of the borrower, including income from a small business, is a repayment source for an extension of credit secured by residential real estate or a dwelling, the creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.

### **Problem 9.3**

15 U.S.C. §45(a)(4), Unfair methods of competition unlawful; prevention by Commission.

*(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade.*

(4) (A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—

- (i) cause or are likely to cause reasonably foreseeable injury within the United States; or
- (ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

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## Assignment 10: Warranties

### Problem 10.1

#### 15 U.S.C. §2301, Definitions.

For the purposes of this chapter:

- (1) The term “consumer product” means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).
- (2) The term “Commission” means the Federal Trade Commission.
- (3) The term “consumer” means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).
- (4) The term “supplier” means any person engaged in the business of making a consumer product directly or indirectly available to consumers.
- (5) The term “warrantor” means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.
- (6) The term “written warranty” means—
  - (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
  - (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term “implied warranty” means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

(8) The term “service contract” means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term “reasonable and necessary maintenance” consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term “remedy” means whichever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term “replacement” means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term “refund” means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term “distributed in commerce” means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term “commerce” means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term “State law” includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term “Federal law” excludes any State law.

15 U.S.C. §2310(d), Remedies in consumer disputes.

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims

(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of \$25;

(B) if the amount in controversy is less than the sum or value of \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

UCC §2-104(1), Definitions.

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge of skill peculiar to the practices or goods involved in the transactions or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

UCC §2-313, Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

UCC §2-314, Implied Warranty: Merchantability; Usage of Trade.

1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

UCC §2-315, Implied Warranty: Fitness or Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

UCC §2-608, Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

UCC §2-714(2), Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

## **Problem 10.2**

### 15 U.S.C. §2302(b), Rules governing contents of warranties.

(b) Availability of terms to consumer; manner and form for presentation and display of information; duration; extension of period for written warranty or service contract

(1)

(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this chapter (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

### 15 U.S.C. §§2304, Federal minimum standards for warranties.

(a) Remedies under written warranty; duration of implied warranty; exclusion or limitation on consequential damages for breach of written or implied warranty; election of refund or replacement. In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;



(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b) Duties and conditions imposed on consumer by warrantor

(1) In fulfilling the duties under subsection (a) of this section respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a) of this section, that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in subsection (a) of this section and the applicability of such duties to warrantors of different categories of consumer products with “full (statement of duration)” warranties.

(4) The duties under subsection (a) of this section extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) Waiver of standards

The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect

or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) Remedy without charge

For purposes of this section and of section 2302(c) of this title, the term “without charge” means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) of this section to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) Incorporation of standards to products designated with full warranty for purposes of judicial actions

If a supplier designates a warranty applicable to a consumer product as a “full (statement of duration)” warranty, then the warranty on such product shall, for purposes of any action under section 2310(d) of this title or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

16 C.F.R. §700.7, Use of warranty registration cards.

(a) Under section 104(b)(1) of the Act a warrantor offering a full warranty may not impose on consumers any duty other than notification of a defect as a condition of securing remedy of the defect or malfunction, unless such additional duty can be demonstrated by the warrantor to be reasonable. Warrantors have in the past stipulated the return of a “warranty registration” or similar card. By “warranty registration card” the Commission means a card which must be returned by the consumer shortly after purchase of the product and which is stipulated or implied in the warranty to be a condition precedent to warranty coverage and performance.

(b) A requirement that the consumer return a warranty registration card or a similar notice as a condition of performance under a full warranty is an unreasonable duty. Thus, a provision such as, “This warranty is void unless the warranty registration card is returned to the warrantor” is not permissible in a full warranty, nor is it permissible to imply such a condition in a full warranty.

(c) This does not prohibit the use of such registration cards where a warrantor suggests use of the card as one possible means of proof of the date the product was purchased. For example, it is permissible to provide in a full warranty that a consumer may fill out and return a card to

place on file proof of the date the product was purchased. Any such suggestion to the consumer must include notice that failure to return the card will not affect rights under the warranty, so long as the consumer can show in a reasonable manner the date the product was purchased. Nor does this interpretation prohibit a seller from obtaining from purchasers at the time of sale information requested by the warrantor.

### **Problem 10.3**

15 U.S.C. §2302, Rules governing contents of warranties.

a) Full and conspicuous disclosure of terms and conditions; additional requirements for contents. In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

- (1) The clear identification of the names and addresses of the warrantors.
- (2) The identity of the party or parties to whom the warranty is extended.
- (3) The products or parts covered.
- (4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.
- (5) A statement of what the consumer must do and expenses he must bear.
- (6) Exceptions and exclusions from the terms of the warranty.
- (7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.
- (8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.
- (9) A brief, general description of the legal remedies available to the consumer.
- (10) The time at which the warrantor will perform any obligations under the warranty.
- (11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b) Availability of terms to consumer; manner and form for presentation and display of information; duration; extension of period for written warranty or service contract

(1)

(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this chapter (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(c) Prohibition on conditions for written or implied warranty; waiver by Commission. No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) Incorporation by reference of detailed substantive warranty provisions

The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) Applicability to consumer products costing more than \$5

The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than \$5.

15 U.S.C. §2310, Remedies in consumer disputes.

(a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures

(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of

the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) Prohibited acts

It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

(c) Injunction proceedings by Attorney General or Commission for deceptive warranty, noncompliance with requirements, or violating prohibitions; procedures; definitions

(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance

of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term “deceptive warranty” means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as “guaranty” or “warranty”, if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims

(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys’ fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys’ fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of \$25;

(B) if the amount in controversy is less than the sum or value of \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) Class actions; conditions; procedures applicable

No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) Warrantors subject to enforcement of remedies

For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

**Problem 10.4**

UCC §2-316, Exclusion of Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."



(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

16 C.F.R. §702.1, Definitions.

(a) *The Act* means the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. 2301, et seq.

(b) *Consumer product* means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed). Products which are purchased solely for commercial or industrial use are excluded solely for purposes of this part.

(c) *Written warranty* means—

(1) Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(2) Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(d) *Warrantor* means any supplier or other person who gives or offers to give a written warranty.

(e) *Seller* means any person who sells or offers for sale for purposes other than resale or use in the ordinary course of the buyer's business any consumer product.

(f) *Supplier* means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

16 C.F.R. §702.2, Scope.

The regulations in this part establish requirements for sellers and warrantors for making the terms of any written warranty on a consumer product available to the consumer prior to sale.

16 C.F.R. §702.3, Pre-sale availability of written warranty terms.

The following requirements apply to consumer products actually costing the consumer more than \$15.00:

(a) Duties of seller. Except as provided in paragraphs (c) through (d) of this section, the seller of a consumer product with a written warranty shall make a text of the warranty readily available for examination by the prospective buyer by:

(1) Displaying it in close proximity to the warranted product, or

(2) Furnishing it upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

(b) Duties of the warrantor.

(1) A warrantor who gives a written warranty warranting to a consumer a consumer product actually costing the consumer more than \$15.00 shall:

(i) Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in paragraph (a) of this section, by the use of one or more of the following means:

(A) Providing a copy of the written warranty with every warranted consumer product; and/or

(B) Providing a tag, sign, sticker, label, decal or other attachment to the product, which contains the full text of the written warranty; and/or

(C) Printing on or otherwise attaching the text of the written warranty to the package, carton, or other container if that package, carton or other container is normally used for

display purposes. If the warrantor elects this option a copy of the written warranty must also accompany the warranted product; and/or

(D) Providing a notice, sign, or poster disclosing the text of a consumer product warranty. If the warrantor elects this option, a copy of the written warranty must also accompany each warranted product.

(ii) Provide catalog, mail order, and door-to-door sellers with copies of written warranties necessary for such sellers to comply with the requirements set forth in paragraphs (c) and (d) of this section.

(2) Paragraph (a)(1) of this section shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that

(i) The disclosures required by §701.3(a) (1) through (9) of this part are published by such third parties in each issue of a publication with a general circulation, and

(ii) Such disclosures are provided free of charge to any consumer upon written request.

(c) Catalog and mail order sales.

(1) For purposes of this paragraph:

(i) Catalog or mail order sales means any offer for sale, or any solicitation for an order for a consumer product with a written warranty, which includes instructions for ordering the product which do not require a personal visit to the seller's establishment.

(ii) Close conjunction means on the page containing the description of the warranted product, or on the page facing that page.

(2) Any seller who offers for sale to consumers consumer products with written warranties by means of a catalog or mail order solicitation shall:

(i) Clearly and conspicuously disclose in such catalog or solicitation in close conjunction to the description of warranted product, or in an information section of the catalog or solicitation clearly referenced, including a page number, in close conjunction to the description of the warranted product, either:

(A) The full text of the written warranty; or

(B) That the written warranty can be obtained free upon specific written request, and the

address where such warranty can be obtained. If this option is elected, such seller shall promptly provide a copy of any written warranty requested by the consumer.

(d) Door-to-door sales.

(1) For purposes of this paragraph:

(i) Door-to-door sale means a sale of consumer products in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by a buyer, and the buyer's agreement to offer to purchase is made at a place other than the place of business of the seller.

(ii) Prospective buyer means an individual solicited by a door-to-door seller to buy a consumer product who indicates sufficient interest in that consumer product or maintains sufficient contact with the seller for the seller reasonably to conclude that the person solicited is considering purchasing the product.

(2) Any seller who offers for sale to consumers consumer products with written warranties by means of door-to-door sales shall, prior to the consummation of the sale, disclose the fact that the sales representative has copies of the warranties for the warranted products being offered for sale, which may be inspected by the prospective buyer at any time during the sales presentation. Such disclosure shall be made orally and shall be included in any written materials shown to prospective buyers.

## Assignment 12: Credit Cost Disclosures

### Problem 12.1

12 C.F.R. §1026.4, Finance charge.

a) Definition.

The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

(1) Charges by Third Parties.

The finance charge includes fees and amounts charged by someone other than the creditor, unless otherwise excluded under this section, if the creditor:

- (i) Requires the use of a third party as a condition of or an incident to the extension of credit, even if the consumer can choose the third party; or
- (ii) Retains a portion of the third-party charge, to the extent of the portion retained.

(2) Special Rule; Closing Agent Charges.

Fees charged by a third party that conducts the loan closing (such as a settlement agent, attorney, or escrow or title company) are finance charges only if the creditor:

- (i) Requires the particular services for which the consumer is charged;
- (ii) Requires the imposition of the charge; or
- (iii) Retains a portion of the third-party charge, to the extent of the portion retained.

(3) Special rule; mortgage broker fees.

Fees charged by a mortgage broker (including fees paid by the consumer directly to the broker or to the creditor for delivery to the broker) are finance charges even if the creditor does not require the consumer to use a mortgage broker and even if the creditor does not retain any portion of the charge.

(b) Examples of finance charges.

The finance charge includes the following types of charges, except for charges specifically excluded by paragraphs (c) through (e) of this section:

(1) Interest, time price differential, and any amount payable under an add-on or discount system of additional charges.

(2) Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account to the extent that the charge exceeds the charge for a similar account without a credit feature.

(3) Points, loan fees, assumption fees, finder's fees, and similar charges.

(4) Appraisal, investigation, and credit report fees.

(5) Premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default or other credit loss.

(6) Charges imposed on a creditor by another person for purchasing or accepting a consumer's obligation, if the consumer is required to pay the charges in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.

(7) Premiums or other charges for credit life, accident, health, or loss-of-income insurance, written in connection with a credit transaction.

(8) Premiums or other charges for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, written in connection with a credit transaction.

(9) Discounts for the purpose of inducing payment by a means other than the use of credit.

(10) Charges or premiums paid for debt cancellation or debt suspension coverage written in connection with a credit transaction, whether or not the coverage is insurance under applicable law.

(c) Charges excluded from the finance charge.

The following charges are not finance charges:

(1) Application fees charged to all applicants for credit, whether or not credit is actually extended.

(2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.

(3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.

(4) Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.

(5) Seller's points.

(6) Interest forfeited as a result of an interest reduction required by law on a time deposit used as security for an extension of credit.

(7) Real-estate related fees. The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:

(i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

(ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.

(iii) Notary and credit-report fees.

(iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest-infestation or flood-hazard determinations.

(v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

(8) Discounts offered to induce payment for a purchase by cash, check, or other means, as provided in section 167(b) of the Act.

(d) Insurance and debt cancellation and debt suspension coverage—

(1) Voluntary credit insurance premiums.

Premiums for credit life, accident, health, or loss-of-income insurance may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage is not required by the creditor, and this fact is disclosed in writing.

(ii) The premium for the initial term of insurance coverage is disclosed in writing. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under §1026.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total

amount of indebtedness subject to coverage.

(iii) The consumer signs or initials an affirmative written request for the insurance after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

(2) Property insurance premiums.

Premiums for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, including single interest insurance if the insurer waives all right of subrogation against the consumer, may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage may be obtained from a person of the consumer's choice, and this fact is disclosed. (A creditor may reserve the right to refuse to accept, for reasonable cause, an insurer offered by the consumer.)

(ii) If the coverage is obtained from or through the creditor, the premium for the initial term of insurance coverage shall be disclosed. If the term of insurance is less than the term of the transaction, the term of insurance shall also be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under §1026.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.

(3) Voluntary debt cancellation or debt suspension fees.

Charges or premiums paid for debt cancellation coverage for amounts exceeding the value of the collateral securing the obligation or for debt cancellation or debt suspension coverage in the event of the loss of life, health, or income or in case of accident may be excluded from the finance charge, whether or not the coverage is insurance, if the following conditions are met:

(i) The debt cancellation or debt suspension agreement or coverage is not required by the creditor, and this fact is disclosed in writing;

(ii) The fee or premium for the initial term of coverage is disclosed in writing. If the term of coverage is less than the term of the credit transaction, the term of coverage also shall be disclosed. The fee or premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under §1026.17(g), and certain closed-end credit transactions involving a debt cancellation agreement that limits the total amount of indebtedness subject to coverage;

(iii) The following are disclosed, as applicable, for debt suspension coverage: That the



obligation to pay loan principal and interest is only suspended, and that interest will continue to accrue during the period of suspension.

(iv) The consumer signs or initials an affirmative written request for coverage after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

(4) Telephone purchases.

If a consumer purchases credit insurance or debt cancellation or debt suspension coverage for an open-end (not home-secured) plan by telephone, the creditor must make the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as applicable, orally. In such a case, the creditor shall:

(i) Maintain evidence that the consumer, after being provided the disclosures orally, affirmatively elected to purchase the insurance or coverage; and

(ii) Mail the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as applicable, within three business days after the telephone purchase.

(e) Certain security interest charges.

If itemized and disclosed, the following charges may be excluded from the finance charge:

(1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest.

(2) The premium for insurance in lieu of perfecting a security interest to the extent that the premium does not exceed the fees described in paragraph (e)(1) of this section that otherwise would be payable.

(3) Taxes on security instruments. Any tax levied on security instruments or on documents evidencing indebtedness if the payment of such taxes is a requirement for recording the instrument securing the evidence of indebtedness.

(f) Prohibited offsets.

Interest, dividends, or other income received or to be received by the consumer on deposits or investments shall not be deducted in computing the finance charge.

## **Problem 12.4**

### 15 U.S.C. §1632(a), Forms of disclosure; additional information.

Information clearly and conspicuously disclosed; “annual percentage rate” and “finance charge”; order of disclosures and use of different terminology. Information required by this title [15 USCS §§1601 et seq.] shall be disclosed clearly and conspicuously, in accordance with regulations of the Bureau. The terms “annual percentage rate” and “finance charge” shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identity of the creditor. Except as provided in subsection (c), regulations of the Bureau need not require that disclosures pursuant to this title [15 USCS §§1601 et seq.] be made in the order set forth in this title [15 USCS §§1601 et seq.] and, except as otherwise provided, may permit the use of terminology different from that employed in this title [15 USCS §§1601 et seq.] if it conveys substantially the same meaning.

### 15 U.S.C. §1638(a), Transactions other than under an open end credit plan.

Required disclosures by creditor. For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

(1) The identity of the creditor required to make disclosure.

(2) (A) The “amount financed”, using that term, which shall be the amount of credit of which the consumer has actual use. This amount shall be computed as follows, but the computations need not be disclosed and shall not be disclosed with the disclosures conspicuously segregated in accordance with subsection (b)(1):

(i) take the principal amount of the loan or the cash price less downpayment and trade-in;

(ii) add any charges which are not part of the finance charge or of the principal amount of the loan and which are financed by the consumer, including the cost of any items excluded from the finance charge pursuant to section 106 [15 USCS §1605]; and

(iii) subtract any charges which are part of the finance charge but which will be paid by the consumer before or at the time of the consummation of the transaction, or have been withheld from the proceeds of the credit.

(B) In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer’s right to obtain, upon a written request, a written itemization of the amount financed. The statement shall include spaces for a “yes” and “no” indication to be initialed by the consumer to indicate whether the

consumer wants a written itemization of the amount financed. Upon receiving an affirmative indication, the creditor shall provide, at the time other disclosures are required to be furnished, a written itemization of the amount financed. For the purposes of this subparagraph, "itemization of the amount financed" means a disclosure of the following items, to the extent applicable:

- (i) the amount that is or will be paid directly to the consumer;
- (ii) the amount that is or will be credited to the consumer's account to discharge obligations owed to the creditor;
- (iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person; and
- (iv) the total amount of any charges described in the preceding subparagraph (A)(iii).

(3) The "finance charge", not itemized, using that term.

(4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed \$75 and the finance charge does not exceed \$5, or if the amount financed exceeds \$75 and the finance charge does not exceed \$7.50.

(5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments".

(6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

(7) In a sale of property or services in which the seller is the creditor required to disclose pursuant to section 121(b) [15 USCS §1631(b)], the "total sale price", using that term, which shall be the total of the cash price of the property or services, additional charges, and the finance charge.

(8) Descriptive explanations of the terms "amount financed", "finance charge", "annual percentage rate", "total of payments", and "total sale price" as specified by the Bureau. The descriptive explanation of "total sale price" shall include reference to the amount of the downpayment.

(9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not

purchased as part of the credit transaction identified by item or type.

(10) Any dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment, other than a deferral or extension charge.

(11) A statement indicating whether or not the consumer is entitled to a rebate of any finance charge upon refinancing or prepayment in full pursuant to acceleration or otherwise, if the obligation involves a precomputed finance charge. A statement indicating whether or not a penalty will be imposed in those same circumstances if the obligation involves a finance charge computed from time to time by application of a rate to the unpaid principal balance.

(12) A statement that the consumer should refer to the appropriate contract document for any information such document provides about nonpayment, default, the right to accelerate the maturity of the debt, and prepayment rebates and penalties.

(13) In any residential mortgage transaction, a statement indicating whether a subsequent purchaser or assignee of the consumer may assume the debt obligation on its original terms and conditions.

(14) In the case of any variable interest rate residential mortgage transaction, in disclosures provided at application as prescribed by the Bureau for a variable rate transaction secured by the consumer's principal dwelling, at the option of the creditor, a statement that the periodic payments may increase or decrease substantially, and the maximum interest rate and payment for a \$10,000 loan originated at a recent interest rate, as determined by the Bureau, assuming the maximum periodic increases in rates and payments under the program, or a historical example illustrating the effects of interest rate changes implemented according to the loan program.

(15) In the case of a consumer credit transaction that is secured by the principal dwelling of the consumer, in which the extension of credit may exceed the fair market value of the dwelling, a clear and conspicuous statement that—

(A) the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(B) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

(16) In the case of a variable rate residential mortgage loan for which an escrow or impound account will be established for the payment of all applicable taxes, insurance, and assessments—

(A) the amount of initial monthly payment due under the loan for the payment of principal and interest, and the amount of such initial monthly payment including the monthly payment deposited in the account for the payment of all applicable taxes, insurance, and assessments; and

(B) the amount of the fully indexed monthly payment due under the loan for the payment of principal and interest, and the amount of such fully indexed monthly payment including the monthly payment deposited in the account for the payment of all applicable taxes, insurance, and assessments.

(17) In the case of a residential mortgage loan, the aggregate amount of settlement charges for all settlement services provided in connection with the loan, the amount of charges that are included in the loan and the amount of such charges the borrower must pay at closing, the approximate amount of the wholesale rate of funds in connection with the loan, and the aggregate amount of other fees or required payments in connection with the loan.

(18) In the case of a residential mortgage loan, the aggregate amount of fees paid to the mortgage originator in connection with the loan, the amount of such fees paid directly by the consumer, and any additional amount received by the originator from the creditor.

(19) In the case of a residential mortgage loan, the total amount of interest that the consumer will pay over the life of the loan as a percentage of the principal of the loan. Such amount shall be computed assuming the consumer makes each monthly payment in full and on-time, and does not make any over-payments.

12 C.F.R. §1026.17(a), General disclosure requirements.

Form of disclosures. Except for the disclosures required by §1026.19(e), (f), and (g):

(1) The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures required by this subpart may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.). The disclosures required by §§1026.17(g), 1026.19(b), and 1026.24 may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under §1026.18, §1026.20(c) and (d), or §1026.47. The disclosures required by §1026.20(d) shall be provided as a separate document from all other written materials. The disclosures may include an acknowledgment of receipt, the date of the transaction, and the consumer's name, address,

and account number. The following disclosures may be made together with or separately from other required disclosures: The creditor's identity under §1026.18(a), the variable rate example under §1026.18(f)(1)(iv), insurance or debt cancellation under §1026.18(n), and certain security interest charges under §1026.18(o). The itemization of the amount financed under §1026.18(c)(1) must be separate from the other disclosures under §1026.18, except for private education loan disclosures made in compliance with §1026.47.

(2) Except for private education loan disclosures made in compliance with §1026.47, the terms "finance charge" and "annual percentage rate," when required to be disclosed under §1026.18(d) and (e) together with a corresponding amount or percentage rate, shall be more conspicuous than any other disclosure, except the creditor's identity under §1026.18(a). For private education loan disclosures made in compliance with §1026.47, the term "annual percentage rate," and the corresponding percentage rate must be less conspicuous than the term "finance charge" and corresponding amount under §1026.18(d), the interest rate under §§1026.47(b)(1)(i) and (c)(1), and the notice of the right to cancel under §1026.47(c)(4).

12 C.F.R. §1026.19(f), Certain mortgage and variable-rate transactions.

Mortgage loans secured by real property—final disclosures. (1) Provision of disclosures. (i) Scope. In a closed-end consumer credit transaction secured by real property, other than a reverse mortgage subject to §1026.33, the creditor shall provide the consumer with the disclosures in §1026.38 reflecting the actual terms of the transaction.

(ii) Timing. (A) In general. Except as provided in paragraphs (f)(1)(ii)(B), (f)(2)(i), (f)(2)(iii), (f)(2)(iv), and (f)(2)(v) of this section, the creditor shall ensure that the consumer receives the disclosures required under paragraph (f)(1)(i) of this section no later than three business days before consummation.

(B) Timeshares. For transactions secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), the creditor shall ensure that the consumer receives the disclosures required under paragraph (f)(1)(i) of this section no later than consummation.

(iii) Receipt of disclosures. If any disclosures required under paragraph (f)(1)(i) of this section are not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail.

(iv) Consumer's waiver of waiting period before consummation. If the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency, the consumer may modify or waive the three-business-day waiting period under paragraph (f)(1)(ii)(A) or (f)(2)(ii) of this section, after receiving the disclosures required under

paragraph (f)(1)(i) of this section. To modify or waive the waiting period, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all consumers who are primarily liable on the legal obligation. Printed forms for this purpose are prohibited.

(v) Settlement agent. A settlement agent may provide a consumer with the disclosures required under paragraph (f)(1)(i) of this section, provided the settlement agent complies with all relevant requirements of this paragraph (f). The creditor shall ensure that such disclosures are provided in accordance with all requirements of this paragraph (f). Disclosures provided by a settlement agent in accordance with the requirements of this paragraph (f) satisfy the creditor's obligation under this paragraph (f).

(2) Subsequent changes.

(i) Changes before consummation not requiring a new waiting period. Except as provided in paragraph (f)(2)(ii), if the disclosures provided under paragraph (f)(1)(i) of this section become inaccurate before consummation, the creditor shall provide corrected disclosures reflecting any changed terms to the consumer so that the consumer receives the corrected disclosures at or before consummation.

Notwithstanding the requirement to provide corrected disclosures at or before consummation, the creditor shall permit the consumer to inspect the disclosures provided under this paragraph, completed to set forth those items that are known to the creditor at the time of inspection, during the business day immediately preceding consummation, but the creditor may omit from inspection items related only to the seller's transaction.

(ii) Changes before consummation requiring a new waiting period. If one of the following disclosures provided under paragraph (f)(1)(i) of this section becomes inaccurate in the following manner before consummation, the creditor shall ensure that the consumer receives corrected disclosures containing all changed terms in accordance with the requirements of paragraph (f)(1)(ii)(A) of this section:

(A) The annual percentage rate disclosed under §1026.38(o)(4) becomes inaccurate, as defined in §1026.22.

(B) The loan product is changed, causing the information disclosed under §1026.38(a)(5)(iii) to become inaccurate.

(C) A prepayment penalty is added, causing the statement regarding a prepayment penalty required under §1026.38(b) to become inaccurate.

(iii) Changes due to events occurring after consummation. If during the 30-day period following consummation, an event in connection with the settlement of the transaction occurs that causes the disclosures required under paragraph (f)(1)(i) of this section to become inaccurate, and such inaccuracy results in a change to an amount actually paid by the consumer from that amount disclosed under paragraph (f)(1)(i) of this section, the creditor shall deliver or place in the mail corrected disclosures not later than 30 days after receiving information sufficient to establish that such event has occurred.

(iv) Changes due to clerical errors. A creditor does not violate paragraph (f)(1)(i) of this section if the disclosures provided under paragraph (f)(1)(i) contain non-numeric clerical errors, provided the creditor delivers or places in the mail corrected disclosures no later than 60 days after consummation.

(v) Refunds related to the good faith analysis. If amounts paid by the consumer exceed the amounts specified under paragraph (e)(3)(i) or (ii) of this section, the creditor complies with paragraph (e)(1)(i) of this section if the creditor refunds the excess to the consumer no later than 60 days after consummation, and the creditor complies with paragraph (f)(1)(i) of this section if the creditor delivers or places in the mail corrected disclosures that reflect such refund no later than 60 days after consummation.

### (3) Charges disclosed.

(i) Actual charge. The amount imposed upon the consumer for any settlement service shall not exceed the amount actually received by the settlement service provider for that service, except as otherwise provided in paragraph (f)(3)(ii) of this section.

(ii) Average charge. A creditor or settlement service provider may charge a consumer or seller the average charge for a settlement service if the following conditions are satisfied:

(A) The average charge is no more than the average amount paid for that service by or on behalf of all consumers and sellers for a class of transactions;

(B) The creditor or settlement service provider defines the class of transactions based on an appropriate period of time, geographic area, and type of loan;

(C) The creditor or settlement service provider uses the same average charge for every transaction within the defined class; and



(D) The creditor or settlement service provider does not use an average charge:

(1) For any type of insurance;

(2) For any charge based on the loan amount or property value; or

(3) If doing so is otherwise prohibited by law.

(4) Transactions involving a seller.

(i) Provision to seller. In a closed-end consumer credit transaction secured by real property that involves a seller, other than a reverse mortgage subject to §1026.33, the settlement agent shall provide the seller with the disclosures in §1026.38 that relate to the seller's transaction reflecting the actual terms of the seller's transaction.

(ii) Timing. The settlement agent shall provide the disclosures required under paragraph (f)(4)(i) of this section no later than the day of consummation. If during the 30-day period following consummation, an event in connection with the settlement of the transaction occurs that causes disclosures required under paragraph (f)(4)(i) of this section to become inaccurate, and such inaccuracy results in a change to the amount actually paid by the seller from that amount disclosed under paragraph (f)(4)(i) of this section, the settlement agent shall deliver or place in the mail corrected disclosures not later than 30 days after receiving information sufficient to establish that such event has occurred.

(iii) Charges disclosed. The amount imposed on the seller for any settlement service shall not exceed the amount actually received by the service provider for that service, except as otherwise provided in paragraph (f)(3)(ii) of this section.

(iv) Creditor's copy. When the consumer's and seller's disclosures under this paragraph (f) are provided on separate documents, as permitted under §1026.38(t)(5), the settlement agent shall provide to the creditor (if the creditor is not the settlement agent) a copy of the disclosures provided to the seller under paragraph (f)(4)(i) of this section.

(5) No fee. No fee may be imposed on any person, as a part of settlement costs or otherwise, by a creditor or by a servicer (as that term is defined under 12 U.S.C. 2605(i)(2)) for the preparation or delivery of the disclosures required under paragraph (f)(1)(i) of this section.

12 C.F.R. §1026.38, Content of disclosures for certain mortgage transactions (Closing Disclosure).

For each transaction subject to §1026.19(f), the creditor shall disclose the information in this section:

(a) General information —(1) Form title. The title of the form, “Closing Disclosure,” using that term.

(2) Form purpose. The following statement: “This form is a statement of final loan terms and closing costs. Compare this document with your Loan Estimate.”

(3) Closing information. Under the heading “Closing Information”:

(i) Date issued. The date the disclosures required by this section are delivered to the consumer, labeled “Date Issued.”

(ii) Closing date. The date of consummation, labeled “Closing Date.”

(iii) Disbursement date. The date the amounts disclosed pursuant to paragraphs (j)(3)(iii) and (k)(3)(iii) of this section are expected to be paid in a purchase transaction under §1026.37(a)(9)(i) to the consumer and seller, respectively, as applicable, or the date the amounts disclosed pursuant to paragraphs (j)(2)(iii) or (t)(5)(vii)(B) of this section are expected to be paid to the consumer or a third party in a transaction that is not a purchase transaction under §1026.37(a)(9)(i), labeled “Disbursement Date.”

(iv) Settlement agent. The name of the settlement agent conducting the closing, labeled “Settlement Agent.”

(v) File number. The number assigned to the transaction by the settlement agent for identification purposes, labeled “File #.”

(vi) Property. The address or location of the property required to be disclosed under §1026.37(a)(6), labeled “Property.”

(vii) Sale price. (A) In credit transactions where there is a seller, the contract sale price of the property identified in paragraph (a)(3)(vi) of this section, labeled “Sale Price.”

(B) In credit transactions where there is no seller, the appraised value of the property identified in paragraph (a)(3)(vi) of this section, labeled “Appraised Prop. Value.”

(4) Transaction information. Under the heading “Transaction Information”:

(i) Borrower. The consumer’s name and mailing address, labeled “Borrower.”

(ii) Seller. Where applicable, the seller’s name and mailing address, labeled “Seller.”

(iii) Lender. The name of the creditor making the disclosure, labeled “Lender.”

(5) Loan information. Under the heading “Loan Information”:

(i) Loan term. The information required to be disclosed under §1026.37(a)(8), labeled “Loan Term.”

(ii) Purpose. The information required to be disclosed under §1026.37(a)(9), labeled “Purpose.”

(iii) Product. The information required to be disclosed under §1026.37(a)(10), labeled “Product.”

(iv) Loan type. The information required to be disclosed under §1026.37(a)(11), labeled “Loan Type.”

(v) Loan identification number. The information required to be disclosed under §1026.37(a)(12), labeled “Loan ID #.”

(vi) Mortgage insurance case number. The case number for any mortgage insurance policy, if required by the creditor, labeled “MIC #.”

(b) Loan terms. A separate table under the heading “Loan Terms” that includes the information required by §1026.37(b).

(c) Projected payments. A separate table, under the heading “Projected Payments,” that includes and satisfies the following information and requirements:

(1) Projected payments or range of payments. The information required to be disclosed pursuant to §1026.37(c)(1) through (4), other than §1026.37(c)(4)(vi). In disclosing estimated escrow payments as described in §1026.37(c)(2)(iii) and (c)(4)(ii), the amount disclosed on the Closing Disclosure:

(i) For transactions subject to RESPA, is determined under the escrow account analysis described in Regulation X, 12 CFR 1024.17;

(ii) For transactions not subject to RESPA, may be determined under the escrow account analysis described in Regulation X, 12 CFR 1024.17 or in the manner set forth in §1026.37(c)(5).

(2) Estimated taxes, insurance, and assessments. A reference to the disclosure required by paragraph (l)(7) of this section.

(d) Costs at closing —(1) Costs at closing table. In a separate table, under the heading “Costs at Closing”:

(i) Labeled “Closing Costs,” the sum of the dollar amounts disclosed pursuant to paragraphs (f)(4), (g)(5), and (h)(3) of this section, together with:

(A) A statement that the amount disclosed pursuant to paragraph (d)(1)(i) of this section includes the amounts disclosed pursuant to paragraphs (f)(4), (g)(5), and (h)(3) of this section;

(B) The dollar amount disclosed pursuant to paragraph (f)(4) of this section, labeled “Loan Costs”;

(C) The dollar amount disclosed pursuant to paragraph (g)(5) of this section, labeled “Other Costs”;

(D) The dollar amount disclosed pursuant to paragraph (h)(3) of this section, labeled “Lender Credits”; and

(E) A statement referring the consumer to the tables disclosed pursuant to paragraphs (f) and (g) of this section for details.

(ii) Labeled “Cash to Close,” the sum of the dollar amounts calculated in accordance with paragraph (i)(9)(ii) of this section, together with:

(A) A statement that the amount disclosed pursuant to paragraph (d)(1)(ii) of this section includes the amount disclosed pursuant to paragraph (d)(1)(i) of this section; and

(B) A statement referring the consumer to the table required pursuant to paragraph (i) of this section for details.

(2) Alternative table for transactions without a seller. For transactions that do not involve a seller and where the creditor disclosed the optional alternative table pursuant to §1026.37(d)(2), the creditor shall disclose, with the label “Cash to Close,” instead of the sum of the dollar amounts described in paragraph

(d)(1)(ii) of this section:

- (i) The amount calculated in accordance with paragraph (e)(5)(ii) of this section;
- (ii) A statement of whether the disclosed amount is due from or to the consumer; and
- (iii) A statement referring the consumer to the table required pursuant to paragraph (e) of this section for details.

(e) Alternative calculating cash to close table for transactions without a seller. For transactions that do not involve a seller and where the creditor disclosed the optional alternative table pursuant to §1026.37(h)(2), the creditor shall disclose, instead of the table described in paragraph (i) of this section, in a separate table, under the heading “Calculating Cash to Close,” together with the statement “Use this table to see what has changed from your Loan Estimate”:

(1) Loan amount. Labeled “Loan Amount:”

- (i) Under the subheading “Loan Estimate,” the loan amount disclosed on the Loan Estimate under §1026.37(b)(1);
- (ii) Under the subheading “Final,” the loan amount disclosed under paragraph (b) of this section;
- (iii) Disclosed more prominently than the other disclosures under paragraph (e)(1)(i) and (ii) of this section, under the subheading “Did this change?”:
  - (A) If the amount disclosed under paragraph (e)(1)(ii) of this section is different than the amount disclosed under paragraph (e)(1)(i) of this section (unless the difference is due to rounding), a statement of that fact along with a statement of whether this amount increased or decreased; or
  - (B) If the amount disclosed under paragraph (e)(1)(i) of this section is equal to the amount disclosed under paragraph (e)(1)(ii) of this section a statement of that fact.

(2) Total closing costs. Labeled “Total Closing Costs”:

- (i) Under the subheading “Loan Estimate,” the amount disclosed on the Loan Estimate under §1026.37(h)(2)(ii);

(ii) Under the subheading “Final,” the amount disclosed under paragraph (h)(1) of this section, disclosed as a negative number; and

(iii) Disclosed more prominently than the other disclosures under this paragraph (e)(2)(i) and (ii) of this section, under the subheading “Did this change?”:

(A) If the amount disclosed under paragraph (e)(2)(ii) of this section is different than the amount disclosed under paragraph (e)(2)(i) of this section (unless the difference is due to rounding):

(1) A statement of that fact;

(2) If the difference in the amounts disclosed under paragraphs (e)(2)(i) and (e)(2)(ii) is attributable to differences in itemized charges that are included in either or both subtotals, a statement that the consumer should see the total loan costs and total other costs subtotals disclosed under paragraphs (f)(4) and (g)(5) of this section (together with references to such disclosures), as applicable; and

(3) If the increase exceeds the limitations on increases in closing costs under §1026.19(e)(3), a statement that such increase exceeds the legal limits by the dollar amount of the excess and if any refund is provided pursuant to §1026.19(f)(2)(v), a statement directing the consumer to the disclosure required under paragraph (h)(3) of this section. Such dollar amount shall equal the sum total of all excesses of the limitations on increases in closing costs under §1026.19(e)(3), taking into account the different methods of calculating excesses of the limitations on increases in closing costs under §1026.19(e)(3)(i) and (ii).

(B) If the amount disclosed under paragraph (e)(2)(i) of this section is equal to the amount disclosed under paragraph (e)(2)(ii) of this section, a statement of that fact.

(3) Closing costs paid before closing. Labeled “Closing Costs Paid Before Closing:”

(i) Under the subheading “Loan Estimate,” the amount of \$0;

(ii) Under the subheading “Final,” any amount designated as borrower-paid before closing under paragraph (h)(2) of this section, disclosed as a positive number; and

(iii) Disclosed more prominently than the other disclosures under this paragraph (e)(3)(i) and (ii) of this section, under the subheading “Did this change?”:

(A) If the amount disclosed under paragraph (e)(3)(ii) of this section is different than the amount disclosed under paragraph (e)(3)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer paid such amounts prior to consummation of the transaction; or

(B) If the amount disclosed under paragraph (e)(3)(ii) of this section is equal to the amount disclosed under paragraph (e)(3)(i) of this section, a statement of that fact.

(4) Payoffs and payments. Labeled “Total Payoffs and Payments,”

(i) Under the subheading “Loan Estimate,” the total payoffs and payments disclosed on the Loan Estimate under §1026.37(h)(2)(iii);

(ii) Under the subheading “Final,” the total amount of payoffs and payments made to third parties disclosed pursuant to paragraph (t)(5)(vii)(B) of this section, to the extent known, disclosed as a negative number;

(iii) Disclosed more prominently than the other disclosures under this paragraph (e)(4)(i) and (ii), under the subheading “Did this change?”:

(A) If the amount disclosed under paragraph (e)(4)(ii) of this section is different than the amount disclosed under paragraph (e)(4)(i) of this section (unless the difference is due to rounding), a statement of that fact along with a reference to the table disclosed under paragraph (t)(5)(vii)(B) of this section; or

(B) If the amount disclosed under paragraph (e)(4)(ii) of this section is equal to the amount disclosed under paragraph (e)(4)(i) of this section, a statement of that fact.

(5) Cash to or from consumer. Labeled “Cash to Close:”

(i) Under the subheading “Loan Estimate,” the estimated cash to close on the Loan Estimate together with the statement of whether the estimated amount is due from or to the consumer as disclosed under §1026.37(h)(2)(iv);

(ii) Under the subheading “Final,” the amount due from or to the consumer, calculated by the sum of the amounts disclosed under paragraphs (e)(1)(ii), (e)(2)(ii), (e)(3)(ii), and (e)(4)(ii) of this section, disclosed as a positive number, together with a statement of whether the disclosed amount is due from or to the consumer.

(6) Closing costs financed. Labeled “Closing Costs Financed (Paid from your Loan Amount),” the sum of the amounts disclosed under paragraphs (e)(1)(ii) and (e)(4)(ii) of this section, but only to the extent that the sum is greater than zero and less than or equal to the sum disclosed under paragraph (h)(1) of this section minus the sum disclosed under paragraph (h)(2) of this section designated borrower-paid before closing.

(f) Closing cost details; loan costs. Under the master heading “Closing Cost Details” with columns stating whether the charge was borrower-paid at or before closing, seller-paid at or before closing, or paid by others, all loan costs associated with the transaction, listed in a table under the heading “Loan Costs.” The table shall contain the items and amounts listed under four subheadings, described in paragraphs (f)(1) through (5) of this section.

(1) Origination charges. Under the subheading “Origination Charges,” and in the applicable columns as described in paragraph (f) of this section, an itemization of each amount paid for charges described in §1026.37(f)(1), the amount of compensation paid by the creditor to a third-party loan originator along with the name of the loan originator ultimately receiving the payment, and the total of all such itemized amounts that are designated borrower-paid at or before closing.

(2) Services borrower did not shop for. Under the subheading “Services Borrower Did Not Shop For” and in the applicable columns as described in paragraph (f) of this section, an itemization of the services and corresponding costs for each of the settlement services required by the creditor for which the consumer did not shop in accordance with §1026.19(e)(1)(vi)(A) and that are provided by persons other than the creditor or mortgage broker, the name of the person ultimately receiving the payment for each such amount, and the total of all such itemized amounts that are designated borrower-paid at or before closing. Items that were disclosed pursuant to §1026.37(f)(3) must be disclosed under this paragraph (f)(2) if the consumer was provided a written list of settlement service providers under §1026.19(e)(1)(vi)(C) and the consumer selected a settlement service provider contained on that written list.

(3) Services borrower did shop for. Under the subheading “Services Borrower Did Shop For” and in the applicable column as described in paragraph (f) of this section, an itemization of the services and corresponding costs for each of the settlement services required by the creditor for which the consumer shopped in accordance with §1026.19(e)(1)(vi)(A) and that are provided by persons other than the creditor or mortgage broker, the name of the person ultimately receiving the payment for each such amount, and the total of all such itemized costs that are designated borrower-paid at or before closing. Items that were disclosed pursuant to §1026.37(f)(3) must be



disclosed under this paragraph (f)(3) if the consumer was provided a written list of settlement service providers under §1026.19(e)(1)(vi)(C) and the consumer did not select a settlement service provider contained on that written list.

(4) Total loan costs. Under the subheading “Total Loan Costs (Borrower-Paid),” the sum of the amounts disclosed as borrower-paid pursuant to paragraph (f)(5) of this section.

(5) Subtotal of loan costs. The sum of loan costs, calculated by totaling the amounts described in paragraphs (f)(1) through (3) of this section for costs designated borrower-paid at or before closing, labeled “Loan Costs Subtotals.”

(g) Closing cost details; other costs. Under the master heading “Closing Cost Details” disclosed pursuant to paragraph (f) of this section, with columns stating whether the charge was borrower-paid at or before closing, seller-paid at or before closing, or paid by others, all costs in connection with the transaction, other than those disclosed under paragraph (f) of this section, listed in a table with a heading disclosed as “Other Costs.” The table shall contain the items and amounts listed under five subheadings, described in paragraphs (g)(1) through (6) of this section.

(1) Taxes and other government fees. Under the subheading “Taxes and Other Government Fees,” and in the applicable column as described in paragraph (g) of this section, an itemization of each amount that is expected to be paid to State and local governments for taxes and government fees and the total of all such itemized amounts that are designated borrower-paid at or before closing, as follows:

- (i) Recording fees and the amounts paid in the applicable columns; and
- (ii) An itemization of transfer taxes, with the name of the government entity assessing the transfer tax.

(2) Prepaids. Under the subheading “Prepaids” and in the applicable column as described in paragraph (g) of this section, an itemization of each amount for charges described in §1026.37(g)(2), the name of the person ultimately receiving the payment or government entity assessing the property tax, provided that the person ultimately receiving the payment need not be disclosed for the disclosure required by §1026.37(g)(2)(iii) when disclosed pursuant to this paragraph, and the total of all such itemized amounts that are designated borrower-paid at or before closing.

(3) Initial escrow payment at closing. Under the subheading “Initial escrow payment at closing” and in the applicable column as described in paragraph (g) of this section, an itemization of each amount for charges described in §1026.37(g)(3), the applicable

aggregate adjustment pursuant to 12 CFR 1024.17(d)(2) along with the label “aggregate adjustment,” and the total of all such itemized amounts that are designated borrower-paid at or before closing.

(4) Other. Under the subheading “Other” and in the applicable column as described in paragraph (g) of this section, an itemization of each amount for charges in connection with the transaction that are in addition to the charges disclosed under paragraphs (f) and (g)(1) through (3) for services that are required or obtained in the real estate closing by the consumer, the seller, or other party, the name of the person ultimately receiving the payment, and the total of all such itemized amounts that are designated borrower-paid at or before closing.

(i) For any cost that is a component of title insurance services, the introductory description “Title —” shall appear at the beginning of the label for that actual cost.

(ii) The parenthetical description “(optional)” shall appear at the end of the label for costs designated borrower-paid at or before closing for any premiums paid for separate insurance, warranty, guarantee, or event-coverage products.

(5) Total other costs. Under the subheading “Total Other Costs (Borrower-Paid),” the sum of the amounts disclosed as borrower-paid pursuant to paragraph (g)(6) of this section.

(6) Subtotal of costs. The sum of other costs, calculated by totaling the costs disclosed in paragraphs (g)(1) through (4) of this section designated borrower-paid at or before closing, labeled “Other Costs Subtotals.”

(h) Closing cost totals.

(1) The sum of the costs disclosed as borrower-paid pursuant to paragraph (h)(2) of this section and the amount disclosed in paragraph (h)(3) of this section, under the subheading “Total Closing Costs (Borrower-Paid).”

(2) The sum of the amounts disclosed in paragraphs (f)(5) and (g)(6) of this section, designated borrower-paid at or before closing, and the sum of the costs designated seller-paid at or before closing or paid by others disclosed pursuant to paragraphs (f) and (g) of this section, labeled “Closing Costs Subtotals.”

(3) The amount described in §1026.37(g)(6)(ii) as a negative number, labeled “Lender Credits” and designated borrower-paid at closing, and if a refund is provided pursuant to §1026.19(f)(2)(v), a statement that this amount includes a credit for an amount that exceeds the limitations on increases in closing costs under §1026.19(e)(3), and the amount of such credit under §1026.19(f)(2)(v).

(4) The services and costs disclosed pursuant to paragraphs (f) and (g) of this section on the Closing Disclosure shall be labeled using terminology that describes the item disclosed, in a manner that is consistent with the descriptions or prescribed labels, as applicable, used for such items on the Loan Estimate pursuant to §1026.37. The creditor must also list the items on the Closing Disclosure in the same sequential order as on the Loan Estimate pursuant to §1026.37.

(i) Calculating cash to close. In a separate table, under the heading “Calculating Cash to Close,” together with the statement “Use this table to see what has changed from your Loan Estimate”:

(1) Total closing costs.

(i) Under the subheading “Loan Estimate,” the “Total Closing Costs” disclosed on the Loan Estimate under §1026.37(h)(1)(i), labeled using that term.

(ii) Under the subheading “Final,” the amount disclosed under paragraph (h)(1) of this section.

(iii) Under the subheading “Did this change?,” disclosed more prominently than the other disclosures under this paragraph (i)(1):

(A) If the amount disclosed under paragraph (i)(1)(ii) of this section is different than the amount disclosed under paragraph (i)(1)(i) of this section (unless the difference is due to rounding):

(1) A statement of that fact;

(2) If the difference in the “Total Closing Costs” is attributable to differences in itemized charges that are included in either or both subtotals, a statement that the consumer should see the total loan costs and total other costs subtotals disclosed under paragraphs (f)(4) and (g)(5) of this section (together with references to such disclosures), as applicable; and

(3) If the increase exceeds the limitations on increases in closing costs under §1026.19(e)(3), a statement that such increase exceeds the legal limits by the

dollar amount of the excess, and if any refund is provided pursuant to §1026.19(f)(2)(v), a statement directing the consumer to the disclosure required under paragraph (h)(3) of this section. Such dollar amount shall equal the sum total of all excesses of the limitations on increases in closing costs under §1026.19(e)(3), taking into account the different methods of calculating excesses of the limitations on increases in closing costs under §1026.19(e)(3)(i) and (ii).

(B) If the amount disclosed under paragraph (i)(1)(ii) of this section is equal to the amount disclosed under paragraph (i)(1)(i) of this section, a statement of that fact.

(2) Closing costs paid before closing.

(i) Under the subheading “Loan Estimate,” the dollar amount “\$0,” labeled “Closing Costs Paid Before Closing.”

(ii) Under the subheading “Final,” the amount of “Total Closing Costs” disclosed under paragraph (h)(2) of this section and designated as borrower-paid before closing, stated as a negative number.

(iii) Under the subheading “Did this change?” disclosed more prominently than the other disclosures under this paragraph (i)(2):

(A) If the amount disclosed under paragraph (i)(2)(ii) of this section is different than the amount disclosed under paragraph (i)(2)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer paid such amounts prior to consummation of the transaction; or

(B) If the amount disclosed under paragraph (i)(2)(ii) of this section is equal to the amount disclosed under paragraph (i)(2)(i) of this section, a statement of that fact.

(3) Closing costs financed.

(i) Under the subheading “Loan Estimate,” the amount disclosed under §1026.37(h)(1)(ii), labeled “Closing Costs Financed (Paid from your Loan Amount).”

(ii) Under the subheading “Final,” the actual amount of the closing costs that are to be paid out of loan proceeds, if any, stated as a negative number.

(iii) Under the subheading “Did this change?,” disclosed more prominently than the other disclosures under this paragraph (i)(3):

(A) If the amount disclosed under paragraph (i)(3)(ii) of this section is different than the amount disclosed under paragraph (i)(3)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer included the closing costs in the loan amount, which increased the loan amount; or

(B) If the amount disclosed under paragraph (i)(3)(ii) of this section is equal to the amount disclosed under paragraph (i)(3)(i) of this section, a statement of that fact.

(4) Down payment/funds from borrower.

(i) Under the subheading “Loan Estimate,” the amount disclosed under §1026.37(h)(1)(iii), labeled “Down Payment/Funds from Borrower.”

(ii) Under the subheading “Final”:

(A) In a transaction that is a purchase as defined in §1026.37(a)(9)(i), the amount of the difference between the purchase price of the property and the principal amount of the credit extended, stated as a positive number, labeled “Down Payment/Funds from Borrower”; or

(B) In a transaction other than the type described in paragraph (i)(4)(ii)(A) of this section, the “Funds from Borrower” as determined in accordance with paragraph (i)(6)(iv) of this section, labeled “Down Payment/Funds from Borrower.”

(iii) Under the subheading “Did this change?,” disclosed more prominently than the other disclosures under this paragraph (i)(4):

(A) If the amount disclosed under paragraph (i)(4)(ii) of this section is different than the amount disclosed under paragraph (i)(4)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer increased or decreased this payment and that the consumer should see the details disclosed under paragraph (j)(1) or (j)(2) of this section, as applicable; or

(B) If the amount disclosed under paragraph (i)(4)(ii) of this section is equal to the amount disclosed under paragraph (i)(4)(i) of this section, a statement of that fact.

(5) Deposit.

(i) Under the subheading “Loan Estimate,” the amount disclosed under §1026.37(h)(1)(iv), labeled “Deposit.”

(ii) Under the subheading “Final,” the amount disclosed under paragraph (j)(2)(ii) of this section, stated as a negative number.

(iii) Under the subheading “Did this change?,” disclosed more prominently than the other disclosures under this paragraph (i)(5):

(A) If the amount disclosed under paragraph (i)(5)(ii) of this section is different than the amount disclosed under paragraph (i)(5)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer increased or decreased this payment, as applicable, and that the consumer should see the details disclosed under paragraph (j)(2)(ii) of this section; or

(B) If the amount disclosed under paragraph (i)(5)(ii) of this section is equal to the amount disclosed under paragraph (i)(5)(i) of this section, a statement of that fact.

(6) Funds for borrower.

(i) Under the subheading “Loan Estimate,” the amount disclosed under §1026.37(h)(1)(v), labeled “Funds for Borrower.”

(ii) Under the subheading “Final,” the “Funds for Borrower,” labeled using that term, as determined in accordance with paragraph (i)(6)(iv) of this section.

(iii) Under the subheading “Did this change?,” disclosed more prominently than the other disclosures under this paragraph (i)(6):

(A) If the amount disclosed under paragraph (i)(6)(ii) of this section is different than the amount disclosed under paragraph (i)(6)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer’s available funds from the loan amount have increased or decreased, as applicable; or

(B) If the amount disclosed under paragraph (i)(6)(ii) of this section is equal to the amount disclosed under paragraph (i)(6)(i) of this section, a statement of that fact.

(iv) The “Funds from Borrower” to be disclosed under paragraph (i)(4)(ii)(B) of this section and “Funds for Borrower” to be disclosed under paragraph (i)(6)(ii) of this section are determined by subtracting the principal amount of the credit extended (excluding any amount disclosed pursuant to paragraph (i)(3)(ii) of this section) from the total amount of all existing debt being satisfied in the real estate closing and disclosed under paragraph (j)(1)(v) of this section (except to the extent the satisfaction of such existing debt is disclosed under paragraph (g) of this section).

(A) If the calculation under this paragraph (i)(6)(iv) yields an amount that is a positive number, such amount shall be disclosed under paragraph (i)(4)(ii)(B) of this section, and \$0 shall be disclosed under paragraph (i)(6)(ii) of this section.

(B) If the calculation under this paragraph (i)(6)(iv) yields an amount that is a negative number, such amount shall be disclosed under paragraph (i)(6)(ii) of this section, stated as a negative number, and \$0 shall be disclosed under paragraph (i)(4)(ii)(B) of this section.

(C) If the calculation under this paragraph (i)(6)(iv) yields \$0, \$0 shall be disclosed under paragraph (i)(4)(ii)(B) of this section and under paragraph (i)(6)(ii) of this section.

(7) Seller credits.

(i) Under the subheading “Loan Estimate,” the amount disclosed under §1026.37(h)(1)(vi), labeled “Seller Credits.”

(ii) Under the subheading “Final,” the amount disclosed under paragraph (j)(2)(v) of this section, stated as a negative number.

(iii) Under the subheading “Did this change?,” disclosed more prominently than the other disclosures under this paragraph (i)(7):

(A) If the amount disclosed under paragraph (i)(7)(ii) of this section is different than the amount disclosed under paragraph (i)(7)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer should see the details disclosed under paragraph (j)(2)(v) of this section; or

(B) If the amount disclosed under paragraph (i)(7)(ii) of this section is equal to the amount disclosed under paragraph (i)(7)(i) of this section, a statement of that fact.

(8) Adjustments and other credits.

(i) Under the subheading “Loan Estimate,” the amount disclosed on the Loan Estimate under §1026.37(h)(1)(vii) rounded to the nearest whole dollar, labeled “Adjustments and Other Credits.”

(ii) Under the subheading “Final,” the amount equal to the total of the amounts disclosed under paragraphs (j)(1)(iii) and (v) through (x) of this section reduced by the total of the amounts disclosed under paragraphs (j)(2)(vi) through (xi) of this section.

(iii) Under the subheading “Did this change?,” disclosed more prominently than the other disclosures under this paragraph (i)(8):

(A) If the amount disclosed under paragraph (i)(8)(ii) of this section is different than the amount disclosed under paragraph (i)(8)(i) of this section (unless the difference is due to rounding), a statement of that fact, along with a statement that the consumer should see the details disclosed under paragraphs (j)(1)(iii) and (v) through (x) and (j)(2)(vi) through (xi) of this section; or

(B) If the amount disclosed under paragraph (i)(8)(ii) of this section is equal to the amount disclosed under paragraph (i)(8)(i) of this section, a statement of that fact.

(9) Cash to close.

(i) Under the subheading “Loan Estimate,” the amount disclosed on the Loan Estimate under §1026.37(h)(1)(viii), labeled “Cash to Close” and disclosed more prominently than the other disclosures under this paragraph (i).

(ii) Under the subheading “Final,” the sum of the amounts disclosed under paragraphs (i)(1) through (i)(8) of this section under the subheading “Final,” and disclosed more prominently than the other disclosures under this paragraph (i).

(j) Summary of borrower’s transaction. Under the heading “Summaries of Transactions,” with a statement to “Use this table to see a summary of your transaction,” two separate tables are disclosed. The first table shall include, under the subheading “Borrower’s Transaction,” the following information and shall satisfy the following requirements:

(1) Itemization of amounts due from borrower.

(i) The total amount due from the consumer at closing, calculated as the sum of items required to be disclosed by paragraph (j)(1)(ii) through (x) of this section,



- excluding items paid from funds other than closing funds as described in paragraph (j)(4)(i) of this section, labeled “Due from Borrower at Closing”;
- (ii) The amount of the contract sales price of the property being sold in a purchase real estate transaction, excluding the price of any tangible personal property if the consumer and seller have agreed to a separate price for such items, labeled “Sale Price of Property”;
  - (iii) The amount of the sales price of any tangible personal property excluded from the contract sales price pursuant to paragraph (j)(1)(ii) of this section, labeled “Sale Price of Any Personal Property Included in Sale”;
  - (iv) The total amount of closing costs disclosed that are designated borrower-paid at closing, as the sum of the amounts calculated pursuant to paragraphs (h)(2) and (3) of this section, labeled “Closing Costs Paid at Closing”;
  - (v) A description and the amount of any additional items that the seller has paid prior to the real estate closing, but reimbursed by the consumer at the real estate closing, and a description and the amount of any other items owed by the consumer at the real estate closing not otherwise disclosed pursuant to paragraph (f), (g), or (j) of this section;
  - (vi) The description “Adjustments for Items Paid by Seller in Advance”;
  - (vii) The prorated amount of any prepaid taxes due from the consumer to reimburse the seller at the real estate closing, and the time period corresponding to that amount, labeled “City/Town Taxes”;
  - (viii) The prorated amount of any prepaid taxes due from the consumer to reimburse the seller at the real estate closing, and the time period corresponding to that amount, labeled “County Taxes”;
  - (ix) The prorated amount of any prepaid assessments due from the consumer to reimburse the seller at the real estate closing, and the time period corresponding to that amount, labeled “Assessments”; and
  - (x) A description and the amount of any additional items paid by the seller prior to the real estate closing that are due from the consumer at the real estate closing.
- (2) Itemization of amounts already paid by or on behalf of borrower.
- (i) The sum of the amounts disclosed in this paragraphs (j)(2)(ii) through (xi) of this section, excluding items paid from funds other than closing funds as described in

paragraph (j)(4)(i) of this section, labeled “Paid Already by or on Behalf of Borrower at Closing”;

(ii) Any amount that is paid to the seller or held in trust or escrow by an attorney or other party under the terms of the agreement for the sale of the property, labeled “Deposit”;

(iii) The amount of the consumer’s new loan amount or first user loan as disclosed pursuant to paragraph (b) of this section, labeled “Loan Amount”;

(iv) The amount of any existing loans that the consumer is assuming, or any loans subject to which the consumer is taking title to the property, labeled “Existing Loan(s) Assumed or Taken Subject to”;

(v) The total amount of money that the seller will provide at the real estate closing as a lump sum not otherwise itemized to pay for loan costs as determined by paragraph (f) of this section and other costs as determined by paragraph (g) of this section and any other obligations of the seller to be paid directly to the consumer, labeled “Seller Credit”;

(vi) The description “Other Credits,” together with a description and amount of other items paid by or on behalf of the consumer and not otherwise disclosed pursuant to paragraphs (f), (g), (h), and (j)(2) of this section;

(vii) The description “Adjustments for Items Unpaid by Seller”;

(viii) The prorated amount of any unpaid taxes due from the seller to reimburse the consumer at the real estate closing, and the time period corresponding to that amount, labeled “City/Town Taxes”;

(ix) The prorated amount of any unpaid taxes due from the seller to reimburse the consumer at the real estate closing, and the time period corresponding to that amount, labeled “County Taxes”;

(x) The prorated amount of any unpaid assessments due from the seller to reimburse the consumer at the real estate closing, and the time period corresponding to that amount, labeled “Assessments”; and

(xi) A description and the amount of any additional items which have not yet been paid and which the consumer is expected to pay after the real estate closing, but which are attributable in part to a period of time prior to the real estate closing.

(3) Calculation of borrower’s transaction. Under the label “Calculation”:

(i) The amount disclosed pursuant to paragraph (j)(1)(i) of this section, labeled “Total Due from Borrower at Closing”;

(ii) The amount disclosed pursuant to paragraph (j)(2)(i) of this section, if any, disclosed as a negative number, labeled “Total Paid Already by or on Behalf of Borrower at Closing”; and

(iii) A statement that the disclosed amount is due from or to the consumer, and the amount due from or to the consumer at the real estate closing, calculated by the sum of the amounts disclosed under paragraphs (j)(3)(i) and (ii) of this section, labeled “Cash to Close.”

(4) Items paid outside of closing funds.

(i) Costs that are not paid from closing funds but that would otherwise be disclosed in the table required pursuant to paragraph (j) of this section, should be marked with the phrase “Paid Outside of Closing” or the abbreviation “P.O.C.” and include the name of the party making the payment.

(ii) For purposes of this paragraph (j), “closing funds” means funds collected and disbursed at real estate closing.

(k) Summary of seller’s transaction. Under the heading “Summaries of Transactions” required by paragraph (j) of this section, a separate table under the subheading “Seller’s Transaction,” that includes the following information and satisfies the following requirements:

(1) Itemization of amounts due to seller.

(i) The total amount due to the seller at the real estate closing, calculated as the sum of items required to be disclosed pursuant to paragraphs (k)(1)(ii) through (ix) of this section, excluding items paid from funds other than closing funds as described in paragraph (k)(4)(i) of this section, labeled “Due to Seller at Closing”;

(ii) The amount of the contract sales price of the property being sold, excluding the price of any tangible personal property if the consumer and seller have agreed to a separate price for such items, labeled “Sale Price of Property”;

(iii) The amount of the sales price of any tangible personal property excluded from the contract sales price pursuant to paragraph (k)(1)(ii) of this section, labeled “Sale Price of Any Personal Property Included in Sale”;

(iv) A description and the amount of other items paid to the seller by the consumer

pursuant to the contract of sale or other agreement, such as charges that were not disclosed pursuant to §1026.37 on the Loan Estimate or items paid by the seller prior to the real estate closing but reimbursed by the consumer at the real estate closing;

(v) The description “Adjustments for Items Paid by Seller in Advance”;

(vi) The prorated amount of any prepaid taxes due from the consumer to reimburse the seller at the real estate closing, and the time period corresponding to that amount, labeled “City/Town Taxes”;

(vii) The prorated amount of any prepaid taxes due from the consumer to reimburse the seller at the real estate closing, and the time period corresponding to that amount, labeled “County Taxes”;

(viii) The prorated amount of any prepaid assessments due from the consumer to reimburse the seller at the real estate closing, and the time period corresponding to that amount, labeled “Assessments”; and

(ix) A description and the amount of additional items paid by the seller prior to the real estate closing that are reimbursed by the consumer at the real estate closing.

(2) Itemization of amounts due from seller.

(i) The total amount due from the seller at the real estate closing, calculated as the sum of items required to be disclosed pursuant to paragraphs (k)(2)(ii) through (xiii) of this section, excluding items paid from funds other than closing funds as described in paragraph (k)(4)(i) of this section, labeled “Due from Seller at Closing”;

(ii) The amount of any excess deposit disbursed to the seller prior to the real estate closing, labeled “Excess Deposit”;

(iii) The amount of closing costs designated seller-paid at closing disclosed pursuant to paragraph (h)(2) of this section, labeled “Closing Costs Paid at Closing”;

(iv) The amount of any existing loans that the consumer is assuming, or any loans subject to which the consumer is taking title to the property, labeled “Existing Loan(s) Assumed or Taken Subject to”;

(v) The amount of any loan secured by a first lien on the property that will be paid off as part of the real estate closing, labeled “Payoff of First Mortgage Loan”;

(vi) The amount of any loan secured by a second lien on the property that will be

paid off as part of the real estate closing, labeled "Payoff of Second Mortgage Loan";

(vii) The total amount of money that the seller will provide at the real estate closing as a lump sum not otherwise itemized to pay for loan costs as determined by paragraph (f) of this section and other costs as determined by paragraph (g) of this section and any other obligations of the seller to be paid directly to the consumer, labeled "Seller Credit";

(viii) A description and amount of any and all other obligations required to be paid by the seller at the real estate closing, including any lien-related payoffs, fees, or obligations;

(ix) The description "Adjustments for Items Unpaid by Seller";

(x) The prorated amount of any unpaid taxes due from the seller to reimburse the consumer at the real estate closing, and the time period corresponding to that amount, labeled "City/Town Taxes";

(xi) The prorated amount of any unpaid taxes due from the seller to the consumer at the real estate closing, and the time period corresponding to that amount, labeled "County Taxes";

(xii) The prorated amount of any unpaid assessments due from the seller to reimburse the consumer at the real estate closing, and the time period corresponding to that amount, labeled "Assessments"; and

(xiii) A description and the amount of any additional items which have not yet been paid and which the consumer is expected to pay after the real estate closing, but which are attributable in part to a period of time prior to the real estate closing.

(3) Calculation of seller's transaction. Under the label "Calculation":

(i) The amount described in paragraph (k)(1)(i) of this section, labeled "Total Due to Seller at Closing";

(ii) The amount described in paragraph (k)(2)(i) of this section, disclosed as a negative number, labeled "Total Due from Seller at Closing"; and

(iii) A statement that the disclosed amount is due from or to the seller, and the amount due from or to the seller at closing, calculated by the sum of the amounts disclosed pursuant to paragraphs (k)(3)(i) and (ii) of this section, labeled "Cash."

(4) Items paid outside of closing funds.

(i) Charges that are not paid from closing funds but that would otherwise be disclosed in the table described in paragraph (k) of this section, should be marked with the phrase “Paid Outside of Closing” or the acronym “P.O.C.” and include a statement of the party making the payment.

(ii) For purposes of this paragraph (k), “closing funds” are defined as funds collected and disbursed at real estate closing.

(l) Loan disclosures. Under the master heading “Additional Information About This Loan” and under the heading “Loan Disclosures”:

(1) Assumption. Under the subheading “Assumption,” the information required by §1026.37(m)(2).

(2) Demand feature. Under the subheading “Demand Feature,” a statement of whether the legal obligation permits the creditor to demand early repayment of the loan and, if the statement is affirmative, a reference to the note or other loan contract for details.

(3) Late payment. Under the subheading “Late Payment,” the information required by §1026.37(m)(4).

(4) Negative amortization. Under the subheading “Negative Amortization (Increase in Loan Amount),” a statement of whether the regular periodic payments may cause the principal balance to increase.

(i) If the regular periodic payments do not cover all of the interest due, the creditor must provide a statement that the principal balance will increase, such balance will likely become larger than the original loan amount, and increases in such balance lower the consumer’s equity in the property.

(ii) If the consumer may make regular periodic payments that do not cover all of the interest due, the creditor must provide a statement that, if the consumer chooses a monthly payment option that does not cover all of the interest due, the principal balance may become larger than the original loan amount and the increases in the principal balance lower the consumer’s equity in the property.

(5) Partial payment policy. Under the subheading “Partial Payments”:

(i) If periodic payments that are less than the full amount due are accepted, a statement that the creditor, using the term “lender,” may accept partial payments and apply such payments to the consumer’s loan;

(ii) If periodic payments that are less than the full amount due are accepted but not

applied to a consumer's loan until the consumer pays the remainder of the full amount due, a statement that the creditor, using the term "lender," may hold partial payments in a separate account until the consumer pays the remainder of the payment and then apply the full periodic payment to the consumer's loan;

(iii) If periodic payments that are less than the full amount due are not accepted, a statement that the creditor, using the term "lender," does not accept any partial payments; and

(iv) A statement that, if the loan is sold, the new creditor, using the term "lender," may have a different policy.

(6) Security interest. Under the subheading "Security Interest," a statement that the consumer is granting a security interest in the property securing the transaction, the property address including a zip code, and a statement that the consumer may lose the property if the consumer does not make the required payments or satisfy other requirements under the legal obligation.

(7) Escrow account. Under the subheading "Escrow Account":

(i) Under the reference "For now," a statement that an escrow account may also be called an impound or trust account, a statement of whether the creditor has established or will establish, at or before consummation, an escrow account in connection with the transaction for the costs that will be paid using escrow account funds described in paragraph (l)(7)(i)(A)(1) of this section:

(A) A statement that the creditor may be liable for penalties and interest if it fails to make a payment for any cost for which the escrow account is established, a statement that the consumer would have to pay such costs directly in the absence of the escrow account, and a table, titled "Escrow" that contains, if an escrow account is or will be established, an itemization of the following:

(1) The total amount the consumer will be required to pay into an escrow account over the first year after consummation for payment of the charges described in §1026.37(c)(4)(ii), labeled "Escrowed Property Costs over Year 1," together with a descriptive name of each such charge, calculated as the amount disclosed under paragraph (l)(7)(i)(A)(4) of this section multiplied by the number of periodic payments scheduled to be made to the escrow account during the first year after consummation;

(2) The estimated amount the consumer is likely to pay during the first year

after consummation for charges described in §1026.37(c)(4)(ii) that are known to the creditor and that will not be paid using escrow account funds, labeled “Non-Escrowed Property Costs over Year 1,” together with a descriptive name of each such charge and a statement that the consumer may have to pay other costs that are not listed;

(3) The total amount disclosed pursuant to paragraph (g)(3) of this section, a statement that the payment is a cushion for the escrow account, labeled “Initial Escrow Payment,” and a reference to the information disclosed pursuant to paragraph (g)(3) of this section;

(4) The amount the consumer will be required to pay into the escrow account with each periodic payment during the first year after consummation for payment of the charges described in §1026.37(c)(4)(ii), labeled “Monthly Escrow Payment.”

(5) A creditor complies with the requirements of paragraphs (l)(7)(i)(A)(1) and (l)(7)(i)(A)(4) of this section if the creditor bases the numerical disclosures required by those paragraphs on amounts derived from the escrow account analysis required under Regulation X, 12 CFR 1024.17.

(B) A statement of whether the consumer will not have an escrow account, the reason why an escrow account will not be established, a statement that the consumer must pay all property costs, such as taxes and homeowner’s insurance, directly, a statement that the consumer may contact the creditor to inquire about the availability of an escrow account, and a table, titled “No Escrow,” that contains, if an escrow account will not be established, an itemization of the following:

(1) The estimated total amount the consumer will pay directly for charges described in §1026.37(c)(4)(ii) during the first year after consummation that are known to the creditor and a statement that, without an escrow account, the consumer must pay the identified costs, possibly in one or two large payments, labeled “Property Costs over Year 1”; and

(2) The amount of any fee the creditor imposes on the consumer for not establishing an escrow account in connection with the transaction, labeled “Escrow Waiver Fee.”

(ii) Under the reference “In the future”:



(A) A statement that the consumer's property costs may change and that, as a result, the consumer's escrow payment may change;

(B) A statement that the consumer may be able to cancel any escrow account that has been established, but that the consumer is responsible for directly paying all property costs in the absence of an escrow account; and

(C) A description of the consequences if the consumer fails to pay property costs, including the actions that a State or local government may take if property taxes are not paid and the actions the creditor may take if the consumer does not pay some or all property costs, such as adding amounts to the loan balance, adding an escrow account to the loan, or purchasing a property insurance policy on the consumer's behalf that may be more expensive and provide fewer benefits than what the consumer could obtain directly.

(m) Adjustable payment table. Under the master heading "Additional Information About This Loan" required by paragraph (l) of this section, and under the heading "Adjustable Payment (AP) Table," the table required to be disclosed by §1026.37(i).

(n) Adjustable interest rate table. Under the master heading "Additional Information About This Loan" required by paragraph (l) of this section, and under the heading "Adjustable Interest Rate (AIR) Table," the table required to be disclosed by §1026.37(j).

(o) Loan calculations. In a separate table under the heading "Loan Calculations":

(1) Total of payments. The "Total of Payments," using that term and expressed as a dollar amount, and a statement that the disclosure is the total the consumer will have paid after making all payments of principal, interest, mortgage insurance, and loan costs, as scheduled.

(2) Finance charge. The "Finance Charge," using that term and expressed as a dollar amount, and the following statement: "The dollar amount the loan will cost you." The disclosed finance charge and other disclosures affected by the disclosed financed charge (including the amount financed and the annual percentage rate) shall be treated as accurate if the amount disclosed as the finance charge:

(i) Is understated by no more than \$100; or

(ii) Is greater than the amount required to be disclosed.

(3) Amount financed. The “Amount Financed,” using that term and expressed as a dollar amount, and the following statement: “The loan amount available after paying your upfront finance charge.”

(4) Annual percentage rate. The “Annual Percentage Rate,” using that term and the abbreviation “APR” and expressed as a percentage, and the following statement: “Your costs over the loan term expressed as a rate. This is not your interest rate.”

(5) Total interest percentage. The “Total Interest Percentage,” using that term and the abbreviation “TIP” and expressed as a percentage, and the following statement: “The total amount of interest that you will pay over the loan term as a percentage of your loan amount.”

(p) Other disclosures. Under the heading “Other Disclosures”:

(1) Appraisal. For transactions subject to 15 U.S.C. 1639h or 1691(e), as implemented in this part or Regulation B, 12 CFR part 1002, respectively, under the subheading “Appraisal,” that:

(i) If there was an appraisal of the property in connection with the loan, the creditor is required to provide the consumer with a copy at no additional cost to the consumer at least three days prior to consummation; and

(ii) If the consumer has not yet received a copy of the appraisal, the consumer should contact the creditor using the information disclosed pursuant to paragraph (r) of this section.

(2) Contract details. A statement that the consumer should refer to the appropriate loan document and security instrument for information about nonpayment, what constitutes a default under the legal obligation, circumstances under which the creditor may accelerate the maturity of the obligation, and prepayment rebates and penalties, under the subheading “Contract Details.”

(3) Liability after foreclosure. A brief statement of whether, and the conditions under which, the consumer may remain responsible for any deficiency after foreclosure under applicable State law, a brief statement that certain protections may be lost if the consumer refinances or incurs additional debt on the property, and a statement that the consumer should consult an attorney for additional information, under the subheading “Liability after Foreclosure.”

(4) Refinance. Under the subheading “Refinance,” the statement required by §1026.37(m)(5).

(5) Tax deductions. Under the subheading “Tax Deductions,” a statement that, if the extension of credit exceeds the fair market value of the property, the interest on the portion of the credit extension that is greater than the fair market value of the property is not tax deductible for Federal income tax purposes and a statement that the consumer should consult a tax adviser for further information.

(q) Questions notice. In a separate notice labeled “Questions?”:

(1) A statement directing the consumer to use the contact information disclosed under paragraph (r) of this section if the consumer has any questions about the disclosures required pursuant to §1026.19(f);

(2) A reference to the Bureau’s Web site to obtain more information or to submit a complaint; and the link or uniform resource locator address to the Web site: [www.consumerfinance.gov/mortgage-closing](http://www.consumerfinance.gov/mortgage-closing); and

(3) A prominent question mark.

(r) Contact information. In a separate table, under the heading “Contact Information,” the following information for each creditor (under the subheading “Lender”), mortgage broker (under the subheading “Mortgage Broker”), consumer’s real estate broker (under the subheading “Real Estate Broker (B)”), seller’s real estate broker (under the subheading “Real Estate Broker (S)”), and settlement agent (under the subheading “Settlement Agent”) participating in the transaction:

(1) Name of the person, labeled “Name”;

(2) Address, using that label;

(3) Nationwide Mortgage Licensing System & Registry (NMLSR ID) identification number, labeled “NMLS ID,” or, if none, license number or other unique identifier issued by the applicable jurisdiction or regulating body with which the person is licensed and/or registered, labeled “License ID,” with the abbreviation for the State of the applicable jurisdiction or regulatory body stated before the word “License” in the label, for the persons identified in paragraph (r)(1) of this section;

(4) Name of the natural person who is the primary contact for the consumer with the person identified in paragraph (r)(1) of this section, labeled “Contact”;

(5) NMLSR ID, labeled “Contact NMLS ID,” or, if none, license number or other unique identifier issued by the applicable jurisdiction or regulating body with which the person is licensed and/or registered, labeled “Contact License ID,” with the abbreviation for the

State of the applicable jurisdiction or regulatory body stated before the word “License” in the label, for the natural person identified in paragraph (r)(4) of this section,

(6) Email address for the person identified in paragraph (r)(4) of this section, labeled “Email”; and

(7) Telephone number for the person identified in paragraph (r)(4) of this section, labeled “Phone.”

(s) Signature statement.

(1) At the creditor’s option, under the heading “Confirm Receipt,” a line for the signatures of the consumers in the transaction. If the creditor provides a line for the consumer’s signature, the creditor must disclose above the signature line the statement required to be disclosed under §1026.37(n)(1).

(2) If the creditor does not provide a line for the consumer’s signature, the statement required to be disclosed under §1026.37(n)(2) under the heading “Other Disclosures” required by paragraph (p) of this section.

(t) Form of disclosures —(1) General requirements.

(i) The creditor shall make the disclosures required by this section clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures also shall be grouped together and segregated from everything else.

(ii) Except as provided in paragraph (t)(5), the disclosures shall contain only the information required by paragraphs (a) through (s) of this section and shall be made in the same order, and positioned relative to the master headings, headings, subheadings, labels, and similar designations in the same manner, as shown in form H-25, set forth in appendix H to this part.

(2) Headings and labels. If a master heading, heading, subheading, label, or similar designation contains the word “estimated” or a capital letter designation in form H-25, set forth in appendix H to this part, that heading, label, or similar designation shall contain the word “estimated” and the applicable capital letter designation.

(3) Form. Except as provided in paragraph (t)(5) of this section:

(i) For a transaction subject to §1026.19(f) that is a federally related mortgage loan, as defined in Regulation X, 12 CFR 1024.2, the disclosures must be made using form H-25, set forth in appendix H to this part.

(ii) For any other transaction subject to this section, the disclosures must be made with headings, content, and format substantially similar to form H-25, set forth in appendix H to this part.

(iii) The disclosures required by this section may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.).

(4) Rounding —(i) Nearest dollar. The following dollar amounts are required to be rounded to the nearest whole dollar:

(A) The dollar amounts required to be disclosed by paragraph (b) of this section that are required to be rounded by §1026.37(o)(4)(i)(A) when disclosed under §1026.37(b)(6) and (7);

(B) The dollar amounts required to be disclosed by paragraph (c) of this section that are required to be rounded by §1026.37(o)(4)(i)(A) when disclosed under §1026.37(c)(1)(iii);

(C) The dollar amounts required to be disclosed by paragraphs (e) and (i) of this section under the subheading “Loan Estimate”;

(D) The dollar amounts required to be disclosed by paragraph (m) of this section; and

(E) The dollar amounts required to be disclosed by paragraph (c) of this section that are required to be rounded by §1026.37(o)(4)(i)(C) when disclosed under §1026.37(c)(2)(iv).

(ii) Percentages. The percentage amounts required to be disclosed under paragraphs (b), (f)(1), (n), and (o)(5) of this section shall not be rounded and shall be disclosed up to two or three decimal places. The percentage amount required to be disclosed under paragraph (o)(4) of this section shall not be rounded and shall be disclosed up to three decimal places. If the amount is a whole number then the amount disclosed shall be truncated at the decimal point.

(iii) Loan amount. The dollar amount required to be disclosed by paragraph (b) of this section as required by §1026.37(b)(1) shall be disclosed as an unrounded number, except that if the amount is a whole number then the amount disclosed shall be truncated at the decimal point.

(5) Exceptions— (i) Unit-period. Wherever the form or this section uses “monthly” to describe the frequency of any payments or uses “month” to describe the applicable unit-period, the creditor shall substitute the appropriate term to reflect the fact that the transaction’s terms provide for other than monthly periodic payments, such as bi-weekly or quarterly payments.

(ii) Lender credits. The amount required to be disclosed by paragraph (d)(1)(i)(D) of this section may be omitted from the form if the amount is zero.

(iii) Administrative information. The creditor may insert at the bottom of each page under the disclosures required by this section as illustrated by form H-25 of appendix H to this part, any administrative information, text, or codes that assist in identification of the form or the information disclosed on the form, provided that the space provided on form H-25 for any of the information required by this section is not altered.

(iv) Closing cost details —(A) Additional line numbers. Line numbers provided on form H-25 of appendix H to this part for the disclosure of the information required by paragraphs (f)(1) through (3) and (g)(1) through (4) of this section that are not used may be deleted and the deleted line numbers added to the space provided for any other of those paragraphs as necessary to accommodate the disclosure of additional items.

(B) Two pages. To the extent that adding or deleting line numbers provided on form H-25 of appendix H to this part, as permitted by paragraph (t)(5)(iv)(A) of this section, does not accommodate an itemization of all information required to be disclosed by paragraphs (f) through (h) on one page, the information required to be disclosed by paragraphs (f) through (h) of this section may be disclosed on two pages, provided that the information required by paragraph (f) is disclosed on a page separate from the information required by paragraph (g). The information required by paragraph (g), if disclosed on a page separate from paragraph (f), shall be disclosed on the same page as the information required by paragraph (h).

(v) Separation of consumer and seller information. The creditor or settlement agent preparing the form may use form H-25 of appendix H to this part for the disclosure provided to both the consumer and the seller, with the following modifications to separate the information of the consumer and seller, as necessary:

(A) The information required to be disclosed by paragraphs (j) and (k) of this section may be disclosed on separate pages to the consumer and the seller,

respectively, with the information required by the other paragraph left blank. The information disclosed to the consumer pursuant to paragraph (j) of this section must be disclosed on the same page as the information required by paragraph (i) of this section.

(B) The information required to be disclosed by paragraphs (f) and (g) of this section with respect to costs paid by the consumer may be left blank on the disclosure provided to the seller.

(C) The information required by paragraphs (a)(2), (a)(4)(iii), (a)(5), (b) through (d), (i), (l) through (p), (r) with respect to the creditor and mortgage broker, and (s)(2) of this section may be left blank on the disclosure provided to the seller.

(vi) Modified version of the form for a seller or third-party. The information required by paragraphs (a)(2), (a)(4)(iii), (a)(5), (b) through (d), (f), and (g) with respect to costs paid by the consumer, (i), (j), (l) through (p), (q)(1), and (r) with respect to the creditor and mortgage broker, and (s) of this section may be deleted from the form provided to the seller or a third-party, as illustrated by form H-25(I) of appendix H to this part.

(vii) Transaction without a seller. The following modifications to form H-25 of appendix H to this part may be made for a transaction that does not involve a seller and for which the alternative tables are disclosed pursuant to paragraphs (d)(2) and (e) of this section, as illustrated by form H-25(J) of appendix H to this part:

(A) The information required by paragraph (a)(4)(ii), and paragraphs (f), (g), and (h) of this section with respect to costs paid by the seller, may be deleted.

(B) A table under the master heading “Closing Cost Details” required by paragraph (f) of this section may be added with the heading “Payoffs and Payments” that itemizes the amounts of payments made at closing to other parties from the credit extended to the consumer or funds provided by the consumer in connection with the transaction, including designees of the consumer; the payees and a description of the purpose of such disbursements under the subheading “To”; and the total amount of such payments labeled “Total Payoffs and Payments.”

(C) The tables required to be disclosed by paragraphs (j) and (k) of this section may be deleted.

(viii) Translation. The form may be translated into languages other than English, and

creditors may modify form H-25 of appendix H to this part to the extent that translation prevents the headings, labels, designations, and required disclosure items under this section from fitting in the space provided on form H-25.

(ix) Customary recitals and information. An additional page may be attached to the form for the purpose of including customary recitals and information used locally in real estate settlements.



## Assignment 13: Home Purchase

### Problem 13.1

12 C.F.R. §1026.2, Definitions and rules of construction.

(a) Definitions. For purposes of this part, the following definitions apply:

- (1) Act means the Truth in Lending Act (15 U.S.C. 1601 et seq.).
- (2) Advertisement means a commercial message in any medium that promotes, directly or indirectly, a credit transaction.
- (3)
  - (i) Application means the submission of a consumer's financial information for the purposes of obtaining an extension of credit.
  - (ii) For transactions subject to §1026.19(e), (f), or (g) of this part, an application consists of the submission of the consumer's name, the consumer's income, the consumer's social security number to obtain a credit report, the property address, an estimate of the value of the property, and the mortgage loan amount sought.
- (4) Billing cycle or cycle means the interval between the days or dates of regular periodic statements. These intervals shall be equal and no longer than a quarter of a year. An interval will be considered equal if the number of days in the cycle does not vary more than four days from the regular day or date of the periodic statement.
- (5) Bureau means the Bureau of Consumer Financial Protection.
- (6) Business day means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under §§1026.15 and 1026.23, and for purposes of §§1026.19(a)(1)(ii), 1026.19(a)(2), 1026.19(e)(1)(iii)(B), 1026.19(e)(1)(iv), 1026.19(e)(2)(i)(A), 1026.19(e)(4)(ii), 1026.19(f)(1)(ii), 1026.19(f)(1)(iii), 1026.20(e)(5), 1026.31, and 1026.46(d)(4), the term means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.
- (7) Card issuer means a person that issues a credit card or that person's agent with respect to the card.

(8) Cardholder means a natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of a credit card to another natural person. For purposes of §1026.12(a) and (b), the term includes any person to whom a credit card is issued for any purpose, including business, commercial or agricultural use, or a person who has agreed with the card issuer to pay obligations arising from the issuance of such a credit card to another person.

(9) Cash price means the price at which a creditor, in the ordinary course of business, offers to sell for cash property or service that is the subject of the transaction. At the creditor's option, the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration. The term does not include any finance charge.

(10) Closed-end credit means consumer credit other than "open-end credit" as defined in this section.

(11) Consumer means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§1026.15 and 1026.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

(12) Consumer credit means credit offered or extended to a consumer primarily for personal, family, or household purposes.

(13) Consummation means the time that a consumer becomes contractually obligated on a credit transaction.

(14) Credit means the right to defer payment of debt or to incur debt and defer its payment.

(15)

(i) Credit card means any card, plate, or other single credit device that may be used from time to time to obtain credit.

(ii) Credit card account under an open-end (not home-secured) consumer credit plan means any open-end credit account that is accessed by a credit card, except:

(A) A home-equity plan subject to the requirements of §1026.40 that is accessed by a credit card; or

(B) An overdraft line of credit that is accessed by a debit card or an account number.

(iii) Charge card means a credit card on an account for which no periodic rate is used to compute a finance charge.

(16) Credit sale means a sale in which the seller is a creditor. The term includes a bailment or lease (unless terminable without penalty at any time by the consumer) under which the consumer:

(i) Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved; and

(ii) Will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

(17) Creditor means:

(i) A person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

(ii) For purposes of §§1026.4(c)(8) (Discounts), 1026.9(d) (Finance charge imposed at time of transaction), and 1026.12(e) (Prompt notification of returns and crediting of refunds), a person that honors a credit card.

(iii) For purposes of subpart B, any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.

(iv) For purposes of subpart B (except for the credit and charge card disclosures contained in §§1026.60 and 1026.9(e) and (f), the finance charge disclosures contained in §1026.6(a)(1) and (b)(3)(i) and §1026.7(a)(4) through (7) and (b)(4) through (6) and the right of rescission set forth in §1026.15) and subpart C, any card issuer that extends closed-end credit that is subject to a finance charge or is payable by written agreement in more than four installments.

(v) A person regularly extends consumer credit only if it extended credit (other than credit subject to the requirements of §1026.32) more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. A person regularly extends consumer credit if, in any 12-month period, the person originates more than one credit extension that is subject to the requirements of §1026.32 or one or more such credit

extensions through a mortgage broker.

(18) Downpayment means an amount, including the value of property used as a trade-in, paid to a seller to reduce the cash price of goods or services purchased in a credit sale transaction. A deferred portion of a downpayment may be treated as part of the downpayment if it is payable not later than the due date of the second otherwise regularly scheduled payment and is not subject to a finance charge.

(19) Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.

(20) Open-end credit means consumer credit extended by a creditor under a plan in which:

(i) The creditor reasonably contemplates repeated transactions;

(ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and

(iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

(21) Periodic rate means a rate of finance charge that is or may be imposed by a creditor on a balance for a day, week, month, or other subdivision of a year.

(22) Person means a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.

(23) Prepaid finance charge means any finance charge paid separately in cash or by check before or at consummation of a transaction, or withheld from the proceeds of the credit at any time.

(24) Residential mortgage transaction means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling.

(25) Security interest means an interest in property that secures performance of a consumer credit obligation and that is recognized by State or Federal law. It does not include incidental interests such as interests in proceeds, accessions, additions, fixtures, insurance proceeds (whether or not the creditor is a loss payee or beneficiary), premium rebates, or interests in after-acquired property. For purposes of disclosures under §§1026.6,

1026.18, 1026.19(e) and (f), and 1026.38(l)(6), the term does not include an interest that arises solely by operation of law. However, for purposes of the right of rescission under §§1026.15 and 1026.23, the term does include interests that arise solely by operation of law.

(26) State means any state, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) Rules of construction. For purposes of this part, the following rules of construction apply:

(1) Where appropriate, the singular form of a word includes the plural form and plural includes singular.

(2) Where the words obligation and transaction are used in the regulation, they refer to a consumer credit obligation or transaction, depending upon the context. Where the word credit is used in the regulation, it means consumer credit unless the context clearly indicates otherwise.

(3) Unless defined in this part, the words used have the meanings given to them by state law or contract.

(4) Where the word amount is used in this part to describe disclosure requirements, it refers to a numerical amount.

12 C.F.R. §1026.19(e)(1), Certain mortgage and variable-rate transactions.

Mortgage loans secured by real property—early disclosures. (1) Provision of disclosures. (i) Creditor. In a closed-end consumer credit transaction secured by real property, other than a reverse mortgage subject to §1026.33, the creditor shall provide the consumer with good faith estimates of the disclosures in §1026.37.

(ii) Mortgage broker. (A) If a mortgage broker receives a consumer's application, either the creditor or the mortgage broker shall provide a consumer with the disclosures required under paragraph (e)(1)(i) of this section in accordance with paragraph (e)(1)(iii) of this section. If the mortgage broker provides the required disclosures, the mortgage broker shall comply with all relevant requirements of this paragraph (e). The creditor shall ensure that such disclosures are provided in accordance with all requirements of this paragraph (e). Disclosures provided by a mortgage broker in accordance with the requirements of this paragraph (e) satisfy the creditor's obligation under this paragraph (e).

(B) If a mortgage broker provides any disclosure under §1026.19(e), the mortgage broker shall also comply with the requirements of §1026.25(c).

(iii) Timing. (A) The creditor shall deliver or place in the mail the disclosures required under paragraph (e)(1)(i) of this section not later than the third business day after the creditor receives the consumer's application, as defined in §1026.2(a)(3).

(B) Except as set forth in paragraph (e)(1)(iii)(C) of this section, the creditor shall deliver or place in the mail the disclosures required under paragraph (e)(1)(i) of this section not later than the seventh business day before consummation of the transaction.

(C) For a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), paragraph (e)(1)(iii)(B) of this section does not apply.

(iv) Receipt of early disclosures. If any disclosures required under paragraph (e)(1)(i) of this section are not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail.

(v) Consumer's waiver of waiting period before consummation. If the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency, the consumer may modify or waive the seven-business-day waiting period for early disclosures required under paragraph (e)(1)(iii)(B) of this section, after receiving the disclosures required under paragraph (e)(1)(i) of this section. To modify or waive the waiting period, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers who are primarily liable on the legal obligation. Printed forms for this purpose are prohibited.

(vi) Shopping for settlement service providers. (A) Shopping permitted. A creditor permits a consumer to shop for a settlement service if the creditor permits the consumer to select the provider of that service, subject to reasonable requirements.

(B) Disclosure of services. The creditor shall identify the settlement services for which the consumer is permitted to shop in the disclosures required under paragraph (e)(1)(i) of this section.

(C) Written list of providers. If the consumer is permitted to shop for a settlement service, the creditor shall provide the consumer with a written list identifying available providers of that settlement service and stating that the consumer may choose a different provider for that service. The creditor must identify at least one available provider for each settlement service for which the consumer is permitted to shop. The creditor shall provide this written list of settlement service providers separately from the disclosures required by paragraph (e)(1)(i) of this section but in accordance with the timing requirements in paragraph (e)(1)(iii) of this section.

12 C.F.R. §1026.19(f)(1), Certain mortgage and variable-rate transactions.

Mortgage loans secured by real property—final disclosures. (1) Provision of disclosures. (i) Scope. In a closed-end consumer credit transaction secured by real property, other than a reverse mortgage subject to §1026.33, the creditor shall provide the consumer with the disclosures in §1026.38 reflecting the actual terms of the transaction.

(ii) Timing. (A) In general. Except as provided in paragraphs (f)(1)(ii)(B), (f)(2)(i), (f)(2)(iii), (f)(2)(iv), and (f)(2)(v) of this section, the creditor shall ensure that the consumer receives the disclosures required under paragraph (f)(1)(i) of this section no later than three business days before consummation.

(B) Timeshares. For transactions secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), the creditor shall ensure that the consumer receives the disclosures required under paragraph (f)(1)(i) of this section no later than consummation.

(iii) Receipt of disclosures. If any disclosures required under paragraph (f)(1)(i) of this section are not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail.

(iv) Consumer's waiver of waiting period before consummation. If the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency, the consumer may modify or waive the three-business-day waiting period under paragraph (f)(1)(ii)(A) or (f)(2)(ii) of this section, after receiving the disclosures required under paragraph (f)(1)(i) of this section. To modify or waive the waiting period, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all consumers who are primarily liable on the legal obligation. Printed forms for this purpose are prohibited.

(v) Settlement agent. A settlement agent may provide a consumer with the disclosures required under paragraph (f)(1)(i) of this section, provided the settlement agent complies with all relevant requirements of this paragraph (f). The creditor shall ensure that such disclosures are provided in accordance with all requirements of this paragraph (f). Disclosures provided by a settlement agent in accordance with the requirements of this paragraph (f) satisfy the creditor's obligation under this paragraph (f).

(2) Subsequent changes.

(i) Changes before consummation not requiring a new waiting period. Except as provided in paragraph (f)(2)(ii), if the disclosures provided under paragraph (f)(1)(i) of this section become inaccurate before consummation, the creditor shall provide corrected disclosures reflecting any changed terms to the consumer so that the consumer receives the corrected disclosures at or before consummation.

Notwithstanding the requirement to provide corrected disclosures at or before consummation, the creditor shall permit the consumer to inspect the disclosures provided under this paragraph, completed to set forth those items that are known to the creditor at the time of inspection, during the business day immediately preceding consummation, but the creditor may omit from inspection items related only to the seller's transaction.

(ii) Changes before consummation requiring a new waiting period. If one of the following disclosures provided under paragraph (f)(1)(i) of this section becomes inaccurate in the following manner before consummation, the creditor shall ensure that the consumer receives corrected disclosures containing all changed terms in accordance with the requirements of paragraph (f)(1)(ii)(A) of this section:

(A) The annual percentage rate disclosed under §1026.38(o)(4) becomes inaccurate, as defined in §1026.22.

(B) The loan product is changed, causing the information disclosed under §1026.38(a)(5)(iii) to become inaccurate.

(C) A prepayment penalty is added, causing the statement regarding a prepayment penalty required under §1026.38(b) to become inaccurate.

(iii) Changes due to events occurring after consummation. If during the 30-day period following consummation, an event in connection with the settlement of the transaction occurs that causes the disclosures required under paragraph (f)(1)(i) of this section to become inaccurate, and such inaccuracy results in a change to an amount actually paid by the consumer from that amount disclosed under paragraph (f)(1)(i) of this section, the creditor shall deliver or place in the mail corrected disclosures not later than 30 days after receiving information sufficient to establish that such event has occurred.

(iv) Changes due to clerical errors. A creditor does not violate paragraph (f)(1)(i) of this section if the disclosures provided under paragraph (f)(1)(i) contain non-numeric clerical errors, provided the creditor delivers or places in the mail corrected disclosures no later than 60 days after consummation.



(v) Refunds related to the good faith analysis. If amounts paid by the consumer exceed the amounts specified under paragraph (e)(3)(i) or (ii) of this section, the creditor complies with paragraph (e)(1)(i) of this section if the creditor refunds the excess to the consumer no later than 60 days after consummation, and the creditor complies with paragraph (f)(1)(i) of this section if the creditor delivers or places in the mail corrected disclosures that reflect such refund no later than 60 days after consummation.

(3) Charges disclosed.

(i) Actual charge. The amount imposed upon the consumer for any settlement service shall not exceed the amount actually received by the settlement service provider for that service, except as otherwise provided in paragraph (f)(3)(ii) of this section.

(ii) Average charge. A creditor or settlement service provider may charge a consumer or seller the average charge for a settlement service if the following conditions are satisfied:

(A) The average charge is no more than the average amount paid for that service by or on behalf of all consumers and sellers for a class of transactions;

(B) The creditor or settlement service provider defines the class of transactions based on an appropriate period of time, geographic area, and type of loan;

(C) The creditor or settlement service provider uses the same average charge for every transaction within the defined class; and

(D) The creditor or settlement service provider does not use an average charge:

(1) For any type of insurance;

(2) For any charge based on the loan amount or property value; or

(3) If doing so is otherwise prohibited by law.

(4) Transactions involving a seller.

(i) Provision to seller. In a closed-end consumer credit transaction secured by real property that involves a seller, other than a reverse mortgage subject to §1026.33, the settlement agent shall provide the seller with the disclosures in §1026.38 that relate to the seller's transaction reflecting the actual terms of the seller's transaction.

(ii) Timing. The settlement agent shall provide the disclosures required under

paragraph (f)(4)(i) of this section no later than the day of consummation. If during the 30-day period following consummation, an event in connection with the settlement of the transaction occurs that causes disclosures required under paragraph (f)(4)(i) of this section to become inaccurate, and such inaccuracy results in a change to the amount actually paid by the seller from that amount disclosed under paragraph (f)(4)(i) of this section, the settlement agent shall deliver or place in the mail corrected disclosures not later than 30 days after receiving information sufficient to establish that such event has occurred.

(iii) Charges disclosed. The amount imposed on the seller for any settlement service shall not exceed the amount actually received by the service provider for that service, except as otherwise provided in paragraph (f)(3)(ii) of this section.

(iv) Creditor's copy. When the consumer's and seller's disclosures under this paragraph (f) are provided on separate documents, as permitted under §1026.38(t)(5), the settlement agent shall provide to the creditor (if the creditor is not the settlement agent) a copy of the disclosures provided to the seller under paragraph (f)(4)(i) of this section.

(5) No fee. No fee may be imposed on any person, as a part of settlement costs or otherwise, by a creditor or by a servicer (as that term is defined under 12 U.S.C. 2605(i)(2)) for the preparation or delivery of the disclosures required under paragraph (f)(1)(i) of this section.

### **Problem 13.3**

12 C.F.R. §1026.37(o)(3), Content of disclosures for certain mortgage transactions (Loan Estimate).

(o) Form of disclosures

#### **(1) General Requirements**

(i) The creditor shall make the disclosures required by this section clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures also shall be grouped together and segregated from everything else.

(ii) Except as provided in paragraph (o)(5) of this section, the disclosures shall contain only the information required by paragraphs (a) through (n) of this section and shall be made in the same order, and positioned relative to the master headings, headings, subheadings, labels, and similar designations in the same manner, as shown in form H-

24, set forth in appendix H to this part.

(2) Headings and labels. If a master heading, heading, subheading, label, or similar designation contains the word “estimated” or a capital letter designation in form H-24, set forth in appendix H to this part, that heading, label, or similar designation shall contain the word “estimated” and the applicable capital letter designation.

(3) Form. Except as provided in paragraph (o)(5) of this section:

(i) For a transaction subject to §1026.19(e) that is a federally related mortgage loan, as defined in Regulation X, 12 CFR 1024.2, the disclosures must be made using form H-24, set forth in appendix H to this part.

(ii) For any other transaction subject to this section, the disclosures must be made with headings, content, and format substantially similar to form H-24, set forth in appendix H to this part.

(iii) The disclosures required by this section may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.).

(4) Rounding — (i) Nearest dollar. (A) The dollar amounts required to be disclosed by paragraphs (b)(6) and (7), (c)(1)(iii), (c)(2)(ii) and (iii), (c)(4)(ii), (f), (g), (h), (i), and (l) of this section shall be rounded to the nearest whole dollar, except that the per diem amount required to be disclosed by paragraph (g)(2)(iii) of this section and the monthly amounts required to be disclosed by paragraphs (g)(3)(i) through (iii) and (g)(3)(v) of this section shall not be rounded.

(B) The dollar amount required to be disclosed by paragraph (b)(1) of this section shall not be rounded, and if the amount is a whole number then the amount disclosed shall be truncated at the decimal point.

(C) The dollar amounts required to be disclosed by paragraph (c)(2)(iv) of this section shall be rounded to the nearest whole dollar, if any of the component amounts are required by paragraph (o)(4)(i)(A) of this section to be rounded to the nearest whole dollar.

(ii) Percentages. The percentage amounts required to be disclosed under paragraphs (b)(2) and (6), (f)(1)(i), (g)(2)(iii), (j), and (l)(3) of this section shall not be rounded and shall be disclosed up to two or three decimal places. The percentage amount required to be disclosed under paragraph (l)(2) of this section shall be disclosed up to three decimal

places. If the amount is a whole number then the amount disclosed shall be truncated at the decimal point.

(5) Exceptions —(i) Unit-period. Wherever the form or this section uses “monthly” to describe the frequency of any payments or uses “month” to describe the applicable unit-period, the creditor shall substitute the appropriate term to reflect the fact that the transaction’s terms provide for other than monthly periodic payments, such as bi-weekly or quarterly payments.

(ii) Translation. The form may be translated into languages other than English, and creditors may modify form H-24 of appendix H to this part to the extent that translation prevents the headings, labels, designations, and required disclosure items under this section from fitting in the space provided on form H-24.

(iii) Logo or slogan. The creditor providing the form may use a logo for, and include a slogan with, the information required by paragraph (a)(3) of this section in any font size or type, provided that such logo or slogan does not cause the information required by paragraph (a)(3) of this section to exceed the space provided for that information, as illustrated in form H-24 of appendix H to this part. If the creditor does not use a logo for the information required by paragraph (a)(3) of this section, the information shall be disclosed in a similar format as form H-24.

(iv) Business card. The creditor may physically attach a business card over the information required to be disclosed by paragraph (a)(3) of this section.

(v) Administrative information. The creditor may insert at the bottom of each page under the disclosures required by this section as illustrated by form H-24 of appendix H to this part, any administrative information, text, or codes that assist in identification of the form or the information disclosed on the form, provided that the space provided on form H-24 of appendix H to this part for any of the information required by this section is not altered.

12 C.F.R. §1026.19(e)(3), Certain mortgage and variable-rate transactions.

Good faith determination for estimates of closing costs.

(i) General rule. An estimated closing cost disclosed pursuant to paragraph (e) of this section is in good faith if the charge paid by or imposed on the consumer does not exceed the amount originally disclosed under paragraph (e)(1)(i) of this section, except as otherwise provided in paragraphs (e)(3)(ii) through (iv) of this section.

(ii) Limited increases permitted for certain charges. An estimate of a charge for a third-

party service or a recording fee is in good faith if:

(A) The aggregate amount of charges for third-party services and recording fees paid by or imposed on the consumer does not exceed the aggregate amount of such charges disclosed under paragraph (e)(1)(i) of this section by more than 10 percent;

(B) The charge for the third-party service is not paid to the creditor or an affiliate of the creditor; and

(C) The creditor permits the consumer to shop for the third-party service, consistent with paragraph (e)(1)(vi) of this section.

(iii) Variations permitted for certain charges. An estimate of the following charges is in good faith if it is consistent with the best information reasonably available to the creditor at the time it is disclosed, regardless of whether the amount paid by the consumer exceeds the amount disclosed under paragraph (e)(1)(i) of this section:

(A) Prepaid interest;

(B) Property insurance premiums;

(C) Amounts placed into an escrow, impound, reserve, or similar account;

(D) Charges paid to third-party service providers selected by the consumer consistent with paragraph (e)(1)(vi)(A) of this section that are not on the list provided pursuant to paragraph (e)(1)(vi)(C) of this section; and

(E) Charges paid for third-party services not required by the creditor. These charges may be paid to affiliates of the creditor.

(iv) Revised estimates. For the purpose of determining good faith under paragraph (e)(3)(i) and (ii) of this section, a creditor may use a revised estimate of a charge instead of the estimate of the charge originally disclosed under paragraph (e)(1)(i) of this section if the revision is due to any of the following reasons:

(A) Changed circumstance affecting settlement charges. Changed circumstances cause the estimated charges to increase or, in the case of estimated charges identified in paragraph (e)(3)(ii) of this section, cause the aggregate amount of such charges to increase by more than 10 percent. For purposes of this paragraph, "changed circumstance" means:

(1) An extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction;

- (2) Information specific to the consumer or transaction that the creditor relied upon when providing the disclosures required under paragraph (e)(1)(i) of this section and that was inaccurate or changed after the disclosures were provided; or
- (3) New information specific to the consumer or transaction that the creditor did not rely on when providing the original disclosures required under paragraph (e)(1)(i) of this section.
- (B) Changed circumstance affecting eligibility. The consumer is ineligible for an estimated charge previously disclosed because a changed circumstance, as defined under paragraph (e)(3)(iv)(A) of this section, affected the consumer's creditworthiness or the value of the security for the loan.
- (C) Revisions requested by the consumer. The consumer requests revisions to the credit terms or the settlement that cause an estimated charge to increase.
- (D) Interest rate dependent charges. The points or lender credits change because the interest rate was not locked when the disclosures required under paragraph (e)(1)(i) of this section were provided. No later than three business days after the date the interest rate is locked, the creditor shall provide a revised version of the disclosures required under paragraph (e)(1)(i) of this section to the consumer with the revised interest rate, the points disclosed pursuant to §1026.37(f)(1), lender credits, and any other interest rate dependent charges and terms.
- (E) Expiration. The consumer indicates an intent to proceed with the transaction more than ten business days after the disclosures required under paragraph (e)(1)(i) of this section are provided pursuant to paragraph (e)(1)(iii) of this section.
- (F) Delayed settlement date on a construction loan. In transactions involving new construction, where the creditor reasonably expects that settlement will occur more than 60 days after the disclosures required under paragraph (e)(1)(i) of this section are provided pursuant to paragraph (e)(1)(iii) of this section, the creditor may provide revised disclosures to the consumer if the original disclosures required under paragraph (e)(1)(i) of this section state clearly and conspicuously that at any time prior to 60 days before consummation, the creditor may issue revised disclosures. If no such statement is provided, the creditor may not issue revised disclosures, except as otherwise provided in paragraph (f) of this section.

15 U.S.C. §1640(a), Civil Liability.

(a) Individual or class action for damages; amount of award; factors determining amount of award. Except as otherwise provided in this section, any creditor who fails to comply with any

requirement imposed under this chapter [15 USCS §§ 1631 et seq.], including any requirement under section 125 [15 USCS § 1635], subsection (f) or (g) of section 131 [15 USCS § 1641], or chapter 4 or 5 of this title [15 USCS §§ 1666 et seq. or 1667 et seq.] with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title [15 USCS §§ 1667 et seq.], 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$200 nor greater than \$2,000, (iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of \$500 and a maximum of \$5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures;[,] or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$400 or greater than \$4,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$1,000,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 125 or 128(e)(7) [15 USCS § 1635 or 1638(e)(7)], the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 129 [15 USCS § 1639], paragraph (1) or (2) of section 129B(c) [15 USCS § 1639b(c)], or section 129C(a) [15 USCS § 1639c(a)], an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 127 [15 USCS

§ 1637], a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125 [15 USCS § 1635], [section] 127(a) [15 USCS § 1637(a)], or any of paragraphs (4) through (13) of section 127(b) [15 USCS § 1637(b)], or for failing to comply with disclosure requirements under State law for any term or item that the Bureau has determined to be substantially the same in meaning under section 111(a)(2) [15 USCS § 1610(a)(2)] as any of the terms or items referred to in section 127(a), or any of paragraphs (4) through (13) of section 127(b) [15 USCS § 1637(b)]. In connection with the disclosures referred to in subsection (c) or (d) of section 127 [15 USCS § 1637(c) or (d)], a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 127(c)(1)(A)(ii)(I) or section 127(c)(4)(A)(i) [15 USCS § 1637(c)(1)(A)(ii)(I) or (c)(4)(A)(i)] or who uses the credit card or charge card. In connection with the disclosures referred to in section 128 [15 USCS § 1638], a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125 [15 USCS § 1635], of paragraph (2) (insofar as it requires a disclosure of the “amount financed”), (3), (4), (5), (6), or (9) of section 128(a) [15 USCS § 1638(a)], or section 128(b)(2)(C)(ii) [15 USCS § 1638(b)(2)(C)(ii)], of subparagraphs (A), (B), (D), (F), or (J) of section 128(e)(2) [15 USCS § 1638(e)(2)] (for purposes of paragraph (2) or (4) of section 128(e) [15 USCS § 1638(e)]), or paragraph (4)(C), (6), (7), or (8) of section 128(e) [15 USCS § 1638(e)], or for failing to comply with disclosure requirements under State law for any term which the Bureau has determined to be substantially the same in meaning under section 111(a)(2) [15 USCS § 1610(a)(2)] as any of the terms referred to in any of those paragraphs of section 128(a) [15 USCS § 1638(a)] or section 128(b)(2)(C)(ii) [15 USCS § 1638(b)(2)(C)(ii)]. With respect to any failure to make disclosures required under this chapter [15 USCS §§ 1631 et seq.] or chapter 4 or 5 of this title [15 USCS §§ 1666 et seq. or 1667 et seq.], liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 131 [15 USCS § 1641].



## Assignment 14: Home Mortgages

### Problem 14.1

15 U.S.C. §1639b, Residential mortgage loan origination.

(a) Finding and purpose.

(1) Finding. The Congress finds that economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.

(2) Purpose. It is the purpose of this section and section 129C [15 USCS § 1639c] to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive.

(b) Duty of care.

(1) Standard. Subject to regulations prescribed under this subsection, each mortgage originator shall, in addition to the duties imposed by otherwise applicable provisions of State or Federal law—

(A) be qualified and, when required, registered and licensed as a mortgage originator in accordance with applicable State or Federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 [12 USCS §§ 5101 et seq.]; and

(B) include on all loan documents any unique identifier of the mortgage originator provided by the Nationwide Mortgage Licensing System and Registry.

(2) Compliance procedures required. The Bureau shall prescribe regulations requiring depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions, the subsidiaries of such institutions, and the employees of such institutions or subsidiaries with the requirements of this section and the registration procedures established under section 1507 of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 [12 USCS § 5106].

(c) Prohibition on steering incentives.

(1) In general. For any residential mortgage loan, no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal).

(2) Restructuring of financing origination fee.

(A) In general. For any mortgage loan, a mortgage originator may not receive from any person other than the consumer and no person, other than the consumer, who knows or has reason to know that a consumer has directly compensated or will directly compensate a mortgage originator may pay a mortgage originator any origination fee or charge except bona fide third party charges not retained by the creditor, mortgage originator, or an affiliate of the creditor or mortgage originator .

(B) Exception. Notwithstanding subparagraph (A), a mortgage originator may receive from a person other than the consumer an origination fee or charge, and a person other than the consumer may pay a mortgage originator an origination fee or charge, if—

(i) the mortgage originator does not receive any compensation directly from the consumer; and

(ii) the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator), except that the Bureau may, by rule, waive or provide exemptions to this clause if the Bureau determines that such waiver or exemption is in the interest of consumers and in the public interest.

(3) Regulations. The Bureau shall prescribe regulations to prohibit—

(A) mortgage originators from steering any consumer to a residential mortgage loan that—

(i) the consumer lacks a reasonable ability to repay (in accordance with regulations prescribed under section 129C(a) [15 USCS § 1639c(a)]); or

(ii) has predatory characteristics or effects (such as equity stripping, excessive fees, or abusive terms);

(B) mortgage originators from steering any consumer from a residential mortgage loan for which the consumer is qualified that is a qualified mortgage (as defined in section 129C(b)(2) [15 USCS § 1639c(b)(2)]) to a residential mortgage loan that is not a qualified

mortgage;

(C) abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age; and

(D) mortgage originators from—

(i) mischaracterizing the credit history of a consumer or the residential mortgage loans available to a consumer;

(ii) mischaracterizing or suborning the mischaracterization of the appraised value of the property securing the extension of credit; or

(iii) if unable to suggest, offer, or recommend to a consumer a loan that is not more expensive than a loan for which the consumer qualifies, discouraging a consumer from seeking a residential mortgage loan secured by a consumer's principal dwelling from another mortgage originator.

(4) Rules of construction. No provision of this subsection shall be construed as—

(A) permitting any yield spread premium or other similar compensation that would, for any residential mortgage loan, permit the total amount of direct and indirect compensation from all sources permitted to a mortgage originator to vary based on the terms of the loan (other than the amount of the principal);

(B) limiting or affecting the amount of compensation received by a creditor upon the sale of a consummated loan to a subsequent purchaser;

(C) restricting a consumer's ability to finance, at the option of the consumer, including through principal or rate, any origination fees or costs permitted under this subsection, or the mortgage originator's right to receive such fees or costs (including compensation) from any person, subject to paragraph (2)(B), so long as such fees or costs do not vary based on the terms of the loan (other than the amount of the principal) or the consumer's decision about whether to finance such fees or costs; or

(D) prohibiting incentive payments to a mortgage originator based on the number of residential mortgage loans originated within a specified period of time.

(d) Liability for violations.

(1) In general. For purposes of providing a cause of action for any failure by a mortgage originator, other than a creditor, to comply with any requirement imposed under this section and any regulation prescribed under this section, section 130 [15 USCS § 1640] shall

be applied with respect to any such failure by substituting “mortgage originator” for “creditor” each place such term appears in each such subsection.

(2) Maximum. The maximum amount of any liability of a mortgage originator under paragraph (1) to a consumer for any violation of this section shall not exceed the greater of actual damages or an amount equal to 3 times the total amount of direct and indirect compensation or gain accruing to the mortgage originator in connection with the residential mortgage loan involved in the violation, plus the costs to the consumer of the action, including a reasonable attorney’s fee.

(e) Discretionary regulatory authority.

(1) In general. The Bureau shall, by regulations, prohibit or condition terms, acts or practices relating to residential mortgage loans that the Bureau finds to be abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section and section 129C [15 USCS § 1639c], necessary or proper to effectuate the purposes of this section and section 129C [15 USCS § 1639c], to prevent circumvention or evasion thereof, or to facilitate compliance with such sections, or are not in the interest of the borrower.

(2) Application. The regulations prescribed under paragraph (1) shall be applicable to all residential mortgage loans and shall be applied in the same manner as regulations prescribed under section 105 [15 USCS § 1604].

(f) Applicability. Section 129B [this section] and any regulations promulgated thereunder do not apply to an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.

15 U.S.C. §1639c, Minimum standards for residential mortgage loans.

(a) Ability to repay.

(1) In general. In accordance with regulations prescribed by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.

(2) Multiple loans. If the creditor knows, or has reason to know, that 1 or more residential mortgage loans secured by the same dwelling will be made to the same consumer, the

creditor shall make a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the combined payments of all loans on the same dwelling according to the terms of those loans and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.

(3) Basis for determination. A determination under this subsection of a consumer's ability to repay a residential mortgage loan shall include consideration of the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan. A creditor shall determine the ability of the consumer to repay using a payment schedule that fully amortizes the loan over the term of the loan.

(4) Income verification. A creditor making a residential mortgage loan shall verify amounts of income or assets that such creditor relies on to determine repayment ability, including expected income or assets, by reviewing the consumer's Internal Revenue Service Form W-2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets. In order to safeguard against fraudulent reporting, any consideration of a consumer's income history in making a determination under this subsection shall include the verification of such income by the use of—

(A) Internal Revenue Service transcripts of tax returns; or

(B) a method that quickly and effectively verifies income documentation by a third party subject to rules prescribed by the Bureau.

(5) Exemption. With respect to loans made, guaranteed, or insured by Federal departments or agencies identified in subsection (b)(3)(B)(ii), such departments or agencies may exempt refinancings under a streamlined refinancing from this income verification requirement as long as the following conditions are met:

(A) The consumer is not 30 days or more past due on the prior existing residential mortgage loan.

(B) The refinancing does not increase the principal balance outstanding on the prior existing residential mortgage loan, except to the extent of fees and charges allowed by the department or agency making, guaranteeing, or insuring the refinancing.

(C) Total points and fees (as defined in section 103(aa)(4) [15 USCS § 1602(aa)(4)]), other

than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator) payable in connection with the refinancing do not exceed 3 percent of the total new loan amount.

(D) The interest rate on the refinanced loan is lower than the interest rate of the original loan, unless the borrower is refinancing from an adjustable rate to a fixed-rate loan, under guidelines that the department or agency shall establish for loans they make, guarantee, or issue.

(E) The refinancing is subject to a payment schedule that will fully amortize the refinancing in accordance with the regulations prescribed by the department or agency making, guaranteeing, or insuring the refinancing.

(F) The terms of the refinancing do not result in a balloon payment, as defined in subsection (b)(2)(A)(ii).

(G) Both the residential mortgage loan being refinanced and the refinancing satisfy all requirements of the department or agency making, guaranteeing, or insuring the refinancing.

(6) Nonstandard loans.

(A) Variable rate loans that defer repayment of any principal or interest. For purposes of determining, under this subsection, a consumer's ability to repay a variable rate residential mortgage loan that allows or requires the consumer to defer the repayment of any principal or interest, the creditor shall use a fully amortizing repayment schedule.

(B) Interest-only loans. For purposes of determining, under this subsection, a consumer's ability to repay a residential mortgage loan that permits or requires the payment of interest only, the creditor shall use the payment amount required to amortize the loan by its final maturity.

(C) Calculation for negative amortization. In making any determination under this subsection, a creditor shall also take into consideration any balance increase that may accrue from any negative amortization provision.

(D) Calculation process. For purposes of making any determination under this subsection, a creditor shall calculate the monthly payment amount for principal and interest on any residential mortgage loan by assuming—

- (i) the loan proceeds are fully disbursed on the date of the consummation of the loan;

- (ii) the loan is to be repaid in substantially equal monthly amortizing payments for principal and interest over the entire term of the loan with no balloon payment, unless the loan contract requires more rapid repayment (including balloon payment), in which case the calculation shall be made (I) in accordance with regulations prescribed by the Bureau, with respect to any loan which has an annual percentage rate that does not exceed 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 a first lien residential mortgage loan; and by 3.5 or more percentage points for a subordinate lien residential mortgage loan; or (II) using the contract's repayment schedule, with respect to a loan which has an annual percentage rate, as of the date the interest rate is set, that is at least 1.5 percentage points above the average prime offer rate for a first lien residential mortgage loan; and 3.5 percentage points above the average prime offer rate for a subordinate lien residential mortgage loan; and
  - (iii) the interest rate over the entire term of the loan is a fixed rate equal to the fully indexed rate at the time of the loan closing, without considering the introductory rate.
- (E) Refinance of hybrid loans with current lender. In considering any application for refinancing an existing hybrid loan by the creditor into a standard loan to be made by the same creditor in any case in which there would be a reduction in monthly payment and the mortgagor has not been delinquent on any payment on the existing hybrid loan, the creditor may—
- (i) consider the mortgagor's good standing on the existing mortgage;
  - (ii) consider if the extension of new credit would prevent a likely default should the original mortgage reset and give such concerns a higher priority as an acceptable underwriting practice; and
  - (iii) offer rate discounts and other favorable terms to such mortgagor that would be available to new customers with high credit ratings based on such underwriting practice.
- (7) Fully-indexed rate defined. For purposes of this subsection, the term "fully indexed rate" means the index rate prevailing on a residential mortgage loan at the time the loan is made plus the margin that will apply after the expiration of any introductory interest rates.
- (8) Reverse mortgages and bridge loans. This subsection shall not apply with respect to

any reverse mortgage or temporary or bridge loan with a term of 12 months or less, including to any loan to purchase a new dwelling where the consumer plans to sell a different dwelling within 12 months.

(9) Seasonal income. If documented income, including income from a small business, is a repayment source for a residential mortgage loan, a creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.

(b) Presumption of ability to repay.

(1) In general. Any creditor with respect to any residential mortgage loan, and any assignee of such loan subject to liability under this title [15 USCS §§ 1601 et seq.], may presume that the loan has met the requirements of subsection (a), if the loan is a qualified mortgage.

(2) Definitions. For purposes of this subsection, the following definitions shall apply:

(A) Qualified mortgage. The term “qualified mortgage” means any residential mortgage loan—

(i) for which the regular periodic payments for the loan may not—

(I) result in an increase of the principal balance; or

(II) except as provided in subparagraph (E), allow the consumer to defer repayment of principal;

(ii) except as provided in subparagraph (E), the terms of which do not result in a balloon payment, where a “balloon payment” is a scheduled payment that is more than twice as large as the average of earlier scheduled payments;

(iii) for which the income and financial resources relied upon to qualify the obligors on the loan are verified and documented;

(iv) in the case of a fixed rate loan, for which the underwriting process is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments;

(v) in the case of an adjustable rate loan, for which the underwriting is based on the maximum rate permitted under the loan during the first 5 years, and a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments;



(vi) that complies with any guidelines or regulations established by the Bureau relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the borrower and such other factors as the Bureau may determine relevant and consistent with the purposes described in paragraph (3)(B)(i);

(vii) for which the total points and fees (as defined in subparagraph (C)) payable in connection with the loan do not exceed 3 percent of the total loan amount;

(viii) for which the term of the loan does not exceed 30 years, except as such term may be extended under paragraph (3), such as in high-cost areas; and

(ix) in the case of a reverse mortgage (except for the purposes of subsection (a) of section 129C [this section], to the extent that such mortgages are exempt altogether from those requirements), a reverse mortgage which meets the standards for a qualified mortgage, as set by the Bureau in rules that are consistent with the purposes of this subsection.

(B) Average prime offer rate. The term “average prime offer rate” means the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau.

(C) Points and fees.

(i) In general. For purposes of subparagraph (A), the term “points and fees” means points and fees as defined by section 103(aa)(4) [15 USCS § 1602(aa)(4)] (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator).

(ii) Computation. For purposes of computing the total points and fees under this subparagraph, the total points and fees shall exclude either of the amounts described in the following subclauses, but not both:

(I) Up to and including 2 bona fide discount points payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage’s interest rate will be discounted does not exceed by more than 1 percentage point the average prime offer rate.

(II) Unless 2 bona fide discount points have been excluded under subclause (I), up to and including 1 bona fide discount point payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage’s interest

rate will be discounted does not exceed by more than 2 percentage points the average prime offer rate.

(iii) Bona fide discount points defined. For purposes of clause (ii), the term “bona fide discount points” means loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage.

(iv) Interest rate reduction. Subclauses (I) and (II) of clause (ii) shall not apply to discount points used to purchase an interest rate reduction unless the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.

(D) Smaller loans. The Bureau shall prescribe rules adjusting the criteria under subparagraph (A)(vii) in order to permit lenders that extend smaller loans to meet the requirements of the presumption of compliance under paragraph (1). In prescribing such rules, the Bureau shall consider the potential impact of such rules on rural areas and other areas where home values are lower.

(E) Balloon loans. The Bureau may, by regulation, provide that the term “qualified mortgage” includes a balloon loan—

(i) that meets all of the criteria for a qualified mortgage under subparagraph (A) (except clauses (i)(II), (ii), (iv), and (v) of such subparagraph);

(ii) for which the creditor makes a determination that the consumer is able to make all scheduled payments, except the balloon payment, out of income or assets other than the collateral;

(iii) for which the underwriting is based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into account all applicable taxes, insurance, and assessments; and

(iv) that is extended by a creditor that—

(I) operates in rural or underserved areas;

(II) together with all affiliates, has total annual residential mortgage loan originations that do not exceed a limit set by the Bureau;

(III) retains the balloon loans in portfolio; and

(IV) meets any asset size threshold and any other criteria as the Bureau may

establish, consistent with the purposes of this subtitle [15 USCS §§ 1631 et seq.].

(3) Regulations.

(A) In general. The Bureau shall prescribe regulations to carry out the purposes of this subsection.

(B) Revision of safe harbor criteria.

(i) In general. The Bureau may prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of this section and section 129B [15 USCS § 1639b], to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.

(ii) Loan definition. The following agencies shall, in consultation with the Bureau, prescribe rules defining the types of loans they insure, guarantee, or administer, as the case may be, that are qualified mortgages for purposes of paragraph (2)(A), and such rules may revise, add to, or subtract from the criteria used to define a qualified mortgage under paragraph (2)(A), upon a finding that such rules are consistent with the purposes of this section and section 129B [15 USCS § 1639b], to prevent circumvention or evasion thereof, or to facilitate compliance with such sections:

(I) The Department of Housing and Urban Development, with regard to mortgages insured under the National Housing Act (12 U.S.C. 1707 et seq.).

(II) The Department of Veterans Affairs, with regard to a loan made or guaranteed by the Secretary of Veterans Affairs.

(III) The Department of Agriculture, with regard loans guaranteed by the Secretary of Agriculture pursuant to 42 U.S.C. 1472(h).

(IV) The Rural Housing Service, with regard to loans insured by the Rural Housing Service.

(c) Prohibition on certain prepayment penalties.

(1) Prohibited on certain loans.

(A) In general. A residential mortgage loan that is not a “qualified mortgage”, as defined under subsection (b)(2), may not contain terms under which a consumer must pay a

prepayment penalty for paying all or part of the principal after the loan is consummated.

(B) Exclusions. For purposes of this subsection, a “qualified mortgage” may not include a residential mortgage loan that—

(i) has an adjustable rate; or

(ii) has an annual percentage rate that exceeds the average prime offer rate for a comparable transaction, as of the date the interest rate is set—

(I) by 1.5 or more percentage points, in the case of a first lien residential mortgage loan having a original principal obligation amount that is equal to or less than the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the 6th sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2));

(II) by 2.5 or more percentage points, in the case of a first lien residential mortgage loan having a original principal obligation amount that is more than the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the 6th sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)); and

(III) by 3.5 or more percentage points, in the case of a subordinate lien residential mortgage loan.

(2) Publication of average prime offer rate and APR thresholds. The Bureau—

(A) shall publish, and update at least weekly, average prime offer rates;

(B) may publish multiple rates based on varying types of mortgage transactions; and

(C) shall adjust the thresholds established under subclause (I), (II), and (III) of paragraph (1)(B)(ii) as necessary to reflect significant changes in market conditions and to effectuate the purposes of the Mortgage Reform and Anti-Predatory Lending Act.

(3) Phased-out penalties on qualified mortgages. A qualified mortgage (as defined in subsection (b)(2)) may not contain terms under which a consumer must pay a prepayment penalty for paying all or part of the principal after the loan is consummated in excess of the following limitations:

(A) During the 1-year period beginning on the date the loan is consummated, the prepayment penalty shall not exceed an amount equal to 3 percent of the outstanding balance on the loan.

(B) During the 1-year period beginning after the period described in subparagraph (A), the prepayment penalty shall not exceed an amount equal to 2 percent of the outstanding balance on the loan.

(C) During the 1-year period beginning after the 1-year period described in subparagraph (B), the prepayment penalty shall not exceed an amount equal to 1 percent of the outstanding balance on the loan.

(D) After the end of the 3-year period beginning on the date the loan is consummated, no prepayment penalty may be imposed on a qualified mortgage.

(4) Option for no prepayment penalty required. A creditor may not offer a consumer a residential mortgage loan product that has a prepayment penalty for paying all or part of the principal after the loan is consummated as a term of the loan without offering the consumer a residential mortgage loan product that does not have a prepayment penalty as a term of the loan.

(d) Single premium credit insurance prohibited. No creditor may finance, directly or indirectly, in connection with any residential mortgage loan or with any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer, any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life, or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that—

(1) insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor; and

(2) this subsection shall not apply to credit unemployment insurance for which the unemployment insurance premiums are reasonable, the creditor receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to another insurance contract and not paid to an affiliate of the creditor.

(e) Arbitration.

(1) In general. No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving

any controversy or settling any claims arising out of the transaction.

(2) Post-controversy agreements. Subject to paragraph (3), paragraph (1) shall not be construed as limiting the right of the consumer and the creditor or any assignee to agree to arbitration or any other nonjudicial procedure as the method for resolving any controversy at any time after a dispute or claim under the transaction arises.

(3) No waiver of statutory cause of action. No provision of any residential mortgage loan or of any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer, and no other agreement between the consumer and the creditor relating to the residential mortgage loan or extension of credit referred to in paragraph (1), shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States, or any other court of competent jurisdiction, pursuant to section 130 [15 USCS § 1640] or any other provision of law, for damages or other relief in connection with any alleged violation of this section, any other provision of this title, or any other Federal law.

(f) Mortgages with negative amortization. No creditor may extend credit to a borrower in connection with a consumer credit transaction under an open or closed end consumer credit plan secured by a dwelling or residential real property that includes a dwelling, other than a reverse mortgage, that provides or permits a payment plan that may, at any time over the term of the extension of credit, result in negative amortization unless, before such transaction is consummated—

(1) the creditor provides the consumer with a statement that—

(A) the pending transaction will or may, as the case may be, result in negative amortization;

(B) describes negative amortization in such manner as the Bureau shall prescribe;

(C) negative amortization increases the outstanding principal balance of the account;  
and

(D) negative amortization reduces the consumer's equity in the dwelling or real property; and

(2) in the case of a first-time borrower with respect to a residential mortgage loan that is not a qualified mortgage, the first-time borrower provides the creditor with sufficient documentation to demonstrate that the consumer received homeownership counseling from organizations or counselors certified by the Secretary of Housing and Urban Development as competent to provide such counseling.

(g) Protection against loss of anti-deficiency protection.

(1) Definition. For purposes of this subsection, the term “anti-deficiency law” means the law of any State which provides that, in the event of foreclosure on the residential property of a consumer securing a mortgage, the consumer is not liable, in accordance with the terms and limitations of such State law, for any deficiency between the sale price obtained on such property through foreclosure and the outstanding balance of the mortgage.

(2) Notice at time of consummation. In the case of any residential mortgage loan that is, or upon consummation will be, subject to protection under an anti-deficiency law, the creditor or mortgage originator shall provide a written notice to the consumer describing the protection provided by the anti-deficiency law and the significance for the consumer of the loss of such protection before such loan is consummated.

(3) Notice before refinancing that would cause loss of protection. In the case of any residential mortgage loan that is subject to protection under an anti-deficiency law, if a creditor or mortgage originator provides an application to a consumer, or receives an application from a consumer, for any type of refinancing for such loan that would cause the loan to lose the protection of such anti-deficiency law, the creditor or mortgage originator shall provide a written notice to the consumer describing the protection provided by the anti-deficiency law and the significance for the consumer of the loss of such protection before any agreement for any such refinancing is consummated.

(h) Policy regarding acceptance of partial payment. In the case of any residential mortgage loan, a creditor shall disclose prior to settlement or, in the case of a person becoming a creditor with respect to an existing residential mortgage loan, at the time such person becomes a creditor—

(1) the creditor’s policy regarding the acceptance of partial payments; and

(2) if partial payments are accepted, how such payments will be applied to such mortgage and if such payments will be placed in escrow.

(i) Timeshare plans. This section and any regulations promulgated under this section do not apply to an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.

12 C.F.R. §1026.43, Minimum standards for transactions secured by a dwelling.

(a) Scope. This section applies to any consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), including any real property attached to a dwelling, other than:

(1) A home equity line of credit subject to § 1026.40;

(2) A mortgage transaction secured by a consumer's interest in a timeshare plan, as defined in 11 U.S.C. 101(53(D)); or

(3) For purposes of paragraphs (c) through (f) of this section:

(i) A reverse mortgage subject to § 1026.33;

(ii) A temporary or "bridge" loan with a term of 12 months or less, such as a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months or a loan to finance the initial construction of a dwelling;

(iii) A construction phase of 12 months or less of a construction-to-permanent loan;

(iv) An extension of credit made pursuant to a program administered by a Housing Finance Agency, as defined under 24 CFR 266.5;

(v) An extension of credit made by:

(A) A creditor designated as a Community Development Financial Institution, as defined under 12 CFR 1805.104(h);

(B) A creditor designated as a Downpayment Assistance through Secondary Financing Provider, pursuant to 24 CFR 200.194(a), operating in accordance with regulations prescribed by the U.S. Department of Housing and Urban Development applicable to such persons;

(C) A creditor designated as a Community Housing Development Organization provided that the creditor has entered into a commitment with a participating jurisdiction and is undertaking a project under the HOME program, pursuant to the provisions of 24 CFR 92.300(a), and as the terms community housing development organization, commitment, participating jurisdiction, and project are defined under 24 CFR 92.2; or

(D) A creditor with a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3); 26 CFR 1.501(c)(3)-1), provided that:

(1) During the calendar year preceding receipt of the consumer's application, the creditor extended credit secured by a dwelling no more than 200 times, except as provided in paragraph (a)(3)(vii) of this section;

(2) During the calendar year preceding receipt of the consumer's application, the creditor extended credit secured by a dwelling only to consumers with income



that did not exceed the low- and moderate-income household limit as established pursuant to section 102 of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(20)) and amended from time to time by the U.S. Department of Housing and Urban Development, pursuant to 24 CFR 570.3;

(3) The extension of credit is to a consumer with income that does not exceed the household limit specified in paragraph (a)(3)(v)(D)(2) of this section; and

(4) The creditor determines, in accordance with written procedures, that the consumer has a reasonable ability to repay the extension of credit.

(vi) An extension of credit made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211; 5219);

(vii) Consumer credit transactions that meet the following criteria are not considered in determining whether a creditor exceeds the credit extension limitation in paragraph (a)(3)(v)(D)(1) of this section:

(A) The transaction is secured by a subordinate lien;

(B) The transaction is for the purpose of:

(1) Downpayment, closing costs, or other similar home buyer assistance, such as principal or interest subsidies;

(2) Property rehabilitation assistance;

(3) Energy efficiency assistance; or

(4) Foreclosure avoidance or prevention;

(C) The credit contract does not require payment of interest;

(D) The credit contract provides that repayment of the amount of the credit extended is:

(1) Forgiven either incrementally or in whole, at a date certain, and subject only to specified ownership and occupancy conditions, such as a requirement that the consumer maintain the property as the consumer's principal dwelling for five years;

(2) Deferred for a minimum of 20 years after consummation of the transaction;

(3) Deferred until sale of the property securing the transaction; or

(4) Deferred until the property securing the transaction is no longer the principal dwelling of the consumer;

(E) The total of costs payable by the consumer in connection with the transaction at consummation is less than 1 percent of the amount of credit extended and includes no charges other than:

(1) Fees for recordation of security instruments, deeds, and similar documents;

(2) A bona fide and reasonable application fee; and

(3) A bona fide and reasonable fee for housing counseling services; and

(F) The creditor complies with all other applicable requirements of this part in connection with the transaction.

(b) Definitions. For purposes of this section:

(1) Covered transaction means a consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), including any real property attached to a dwelling, other than a transaction exempt from coverage under paragraph (a) of this section.

(2) Fully amortizing payment means a periodic payment of principal and interest that will fully repay the loan amount over the loan term.

(3) Fully indexed rate means the interest rate calculated using the index or formula that will apply after recast, as determined at the time of consummation, and the maximum margin that can apply at any time during the loan term.

(4) Higher-priced covered transaction means a covered transaction 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 a first-lien covered transaction, other than a qualified mortgage under paragraph (e)(5), (e)(6), or (f) of this section; by 3.5 or more percentage points for a first-lien covered transaction that is a qualified mortgage under paragraph (e)(5), (e)(6), or (f) of this section; or by 3.5 or more percentage points for a subordinate-lien covered transaction.

(5) Loan amount means the principal amount the consumer will borrow as reflected in the promissory note or loan contract.

(6) Loan term means the period of time to repay the obligation in full.

(7) Maximum loan amount means the loan amount plus any increase in principal balance that results from negative amortization, as defined in § 1026.18(s)(7)(v), based on the terms of the legal obligation assuming:

(i) The consumer makes only the minimum periodic payments for the maximum possible time, until the consumer must begin making fully amortizing payments; and

(ii) The maximum interest rate is reached at the earliest possible time.

(8) Mortgage-related obligations mean property taxes; premiums and similar charges identified in § 1026.4(b)(5), (7), (8), and (10) that are required by the creditor; fees and special assessments imposed by a condominium, cooperative, or homeowners association; ground rent; and leasehold payments.

(9) Points and fees has the same meaning as in § 1026.32(b)(1).

(10) Prepayment penalty has the same meaning as in § 1026.32(b)(6).

(11) Recast means:

(i) For an adjustable-rate mortgage, as defined in § 1026.18(s)(7)(i), the expiration of the period during which payments based on the introductory fixed interest rate are permitted under the terms of the legal obligation;

(ii) For an interest-only loan, as defined in § 1026.18(s)(7)(iv), the expiration of the period during which interest-only payments are permitted under the terms of the legal obligation; and

(iii) For a negative amortization loan, as defined in § 1026.18(s)(7)(v), the expiration of the period during which negatively amortizing payments are permitted under the terms of the legal obligation.

(12) Simultaneous loan means another covered transaction or home equity line of credit subject to § 1026.40 that will be secured by the same dwelling and made to the same consumer at or before consummation of the covered transaction or, if to be made after consummation, will cover closing costs of the first covered transaction.

(13) Third-party record means:

(i) A document or other record prepared or reviewed by an appropriate person other than the consumer, the creditor, or the mortgage broker, as defined in § 1026.36(a)(2), or an agent of the creditor or mortgage broker;

(ii) A copy of a tax return filed with the Internal Revenue Service or a State taxing authority;

(iii) A record the creditor maintains for an account of the consumer held by the creditor; or

(iv) If the consumer is an employee of the creditor or the mortgage broker, a document or other record maintained by the creditor or mortgage broker regarding the consumer's employment status or employment income.

(c) Repayment ability — (1) General requirement. A creditor shall not make a loan that is a covered transaction unless the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms.

(2) Basis for determination. Except as provided otherwise in paragraphs (d), (e), and (f) of this section, in making the repayment ability determination required under paragraph (c)(1) of this section, a creditor must consider the following:

(i) The consumer's current or reasonably expected income or assets, other than the value of the dwelling, including any real property attached to the dwelling, that secures the loan;

(ii) If the creditor relies on income from the consumer's employment in determining repayment ability, the consumer's current employment status;

(iii) The consumer's monthly payment on the covered transaction, calculated in accordance with paragraph (c)(5) of this section;

(iv) The consumer's monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made, calculated in accordance with paragraph (c)(6) of this section;

(v) The consumer's monthly payment for mortgage-related obligations;

(vi) The consumer's current debt obligations, alimony, and child support;

(vii) The consumer's monthly debt-to-income ratio or residual income in accordance with paragraph (c)(7) of this section; and

(viii) The consumer's credit history.

(3) Verification using third-party records. A creditor must verify the information that the

creditor relies on in determining a consumer's repayment ability under § 1026.43(c)(2) using reasonably reliable third-party records, except that:

- (i) For purposes of paragraph (c)(2)(i) of this section, a creditor must verify a consumer's income or assets that the creditor relies on in accordance with § 1026.43(c)(4);
- (ii) For purposes of paragraph (c)(2)(ii) of this section, a creditor may verify a consumer's employment status orally if the creditor prepares a record of the information obtained orally; and
- (iii) For purposes of paragraph (c)(2)(vi) of this section, if a creditor relies on a consumer's credit report to verify a consumer's current debt obligations and a consumer's application states a current debt obligation not shown in the consumer's credit report, the creditor need not independently verify such an obligation.

(4) Verification of income or assets. A creditor must verify the amounts of income or assets that the creditor relies on under § 1026.43(c)(2)(i) to determine a consumer's ability to repay a covered transaction using third-party records that provide reasonably reliable evidence of the consumer's income or assets. A creditor may verify the consumer's income using a tax-return transcript issued by the Internal Revenue Service (IRS). Examples of other records the creditor may use to verify the consumer's income or assets include:

- (i) Copies of tax returns the consumer filed with the IRS or a State taxing authority;
- (ii) IRS Form W-2s or similar IRS forms used for reporting wages or tax withholding;
- (iii) Payroll statements, including military Leave and Earnings Statements;
- (iv) Financial institution records;
- (v) Records from the consumer's employer or a third party that obtained information from the employer;
- (vi) Records from a Federal, State, or local government agency stating the consumer's income from benefits or entitlements;
- (vii) Receipts from the consumer's use of check cashing services; and
- (viii) Receipts from the consumer's use of a funds transfer service.

(5) Payment calculation —(i) General rule. Except as provided in paragraph (c)(5)(ii) of this section, a creditor must make the consideration required under paragraph (c)(2)(iii) of this section using:

- (A) The fully indexed rate or any introductory interest rate, whichever is greater; and
  - (B) Monthly, fully amortizing payments that are substantially equal.
- (ii) Special rules for loans with a balloon payment, interest-only loans, and negative amortization loans. A creditor must make the consideration required under paragraph (c)(2)(iii) of this section for:
- (A) A loan with a balloon payment, as defined in § 1026.18(s)(5)(i), using:
    - (1) The maximum payment scheduled during the first five years after the date on which the first regular periodic payment will be due for a loan that is not a higher-priced covered transaction; or
    - (2) The maximum payment in the payment schedule, including any balloon payment, for a higher-priced covered transaction;
  - (B) An interest-only loan, as defined in § 1026.18(s)(7)(iv), using:
    - (1) The fully indexed rate or any introductory interest rate, whichever is greater; and
    - (2) Substantially equal, monthly payments of principal and interest that will repay the loan amount over the term of the loan remaining as of the date the loan is recast.
  - (C) A negative amortization loan, as defined in § 1026.18(s)(7)(v), using:
    - (1) The fully indexed rate or any introductory interest rate, whichever is greater; and
    - (2) Substantially equal, monthly payments of principal and interest that will repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast.
- (6) Payment calculation for simultaneous loans. For purposes of making the evaluation required under paragraph (c)(2)(iv) of this section, a creditor must consider, taking into account any mortgage-related obligations, a consumer's payment on a simultaneous loan that is:
- (i) A covered transaction, by following paragraph (c)(5) of this section; or

(ii) A home equity line of credit subject to § 1026.40, by using the periodic payment required under the terms of the plan and the amount of credit to be drawn at or before consummation of the covered transaction.

(7) Monthly debt-to-income ratio or residual income —(i) Definitions. For purposes of this paragraph (c)(7), the following definitions apply:

(A) Total monthly debt obligations. The term total monthly debt obligations means the sum of: the payment on the covered transaction, as required to be calculated by paragraphs (c)(2)(iii) and (c)(5) of this section; simultaneous loans, as required by paragraphs (c)(2)(iv) and (c)(6) of this section; mortgage-related obligations, as required by paragraph (c)(2)(v) of this section; and current debt obligations, alimony, and child support, as required by paragraph (c)(2)(vi) of this section.

(B) Total monthly income. The term total monthly income means the sum of the consumer's current or reasonably expected income, including any income from assets, as required by paragraphs (c)(2)(i) and (c)(4) of this section.

(ii) Calculations— (A) Monthly debt-to-income ratio. If a creditor considers the consumer's monthly debt-to-income ratio under paragraph (c)(2)(vii) of this section, the creditor must consider the ratio of the consumer's total monthly debt obligations to the consumer's total monthly income.

(B) Monthly residual income. If a creditor considers the consumer's monthly residual income under paragraph (c)(2)(vii) of this section, the creditor must consider the consumer's remaining income after subtracting the consumer's total monthly debt obligations from the consumer's total monthly income.

(d) Refinancing of non-standard mortgages —(1) Definitions. For purposes of this paragraph (d), the following definitions apply:

(i) Non-standard mortgage. The term non-standard mortgage means a covered transaction that is:

(A) An adjustable-rate mortgage, as defined in § 1026.18(s)(7)(i), with an introductory fixed interest rate for a period of one year or longer;

(B) An interest-only loan, as defined in § 1026.18(s)(7)(iv); or

(C) A negative amortization loan, as defined in § 1026.18(s)(7)(v).

(ii) Standard mortgage. The term standard mortgage means a covered transaction:

(A) That provides for regular periodic payments that do not:

- (1) Cause the principal balance to increase;
- (2) Allow the consumer to defer repayment of principal; or
- (3) Result in a balloon payment, as defined in § 1026.18(s)(5)(i);

(B) For which the total points and fees payable in connection with the transaction do not exceed the amounts specified in paragraph (e)(3) of this section;

(C) For which the term does not exceed 40 years;

(D) For which the interest rate is fixed for at least the first five years after consummation; and

(E) For which the proceeds from the loan are used solely for the following purposes:

- (1) To pay off the outstanding principal balance on the non-standard mortgage; and
- (2) To pay closing or settlement charges required to be disclosed under the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq.

(iii) Refinancing. The term refinancing has the same meaning as in § 1026.20(a).

(2) Scope. The provisions of this paragraph (d) apply to the refinancing of a non-standard mortgage into a standard mortgage when the following conditions are met:

- (i) The creditor for the standard mortgage is the current holder of the existing non-standard mortgage or the servicer acting on behalf of the current holder;
- (ii) The monthly payment for the standard mortgage is materially lower than the monthly payment for the non-standard mortgage, as calculated under paragraph (d)(5) of this section.
- (iii) The creditor receives the consumer's written application for the standard mortgage no later than two months after the non-standard mortgage has recast.
- (iv) The consumer has made no more than one payment more than 30 days late on the non-standard mortgage during the 12 months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage.



(v) The consumer has made no payments more than 30 days late during the six months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage; and

(vi) If the non-standard mortgage was consummated on or after January 10, 2014, the non-standard mortgage was made in accordance with paragraph (c) or (e) of this section, as applicable.

(3) Exemption from repayment ability requirements. A creditor is not required to comply with the requirements of paragraph (c) of this section if:

(i) The conditions in paragraph (d)(2) of this section are met; and

(ii) The creditor has considered whether the standard mortgage likely will prevent a default by the consumer on the non-standard mortgage once the loan is recast.

(4) Offer of rate discounts and other favorable terms. A creditor making a covered transaction under this paragraph (d) may offer to the consumer rate discounts and terms that are the same as, or better than, the rate discounts and terms that the creditor offers to new consumers, consistent with the creditor's documented underwriting practices and to the extent not prohibited by applicable State or Federal law.

(5) Payment calculations. For purposes of determining whether the consumer's monthly payment for a standard mortgage will be materially lower than the monthly payment for the non-standard mortgage, the following provisions shall be used:

(i) Non-standard mortgage. For purposes of the comparison conducted pursuant to paragraph (d)(2)(ii) of this section, the creditor must calculate the monthly payment for a non-standard mortgage based on substantially equal, monthly, fully amortizing payments of principal and interest using:

(A) The fully indexed rate as of a reasonable period of time before or after the date on which the creditor receives the consumer's written application for the standard mortgage;

(B) The term of the loan remaining as of the date on which the recast occurs, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; and

(C) A remaining loan amount that is:

(1) For an adjustable-rate mortgage under paragraph (d)(1)(i)(A) of this section, the outstanding principal balance as of the date of the recast, assuming all

scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date;

(2) For an interest-only loan under paragraph (d)(1)(i)(B) of this section, the outstanding principal balance as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; or

(3) For a negative amortization loan under paragraph (d)(1)(i)(C) of this section, the maximum loan amount, determined after adjusting for the outstanding principal balance.

(ii) Standard mortgage. For purposes of the comparison conducted pursuant to paragraph (d)(2)(ii) of this section, the monthly payment for a standard mortgage must be based on substantially equal, monthly, fully amortizing payments based on the maximum interest rate that may apply during the first five years after consummation.

(e) Qualified mortgages. (1) Safe harbor and presumption of compliance. (i) Safe harbor for loans that are not higher-priced covered transactions. A creditor or assignee of a qualified mortgage, as defined in paragraphs (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, that is not a higher-priced covered transaction, as defined in paragraph (b)(4) of this section, complies with the repayment ability requirements of paragraph (c) of this section.

(ii) Presumption of compliance for higher-priced covered transactions. (A) A creditor or assignee of a qualified mortgage, as defined in paragraph (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, that is a higher-priced covered transaction, as defined in paragraph (b)(4) of this section, is presumed to comply with the repayment ability requirements of paragraph (c) of this section.

(B) To rebut the presumption of compliance described in paragraph (e)(1)(ii)(A) of this section, it must be proven that, despite meeting the prerequisites of paragraph (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, the creditor did not make a reasonable and good faith determination of the consumer's repayment ability at the time of consummation, by showing that the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation.

(2) Qualified mortgage defined—general. Except as provided in paragraph (e)(4), (e)(5), (e)(6), or (f) of this section, a qualified mortgage is a covered transaction:

(i) That provides for regular periodic payments that are substantially equal, except for the effect that any interest rate change after consummation has on the payment in the case of an adjustable-rate or step-rate mortgage, that do not:

(A) Result in an increase of the principal balance;

(B) Allow the consumer to defer repayment of principal, except as provided in paragraph (f) of this section; or

(C) Result in a balloon payment, as defined in § 1026.18(s)(5)(i), except as provided in paragraph (f) of this section;

(ii) For which the loan term does not exceed 30 years;

(iii) For which the total points and fees payable in connection with the loan do not exceed the amounts specified in paragraph (e)(3) of this section;

(iv) For which the creditor underwrites the loan, taking into account the monthly payment for mortgage-related obligations, using:

(A) The maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due; and

(B) Periodic payments of principal and interest that will repay either:

(1) The outstanding principal balance over the remaining term of the loan as of the date the interest rate adjusts to the maximum interest rate set forth in paragraph (e)(2)(iv)(A) of this section, assuming the consumer will have made all required payments as due prior to that date; or

(2) The loan amount over the loan term;

(v) For which the creditor considers and verifies at or before consummation the following:

(A) The consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, in accordance with appendix Q and paragraphs (c)(2)(i) and (c)(4) of this section; and

- (B) The consumer's current debt obligations, alimony, and child support in accordance with appendix Q and paragraphs (c)(2)(vi) and (c)(3) of this section; and
- (vi) For which the ratio of the consumer's total monthly debt to total monthly income at the time of consummation does not exceed 43 percent. For purposes of this paragraph (e)(2)(vi), the ratio of the consumer's total monthly debt to total monthly income is determined:
- (A) Except as provided in paragraph (e)(2)(vi)(B) of this section, in accordance with the standards in appendix Q;
- (B) Using the consumer's monthly payment on:
- (1) The covered transaction, including the monthly payment for mortgage-related obligations, in accordance with paragraph (e)(2)(iv) of this section; and
- (2) Any simultaneous loan that the creditor knows or has reason to know will be made, in accordance with paragraphs (c)(2)(iv) and (c)(6) of this section.
- (3) Limits on points and fees for qualified mortgages. (i) Except as provided in paragraph (e)(3)(iii) of this section, a covered transaction is not a qualified mortgage unless the transaction's total points and fees, as defined in § 1026.32(b)(1), do not exceed:
- (A) For a loan amount greater than or equal to \$100,000 (indexed for inflation): 3 percent of the total loan amount;
- (B) For a loan amount greater than or equal to \$60,000 (indexed for inflation) but less than \$100,000 (indexed for inflation): \$3,000 (indexed for inflation);
- (C) For a loan amount greater than or equal to \$20,000 (indexed for inflation) but less than \$60,000 (indexed for inflation): 5 percent of the total loan amount;
- (D) For a loan amount greater than or equal to \$12,500 (indexed for inflation) but less than \$20,000 (indexed for inflation): \$1,000 (indexed for inflation);
- (E) For a loan amount less than \$12,500 (indexed for inflation): 8 percent of the total loan amount.
- (ii) The dollar amounts, including the loan amounts, in paragraph (e)(3)(i) of this section shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index for All Urban Consumers (CPI-U) that was reported on the preceding June 1. See the official commentary to this paragraph (e)(3)(ii) for the current dollar amounts.

(iii) For covered transactions consummated on or before January 10, 2021, if the creditor or assignee determines after consummation that the transaction's total points and fees exceed the applicable limit under paragraph (e)(3)(i) of this section, the loan is not precluded from being a qualified mortgage, provided:

(A) The loan otherwise meets the requirements of paragraphs (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, as applicable;

(B) The creditor or assignee pays to the consumer the amount described in paragraph (e)(3)(iv) of this section within 210 days after consummation and prior to the occurrence of any of the following events:

(1) The institution of any action by the consumer in connection with the loan;

(2) The receipt by the creditor, assignee, or servicer of written notice from the consumer that the transaction's total points and fees exceed the applicable limit under paragraph (e)(3)(i) of this section; or

(3) The consumer becoming 60 days past due on the legal obligation; and

(C) The creditor or assignee, as applicable, maintains and follows policies and procedures for post-consummation review of points and fees and for making payments to consumers in accordance with paragraphs (e)(3)(iii)(B) and (e)(3)(iv) of this section.

(iv) For purposes of paragraph (e)(3)(iii) of this section, the creditor or assignee must pay to the consumer an amount that is not less than the sum of the following:

(A) The dollar amount by which the transaction's total points and fees exceeds the applicable limit under paragraph (e)(3)(i) of this section; and

(B) Interest on the dollar amount described in paragraph (e)(3)(iv)(A) of this section, calculated using the contract interest rate applicable during the period from consummation until the payment described in this paragraph (e)(3)(iv) is made to the consumer.

(4) Qualified mortgage defined—special rules —(i) General. Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction that satisfies:

(A) The requirements of paragraphs (e)(2)(i) through (iii) of this section; and

(B) One or more of the criteria in paragraph (e)(4)(ii) of this section.

(ii) Eligible loans. A qualified mortgage under this paragraph (e)(4) must be one of the following at consummation:

(A) A loan that is eligible, except with regard to matters wholly unrelated to ability to repay:

(1) To be purchased or guaranteed by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367(a) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(a)); or

(2) To be purchased or guaranteed by any limited-life regulatory entity succeeding the charter of either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i));

(B) A loan that is eligible to be insured, except with regard to matters wholly unrelated to ability to repay, by the U.S. Department of Housing and Urban Development under the National Housing Act (12 U.S.C. 1707 et seq.);

(C) A loan that is eligible to be guaranteed, except with regard to matters wholly unrelated to ability to repay, by the U.S. Department of Veterans Affairs;

(D) A loan that is eligible to be guaranteed, except with regard to matters wholly unrelated to ability to repay, by the U.S. Department of Agriculture pursuant to 42 U.S.C. 1472(h); or

(E) A loan that is eligible to be insured, except with regard to matters wholly unrelated to ability to repay, by the Rural Housing Service.

(iii) Sunset of special rules. (A) Each respective special rule described in paragraph (e)(4)(ii)(B), (C), (D), or (E) of this section shall expire on the effective date of a rule issued by each respective agency pursuant to its authority under TILA section 129C(b)(3)(ii) to define a qualified mortgage.

(B) Unless otherwise expired under paragraph (e)(4)(iii)(A) of this section, the special rules in this paragraph (e)(4) are available only for covered transactions consummated on or before January 10, 2021.

(5) Qualified mortgage defined—small creditor portfolio loans. (i) Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction:

(A) That satisfies the requirements of paragraph (e)(2) of this section other than the requirements of paragraph (e)(2)(vi) and without regard to the standards in appendix Q to this part;

(B) For which the creditor considers at or before consummation the consumer's monthly debt-to-income ratio or residual income and verifies the debt obligations and income used to determine that ratio in accordance with paragraph (c)(7) of this section, except that the calculation of the payment on the covered transaction for purposes of determining the consumer's total monthly debt obligations in paragraph (c)(7)(i)(A) shall be determined in accordance with paragraph (e)(2)(iv) of this section instead of paragraph (c)(5) of this section;

(C) That is not subject, at consummation, to a commitment to be acquired by another person, other than a person that satisfies the requirements of paragraph (e)(5)(i)(D) of this section; and

(D) For which the creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(B) and (C).

(ii) A qualified mortgage extended pursuant to paragraph (e)(5)(i) of this section immediately loses its status as a qualified mortgage under paragraph (e)(5)(i) if legal title to the qualified mortgage is sold, assigned, or otherwise transferred to another person except when:

(A) The qualified mortgage is sold, assigned, or otherwise transferred to another person three years or more after consummation of the qualified mortgage;

(B) The qualified mortgage is sold, assigned, or otherwise transferred to a creditor that satisfies the requirements of paragraph (e)(5)(i)(D) of this section;

(C) The qualified mortgage is sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee, an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency; or

(D) The qualified mortgage is sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor.

(6) Qualified mortgage defined—temporary balloon-payment qualified mortgage rules.

(i) Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction:

(A) That satisfies the requirements of paragraph (f) of this section other than the requirements of paragraph (f)(1)(vi); and

(B) For which the creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(B) and (C).

(ii) The provisions of this paragraph (e)(6) apply only to covered transactions for which the application was received before April 1, 2016.

(f) Balloon-payment qualified mortgages made by certain creditors— (1) Exemption.

Notwithstanding paragraph (e)(2) of this section, a qualified mortgage may provide for a balloon payment, provided:

(i) The loan satisfies the requirements for a qualified mortgage in paragraphs (e)(2)(i)(A), (e)(2)(ii), (e)(2)(iii), and (e)(2)(v) of this section, but without regard to the standards in appendix Q;

(ii) The creditor determines at or before consummation that the consumer can make all of the scheduled payments under the terms of the legal obligation, as described in paragraph (f)(1)(iv) of this section, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment, from the consumer's current or reasonably expected income or assets other than the dwelling that secures the loan;

(iii) The creditor considers at or before consummation the consumer's monthly debt-to-income ratio or residual income and verifies the debt obligations and income used to determine that ratio in accordance with paragraph (c)(7) of this section, except that the calculation of the payment on the covered transaction for purposes of determining the consumer's total monthly debt obligations in (c)(7)(i)(A) shall be determined in accordance with paragraph (f)(iv)(A) of this section, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment;



(iv) The legal obligation provides for:

(A) Scheduled payments that are substantially equal, calculated using an amortization period that does not exceed 30 years;

(B) An interest rate that does not increase over the term of the loan; and

(C) A loan term of five years or longer.

(v) The loan is not subject, at consummation, to a commitment to be acquired by another person, other than a person that satisfies the requirements of paragraph (f)(1)(vi) of this section; and

(vi) The creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(A), (B), and (C).

(2) Post-consummation transfer of balloon-payment qualified mortgage. A balloon-payment qualified mortgage, extended pursuant to paragraph (f)(1), immediately loses its status as a qualified mortgage under paragraph (f)(1) if legal title to the balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person except when:

(i) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person three years or more after consummation of the balloon-payment qualified mortgage;

(ii) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to a creditor that satisfies the requirements of paragraph (f)(1)(vi) of this section;

(iii) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver or bankruptcy trustee, an order of a State or Federal governmental agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency; or

(iv) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor.

(g) Prepayment penalties —(1) When permitted. A covered transaction must not include a prepayment penalty unless:

(i) The prepayment penalty is otherwise permitted by law; and

(ii) The transaction:

- (A) Has an annual percentage rate that cannot increase after consummation;
- (B) Is a qualified mortgage under paragraph (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section; and
- (C) Is not a higher-priced mortgage loan, as defined in § 1026.35(a).

(2) Limits on prepayment penalties. A prepayment penalty:

- (i) Must not apply after the three-year period following consummation; and
- (ii) Must not exceed the following percentages of the amount of the outstanding loan balance prepaid:
  - (A) 2 percent, if incurred during the first two years following consummation; and
  - (B) 1 percent, if incurred during the third year following consummation.

(3) Alternative offer required. A creditor must not offer a consumer a covered transaction with a prepayment penalty unless the creditor also offers the consumer an alternative covered transaction without a prepayment penalty and the alternative covered transaction:

- (i) Has an annual percentage rate that cannot increase after consummation and has the same type of interest rate as the covered transaction with a prepayment penalty; for purposes of this paragraph (g), the term “type of interest rate” refers to whether a transaction:
  - (A) Is a fixed-rate mortgage, as defined in § 1026.18(s)(7)(iii); or
  - (B) Is a step-rate mortgage, as defined in § 1026.18(s)(7)(ii);
- (ii) Has the same loan term as the loan term for the covered transaction with a prepayment penalty;
- (iii) Satisfies the periodic payment conditions under paragraph (e)(2)(i) of this section;
- (iv) Satisfies the points and fees conditions under paragraph (e)(2)(iii) of this section, based on the information known to the creditor at the time the transaction is offered; and
- (v) Is a transaction for which the creditor has a good faith belief that the consumer likely qualifies, based on the information known to the creditor at the time the creditor offers the covered transaction without a prepayment penalty.

(4) Offer through a mortgage broker. If the creditor offers a covered transaction with a prepayment penalty to the consumer through a mortgage broker, as defined in § 1026.36(a)(2), the creditor must:

(i) Present the mortgage broker an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section; and

(ii) Establish by agreement that the mortgage broker must present the consumer an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section, offered by:

(A) The creditor; or

(B) Another creditor, if the transaction offered by the other creditor has a lower interest rate or a lower total dollar amount of discount points and origination points or fees.

(5) Creditor that is a loan originator. If the creditor is a loan originator, as defined in § 1026.36(a)(1), and the creditor presents the consumer a covered transaction offered by a person to which the creditor would assign the covered transaction after consummation, the creditor must present the consumer an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section, offered by:

(i) The assignee; or

(ii) Another person, if the transaction offered by the other person has a lower interest rate or a lower total dollar amount of origination discount points and points or fees.

(6) Applicability. This paragraph (g) applies only if a covered transaction is consummated with a prepayment penalty and is not violated if:

(i) A covered transaction is consummated without a prepayment penalty; or

(ii) The creditor and consumer do not consummate a covered transaction.

(h) Evasion; open-end credit. In connection with credit secured by a consumer's dwelling that does not meet the definition of open-end credit in § 1026.2(a)(20), a creditor shall not structure the loan as an open-end plan to evade the requirements of this section.

## **Problem 14.2**

### 15 U.S.C. §1640(a), Civil Liability.

(a) Individual or class action for damages; amount of award; factors determining amount of award. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter [15 USCS §§ 1631 et seq.], including any requirement

under section 125 [15 USCS § 1635], subsection (f) or (g) of section 131 [15 USCS § 1641], or chapter 4 or 5 of this title [15 USCS §§ 1666 et seq. or 1667 et seq.] with respect to any person is liable to such person in an amount equal to the sum of—

- (1) any actual damage sustained by such person as a result of the failure;
- (2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title [15 USCS §§ 1667 et seq.], 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$200 nor greater than \$2,000, (iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of \$500 and a maximum of \$5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures;[, or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$400 or greater than \$4,000; or
- (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$1,000,000 or 1 per centum of the net worth of the creditor;
- (3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 125 or 128(e)(7) [15 USCS § 1635 or 1638(e)(7)], the costs of the action, together with a reasonable attorney's fee as determined by the court; and
- (4) in the case of a failure to comply with any requirement under section 129 [15 USCS § 1639], paragraph (1) or (2) of section 129B(c) [15 USCS § 1639b(c)], or section 129C(a) [15 USCS § 1639c(a)], an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

### **Problem 14.3**

#### 12 C.F.R. §1024.33, Mortgage servicing transfers.

(a) Servicing disclosure statement. Within three days (excluding legal public holidays, Saturdays, and Sundays) after a person applies for a reverse mortgage transaction, the lender, mortgage broker who anticipates using table funding, or dealer in a first-lien dealer loan shall provide to the person a servicing disclosure statement that states whether the servicing of the mortgage loan may be assigned, sold, or transferred to any other person at any time. Appendix MS-1 of this part contains a model form for the disclosures required under this paragraph (a). If a person who applies for a reverse mortgage transaction is denied credit within the three-day period, a servicing disclosure statement is not required to be delivered.

(b) Notices of transfer of loan servicing.

(1) Requirement for notice. Except as provided in paragraph (b)(2) of this section, each transferor servicer and transferee servicer of any mortgage loan shall provide to the borrower a notice of transfer for any assignment, sale, or transfer of the servicing of the mortgage loan. The notice must contain the information described in paragraph (b)(4) of this section. Appendix MS-2 of this part contains a model form for the disclosures required under this paragraph (b).

(2) Certain transfers excluded. (i) The following transfers are not assignments, sales, or transfers of mortgage loan servicing for purposes of this section if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due:

(A) A transfer between affiliates;

(B) A transfer that results from mergers or acquisitions of servicers or subservicers;

(C) A transfer that occurs between master servicers without changing the subservicer;

(ii) The Federal Housing Administration (FHA) is not required to provide to the borrower a notice of transfer where a mortgage insured under the National Housing Act is assigned to the FHA.

(3) Time of notice.

(i) In general. Except as provided in paragraphs (b)(3)(ii) and (iii) of this section, the transferor servicer shall provide the notice of transfer to the borrower not less than 15 days before the effective date of the transfer of the servicing of the mortgage loan. The transferee servicer shall provide the notice of transfer to the borrower not more than 15 days after the effective date of the transfer. The transferor and transferee servicers may

provide a single notice, in which case the notice shall be provided not less than 15 days before the effective date of the transfer of the servicing of the mortgage loan.

(ii) Extended time. The notice of transfer shall be provided to the borrower by the transferor servicer or the transferee servicer not more than 30 days after the effective date of the transfer of the servicing of the mortgage loan in any case in which the transfer of servicing is preceded by:

- (A) Termination of the contract for servicing the loan for cause;
- (B) Commencement of proceedings for bankruptcy of the servicer;
- (C) Commencement of proceedings by the FDIC for conservatorship or receivership of the servicer or an entity that owns or controls the servicer; or
- (D) Commencement of proceedings by the NCUA for appointment of a conservator or liquidating agent of the servicer or an entity that owns or controls the servicer.

(iii) Notice provided at settlement. Notices of transfer provided at settlement by the transferor servicer and transferee servicer, whether as separate notices or as a combined notice, satisfy the timing requirements of paragraph (b)(3) of this section.

(4) Contents of notice. The notices of transfer shall include the following information:

- (i) The effective date of the transfer of servicing;
- (ii) The name, address, and a collect call or toll-free telephone number for an employee or department of the transferee servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries;
- (iii) The name, address, and a collect call or toll-free telephone number for an employee or department of the transferor servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries;
- (iv) The date on which the transferor servicer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments. These dates shall either be the same or consecutive days;
- (v) Whether the transfer will affect the terms or the continued availability of mortgage life or disability insurance, or any other type of optional insurance, and any action the borrower must take to maintain such coverage; and
- (vi) A statement that the transfer of servicing does not affect any term or condition of the

mortgage loan other than terms directly related to the servicing of the loan.

(c) Borrower payments during transfer of servicing.

(1) Payments not considered late. During the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, if the transferor servicer (rather than the transferee servicer that should properly receive payment on the loan) receives payment on or before the applicable due date (including any grace period allowed under the mortgage loan instruments), a payment may not be treated as late for any purpose.

(2) Treatment of payments. Beginning on the effective date of transfer of the servicing of any mortgage loan, with respect to payments received incorrectly by the transferor servicer (rather than the transferee servicer that should properly receive the payment on the loan), the transferor servicer shall promptly either:

(i) Transfer the payment to the transferee servicer for application to a borrower's mortgage loan account, or

(ii) Return the payment to the person that made the payment and notify such person of the proper recipient of the payment.

(d) Preemption of State laws. A lender who makes a mortgage loan or a servicer shall be considered to have complied with the provisions of any State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of servicing of a loan if the lender or servicer complies with the requirements of this section. Any State law requiring notice to the borrower at the time of application or at the time of transfer of servicing of the loan is preempted, and there shall be no additional borrower disclosure requirements. Provisions of State law, such as those requiring additional notices to insurance companies or taxing authorities, are not preempted by section 6 of RESPA or this section, and this additional information may be added to a notice provided under this section, if permitted under State law.

Appendix MS-2 to Part 1024—Notice of Servicing Transfer.

The servicing of your mortgage loan is being transferred, effective [Date]. This means that after this date, a new servicer will be collecting your mortgage loan payments from you. Nothing else about your mortgage loan will change.

[Name of present servicer] is now collecting your payments. [Name of present servicer] will stop accepting payments received from you after [Date].

[Name of new servicer] will collect your payments going forward. Your new servicer will start accepting payments received from you on [Date].

Send all payments due on or after [Date] to [Name of new servicer] at this address: [New servicer address].

If you have any questions for either your present servicer, [Name of present servicer] or your new servicer [Name of new servicer], about your mortgage loan or this transfer, please contact them using the information below:

Current Servicer:

New Servicer:

[Name of present servicer]

[Name of new servicer]

[Individual or Department]

[Individual or Department]

[Telephone Number]

[Telephone Number]

[Address]

[Address]

[Use this paragraph if appropriate; otherwise omit.] Important note about insurance: If you have mortgage life or disability insurance or any other type of optional insurance, the transfer of servicing rights may affect your insurance in the following way:

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You should do the following to maintain coverage:

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Under Federal law, during the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer on or before its due date may not be treated by the new servicer as late, and a late fee may not be imposed on you.

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[NAME OF PRESENT SERVICER]

-----

Date

- **[and]** [or]



-----  
[NAME OF NEW SERVICER]  
-----

Date

12 C.F.R. §1024.41(a), Loss mitigation procedures.

(a) Enforcement and limitations. A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

**Problem 14.4**

12 C.F.R. §1024.41(b)(1), Loss mitigation procedures.

(b) Receipt of a loss mitigation application.

(1) Complete loss mitigation application. A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

Cal. Civ. Code §2923.6, Legislative findings and declarations; Loan modification or workout plan; Conditions for recording notice of default or sale, or conducting trustee's sale; Denial of application.

(a) The Legislature finds and declares that any duty that mortgage servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan pool, or to all investors under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a pooling and servicing agreement, and that a mortgage servicer acts in the best interests of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan for which both of the following apply:

- (1) The loan is in payment default, or payment default is reasonably foreseeable.
- (2) Anticipated recovery under the loan modification or workout plan exceeds the anticipated

recovery through foreclosure on a net present value basis.

(b) It is the intent of the Legislature that the mortgage servicer offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority.

(c) If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs:

(1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired.

(2) The borrower does not accept an offered first lien loan modification within 14 days of the offer.

(3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification.

(d) If the borrower's application for a first lien loan modification is denied, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error.

(e) If the borrower's application for a first lien loan modification is denied, the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or, if a notice of default has already been recorded, record a notice of sale or conduct a trustee's sale until the later of:

(1) Thirty-one days after the borrower is notified in writing of the denial.

(2) If the borrower appeals the denial pursuant to subdivision (d), the later of 15 days after the denial of the appeal or 14 days after a first lien loan modification is offered after appeal but declined by the borrower, or, if a first lien loan modification is offered and accepted after appeal, the date on which the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

(f) Following the denial of a first lien loan modification application, the mortgage servicer shall send a written notice to the borrower identifying the reasons for denial, including the following:

(1) The amount of time from the date of the denial letter in which the borrower may request an appeal of the denial of the first lien loan modification and instructions regarding how to

appeal the denial.

(2) If the denial was based on investor disallowance, the specific reasons for the investor disallowance.

(3) If the denial is the result of a net present value calculation, the monthly gross income and property value used to calculate the net present value and a statement that the borrower may obtain all of the inputs used in the net present value calculation upon written request to the mortgage servicer.

(4) If applicable, a finding that the borrower was previously offered a first lien loan modification and failed to successfully make payments under the terms of the modified loan.

(5) If applicable, a description of other foreclosure prevention alternatives for which the borrower may be eligible, and a list of the steps the borrower must take in order to be considered for those options. If the mortgage servicer has already approved the borrower for another foreclosure prevention alternative, information necessary to complete the foreclosure prevention alternative.

(g) In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer.

(h) For purposes of this section, an application shall be deemed complete when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.

(i) Subdivisions (c) to (h), inclusive, shall not apply to entities described in subdivision (b) of Section 2924.18.

(j) This section shall apply only to mortgages or deeds of trust described in Section 2924.15.

(k) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

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## Assignment 15: Credit Cards

### Problem 15.1

15 U.S.C. §1637(n), Open end consumer credit plans.

(n) Standards applicable to initial issuance of subprime or “fee harvester” cards

(1) In general

If the terms of a credit card account under an open end consumer credit plan require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened, no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account.

(2) Rule of construction

No provision of this subsection may be construed as authorizing any imposition or payment of advance fees otherwise prohibited by any provision of law.

12 C.F.R. §1026.51, Ability to pay.

(a) General rule—

(1)

(i) Consideration of ability to pay. A card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the consumer’s ability to make the required minimum periodic payments under the terms of the account based on the consumer’s income or assets and the consumer’s current obligations.

(ii) Reasonable policies and procedures. Card issuers must establish and maintain reasonable written policies and procedures to consider the consumer’s ability to make the required minimum payments under the terms of the account based on a consumer’s income or assets and a consumer’s current obligations. Reasonable policies and procedures include treating any income and assets to which the consumer has a reasonable expectation of access as the consumer’s income or assets, or limiting consideration of the consumer’s income or assets to the consumer’s independent income and assets. Reasonable policies and procedures also include consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer

will have after paying debt obligations. It would be unreasonable for a card issuer not to review any information about a consumer's income or assets and current obligations, or to issue a credit card to a consumer who does not have any income or assets.

(2) Minimum periodic payments.

(i) Reasonable method. For purposes of paragraph (a)(1) of this section, a card issuer must use a reasonable method for estimating the minimum periodic payments the consumer would be required to pay under the terms of the account.

(ii) Safe harbor. A card issuer complies with paragraph (a)(2)(i) of this section if it estimates required minimum periodic payments using the following method:

(A) The card issuer assumes utilization, from the first day of the billing cycle, of the full credit line that the issuer is considering offering to the consumer; and

(B) The card issuer uses a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account, provided that:

(1) If the applicable minimum payment formula includes interest charges, the card issuer estimates those charges using an interest rate that the issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases; and

(2) If the applicable minimum payment formula includes mandatory fees, the card issuer must assume that such fees have been charged to the account.

(b) Rules affecting young consumers—

(1) Applications from young consumers. A card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old, unless the consumer has submitted a written application and the card issuer has:

(i) Financial information indicating the consumer has an independent ability to make the required minimum periodic payments on the proposed extension of credit in connection with the account; or

(ii)

(A) A signed agreement of a cosigner, guarantor, or joint applicant who is at least 21 years old to be either secondarily liable for any debt on the account incurred by the consumer

before the consumer has attained the age of 21 or jointly liable with the consumer for any debt on the account; and

(B) Financial information indicating such cosigner, guarantor, or joint applicant has the ability to make the required minimum periodic payments on such debts, consistent with paragraph (a) of this section.

(2) Credit line increases for young consumers.

(i) If a credit card account has been opened pursuant to paragraph (b)(1)(i) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless:

(A) At the time of the contemplated increase, the consumer has an independent ability to make the required minimum periodic payments on the increased limit consistent with paragraph (b)(1)(i) of this section; or

(B) A cosigner, guarantor, or joint applicant who is at least 21 years old agrees in writing to assume liability for any debt incurred on the account, consistent with paragraph (b)(1)(ii) of this section.

(ii) If a credit card account has been opened pursuant to paragraph (b)(1)(ii) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless the cosigner, guarantor, or joint account holder who assumed liability at account opening agrees in writing to assume liability on the increase.

12 C.F.R. §1026.52, Limitations on fees.

(a) Limitations during first year after account opening.

(1) General rule. Except as provided in paragraph (a)(2) of this section, the total amount of fees a consumer is required to pay with respect to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after account opening must not exceed 25 percent of the credit limit in effect when the account is opened. For purposes of this paragraph, an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions.

(2) Fees not subject to limitations. Paragraph (a) of this section does not apply to:

(i) Late payment fees, over-the-limit fees, and returned-payment fees; or

(ii) Fees that the consumer is not required to pay with respect to the account.

(3) Rule of construction. Paragraph (a) of this section does not authorize the imposition or payment of fees or charges otherwise prohibited by law.

(b) Limitations on penalty fees. A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the dollar amount of the fee is consistent with paragraphs (b)(1) and (b)(2) of this section.

(1) General rule. Except as provided in paragraph (b)(2) of this section, a card issuer may impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan if the dollar amount of the fee is consistent with either paragraph (b)(1)(i) or (b)(1)(ii) of this section.

(i) Fees based on costs. A card issuer may impose a fee for violating the terms or other requirements of an account if the card issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation. A card issuer must reevaluate this determination at least once every twelve months. If as a result of the reevaluation the card issuer determines that a lower fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation, the card issuer must begin imposing the lower fee within 45 days after completing the reevaluation. If as a result of the reevaluation the card issuer determines that a higher fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation, the card issuer may begin imposing the higher fee after complying with the notice requirements in § 1026.9.

(ii) Safe harbors. A card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed, as applicable:

(A) \$27

(B) [Effective until Jan. 1, 2016.] \$38 if the card issuer previously imposed a fee pursuant to paragraph (b)(1)(ii)(A) of this section for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles; or

(B) [Effective Jan. 1, 2016.] \$37 if the card issuer previously imposed a fee pursuant to paragraph (b)(1)(ii)(A) of this section for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles; or

(C) Three percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the card issuer has not received the required payment for two or more consecutive billing cycles.



(D) The amounts in paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section will be adjusted annually by the Bureau to reflect changes in the Consumer Price Index.

(2) Prohibited fees.

(i) Fees that exceed dollar amount associated with violation.

(A) Generally. A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan that exceeds the dollar amount associated with the violation.

(B) No dollar amount associated with violation. A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan when there is no dollar amount associated with the violation. For purposes of paragraph (b)(2)(i) of this section, there is no dollar amount associated with the following violations:

(1) Transactions that the card issuer declines to authorize;

(2) Account inactivity; and

(3) The closure or termination of an account.

(ii) Multiple fees based on a single event or transaction. A card issuer must not impose more than one fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan based on a single event or transaction. A card issuer may, at its option, comply with this prohibition by imposing no more than one fee for violating the terms or other requirements of an account during a billing cycle.

12 C.F.R. §1026.56, Requirements for over-the-limit transactions.

(a) Definition. For purposes of this section, the term “over-the-limit transaction” means any extension of credit by a card issuer to complete a transaction that causes a consumer’s credit card account balance to exceed the credit limit.

(b) Opt-in requirement.

(1) General. A card issuer shall not assess a fee or charge on a consumer’s credit card account under an open-end (not home-secured) consumer credit plan for an over-the-limit transaction unless the card issuer:

(i) Provides the consumer with an oral, written or electronic notice, segregated from all other information, describing the consumer’s right to affirmatively consent, or opt in, to the card issuer’s payment of an over-the-limit transaction;

(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the card issuer's payment of over-the-limit transactions;

(iii) Obtains the consumer's affirmative consent, or opt-in, to the card issuer's payment of such transactions;

(iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically; and

(v) Provides the consumer notice in writing of the right to revoke that consent following the assessment of an over-the-limit fee or charge.

(2) Completion of over-the-limit transactions without consumer consent. Notwithstanding the absence of a consumer's affirmative consent under paragraph (b)(1)(iii) of this section, a card issuer may pay any over-the-limit transaction on a consumer's account provided that the card issuer does not impose any fee or charge on the account for paying that over-the-limit transaction.

(c) Method of election. A card issuer may permit a consumer to consent to the card issuer's payment of any over-the-limit transaction in writing, orally, or electronically, at the card issuer's option. The card issuer must also permit the consumer to revoke his or her consent using the same methods available to the consumer for providing consent.

(d) Timing and placement of notices.

(1) Initial notice.

(i) General. The notice required by paragraph (b)(1)(i) of this section shall be provided prior to the assessment of any over-the-limit fee or charge on a consumer's account.

(ii) Oral or electronic consent. If a consumer consents to the card issuer's payment of any over-the-limit transaction by oral or electronic means, the card issuer must provide the notice required by paragraph (b)(1)(i) of this section immediately prior to obtaining that consent.

(2) Confirmation of opt-in. The notice required by paragraph (b)(1)(iv) of this section may be provided no later than the first periodic statement sent after the consumer has consented to the card issuer's payment of over-the-limit transactions.

(3) Notice of right of revocation. The notice required by paragraph (b)(1)(v) of this section shall be provided on the front of any page of each periodic statement that reflects the assessment of an over-the-limit fee or charge on a consumer's account.

(e) Content.

(1) Initial notice. The notice required by paragraph (b)(1)(i) of this section shall include all applicable items in this paragraph (e)(1) and may not contain any information not specified in or otherwise permitted by this paragraph.

(i) Fees. The dollar amount of any fees or charges assessed by the card issuer on a consumer's account for an over-the-limit transaction;

(ii) APRs. Any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of an over-the-limit transaction; and

(iii) Disclosure of opt-in right. An explanation of the consumer's right to affirmatively consent to the card issuer's payment of over-the-limit transactions, including the method(s) by which the consumer may consent.

(2) Subsequent notice. The notice required by paragraph (b)(1)(v) of this section shall describe the consumer's right to revoke any consent provided under paragraph (b)(1)(iii) of this section, including the method(s) by which the consumer may revoke.

(3) Safe harbor. Use of Model Forms G-25(A) or G-25(B) of Appendix G to this part, or substantially similar notices, constitutes compliance with the notice content requirements of paragraph (e) of this section.

(f) Joint relationships. If two or more consumers are jointly liable on a credit card account under an open-end (not home-secured) consumer credit plan, the card issuer shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account. Similarly, the card issuer shall treat a revocation of consent by any of the joint consumers as revocation of consent for that account.

(g) Continuing right to opt in or revoke opt-in. A consumer may affirmatively consent to the card issuer's payment of over-the-limit transactions at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section. Similarly, the consumer may revoke the consent at any time in the manner described in the notice required by paragraph (b)(1)(v) of this section.

(h) Duration of opt-in. A consumer's affirmative consent to the card issuer's payment of over-the-limit transactions is effective until revoked by the consumer, or until the card issuer decides for any reason to cease paying over-the-limit transactions for the consumer.

(i) Time to comply with revocation request. A card issuer must comply with a consumer's revocation request as soon as reasonably practicable after the card issuer receives it.

(j) Prohibited practices. Notwithstanding a consumer's affirmative consent to a card issuer's payment of over-the-limit transactions, a card issuer is prohibited from engaging in the following practices:

(1) Fees or charges imposed per cycle.

(i) General rule. A card issuer may not impose more than one over-the-limit fee or charge on a consumer's credit card account per billing cycle, and, in any event, only if the credit limit was exceeded during the billing cycle. In addition, except as provided in paragraph (j)(1)(ii) of this section, a card issuer may not impose an over-the-limit fee or charge on the consumer's credit card account for more than three billing cycles for the same over-the-limit transaction where the consumer has not reduced the account balance below the credit limit by the payment due date for either of the last two billing cycles.

(ii) Exception. The prohibition in paragraph (j)(1)(i) of this section on imposing an over-the-limit fee or charge in more than three billing cycles for the same over-the-limit transaction(s) does not apply if another over-the-limit transaction occurs during either of the last two billing cycles.

(2) Failure to promptly replenish. A card issuer may not impose an over-the-limit fee or charge solely because of the card issuer's failure to promptly replenish the consumer's available credit following the crediting of the consumer's payment under § 1026.10.

(3) Conditioning. A card issuer may not condition the amount of a consumer's credit limit on the consumer affirmatively consenting to the card issuer's payment of over-the-limit transactions if the card issuer assesses a fee or charge for such service.

(4) Over-the-limit fees attributed to fees or interest. A card issuer may not impose an over-the-limit fee or charge for a billing cycle if a consumer exceeds a credit limit solely because of fees or interest charged by the card issuer to the consumer's account during that billing cycle. For purposes of this paragraph (j)(4), the relevant fees or interest charges are charges imposed as part of the plan under § 1026.6(b)(3).

## **Problem 15.2**

### 15 U.S.C. §1637(i), Open end consumer credit plans.

(i) Advance notice of rate increase and other changes required.

(1) Advance notice of increase in interest rate required. In the case of any credit card account under an open end consumer credit plan, a creditor shall provide a written notice of an increase in an annual percentage rate (except in the case of an increase described in paragraph (1), (2), or (3) of section 171(b) [15 USCS §1666i-1(b)]) not later than 45 days prior

to the effective date of the increase.

(2) Advance notice of other significant changes required. In the case of any credit card account under an open end consumer credit plan, a creditor shall provide a written notice of any significant change, as determined by rule of the Bureau, in the terms (including an increase in any fee or finance charge, other than as provided in paragraph (1)) of the cardholder agreement between the creditor and the obligor, not later than 45 days prior to the effective date of the change.

(3) Notice of right to cancel. Each notice required by paragraph (1) or (2) shall be made in a clear and conspicuous manner, and shall contain a brief statement of the right of the obligor to cancel the account pursuant to rules established by the Bureau before the effective date of the subject rate increase or other change.

(4) Rule of construction. Closure or cancellation of an account by the obligor shall not constitute a default under an existing cardholder agreement, and shall not trigger an obligation to immediately repay the obligation in full or through a method that is less beneficial to the obligor than one of the methods described in section 171(c)(2) [15 USCS §1666i-1(c)(2)], or the imposition of any other penalty or fee.

12 C.F.R. §1026.9, Subsequent disclosure requirements.

(a) Furnishing statement of billing rights.

(1) Annual statement. The creditor shall mail or deliver the billing rights statement required by § 1026.6(a)(5) and (b)(5)(iii) at least once per calendar year, at intervals of not less than 6 months nor more than 18 months, either to all consumers or to each consumer entitled to receive a periodic statement under § 1026.5(b)(2) for any one billing cycle.

(2) Alternative summary statement. As an alternative to paragraph (a)(1) of this section, the creditor may mail or deliver, on or with each periodic statement, a statement substantially similar to Model Form G-4 or Model Form G-4(A) in Appendix G to this part, as applicable. Creditors offering home-equity plans subject to the requirements of § 1026.40 may use either Model Form, at their option.

(b) Disclosures for supplemental credit access devices and additional features.

(1) If a creditor, within 30 days after mailing or delivering the account-opening disclosures under § 1026.6(a)(1) or (b)(3)(ii)(A), as applicable, adds a credit feature to the consumer's account or mails or delivers to the consumer a credit access device, including but not limited to checks that access a credit card account, for which the finance charge terms are the same as those previously disclosed, no additional disclosures are necessary. Except as provided in

paragraph (b)(3) of this section, after 30 days, if the creditor adds a credit feature or furnishes a credit access device (other than as a renewal, resupply, or the original issuance of a credit card) on the same finance charge terms, the creditor shall disclose, before the consumer uses the feature or device for the first time, that it is for use in obtaining credit under the terms previously disclosed.

(2) Except as provided in paragraph (b)(3) of this section, whenever a credit feature is added or a credit access device is mailed or delivered to the consumer, and the finance charge terms for the feature or device differ from disclosures previously given, the disclosures required by § 1026.6(a)(1) or (b)(3)(ii)(A), as applicable, that are applicable to the added feature or device shall be given before the consumer uses the feature or device for the first time.

(3) Checks that access a credit card account.

(i) Disclosures. For open-end plans not subject to the requirements of § 1026.40, if checks that can be used to access a credit card account are provided more than 30 days after account-opening disclosures under § 1026.6(b) are mailed or delivered, or are provided within 30 days of the account-opening disclosures and the finance charge terms for the checks differ from the finance charge terms previously disclosed, the creditor shall disclose on the front of the page containing the checks the following terms in the form of a table with the headings, content, and form substantially similar to Sample G-19 in Appendix G to this part:

(A) If a promotional rate, as that term is defined in § 1026.16(g)(2)(i) applies to the checks:

(1) The promotional rate and the time period during which the promotional rate will remain in effect;

(2) The type of rate that will apply (such as whether the purchase or cash advance rate applies) after the promotional rate expires, and the annual percentage rate that will apply after the promotional rate expires. For a variable-rate account, a creditor must disclose an annual percentage rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraph (b)(3)(ii) of this section; and

(3) The date, if any, by which the consumer must use the checks in order to qualify for the promotional rate. If the creditor will honor checks used after such date but will apply an annual percentage rate other than the promotional rate, the creditor must disclose this fact and the type of annual percentage rate that will apply if the consumer uses the checks after such date.

(B) If no promotional rate applies to the checks:

(1) The type of rate that will apply to the checks and the applicable annual percentage rate. For a variable-rate account, a creditor must disclose an annual percentage rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraph (b)(3)(ii) of this section.

(2) [Reserved]

(C) Any transaction fees applicable to the checks disclosed under § 1026.6(b)(2)(iv); and

(D) Whether or not a grace period is given within which any credit extended by use of the checks may be repaid without incurring a finance charge due to a periodic interest rate. When disclosing whether there is a grace period, the phrase “How to Avoid Paying Interest on Check Transactions” shall be used as the row heading when a grace period applies to credit extended by the use of the checks. When disclosing the fact that no grace period exists for credit extended by use of the checks, the phrase “Paying Interest” shall be used as the row heading.

(ii) Accuracy. The disclosures in paragraph (b)(3)(i) of this section must be accurate as of the time the disclosures are mailed or delivered. A variable annual percentage rate is accurate if it was in effect within 60 days of when the disclosures are mailed or delivered.

(iii) Variable rates. If any annual percentage rate required to be disclosed pursuant to paragraph (b)(3)(i) of this section is a variable rate, the card issuer shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the card issuer must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases shall not be included in the table.

(c) Change in terms.

(1) Rules affecting home-equity plans.

(i) Written notice required. For home-equity plans subject to the requirements of § 1026.40, whenever any term required to be disclosed under § 1026.6(a) is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer; the notice shall be given, however, before the effective date of the change.

(ii) Notice not required. For home-equity plans subject to the requirements of § 1026.40, a creditor is not required to provide notice under this section when the change involves a reduction of any component of a finance or other charge or when the change results from an agreement involving a court proceeding.

(iii) Notice to restrict credit. For home-equity plans subject to the requirements of § 1026.40, if the creditor prohibits additional extensions of credit or reduces the credit limit pursuant to § 1026.40(f)(3)(i) or (f)(3)(vi), the creditor shall mail or deliver written notice of the action to each consumer who will be affected. The notice must be provided not later than three business days after the action is taken and shall contain specific reasons for the action. If the creditor requires the consumer to request reinstatement of credit privileges, the notice also shall state that fact.

(2) Rules affecting open-end (not home-secured) plans.

(i) Changes where written advance notice is required.

(A) General. For plans other than home-equity plans subject to the requirements of § 1026.40, except as provided in paragraphs (c)(2)(i)(B), (c)(2)(iii) and (c)(2)(v) of this section, when a significant change in account terms as described in paragraph (c)(2)(ii) of this section is made, a creditor must provide a written notice of the change at least 45 days prior to the effective date of the change to each consumer who may be affected. The 45-day timing requirement does not apply if the consumer has agreed to a particular change as described in paragraph (c)(2)(i)(B) of this section; for such changes, notice must be given in accordance with the timing requirements of paragraph (c)(2)(i)(B) of this section. Increases in the rate applicable to a consumer's account due to delinquency, default or as a penalty described in paragraph (g) of this section that are not due to a change in the contractual terms of the consumer's account must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section.

(B) Changes agreed to by the consumer. A notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change if the consumer agrees to the particular change. This paragraph (c)(2)(i)(B) applies only when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum payment amount. The following are not considered agreements between the consumer and the creditor for purposes of this paragraph (c)(2)(i)(B): The consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under state law); the consumer's acceptance of a unilateral



term change that is not particular to that consumer, but rather is of general applicability to consumers with that type of account; and the consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features.

(ii) Significant changes in account terms. For purposes of this section, a "significant change in account terms" means a change to a term required to be disclosed under § 1026.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, a change to a term required to be disclosed under § 1026.6(b)(4), or the acquisition of a security interest.

(iii) Charges not covered by § 1026.6(b)(1) and (b)(2). Except as provided in paragraph (c)(2)(vi) of this section, if a creditor increases any component of a charge, or introduces a new charge, required to be disclosed under § 1026.6(b)(3) that is not a significant change in account terms as described in paragraph (c)(2)(ii) of this section, a creditor must either, at its option:

(A) Comply with the requirements of paragraph (c)(2)(i) of this section; or

(B) Provide notice of the amount of the charge before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure of the charge. The notice may be provided orally or in writing.

(iv) Disclosure requirements.

(A) Significant changes in account terms. If a creditor makes a significant change in account terms as described in paragraph (c)(2)(ii) of this section, the notice provided pursuant to paragraph (c)(2)(i) of this section must provide the following information:

(1) A summary of the changes made to terms required by § 1026.6(b)(1) and (b)(2) or § 1026.6(b)(4), a description of any increase in the required minimum periodic payment, and a description of any security interest being acquired by the creditor;

(2) A statement that changes are being made to the account;

(3) For accounts other than credit card accounts under an open-end (not home-secured) consumer credit plan subject to § 1026.9(c)(2)(iv)(B), a statement indicating the consumer has the right to opt out of these changes, if applicable, and a reference to additional information describing the opt-out right provided in the notice, if applicable;

(4) The date the changes will become effective;

(5) If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice;

(6) If the creditor is changing a rate on the account, other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate described in the notice will not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate;

(7) If the change in terms being disclosed is an increase in an annual percentage rate, the balances to which the increased rate will be applied. If applicable, a statement identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms; and

(8) If the change in terms being disclosed is an increase in an annual percentage rate for a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) Right to reject for credit card accounts under an open-end (not home-secured) consumer credit plan. In addition to the disclosures in paragraph (c)(2)(iv)(A) of this section, if a card issuer makes a significant change in account terms on a credit card account under an open-end (not home-secured) consumer credit plan, the creditor must generally provide the following information on the notice provided pursuant to paragraph (c)(2)(i) of this section. This information is not required to be provided in the case of an increase in the required minimum periodic payment, an increase in a fee as a result of a reevaluation of a determination made under § 1026.52(b)(1)(i) or an adjustment to the safe harbors in § 1026.52(b)(1)(ii) to reflect changes in the Consumer Price Index, a change in an annual percentage rate applicable to a consumer's account, an increase in a fee previously reduced consistent with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation if the amount of the increased fee does not exceed the amount of that fee prior to the reduction, or when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment:

(1) A statement that the consumer has the right to reject the change or changes prior to the effective date of the changes, unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for that payment;

(2) Instructions for rejecting the change or changes, and a toll-free telephone number that the consumer may use to notify the creditor of the rejection; and

(3) If applicable, a statement that if the consumer rejects the change or changes, the consumer's ability to use the account for further advances will be terminated or suspended.

(C) Changes resulting from failure to make minimum periodic payment within 60 days from due date for credit card accounts under an open-end (not home-secured) consumer credit plan. For a credit card account under an open-end (not home-secured) consumer credit plan:

(1) If the significant change required to be disclosed pursuant to paragraph (c)(2)(i) of this section is an increase in an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (c)(2)(i) of this section must state that the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(2) If the significant change required to be disclosed pursuant to paragraph (c)(2)(i) of this section is an increase in a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (c)(2)(i) of this section must also state the reason for the increase.

(D) Format requirements.

(1) Tabular format. The summary of changes described in paragraph (c)(2)(iv)(A)(1) of this section must be in a tabular format (except for a summary of any increase in the required minimum periodic payment, a summary of a term required to be disclosed under § 1026.6(b)(4) that is not required to be disclosed under § 1026.6(b)(1) and (b)(2), or a description of any security interest being acquired by the creditor), with headings and format substantially similar to any of the account-opening tables found in G-17 in Appendix G to this part. The table must disclose the changed term and information relevant to the change, if that relevant information is required by § 1026.6(b)(1) and (b)(2). The new terms shall be described in the same level of detail as required when disclosing the terms under § 1026.6(b)(2).

(2) Notice included with periodic statement. If a notice required by paragraph (c)(2)(i) of this section is included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(1) of this section must be disclosed on the front of any page of the statement. The summary of changes described in paragraph (c)(2)(iv)(A)(1) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(2)

through (c)(2)(iv)(A)(7) and, if applicable, paragraphs (c)(2)(iv)(A)(8), (c)(2)(iv)(B), and (c)(2)(iv)(C) of this section, and be substantially similar to the format shown in Sample G-20 or G-21 in Appendix G to this part.

(3) Notice provided separately from periodic statement. If a notice required by paragraph (c)(2)(i) of this section is not included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(1) of this section must, at the creditor's option, be disclosed on the front of the first page of the notice or segregated on a separate page from other information given with the notice. The summary of changes required to be in a table pursuant to paragraph (c)(2)(iv)(A)(1) of this section may be on more than one page, and may use both the front and reverse sides, so long as the table begins on the front of the first page of the notice and there is a reference on the first page indicating that the table continues on the following page. The summary of changes described in paragraph (c)(2)(iv)(A)(1) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(2) through (c)(2)(iv)(A)(7) and, if applicable, paragraphs (c)(2)(iv)(A)(8), (c)(2)(iv)(B), and (c)(2)(iv)(C), of this section, substantially similar to the format shown in Sample G-20 or G-21 in Appendix G to this part.

(v) Notice not required. For open-end plans (other than home equity plans subject to the requirements of § 1026.40) a creditor is not required to provide notice under this section:

(A) When the change involves charges for documentary evidence; a reduction of any component of a finance or other charge; suspension of future credit privileges (except as provided in paragraph (c)(2)(vi) of this section) or termination of an account or plan; when the change results from an agreement involving a court proceeding; when the change is an extension of the grace period; or if the change is applicable only to checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with paragraph (b)(3) of this section;

(B) When the change is an increase in an annual percentage rate or fee upon the expiration of a specified period of time, provided that:

(1) Prior to commencement of that period, the creditor disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate or fee that would apply after expiration of the period;

(2) The disclosure of the length of the period and the annual percentage rate or fee that would apply after expiration of the period are set forth in close proximity and in equal prominence to the first listing of the disclosure of the rate or fee that applies during the specified period of time; and

(3) The annual percentage rate or fee that applies after that period does not exceed the rate or fee disclosed pursuant to paragraph (c)(2)(v)(B)(1) of this paragraph or, if the rate disclosed pursuant to paragraph (c)(2)(v)(B)(1) of this section was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that was used to calculate the variable rate disclosed pursuant to paragraph (c)(2)(v)(B)(1);

(C) When the change is an increase in a variable annual percentage rate in accordance with a credit card or other account agreement that provides for changes in the rate according to operation of an index that is not under the control of the creditor and is available to the general public; or

(D) When the change is an increase in an annual percentage rate, a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), (b)(2)(viii), (b)(2)(ix), (b)(2)(ix) or (b)(2)(xii), or the required minimum periodic payment due to the completion of a workout or temporary hardship arrangement by the consumer or the consumer's failure to comply with the terms of such an arrangement, provided that:

(1) The annual percentage rate or fee or charge applicable to a category of transactions or the required minimum periodic payment following any such increase does not exceed the rate or fee or charge or required minimum periodic payment that applied to that category of transactions prior to commencement of the arrangement or, if the rate that applied to a category of transactions prior to the commencement of the workout or temporary hardship arrangement was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that applied to the category of transactions prior to commencement of the workout or temporary hardship arrangement; and

(2) The creditor has provided the consumer, prior to the commencement of such arrangement, with a clear and conspicuous disclosure of the terms of the arrangement (including any increases due to such completion or failure). This disclosure must generally be provided in writing. However, a creditor may provide the disclosure of the terms of the arrangement orally by telephone, provided that the creditor mails or delivers a written disclosure of the terms of the arrangement to the consumer as soon as reasonably practicable after the oral disclosure is provided.

(vi) Reduction of the credit limit. For open-end plans that are not subject to the requirements of § 1026.40, if a creditor decreases the credit limit on an account, advance notice of the decrease must be provided before an over-the-limit fee or a penalty rate can be imposed solely as a result of the consumer exceeding the newly decreased credit limit.

Notice shall be provided in writing or orally at least 45 days prior to imposing the over-the-limit fee or penalty rate and shall state that the credit limit on the account has been or will be decreased.

(d) Finance charge imposed at time of transaction.

(1) Any person, other than the card issuer, who imposes a finance charge at the time of honoring a consumer's credit card, shall disclose the amount of that finance charge prior to its imposition.

(2) The card issuer, other than the person honoring the consumer's credit card, shall have no responsibility for the disclosure required by paragraph (d)(1) of this section, and shall not consider any such charge for the purposes of §§ 1026.60, 1026.6 and 1026.7.

(e) Disclosures upon renewal of credit or charge card.

(1) Notice prior to renewal. A card issuer that imposes any annual or other periodic fee to renew a credit or charge card account of the type subject to § 1026.60, including any fee based on account activity or inactivity or any card issuer that has changed or amended any term of a cardholder's account required to be disclosed under § 1026.6(b)(1) and (b)(2) that has not previously been disclosed to the consumer, shall mail or deliver written notice of the renewal to the cardholder. If the card issuer imposes any annual or other periodic fee for renewal, the notice shall be provided at least 30 days or one billing cycle, whichever is less, before the mailing or the delivery of the periodic statement on which any renewal fee is initially charged to the account. If the card issuer has changed or amended any term required to be disclosed under § 1026.6(b)(1) and (b)(2) and such changed or amended term has not previously been disclosed to the consumer, the notice shall be provided at least 30 days prior to the scheduled renewal date of the consumer's credit or charge card. The notice shall contain the following information:

(i) The disclosures contained in § 1026.60(b)(1) through (b)(7) that would apply if the account were renewed; and

(ii) How and when the cardholder may terminate credit availability under the account to avoid paying the renewal fee, if applicable.

(2) Notification on periodic statements. The disclosures required by this paragraph may be made on or with a periodic statement. If any of the disclosures are provided on the back of a periodic statement, the card issuer shall include a reference to those disclosures on the front of the statement.

(f) Change in credit card account insurance provider.

(1) Notice prior to change. If a credit card issuer plans to change the provider of insurance for repayment of all or part of the outstanding balance of an open-end credit card account of the type subject to § 1026.60, the card issuer shall mail or deliver to the cardholder written notice of the change not less than 30 days before the change in provider occurs. The notice shall also include the following items, to the extent applicable:

- (i) Any increase in the rate that will result from the change;
- (ii) Any substantial decrease in coverage that will result from the change; and
- (iii) A statement that the cardholder may discontinue the insurance.

(2) Notice when change in provider occurs. If a change described in paragraph (f)(1) of this section occurs, the card issuer shall provide the cardholder with a written notice no later than 30 days after the change, including the following items, to the extent applicable:

- (i) The name and address of the new insurance provider;
- (ii) A copy of the new policy or group certificate containing the basic terms of the insurance, including the rate to be charged; and
- (iii) A statement that the cardholder may discontinue the insurance.

(3) Substantial decrease in coverage. For purposes of this paragraph, a substantial decrease in coverage is a decrease in a significant term of coverage that might reasonably be expected to affect the cardholder's decision to continue the insurance. Significant terms of coverage include, for example, the following:

- (i) Type of coverage provided;
- (ii) Age at which coverage terminates or becomes more restrictive;
- (iii) Maximum insurable loan balance, maximum periodic benefit payment, maximum number of payments, or other term affecting the dollar amount of coverage or benefits provided;
- (iv) Eligibility requirements and number and identity of persons covered;
- (v) Definition of a key term of coverage such as disability;
- (vi) Exclusions from or limitations on coverage; and
- (vii) Waiting periods and whether coverage is retroactive.

(4) Combined notification. The notices required by paragraph (f)(1) and (2) of this section may be combined provided the timing requirement of paragraph (f)(1) of this section is met. The notices may be provided on or with a periodic statement.

(g) Increase in rates due to delinquency or default or as a penalty.

(1) Increases subject to this section. For plans other than home-equity plans subject to the requirements of § 1026.40, except as provided in paragraph (g)(4) of this section, a creditor must provide a written notice to each consumer who may be affected when:

(i) A rate is increased due to the consumer's delinquency or default; or

(ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit.

(2) Timing of written notice. Whenever any notice is required to be given pursuant to paragraph (g)(1) of this section, the creditor shall provide written notice of the increase in rates at least 45 days prior to the effective date of the increase. The notice must be provided after the occurrence of the events described in paragraphs (g)(1)(i) and (g)(1)(ii) of this section that trigger the imposition of the rate increase.

(3)

(i) Disclosure requirements for rate increases.

(A) General. If a creditor is increasing the rate due to delinquency or default or as a penalty, the creditor must provide the following information on the notice sent pursuant to paragraph (g)(1) of this section:

(1) A statement that the delinquency or default rate or penalty rate, as applicable, has been triggered;

(2) The date on which the delinquency or default rate or penalty rate will apply;

(3) The circumstances under which the delinquency or default rate or penalty rate, as applicable, will cease to apply to the consumer's account, or that the delinquency or default rate or penalty rate will remain in effect for a potentially indefinite time period;

(4) A statement indicating to which balances the delinquency or default rate or penalty rate will be applied;



(5) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless a consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(6) For a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) Rate increases resulting from failure to make minimum periodic payment within 60 days from due date. For a credit card account under an open-end (not home-secured) consumer credit plan, if the rate increase required to be disclosed pursuant to paragraph (g)(1) of this section is an increase pursuant to § 1026.55(b)(4) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (g)(1) of this section must also state that the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(ii) Format requirements.

(A) If a notice required by paragraph (g)(1) of this section is included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement, above the notice described in paragraph (c)(2)(iv) of this section if that notice is provided on the same statement.

(B) If a notice required by paragraph (g)(1) of this section is not included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the increase in the rate to a penalty rate may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(4) of this section.

(4) Exception for decrease in credit limit. A creditor is not required to provide a notice pursuant to paragraph (g)(1) of this section prior to increasing the rate for obtaining an extension of credit that exceeds the credit limit, provided that:

(i) The creditor provides at least 45 days in advance of imposing the penalty rate a notice, in writing, that includes:

- (A) A statement that the credit limit on the account has been or will be decreased.
  - (B) A statement indicating the date on which the penalty rate will apply, if the outstanding balance exceeds the credit limit as of that date;
  - (C) A statement that the penalty rate will not be imposed on the date specified in paragraph (g)(4)(i)(B) of this section, if the outstanding balance does not exceed the credit limit as of that date;
  - (D) The circumstances under which the penalty rate, if applied, will cease to apply to the account, or that the penalty rate, if applied, will remain in effect for a potentially indefinite time period;
  - (E) A statement indicating to which balances the penalty rate may be applied; and
  - (F) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless the consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and
- (ii) The creditor does not increase the rate applicable to the consumer's account to the penalty rate if the outstanding balance does not exceed the credit limit on the date set forth in the notice and described in paragraph (g)(4)(i)(B) of this section.
- (iii)
- (A) If a notice provided pursuant to paragraph (g)(4)(i) of this section is included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement; or
  - (B) If a notice required by paragraph (g)(4)(i) of this section is not included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the reduction in credit limit may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(1) of this section.
- (h) Consumer rejection of certain significant changes in terms.
- (1) Right to reject. If paragraph (c)(2)(iv)(B) of this section requires disclosure of the consumer's right to reject a significant change to an account term, the consumer may reject that change by notifying the creditor of the rejection before the effective date of the change.

(2) Effect of rejection. If a creditor is notified of a rejection of a significant change to an account term as provided in paragraph (h)(1) of this section, the creditor must not:

(i) Apply the change to the account;

(ii) Impose a fee or charge or treat the account as in default solely as a result of the rejection; or

(iii) Require repayment of the balance on the account using a method that is less beneficial to the consumer than one of the methods listed in § 1026.55(c)(2).

(3) Exception. Section 1026.9(h) does not apply when the creditor has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment.

12 C.F.R. §1026.55, Limitations on increasing annual percentage rates, fees, and charges.

(a) General rule. Except as provided in paragraph (b) of this section, a card issuer must not increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account under an open-end (not home-secured) consumer credit plan.

(b) Exceptions. A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in this paragraph even if that increase would not be permitted under a different exception.

(1) Temporary rate, fee, or charge exception. A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) upon the expiration of a specified period of six months or longer, provided that:

(i) Prior to the commencement of that period, the card issuer disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate, fee, or charge that would apply after expiration of the period; and

(ii) Upon expiration of the specified period:

(A) The card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred prior to the period that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to the period;

(B) If the disclosures required by paragraph (b)(1)(i) of this section are provided pursuant to § 1026.9(c), the card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred within 14 days after provision of the notice that exceeds the

annual percentage rate, fee, or charge that applied to that category of transactions prior to provision of the notice; and

(C) The card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred during the period that exceeds the increased annual percentage rate, fee, or charge disclosed pursuant to paragraph (b)(1)(i) of this section.

(2) Variable rate exception. A card issuer may increase an annual percentage rate when:

(i) The annual percentage rate varies according to an index that is not under the card issuer's control and is available to the general public; and

(ii) The increase in the annual percentage rate is due to an increase in the index.

(3) Advance notice exception. A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 1026.9(b), (c), or (g), provided that:

(i) If a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 1026.9(b), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to provision of the notice;

(ii) If a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 1026.9(c) or (g), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to or within 14 days after provision of the notice; and

(iii) This exception does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) during the first year after the account is opened, while the account is closed, or while the card issuer does not permit the consumer to use the account for new transactions. For purposes of this paragraph, an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions.

(4) Delinquency exception. A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) due to the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment, provided that:

(i) The card issuer must disclose in a clear and conspicuous manner in the notice of the increase pursuant to § 1026.9(c) or (g):

(A) A statement of the reason for the increase; and

(B) That the increased annual percentage rate, fee, or charge will cease to apply if the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase; and

(ii) If the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase, the card issuer must reduce any annual percentage rate, fee, or charge increased pursuant to this exception to the annual percentage rate, fee, or charge that applied prior to the increase with respect to transactions that occurred prior to or within 14 days after provision of the § 1026.9(c) or (g) notice.

(5) Workout and temporary hardship arrangement exception. A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) due to the consumer's completion of a workout or temporary hardship arrangement or the consumer's failure to comply with the terms of such an arrangement, provided that:

(i) Prior to commencement of the arrangement (except as provided in § 1026.9(c)(2)(v)(D)), the card issuer has provided the consumer with a clear and conspicuous written disclosure of the terms of the arrangement (including any increases due to the completion or failure of the arrangement); and

(ii) Upon the completion or failure of the arrangement, the card issuer must not apply to any transactions that occurred prior to commencement of the arrangement an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to commencement of the arrangement.

(6) Servicemembers Civil Relief Act exception. If an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) has been decreased pursuant to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, a card issuer may increase that annual percentage rate, fee, or charge once 50 U.S.C. app. 527 or the similar statute or regulation no longer applies, provided that the card issuer must not apply to any transactions that occurred prior to the decrease an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to the decrease.

(c) Treatment of protected balances.

(1) Definition of protected balance. For purposes of this paragraph, “protected balance” means the amount owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) cannot be applied after the annual percentage rate, fee, or charge for that category of transactions has been increased pursuant to paragraph (b)(3) of this section.

(2) Repayment of protected balance. The card issuer must not require repayment of the protected balance using a method that is less beneficial to the consumer than one of the following methods:

- (i) The method of repayment for the account before the effective date of the increase;
- (ii) An amortization period of not less than five years, beginning no earlier than the effective date of the increase; or
- (iii) A required minimum periodic payment that includes a percentage of the balance that is equal to no more than twice the percentage required before the effective date of the increase.

(d) Continuing application. This section continues to apply to a balance on a credit card account under an open-end (not home-secured) consumer credit plan after:

- (1) The account is closed or acquired by another creditor; or
- (2) The balance is transferred from a credit card account under an open-end (not home-secured) consumer credit plan issued by a creditor to another credit account issued by the same creditor or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 1026.40).

(e) Promotional waivers or rebates of interest, fees, and other charges. If a card issuer promotes the waiver or rebate of finance charges due to a periodic interest rate or fees or charges required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) and applies the waiver or rebate to a credit card account under an open-end (not home-secured) consumer credit plan, any cessation of the waiver or rebate on that account constitutes an increase in an annual percentage rate, fee, or charge for purposes of this section.

### **Problem 15.3**

#### 15 U.S.C. §1666, Correction of billing errors.

(a) Written notice by obligor to creditor; time for and contents of notice; procedure upon receipt of notice by creditor. If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor's account in connection with an extension of consumer credit, receives at the address disclosed under section 127(b)(10) [15 USCS § 1637(b)(10)] a written notice (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 127(a)(7)) [15 USCS § 1637(a)(7)] from the obligor in which the obligor—

- (1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,
- (2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and
- (3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error,

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the time limits herein specified, agreed that the statement was correct—

(A) not later than thirty days after the receipt of the notice, send a written acknowledgment thereof to the obligor, unless the action required in subparagraph (B) is taken within such thirty-day period, and

(B) not later than two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the notice and prior to taking any action to collect the amount, or any part thereof, indicated by the obligor under paragraph (2) either—

(i) make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or

(ii) send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement

reflects goods not delivered to the obligor or his designee in accordance with the agreement made at the time of the transaction, a creditor may not construe such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise sent to the obligor and provides the obligor with a statement of such determination.

After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error.

(b) Billing error. For the purpose of this section, a “billing error” consists of any of the following:

- (1) A reflection on a statement of an extension of credit which was not made to the obligor or, if made, was not in the amount reflected on such statement.
- (2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.
- (3) A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.
- (4) The creditor’s failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.
- (5) A computation error or similar error of an accounting nature of the creditor on a statement.
- (6) Failure to transmit the statement required under section 127(b) of this Act [15 USCS § 1637(b)] to the last address of the obligor which has been disclosed to the creditor, unless that address was furnished less than twenty days before the end of the billing cycle for which the statement is required.
- (7) Any other error described in regulations of the Bureau.

(c) Action by creditor to collect amount or any part thereof regarded by obligor to be a billing error. For the purposes of this section, “action to collect the amount, or any part thereof, indicated by an obligor under paragraph (2)” does not include the sending of statements of account, which may include finance charges on amounts in dispute, to the obligor following written notice from the obligor as specified under subsection (a), if—

- (1) the obligor’s account is not restricted or closed because of the failure of the obligor to pay



the amount indicated under paragraph (2) of subsection (a), and

(2) the creditor indicates the payment of such amount is not required pending the creditor's compliance with this section.

Nothing in this section shall be construed to prohibit any action by a creditor to collect any amount which has not been indicated by the obligor to contain a billing error.

(d) Restricting or closing by creditor of account regarded by obligor as containing a billing error. Pursuant to regulations of the Bureau, a creditor operating an open end consumer credit plan may not, prior to the sending of the written explanation or clarification required under paragraph (B)(ii), restrict or close an account with respect to which the obligor has indicated pursuant to subsection (a) that he believes such account to contain a billing error solely because of the obligor's failure to pay the amount indicated to be in error. Nothing in this subsection shall be deemed to prohibit a creditor from applying against the credit limit on the obligor's account the amount indicated to be in error.

(e) Effect of noncompliance with requirements by creditor. Any creditor who fails to comply with the requirements of this section or section 162 [15 USCS § 1666a] forfeits any right to collect from the obligor the amount indicated by the obligor under paragraph (2) of subsection (a) of this section, and any finance charges thereon, except that the amount required to be forfeited under this subsection may not exceed \$50.

12 C.F.R. §1026.12, Special credit card provisions.

(a) Issuance of credit cards. Regardless of the purpose for which a credit card is to be used, including business, commercial, or agricultural use, no credit card shall be issued to any person except:

(1) In response to an oral or written request or application for the card; or

(2) As a renewal of, or substitute for, an accepted credit card.

(b) Liability of cardholder for unauthorized use.

(1)

(i) Definition of unauthorized use. For purposes of this section, the term "unauthorized use" means the use of a credit card by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit.

(ii) Limitation on amount. The liability of a cardholder for unauthorized use of a credit card shall not exceed the lesser of \$50 or the amount of money, property, labor, or services

obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.

(2) Conditions of liability. A cardholder shall be liable for unauthorized use of a credit card only if:

(i) The credit card is an accepted credit card;

(ii) The card issuer has provided adequate notice of the cardholder's maximum potential liability and of means by which the card issuer may be notified of loss or theft of the card. The notice shall state that the cardholder's liability shall not exceed \$50 (or any lesser amount) and that the cardholder may give oral or written notification, and shall describe a means of notification (for example, a telephone number, an address, or both); and

(iii) The card issuer has provided a means to identify the cardholder on the account or the authorized user of the card.

(3) Notification to card issuer. Notification to a card issuer is given when steps have been taken as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information about the loss, theft, or possible unauthorized use of a credit card, regardless of whether any particular officer, employee, or agent of the card issuer does, in fact, receive the information. Notification may be given, at the option of the person giving it, in person, by telephone, or in writing. Notification in writing is considered given at the time of receipt or, whether or not received, at the expiration of the time ordinarily required for transmission, whichever is earlier.

(4) Effect of other applicable law or agreement. If state law or an agreement between a cardholder and the card issuer imposes lesser liability than that provided in this paragraph, the lesser liability shall govern.

(5) Business use of credit cards. If 10 or more credit cards are issued by one card issuer for use by the employees of an organization, this section does not prohibit the card issuer and the organization from agreeing to liability for unauthorized use without regard to this section. However, liability for unauthorized use may be imposed on an employee of the organization, by either the card issuer or the organization, only in accordance with this section.

(c) Right of cardholder to assert claims or defenses against card issuer.

(1) General rule. When a person who honors a credit card fails to resolve satisfactorily a dispute as to property or services purchased with the credit card in a consumer credit transaction, the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the

dispute. The cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute and any finance or other charges imposed on that amount.

(2) Adverse credit reports prohibited. If, in accordance with paragraph (c)(1) of this section, the cardholder withholds payment of the amount of credit outstanding for the disputed transaction, the card issuer shall not report that amount as delinquent until the dispute is settled or judgment is rendered.

(3) Limitations.

(i) General. The rights stated in paragraphs (c)(1) and (c)(2) of this section apply only if:

(A) The cardholder has made a good faith attempt to resolve the dispute with the person honoring the credit card; and

(B) The amount of credit extended to obtain the property or services that result in the assertion of the claim or defense by the cardholder exceeds \$50, and the disputed transaction occurred in the same state as the cardholder's current designated address or, if not within the same state, within 100 miles from that address.

(ii) Exclusion. The limitations stated in paragraph (c)(3)(i)(B) of this section shall not apply when the person honoring the credit card:

(A) Is the same person as the card issuer;

(B) Is controlled by the card issuer directly or indirectly;

(C) Is under the direct or indirect control of a third person that also directly or indirectly controls the card issuer;

(D) Controls the card issuer directly or indirectly;

(E) Is a franchised dealer in the card issuer's products or services; or

(F) Has obtained the order for the disputed transaction through a mail solicitation made or participated in by the card issuer.

(d) Offsets by card issuer prohibited.

(1) A card issuer may not take any action, either before or after termination of credit card privileges, to offset a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer.

(2) This paragraph does not alter or affect the right of a card issuer acting under state or Federal law to do any of the following with regard to funds of a cardholder held on deposit with the card issuer if the same procedure is constitutionally available to creditors generally: Obtain or enforce a consensual security interest in the funds; attach or otherwise levy upon the funds; or obtain or enforce a court order relating to the funds.

(3) This paragraph does not prohibit a plan, if authorized in writing by the cardholder, under which the card issuer may periodically deduct all or part of the cardholder's credit card debt from a deposit account held with the card issuer (subject to the limitations in § 1026.13(d)(1)).

(e) Prompt notification of returns and crediting of refunds.

(1) When a creditor other than the card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor shall, within 7 business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer's normal channels for credit statements.

(2) The card issuer shall, within 3 business days from receipt of a credit statement, credit the consumer's account with the amount of the refund.

(3) If a creditor other than a card issuer routinely gives cash refunds to consumers paying in cash, the creditor shall also give credit or cash refunds to consumers using credit cards, unless it discloses at the time the transaction is consummated that credit or cash refunds for returns are not given. This section does not require refunds for returns nor does it prohibit refunds in kind.

(f) Discounts; tie-in arrangements. No card issuer may, by contract or otherwise:

(1) Prohibit any person who honors a credit card from offering a discount to a consumer to induce the consumer to pay by cash, check, or similar means rather than by use of a credit card or its underlying account for the purchase of property or services; or

(2) Require any person who honors the card issuer's credit card to open or maintain any account or obtain any other service not essential to the operation of the credit card plan from the card issuer or any other person, as a condition of participation in a credit card plan. If maintenance of an account for clearing purposes is determined to be essential to the operation of the credit card plan, it may be required only if no service charges or minimum balance requirements are imposed.

(g) Relation to Electronic Fund Transfer Act and Regulation E. For guidance on whether Regulation Z (12 CFR part 1026) or Regulation E (12 CFR part 1005) applies in instances involving both credit and electronic fund transfer aspects, refer to Regulation E, 12 CFR 1005.12(a) regarding issuance and liability for unauthorized use. On matters other than issuance and liability, this section applies to the credit aspects of combined credit/electronic fund transfer transactions, as applicable.

12 C.F.R. §1026.13, Billing error resolution.

(a) Definition of billing error. For purposes of this section, the term billing error means:

- (1) A reflection on or with a periodic statement of an extension of credit that is not made to the consumer or to a person who has actual, implied, or apparent authority to use the consumer's credit card or open-end credit plan.
- (2) A reflection on or with a periodic statement of an extension of credit that is not identified in accordance with the requirements of §§ 1026.7(a)(2) or (b)(2), as applicable, and 1026.8.
- (3) A reflection on or with a periodic statement of an extension of credit for property or services not accepted by the consumer or the consumer's designee, or not delivered to the consumer or the consumer's designee as agreed.
- (4) A reflection on a periodic statement of the creditor's failure to credit properly a payment or other credit issued to the consumer's account.
- (5) A reflection on a periodic statement of a computational or similar error of an accounting nature that is made by the creditor.
- (6) A reflection on a periodic statement of an extension of credit for which the consumer requests additional clarification, including documentary evidence.
- (7) The creditor's failure to mail or deliver a periodic statement to the consumer's last known address if that address was received by the creditor, in writing, at least 20 days before the end of the billing cycle for which the statement was required.

(b) Billing error notice. A billing error notice is a written notice from a consumer that:

- (1) Is received by a creditor at the address disclosed under § 1026.7(a)(9) or (b)(9), as applicable, no later than 60 days after the creditor transmitted the first periodic statement that reflects the alleged billing error;
- (2) Enables the creditor to identify the consumer's name and account number; and
- (3) To the extent possible, indicates the consumer's belief and the reasons for the belief that

a billing error exists, and the type, date, and amount of the error.

(c) Time for resolution; general procedures.

(1) The creditor shall mail or deliver written acknowledgment to the consumer within 30 days of receiving a billing error notice, unless the creditor has complied with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within the 30-day period; and

(2) The creditor shall comply with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within 2 complete billing cycles (but in no event later than 90 days) after receiving a billing error notice.

(d) Rules pending resolution. Until a billing error is resolved under paragraph (e) or (f) of this section, the following rules apply:

(1) Consumer's right to withhold disputed amount; collection action prohibited. The consumer need not pay (and the creditor may not try to collect) any portion of any required payment that the consumer believes is related to the disputed amount (including related finance or other charges). If the cardholder has enrolled in an automatic payment plan offered by the card issuer and has agreed to pay the credit card indebtedness by periodic deductions from the cardholder's deposit account, the card issuer shall not deduct any part of the disputed amount or related finance or other charges if a billing error notice is received any time up to 3 business days before the scheduled payment date.

(2) Adverse credit reports prohibited. The creditor or its agent shall not (directly or indirectly) make or threaten to make an adverse report to any person about the consumer's credit standing, or report that an amount or account is delinquent, because the consumer failed to pay the disputed amount or related finance or other charges.

(3) Acceleration of debt and restriction of account prohibited. A creditor shall not accelerate any part of the consumer's indebtedness or restrict or close a consumer's account solely because the consumer has exercised in good faith rights provided by this section. A creditor may be subject to the forfeiture penalty under 15 U.S.C. 1666(e) for failure to comply with any of the requirements of this section.

(4) Permitted creditor actions. A creditor is not prohibited from taking action to collect any undisputed portion of the item or bill; from deducting any disputed amount and related finance or other charges from the consumer's credit limit on the account; or from reflecting a disputed amount and related finance or other charges on a periodic statement, provided that the creditor indicates on or with the periodic statement that payment of any disputed

amount and related finance or other charges is not required pending the creditor's compliance with this section.

(e) Procedures if billing error occurred as asserted. If a creditor determines that a billing error occurred as asserted, it shall within the time limits in paragraph (c)(2) of this section:

- (1) Correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable; and
- (2) Mail or deliver a correction notice to the consumer.

(f) Procedures if different billing error or no billing error occurred. If, after conducting a reasonable investigation, a creditor determines that no billing error occurred or that a different billing error occurred from that asserted, the creditor shall within the time limits in paragraph (c)(2) of this section:

- (1) Mail or deliver to the consumer an explanation that sets forth the reasons for the creditor's belief that the billing error alleged by the consumer is incorrect in whole or in part;
- (2) Furnish copies of documentary evidence of the consumer's indebtedness, if the consumer so requests; and
- (3) If a different billing error occurred, correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable.

(g) Creditor's rights and duties after resolution. If a creditor, after complying with all of the requirements of this section, determines that a consumer owes all or part of the disputed amount and related finance or other charges, the creditor:

- (1) Shall promptly notify the consumer in writing of the time when payment is due and the portion of the disputed amount and related finance or other charges that the consumer still owes;
- (2) Shall allow any time period disclosed under § 1026.6(a)(1) or (b)(2)(v), as applicable, and § 1026.7(a)(8) or (b)(8), as applicable, during which the consumer can pay the amount due under paragraph (g)(1) of this section without incurring additional finance or other charges;
- (3) May report an account or amount as delinquent because the amount due under paragraph (g)(1) of this section remains unpaid after the creditor has allowed any time period disclosed under § 1026.6(a)(1) or (b)(2)(v), as applicable, and § 1026.7(a)(8) or (b)(8), as applicable or 10 days (whichever is longer) during which the consumer can pay the amount; but

(4) May not report that an amount or account is delinquent because the amount due under paragraph (g)(1) of the section remains unpaid, if the creditor receives (within the time allowed for payment in paragraph (g)(3) of this section) further written notice from the consumer that any portion of the billing error is still in dispute, unless the creditor also:

(i) Promptly reports that the amount or account is in dispute;

(ii) Mails or delivers to the consumer (at the same time the report is made) a written notice of the name and address of each person to whom the creditor makes a report; and

(iii) Promptly reports any subsequent resolution of the reported delinquency to all persons to whom the creditor has made a report.

(h) Reassertion of billing error. A creditor that has fully complied with the requirements of this section has no further responsibilities under this section (other than as provided in paragraph (g)(4) of this section) if a consumer reasserts substantially the same billing error.

(i) Relation to Electronic Fund Transfer Act and Regulation E. If an extension of credit is incident to an electronic fund transfer, under an agreement between a consumer and a financial institution to extend credit when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, the creditor shall comply with the requirements of Regulation E, 12 CFR 1005.11 governing error resolution rather than those of paragraphs (a), (b), (c), (e), (f), and (h) of this section.

#### **Problem 15.4**

15 U.S.C. §1666i, Assertion by cardholder against card issuer of claims and defenses arising out of credit card transaction; prerequisites; limitation on amount of claims or defenses.

(a) Claims and defenses assertible

Subject to the limitation contained in subsection (b) of this section, a card issuer who has issued a credit card to a cardholder pursuant to an open end consumer credit plan shall be subject to all claims (other than tort claims) and defenses arising out of any transaction in which the credit card is used as a method of payment or extension of credit if (1) the obligor has made a good faith attempt to obtain satisfactory resolution of a disagreement or problem relative to the transaction from the person honoring the credit card; (2) the amount of the initial transaction exceeds \$50; and (3) the place where the initial transaction occurred was in the same State as the mailing address previously provided by the cardholder or was within 100 miles from such address, except that the limitations set forth in clauses (2) and (3) with respect to an obligor's right to assert claims and defenses against a card issuer shall not be applicable to any transaction in which the person honoring the credit card (A) is the same person as the card issuer, (B) is controlled by the card issuer, (C) is under direct or indirect common control with



the card issuer, (D) is a franchised dealer in the card issuer's products or services, or (E) has obtained the order for such transaction through a mail solicitation made by or participated in by the card issuer in which the cardholder is solicited to enter into such transaction by using the credit card issued by the card issuer.

(b) Amount of claims and defenses assertible

The amount of claims or defenses asserted by the cardholder may not exceed the amount of credit outstanding with respect to such transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of such claim or defense. For the purpose of determining the amount of credit outstanding in the preceding sentence, payments and credits to the cardholder's account are deemed to have been applied, in the order indicated, to the payment of: (1) late charges in the order of their entry to the account; (2) finance charges in order of their entry to the account; and (3) debits to the account other than those set forth above, in the order in which each debit entry to the account was made.

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## Assignment 16: Automobile Transactions

### Problem 16.1

Tex. Occ. Code Ann. §2301.601, Definitions.

(1) "Impairment of market value" means a substantial loss in market value caused by a defect specific to a motor vehicle.

(2) "Owner" means a person who is entitled to enforce a manufacturer's warranty with respect to a motor vehicle, and who:

(A) purchased the motor vehicle at retail from a license holder;

(B) is a lessor or lessee, other than a sublessee, who purchased or leased the vehicle from a license holder;

(C) is a resident of this state and has registered the vehicle in this state;

(D) purchased or leased the vehicle at retail and is an active duty member of the United States armed forces stationed in this state at the time a proceeding is commenced under this subchapter; or

(E) is:

(i) the transferee or assignee of a person described by Paragraphs (A)-(D);

(ii) a resident of this state; and

(iii) the person who registered the vehicle in this state.

(3) "Reasonable allowance for use" means the amount directly attributable to use of a motor vehicle when the vehicle is not out of service for repair.

(4) "Serious safety hazard" means a life-threatening malfunction or nonconformity that:

(A) substantially impedes a person's ability to control or operate a motor vehicle for ordinary use or intended purposes; or

(B) creates a substantial risk of fire or explosion.

Tex. Occ. Code Ann. §2301.603, Conformance with warranty required.

(a) A manufacturer, converter, or distributor shall make repairs necessary to conform a new motor vehicle to an applicable manufacturer's, converter's, or distributor's express warranty.

(b) Subsection (a) applies after the expiration date of a warranty if:

- (1) during the term of the warranty, the owner or the owner's agent reported the nonconformity to the manufacturer, converter, or distributor, or to a designated agent or franchised dealer of the manufacturer, converter, or distributor; or
  - (2) a rebuttable presumption relating to the vehicle is created under Section 2301.605.
- (c) This subchapter does not limit a remedy available to an owner under a new motor vehicle warranty that extends beyond the provisions of this subchapter.

Tex. Occ. Code Ann. §2301.604, Replacement of or refund for vehicle.

(a) A manufacturer, converter, or distributor that is unable to conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts shall reimburse the owner for reasonable incidental costs resulting from loss of use of the motor vehicle because of the nonconformity or defect and:

- (1) replace the motor vehicle with a comparable motor vehicle; or
  - (2) accept return of the vehicle from the owner and refund to the owner the full purchase price, less a reasonable allowance for the owner's use of the vehicle, and any other allowances or refunds payable to the owner.
- (b) A refund made for a vehicle for which there is a lienholder shall be made to the owner and lienholder in proportion to each person's interest in the vehicle.

(c) As necessary to promote the public interest, the board by rule:

- (1) shall define the incidental costs that are eligible for reimbursement;
- (2) shall specify other requirements necessary to determine an eligible cost; and
- (3) may set a maximum amount that is eligible for reimbursement, either by type of eligible cost or by a total for all costs.

Tex. Occ. Code Ann. §2301.605, Rebuttable presumption—reasonable belief of attempts.

(a) A rebuttable presumption that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty is established if:

- (1) the same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and:

- (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and

(B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt;

(2) the same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and:

(A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and

(B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt; or

(3) a nonconformity still exists that substantially impairs the vehicle's use or market value and:

(A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and

(B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.

(b) A period or a number of days or miles described by Subsection (a) is extended for any period that repair services are not available to the owner because of:

(1) a war, invasion, or strike; or

(2) a fire, flood, or other natural disaster.

(c) The 30 days described by Subsection (a)(3)(A) do not include any period during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.

Tex. Occ. Code Ann. §2301.606, Conduct of proceedings.

(a) Repealed.

(b) In a hearing under this subchapter, a manufacturer, converter, or distributor may plead and prove as an affirmative defense to a remedy under this subchapter that a nonconformity:

(1) is the result of abuse, neglect, or unauthorized modification or alteration of the motor vehicle; or

- (2) does not substantially impair the use or market value of the motor vehicle.
- (c) The board or a person delegated power from the board under Section 2301.154 may not issue an order requiring a manufacturer, converter, or distributor to make a refund or to replace a motor vehicle unless:
  - (1) the owner or a person on behalf of the owner has mailed written notice of the alleged defect or nonconformity to the manufacturer, converter, or distributor; and
  - (2) the manufacturer, converter, or distributor has been given an opportunity to cure the alleged defect or nonconformity.

Tex. Occ. Code Ann. §2301.607, Exhaustion of Administrative Remedies; Right to Sue.

- (a) A refund or replacement under this subchapter because a motor vehicle is alleged to not conform to an express warranty is not available to the owner of the vehicle unless the owner has exhausted the administrative remedies provided by this subchapter.
- (b) A refund or replacement under this subchapter is not available to a party in an action against a seller under Chapter 2 or 17, Business & Commerce Code, but is available in an action against a manufacturer, converter, or distributor brought under Chapter 17, Business & Commerce Code, after the owner has exhausted the administrative remedies provided by this subchapter.

...

- (f) This subchapter does not limit a right or remedy otherwise available to an owner under another law.
- (g) A contractual provision that excludes or modifies a remedy provided by this subchapter is prohibited and is void as against public policy unless the exclusion or modification is made under a settlement agreement between the owner and the manufacturer, converter, or distributor.

Tex. Occ. Code Ann. §2301.610, Disclosure statement.

- (a) A manufacturer, distributor, or converter that has been ordered to repurchase or replace a vehicle shall, through its franchised dealer, issue a disclosure statement stating that the vehicle was repurchased or replaced by the manufacturer, distributor, or converter under this subchapter. The statement must accompany the vehicle through the first retail purchase following the issuance of the statement and must include the toll-free telephone number described by Subsection (d) that will enable the purchaser to obtain information about the condition or defect that was the basis of the order for repurchase or replacement.

- (b) The manufacturer, distributor, or converter must restore the cause of the repurchase or replacement to factory specifications and issue a new 12-month, 12,000-mile warranty on the vehicle.
- (c) The board shall adopt rules for the enforcement of this section.
- (d) The department shall maintain a toll-free telephone number to provide information to a person who requests information about a condition or defect that was the basis for repurchase or replacement by an order issued under this subchapter. The department shall maintain an effective method of providing information to a person who makes a request.

## **Problem 16.2**

Nevada. Rev. Stat. §482.554, Deceptive trade practices; acts constituting administrative fines; certain disclosures required; remedy not exclusive.

1. The Department may impose an administrative fine of not more than \$10,000 against any person who engages in a deceptive trade practice. The Department shall afford to any person so fined an opportunity for a hearing pursuant to the provisions of NRS 233B.121.
2. For the purposes of this section, a person shall be deemed to be engaged in a “deceptive trade practice” if, in the course of his or her business or occupation, the person:
  - (a) Enters into a contract for the sale of a vehicle on credit with a customer, exercises a valid option to cancel the vehicle sale and then, after the customer returns the vehicle with no damage other than reasonable wear and tear, the seller:
    - (1) Fails to return any down payment or other consideration in full, including, returning a vehicle accepted in trade;
    - (2) Knowingly makes a false representation to the customer that the customer must sign another contract for the sale of the vehicle on less favorable terms; or
    - (3) Fails to use the disclosure as required in subsection 3.
  - (b) Uses a contract for the sale of the vehicle or a security agreement that materially differs from the form prescribed by law.
  - (c) Engages in any deceptive trade practice, as defined in NRS 598.0915 to 598.0925, inclusive, that involves the purchase and sale or lease of a motor vehicle.
  - (d) Engages in any other acts prescribed by the Department by regulation as a deceptive trade practice.

3. If a seller of a vehicle exercises a valid option to cancel the sale of a vehicle to a customer, the seller must provide a disclosure, and the customer must sign that disclosure, before the seller and customer may enter into a new agreement for the sale of the same vehicle on different terms, or for the sale of a different vehicle. The Department shall prescribe the form of the disclosure by regulation.
4. All administrative fines collected by the Department pursuant to this section must be deposited with the State Treasurer to the credit of the State Highway Fund.
5. The administrative remedy provided in this section is not exclusive and is in addition to any other remedy provided by law. The provisions of this section do not deprive a person injured by a deceptive trade practice from resorting to any other legal remedy.

### **Problem 16.3**

Alaska Stat. §45.25.465, Sales of used motor vehicles; required disclosures.

- (a) Before the sale of a used motor vehicle, a motor vehicle dealer shall,
- (1) when obtaining a used motor vehicle from an individual consumer, make a reasonable inquiry of the seller into the condition of the vehicle, including the accident and repair history of the vehicle; the information shall be recorded in writing and signed by the seller; the dealer shall provide this information to a prospective purchaser of the vehicle;
  - (2) when a motor vehicle dealer obtains a used motor vehicle from another motor vehicle dealer, a wholesaler, or an auction, disclose to a prospective purchaser of the vehicle that the vehicle was purchased from another dealer, a wholesaler, or an auction.
- (b) Nothing in this section creates an express warranty by the dealer.
- (c) [Repealed, § 1 ch 56 SLA 2008.]

Haw. Rev. Stat. §481J-4, Disclosure of damages or defects in used motor vehicles.

- (a) No dealer may offer for sale any used motor vehicle without first providing:
- (1) Written notice to the prospective consumer of any material mechanical defect in the motor vehicle and any damage sustained by the motor vehicle due to fire, water, collision, or other causes for which the cost of repairs exceeds \$1,000 for parts and labor, when the defect or damage is known to the dealer; and
  - (2) Written notice to the prospective consumer whether the dealer has conducted any inspection of the motor vehicle to determine known defects or damage.
- (b) If a dealer promises that any repairs will be made or any conditions corrected in connection with the purchase of a used motor vehicle, such promises shall be provided in writing and



either attached or incorporated into the sales contract.

(c) For purposes of this section:

“Known” means that a dealer or the dealer’s agent or employee has obtained facts or information about the condition of a motor vehicle which would lead a reasonable person in similar circumstances to believe that the motor vehicle contained one or more material mechanical defects. The term “known” encompasses knowledge obtained through an inspection, from a previous owner, from the salesperson at an auction or another dealer, or through other means.

“Material mechanical defect” means any defect or malfunction which renders the motor vehicle mechanically unsound or inoperable.

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## Assignment 17: Payday Loans

### Problem 17.1

#### Cal. Civ. Code §1789.30, Disclosures.

(a)

(1) Every check casher, as applicable to the services provided, shall post a complete, detailed, and unambiguous schedule of all fees for (A) cashing checks, drafts, money orders, or other commercial paper serving the same purpose, (B) the sale or issuance of money orders, and (C) the initial issuance of any identification card. Each check casher shall also post a list of valid identification which is acceptable in lieu of identification provided by the check casher. The information required by this section shall be clear, legible, and in letters not less than one-half inch in height. The information shall be posted in a conspicuous location in the unobstructed view of the public within the check casher's premises.

(2) A check casher may be required to file a return required by Section 18631.7 of the Revenue and Taxation Code.

(b)

(1) Except as provided in paragraph (2), this section shall become operative December 31, 2004.

(2)

(A) Except as provided in subparagraph (B), paragraph (2) of subdivision (a) shall apply to checks cashed on or after January 1, 2006.

(B) The amendments to this section made by the act adding this subparagraph shall become operative on January 1, 2008.

#### Cal. Civ. Code §1789.31, Definitions.

(a) As used in this title, a "check casher" means a person or entity that for compensation engages, in whole or in part, in the business of cashing checks, warrants, drafts, money orders, or other commercial paper serving the same purpose. "Check casher" does not include a state or federally chartered bank, savings association, credit union, or industrial loan company. "Check casher" also does not include a retail seller engaged primarily in the business of selling consumer goods, including consumables, to retail buyers that cashes checks or issues money orders for a fee not exceeding two dollars (\$2) as a service to its customers that is incidental to

its main purpose or business.

(b) This section shall become operative December 31, 2004.

Cal. Civ. Code §1789.32, Violations.

Failure to post information as required by this title, or the imposition of fees or identification requirements contrary to the information posted, shall constitute an unfair business practice within the meaning of Section 17200 of the Business and Professions Code.

Cal. Civ. Code §1789.33, [Section repealed 2005.]

Cal. Civ. Code §1789.35, Fees; Penalties for violations; Willful violation as misdemeanor; Civil actions; Damages.

(a) A check casher shall not charge a fee for cashing a payroll check or government check in excess of 3 percent if identification is provided by the customer, or 3.5 percent without the provision of identification, of the face amount of the check, or three dollars (\$3), whichever is greater. Identification, for purposes of this section, is limited to a California driver's license, a California identification card, or a valid United States military identification card.

(b) A check casher may charge a fee of no more than ten dollars (\$10) to set up an initial account and issue an optional identification card for providing check cashing services. A replacement optional identification card may be issued at a cost not to exceed five dollars (\$5).

(c) A check casher shall provide a receipt to the customer for each transaction.

(d) A check casher may charge a fee for cashing a personal check, as posted pursuant to Section 1789.30, for immediate deposit in an amount not to exceed 12 percent of the face value of the check.

(e) Any person who violates any provision of this section shall be liable for a civil penalty not to exceed two thousand dollars (\$2,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General in any court of competent jurisdiction. Any action brought pursuant to this subdivision shall be commenced within four years of the date on which the act or transaction upon which the action is based occurred.

(f) A willful violation of this section is a misdemeanor.

(g) Any person who is injured by any violation of this section may bring an action for the recovery of damages, an equity proceeding to restrain and enjoin those violations, or both. The amount awarded may be up to three times the damages actually incurred, but in no event less than the amount paid by the aggrieved consumer to a person subject to this section. If the

plaintiff prevails, the plaintiff shall be awarded reasonable attorney's fees and costs. If a court determines by clear and convincing evidence that a breach or violation was willful, the court, in its discretion, may award punitive damages in addition to the amounts set forth above.

(h) This section shall become operative December 31, 2004.

Cal. Civ. Code §1789.37, Permits; Regulations; Violations.

(a) Every owner of a check casher's business shall obtain a permit from the Department of Justice to conduct a check casher's business.

(b) All applications for a permit to conduct a check casher's business shall be filed with the department in writing, signed by the applicant, if an individual, or by a member or officer authorized to sign, if the applicant is a corporation or other entity, and shall state the name of the business, the type of business engaged in, and the business address. Each applicant shall be fingerprinted.

(c) Each applicant for a permit to conduct a check casher's business shall pay a fee not to exceed the cost of processing the application, fingerprinting the applicant, and checking or obtaining the criminal record of the applicant, at the time of filing the application.

(d) Each applicant shall annually, beginning one year from the date of issuance of a check casher's permit, file an application for renewal of the permit with the department, along with payment of a renewal fee not to exceed the cost of processing the application for renewal and checking or obtaining the criminal record of the applicant.

(e) The department shall deny an application for a permit to conduct a check casher's business, or for renewal of a permit, if the applicant has a felony conviction involving dishonesty, fraud, or deceit, if the crime is substantially related to the qualifications, functions, or duties of a person engaged in the business of check cashing.

(f) The department shall adopt regulations to implement this section and shall determine the amount of the application fees required by this section. The department shall prescribe forms for the applications and permit required by this section, which shall be uniform throughout the state.

(g) In any action brought by a city attorney or district attorney to enforce a violation of this section, an owner of a check casher's business who engages in the business of check cashing without holding a current and valid permit issued by the department pursuant to this section is subject to a civil penalty, as follows:

(1) For the first offense, not more than one thousand dollars (\$1,000).

(2) For the second offense, not more than five thousand dollars (\$5,000).

(h) Any person who has twice been found in violation of subdivision (g) and who, within 10 years of the date of the first offense, engages in the business of check cashing without holding a current and valid permit issued by the department pursuant to this section is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five thousand dollars (\$5,000), or by both that fine and imprisonment.

(i) All civil penalties, forfeited bail, or fines received by any court pursuant to this section shall, as soon as practicable after the receipt thereof, be deposited with the county treasurer of the county in which the court is situated. Fines and forfeitures deposited shall be disbursed pursuant to the Penal Code. Civil penalties deposited shall be paid at least once a month as follows:

(1) Fifty percent to the Treasurer by warrant of the county auditor drawn upon the requisition of the clerk or judge of the court, to be deposited in the State Treasury on order of the Controller.

(2) Fifty percent to the city treasurer of the city, if the offense occurred in a city, otherwise to the treasurer of the county in which the prosecution is conducted. Any money deposited in the State Treasury under this section that is determined by the Controller to have been erroneously deposited shall be refunded, subject to approval of the California Victim Compensation and Government Claims Board prior to the payment of the refund, out of any money in the State Treasury that is available by law for that purpose.

(j) This section shall become operative December 31, 2004.

Cali. Civ. Code §1789.38, Waiver of provisions of title void.

Any waiver of the provisions of this title is contrary to public policy, and is void and unenforceable.

## **Problem 17.2**

12 C.F.R. §1005.10, Preauthorized transfers.

(a) Preauthorized transfers to consumer's account.

(1) Notice by financial institution. When a person initiates preauthorized electronic fund transfers to a consumer's account at least once every 60 days, the account-holding financial institution shall provide notice to the consumer by:

(i) Positive notice. Providing oral or written notice of the transfer within two business days after the transfer occurs; or

(ii) Negative notice. Providing oral or written notice, within two business days after the date on which the transfer was scheduled to occur, that the transfer did not occur; or

(iii) Readily-available telephone line. Providing a readily available telephone line that the consumer may call to determine whether the transfer occurred and disclosing the telephone number on the initial disclosure of account terms and on each periodic statement.

(2) Notice by payor. A financial institution need not provide notice of a transfer if the payor gives the consumer positive notice that the transfer has been initiated.

(3) Crediting. A financial institution that receives a preauthorized transfer of the type described in paragraph (a)(1) of this section shall credit the amount of the transfer as of the date the funds for the transfer are received.

(b) Written authorization for preauthorized transfers from consumer's account. Preauthorized electronic fund transfers from a consumer's account may be authorized only by a writing signed or similarly authenticated by the consumer. The person that obtains the authorization shall provide a copy to the consumer.

(c) Consumer's right to stop payment.

(1) Notice. A consumer may stop payment of a preauthorized electronic fund transfer from the consumer's account by notifying the financial institution orally or in writing at least three business days before the scheduled date of the transfer.

(2) Written confirmation. The financial institution may require the consumer to give written confirmation of a stop-payment order within 14 days of an oral notification. An institution that requires written confirmation shall inform the consumer of the requirement and provide the address where confirmation must be sent when the consumer gives the oral notification. An oral stop-payment order ceases to be binding after 14 days if the consumer fails to provide the required written confirmation.

(d) Notice of transfers varying in amount.

(1) Notice. When a preauthorized electronic fund transfer from the consumer's account will vary in amount from the previous transfer under the same authorization or from the preauthorized amount, the designated payee or the financial institution shall send the consumer written notice of the amount and date of the transfer at least 10 days before the scheduled date of transfer.

(2) Range. The designated payee or the institution shall inform the consumer of the right to

receive notice of all varying transfers, but may give the consumer the option of receiving notice only when a transfer falls outside a specified range of amounts or only when a transfer differs from the most recent transfer by more than an agreed-upon amount.

(e) Compulsory use.

(1) Credit. No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account.

(2) Employment or government benefit. No financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of a government benefit.

Massachusetts General Law Chapter 140 §96, Small Loan Business.

No person shall directly or indirectly engage in the business of making loans of six thousand dollars or less, if the amount to be paid on any such loan for interest and expenses exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned, without first obtaining from the commissioner of banks, in sections ninety-six to one hundred and fourteen, inclusive, called the commissioner, a license to carry on the said business in the town where the business is to be transacted. When an application for a loan or for an endorsement or guarantee or for the purchase of a note is made by any person within this commonwealth, and the money is advanced or the endorsement or guarantee is made or furnished by any person without this commonwealth, the transaction shall be deemed a loan made within this commonwealth, and such a loan and the parties making it shall be subject to sections ninety-six to one hundred and thirteen, inclusive. The buying or endorsing of notes or the furnishing of guarantee or security for compensation shall be considered to be engaging in the business of making small loans within said sections, but the foregoing provisions of this sentence shall not apply in the case of any transaction which involves any note or other instrument evidencing the indebtedness of a buyer to the seller of goods, services or insurance for a part or all of the purchase price; provided, however, that any advance of money by such seller or, by a person acting on his behalf for the purpose of paying an existing indebtedness of such buyer or for any other purpose shall constitute a loan of money subject to the provisions of this section. For the purposes of said sections, the amount to be paid upon any loan of six thousand dollars or less for interest or expenses shall include all sums paid or to be paid by or on behalf of the borrower for interest, brokerage, recording fees, commissions, services, extension of loan, forbearance to enforce payment, and all other sums charged against or paid or to be paid by the borrower for making or securing directly or indirectly the loan, and shall include all such sums when paid by or on behalf of or charged against the borrower for or on



account of making or securing the loan, directly or indirectly, to or by any person, other than the lender, if such payment or charge was known to the lender at the time of making the loan, or might have been ascertained by reasonable inquiry. Any person directly or indirectly engaging, for a fee, commission, bonus or other consideration, in the business of negotiating, arranging, aiding or assisting the borrower or lender in procuring or making loans of six thousand dollars or less, for which the amount paid or to be paid for interest and expenses, including all amounts paid or to be paid to any other party therefor, exceeds in the aggregate an amount equivalent to twelve per cent per annum, whether such loans are actually made by such person or by another party, shall be deemed to be engaged in the business of making small loans, and shall be subject to sections ninety-six to one hundred and twelve, inclusive. If, after all deductions or payments, whether on account of interest, expenses or principal made substantially contemporaneously with the making of the loan, the amount retained by the borrower be six thousand dollars or less, the transaction shall be deemed to be a loan in the amount of the sum so retained by the borrower after such deductions or payments, notwithstanding that the loan be nominally for a greater sum.

This section shall not apply to loans that are subject to section 90A or section 28B of chapter 183.

The provisions of this section and sections ninety-six A to one hundred and fourteen A, inclusive, shall apply only to loans made primarily for personal, family or household purpose; provided, however, that the provisions of this section and said sections ninety-six A to one hundred and fourteen, inclusive, shall not apply to loans to any student, or to any parent, legal guardian or sponsor of a student, made by any nonprofit, public or independent post-secondary educational institution within the commonwealth authorized by law to grant degrees, by the commonwealth or by any agency or instrumentality thereof; and provided, further, that such institutions may not take, receive, reserve, or charge interest, expenses and other consideration for making or securing a loan of six thousand dollars or less in excess of those permitted by section one hundred, except in the event of prepayment or refinancing, in whole or in part, of any existing loans by such institution to any such student, or to any such parent, legal guardian or sponsor of a student, which refinancing or prepayment occurs within eighteen months of the date such loan was made.

Office of the Comptroller of Currency, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC).

**ACTION:** Final guidance.

**SUMMARY:** The OCC is issuing final supervisory guidance entitled “Guidance on Supervisory

Concerns and Expectations Regarding Deposit Advance Products'' (Guidance), *which addresses* safe and sound banking practices and consumer protection in connection with deposit advance products.

**FOR FURTHER INFORMATION CONTACT:**

Robert Piepergerdes, Director for Retail Credit Risk, (202) 649–6220; Kimberly Hebb, Director for Compliance Policy, (202) 649–5470; Kenneth Lennon, Assistant Director for Community and Consumer Law, (202) 649–6350; Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The Office of the Comptroller of the Currency (OCC) is issuing the Guidance to clarify the OCC's application of principles of safe and sound banking practices and consumer protection in connection with deposit advance products. The Guidance details the OCC's supervisory expectations in connection with any deposit advance product offered by OCC-supervised financial institutions (banks) to address potential credit, reputation, operational, and compliance risks. The OCC expects a bank to apply the principles set forth in this Guidance to any deposit advance product it offers.

**II. Description of Guidance**

A deposit advance product is a small-dollar, short-term loan or line of credit that a bank makes available to a customer whose deposit account reflects recurring direct deposits. The customer obtains a loan, which is to be repaid from the proceeds of the next direct deposit. These loans typically have high fees, are repaid in a lump sum in advance of the customer's other bills, and often are not subject to fundamental and prudent banking practices through which a bank can determine the customer's ability to repay the loan and meet other necessary financial obligations.

The OCC continues to encourage banks to respond to customers' small-dollar credit needs; however, banks should be aware that deposit advance products can pose a variety of credit, reputation, operational, compliance, and other risks. The OCC is issuing the Guidance to ensure that any bank offering these products does so in a safe and sound manner and does not engage in practices that would increase these risks.

### III. Comment Letters Received

The OCC received over 100 official comments on the proposal.<sup>7</sup> After consideration of all such comments, the OCC is issuing the Guidance substantially as proposed, but with certain amendments. The amendments to the Guidance are meant to provide further clarification of certain provisions, including those raised by the commenters.

Several commenters stated they believed the OCC issued the Guidance to address consumer protection issues, not safety and soundness concerns. Additionally, some commenters stated the Guidance would create new rules and regulations within the consumer protection arena, which the OCC does not have the jurisdiction to promulgate. The Guidance, like other supervisory guidance issued by the prudential banking regulators, highlights supervisory expectations based on applicable laws and regulations. It is intended to make a bank aware of the risks related to deposit advance products and provide guidelines to follow, based on safety and soundness principles, if it offers, or is considering offering, deposit advance products. The Guidance, in part, is also designed to help a bank understand which specific consumer compliance laws and regulations may be applicable to these types of loans.

Many commenters also questioned whether guidance relating to a determination of a customer's financial capacity and the level of effort necessary to complete such an analysis may be overly burdensome. The OCC, however, believes analyzing recurring deposits (inflows) and checks/credits/customer withdrawals (outflows) over at least a six-month period is appropriate because it would afford a bank the opportunity to use readily available information to determine whether the customer has the ability to repay the loan without needing to borrow repeatedly from any source, including re-borrowing, to meet necessary expenses. When determining the appropriate credit limit for a customer, there is no expectation in the Guidance that the bank do any additional analysis of inflows and outflows to determine ability to repay other than the specific transactions occurring within the account being used to repay the deposit advance product. However, as a matter of policy, a bank may consider other factors in determining overall eligibility for the product, including performance related to other accounts at the bank.

Several commenters also expressed concerns that this Guidance would have a "chilling effect" on the overall small-dollar, short-term credit market, and potentially drive consumers to illegal and/or unregulated lenders. However, the OCC is aware of a number of banks offering affordable small-dollar loans at reasonable terms to their customers.

Certain other commenters expressed concerns with the underwriting requirements as they

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<sup>7</sup> See "Proposed Guidance on Deposit Advance Products; Withdrawal of Proposed Guidance on Deposit-Related Consumer Credit Products," 78 FR 25353 (April 20, 2013).

relate to classified credits. Specifically, commenters interpreted the proposal to mean it was necessary to look outside of their bank (e.g., obtaining a credit report) to determine whether the customer had any delinquent or adversely classified credits, and was therefore ineligible for their product. This was never the intent of the Guidance. The OCC has added language to clarify that the eligibility and underwriting expectations described in the Guidance do not require the use of credit reports.

A number of other commenters questioned whether the Guidance would be applicable to deposit advance products that are designed to resemble “lines of credit” given that the proposal uses the term “loan.” To address this concern, language has been added to state that the Guidance is applicable to all deposit advance products regardless of how the extension of credit is structured.

Some commenters, primarily state regulatory agencies, raised the concern that the Guidance would preempt applicable state laws, including usury laws, and potentially limit the ability of states to regulate these types of products. This was never the intent of the Guidance. Therefore, to address these concerns, the OCC has added a footnote to the section on Compliance and Consumer Protection Related Concerns clarifying that the Guidance does not impinge on state usury laws, to the extent they are applicable.

Commenters also raised concerns about banks using the proceeds of certain government benefits (e.g., Social Security) in determining a customer’s ability to repay a deposit advance loan. The commenters suggested that, because government benefits are “designed to cover basic living expenses,” the Guidance should discourage a bank from using proceeds from these benefits to determine a customer’s ability to repay deposit advance loans. The Guidance does not distinguish between types of inflows, but more generally cautions a bank against making a loan that cannot be repaid to any customer, including Social Security and other government benefit recipients.

A related concern raised by commenters had to do with the impact of the “cooling off” period. For example, the commenters felt a required cooling off period might result in some customers obtaining larger advances than they might otherwise, because their access to additional advances would be delayed by the cooling off period.

The Guidance makes clear that an OCC-supervised bank is expected to assess the customer’s ability to repay a loan while allowing the customer to continue to meet typical recurring and other necessary expenses such as food, housing, transportation, and healthcare, as well as other outstanding debt obligations. Additionally, the bank’s underwriting criteria should ensure the appropriate deposit advance limit is established and that customers can meet these criteria without needing to borrow repeatedly. The underwriting standards detailed in the Guidance,

along with the cooling off provision, should prevent customers from taking out loans they cannot repay.

#### **IV. Guidance**

The text of the Guidance follows:

##### **OCC Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products**

The Office of the Comptroller of the Currency (OCC) is issuing this “Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products” (Guidance) to OCC-supervised financial institutions (banks) that offer deposit advance products. The Guidance is intended to ensure that banks are aware of the significant risks associated with deposit advance products and supplements the OCC’s existing guidance on payday loans and subprime lending.<sup>8</sup> Although the OCC encourages banks to respond to customers’ small-dollar credit needs in a responsible manner and with reasonable terms and conditions, deposit advance products pose a variety of credit, reputation, operational, and compliance risks to banks.<sup>9</sup>

*Background:* A deposit advance product is a type of small-dollar, short-term credit product offered to customers maintaining a deposit account, reloadable prepaid card, or similar deposit-related vehicle at a bank. The bank provides a credit feature that allows the customer to obtain a loan in advance of the customer’s next direct deposit. The deposit advance is based on the customer’s history of recurring deposits. Typically, the advance is offered as an open-end line of credit.<sup>10</sup> While the specific details of deposit advance products vary from bank to bank, and also may vary over time, those currently offered incorporate some or all of the characteristics described below.

*Cost:* The cost of the deposit advance is typically based on a fee structure, rather than an interest rate. Generally advances are made in fixed dollar increments and a flat fee is assessed for each advance. For example, a customer may obtain advances in increments of \$20 with a fee of \$10 per every \$100 advanced. The cost of the deposit advance can be more expensive than other forms of credit, such as a credit card or a traditional line of credit.

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<sup>8</sup> OCC Advisory Letter AL 2000–10, “Payday Lending” (November 27, 2000); OCC Bulletin 2001– 6, “Expanded Guidance for Subprime Lending Programs” (Subprime Lending Guidance) (January 31, 2001), jointly signed by the OCC, the Board of Governors of the Federal Reserve (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS).

<sup>9</sup> This Guidance does not apply to banks’ overdraft lines of credit. Overdraft lines of credit typically do not have repayment characteristics similar to deposit advance products.

<sup>10</sup> This Guidance applies to all deposit advance products, regardless of whether the deposit advance product is structured as open- or closed-end credit.

*Eligibility, Loan Limits, and Ability to Repay:* Typically, a customer is eligible for a deposit advance if the deposit account has been open for a certain period of time and the customer receives recurring deposits. Banks typically require a minimum sum to be directly deposited each month for a certain period of time in order for the customer to be eligible for a deposit advance loan. Currently, some banks permit a recurring deposit as low as \$100.

The maximum dollar amount of the advance is typically limited to a percent or amount of the recurring monthly deposit. For example, some banks permit the deposit advance to be the lesser of \$500 or 50 percent of the scheduled direct deposits from the preceding statement cycle, rounded up to the nearest \$10. The advance limit does not include the fee associated with the advance. In addition, some banks will allow the advance even if the customer's account is currently overdrawn. Some banks also permit a customer to exceed the advance limit, at the bank's discretion.

Typically, the bank does not analyze the customer's ability to repay the loan based on recurring debits or other indications of a need for residual income to pay other bills. The decision to advance credit to customers, based solely on the amount and frequency of their deposits, stands in contrast to banks' traditional underwriting standards for other products, which typically include an assessment of the ability to repay the loan based on an analysis of the customer's finances.

*Repayment:* Repayment is generally required through an electronic payment of the fee and the advance with the next direct deposit. Typically, the bank is paid first before any other transactions are paid. In some cases, a bank will apply a time limit on how soon it will take the fee and the advance from the direct deposit, but the time limit is minimal, usually one or two days. If the first deposit is insufficient to repay the fee and the advance, the repayment will be obtained from subsequent deposits. If the deposits are insufficient to repay the fee and the advance within a certain time period, typically 35 days, then the bank executes a forced repayment by sweeping the underlying deposit account for the remaining balance. Unlike a payday lender, the bank has automatic access to the underlying deposit account. In some cases, customers may be able to access program features that allow for a longer repayment period than 35 days; however, this is not usually allowed.

If the deposit account funds are insufficient to repay the fee and the advance, then the account goes into overdraft status. Some banks will charge an overdraft fee based on the deposit advance overdrawing the account. Other banks will only charge overdraft fees based on any subsequent transactions that overdraw the account.

Although the deposit advance limit is based on an amount or percentage of the monthly deposit, the repayment can be based on a shorter time period. For example, if a customer

receives direct deposits of \$500 every other Friday from her employer, her monthly direct deposit would be \$1000. Under the typical bank's advance limit, she could receive an advance of \$500 with a fee of \$50. If she obtains the deposit advance on the Thursday before her payday, then the bank will obtain repayment on Friday. The bank will take the entire \$500 paycheck. In addition, the customer will still owe \$50 in principal because the deposit was only sufficient to pay the \$50 fee and \$450 in principal. Assuming the customer has no other source of income, the customer will need to rely on savings to pay bills until the next paycheck. At the next paycheck, the bank will take the remaining \$50 in principal and the customer will have \$450 to pay all outstanding bills.

Some banks have implemented alternative repayment methods that provide more flexibility to the customer. For example, some banks will permit repayment to extend through to the second direct deposit if the first direct deposit falls below a specific dollar threshold. In addition, some banks allow payment by mail rather than electronic transfer, but may charge a fee for this option. Finally, some banks offer an installment loan option, but may also charge an additional fee or may only offer this option if the customer cannot repay the advance and fee from the monthly deposits.

*Repeat Usage Controls:* Banks often have repeat usage limits that trigger a "cooling off" period during which the customer cannot take out a deposit advance, or the credit limit is reduced. For example, some banks may prevent an advance for 35 days if the customer has used the service at least once each month in the previous six-month period. However, the customer can resume use of the product after the 35-day period is completed. Other banks may prevent an advance for one full billing cycle if the customer borrows the entire amount of the advance each month in the previous six months. However, the customer can avoid this limit by taking out something less than the maximum advance.

*Marketing and Access:* Banks market deposit advance products as intended to assist customers through a financial emergency or to meet short-term needs. These advances, however, are typically not included with the bank's list of available credit products, but are instead listed as a deposit account "feature." Customers are alerted to the availability of the products by a reference on their account statements or a "button" or hot link on their personal accounts' Web pages, but it is not clear that the customers are made equally aware of less expensive alternatives.

### **Supervisory Concerns With Deposit Advance Loans**

Although the OCC encourages a bank to respond to customers' small-dollar credit needs, deposit advance products pose supervisory risks. These products share a number of characteristics seen in traditional payday loans, including: High fees; very short, lump-sum

repayment terms; and inadequate attention to the consumer's ability to repay. As such, a bank needs to be aware of these products' potential to harm consumers, as well as elevated credit, reputation, operational, and compliance risks.

The combined impact of both an expensive credit product and short repayment periods increases the risk that customers may end up using what is marketed as a short-term credit product that results in debt over an extended period of time. Specifically, deposit advance customers may repeatedly take out loans because they are unable to fully repay the balance in one pay period while also meeting typical recurring and other necessary expenses (e.g., housing, food, and transportation). Customers may feel compelled to take out another loan very soon thereafter to make up for the shortfall. This is similar to the practice of "loan flipping," which the OCC, the FDIC, and the Board have previously noted to be an element of predatory lending.<sup>11</sup> Though deposit advance products are often marketed as intended for emergency financial assistance, and as unsuitable for meeting a customer's recurring or long-term obligations, the OCC believes the product's design results in consumer behavior that is frequently inconsistent with this marketing and is detrimental to the customer.

To address concerns that certain customers become dependent on deposit advance products to meet their daily expenses (as evidenced by their repeated borrowings), certain lenders now require customers who have taken out a specified number of deposit advance loans within a certain time frame to wait for a specified period before they are eligible to take out a new loan. However, the OCC is concerned these cooling off periods can be easily avoided and are ineffective in preventing repeated usage of these high-cost, short-term loans, for longer-term borrowing needs.

Weak underwriting increases the risk that the customer's account may become overdrawn and result in multiple overdraft fees when subsequent transactions are presented for payment. Some banks assess overdraft fees when the automatic repayment of the deposit advance loan causes the associated account to reflect a negative balance.

### *Safety and Soundness Risks*

**Credit Risk:** Customers who obtain deposit advance loans may have cash flow difficulties or blemished or insufficient credit histories that limit other borrowing options. The high aggregate cost of numerous and repeated extensions of credit that may be a consequence of this product further increases credit risk. Lenders that offer deposit advance loans typically focus on the amount of the customer's monthly deposit for underwriting purposes. Failure to consider whether the income sources are adequate to repay the debt while covering typical living

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<sup>11</sup> *Subprime Lending Guidance*, jointly signed by the OCC, the Board, the FDIC, and the OTS (January 31, 2001).



expenses and other debt payments presents safety and soundness risks.

Numerous and repeated extensions of credit to the same individual may be substantially similar to continuous advances and subject the bank to increased credit risk. While re-aging, extensions, deferrals, renewals, and rewrites of lending products can be used to help customers overcome temporary financial difficulties, such practices, if repeated, can cloud the true performance and delinquency status of the portfolio.<sup>12</sup> Further, a bank should ensure customers do not use deposit advances to make payments on other loans at the bank, as this could mask a lack of repayment ability and delinquencies on other loans at the bank.

Relying on the amount of the customer's incoming deposits without consideration of expected outflows does not allow for a proper assessment of the customer's ability to repay the loan and other necessary expenses. This failure to properly assess the customer's financial capacity, a basic underwriting principle, increases default risk.

*Reputation Risk:* Reputation risk is the risk arising from negative public opinion. Deposit advance products are receiving significant levels of negative news coverage and public scrutiny. This increased scrutiny includes reports of high fees and customers taking out multiple advances to cover prior advances and everyday expenses. Engaging in practices that are perceived to be unfair or detrimental to the customer can cause a bank to lose community support and business.

*Operational Risk:* Banks remain responsible for compliance with all applicable laws and regulations, including the activities of a third party.<sup>13</sup> The OCC is aware of banks working with third parties to develop, design and service the deposit advance product. The existence of third-party arrangements may, when not properly managed, significantly increase banks' reputation, compliance, and, operational risks. Some of the risks are associated with the underlying activity itself, similar to the risks faced by a bank directly conducting the activity. Consequently, third-party arrangements may expose the bank to regulatory action and may impact the bank's ability to establish new or service existing customer relationships.

*Compliance Risk:* The significant risks associated with deposit advance lending products may subject banks to the risk of litigation—both from private lawsuits and regulatory enforcement actions.

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<sup>12</sup> See "Federal Financial Institutions Examination Council's Uniform Retail Credit Classification and Account Management Policy," 65 FR 36903 (June 12, 2000). This policy is addressed more fully in the "Credit Quality" section of this Guidance. See also OCC Bulletin 2000-20, "Uniform Retail Credit Classification and Account Management Policy" (June 20, 2000).

<sup>13</sup> See OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance" (October 30, 2013).

## *Compliance and Consumer Protection Related Concerns*

Deposit advance products must comply with all applicable federal laws and regulations, some of which are outlined below. In some circumstances, certain state laws may be applicable.<sup>14</sup> It is important that a bank's deposit advance products be reviewed by counsel for compliance with all applicable laws prior to implementation. Furthermore, although the guidance below outlines federal laws and regulations as of the date this Guidance is published, applicable laws and regulations are subject to amendment. In addition, statutes and regulations will have different applications depending on how a deposit advance product is structured. A bank offering deposit advances should carefully consider whether and how these laws and rules will apply to the particular version of the deposit advance product it is providing. Accordingly, a bank should monitor applicable laws and regulations for revisions and to ensure that its deposit advance product is fully compliant. Federal laws and regulations applicable to deposit advance products include the following:

*The Federal Trade Commission Act (FTC Act):* Section 5 of the FTC Act prohibits unfair or deceptive acts or practices (UDAP).<sup>15</sup> The OCC enforces this section pursuant to its authority in Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818.<sup>16</sup> An act or practice is unfair where it: (1) Causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition. Public policy may also be considered. An act or practice is deceptive if: (1) There is a representation, omission, or practice that misleads or is likely to mislead a consumer; (2) the consumer's interpretation is reasonable under the circumstances; and (3) the misleading representation, omission, or practice is material.

Deposit advance products may raise issues under the FTC Act depending upon how the products are marketed and administered. Any FTC Act analysis will be dependent on the facts and circumstances in a particular matter.

The prohibition on UDAP applies not only to the product, but to every stage and activity, from product development to the creation and rollout of marketing campaigns, and to servicing and collections. For example, marketing materials and disclosures should be clear, conspicuous, accurate, and timely and should describe fairly and adequately the terms, benefits, potential risks, and material limitations of the product.

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<sup>14</sup> This Guidance has no bearing on state usury laws or existing federal laws regarding usury. See 12 U.S.C. 85, 1831d(a).

<sup>15</sup> 15 U.S.C. 45(a) and (n).

<sup>16</sup> See OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices" (March 22, 2002).

*Truth in Lending Act (TILA):* TILA and Regulation Z require creditors to provide cost disclosures for extensions of consumer credit.<sup>17</sup> Different rules apply to Regulation Z disclosures depending on whether the loan is an open- or closed-end credit product. A bank should ensure the product's disclosures comply with the applicable requirements. TILA advertising rules for open-end credit require that, if an advertisement states any periodic rate that may be applied, it must state the rate as an Annual Percentage Rate, using that term.<sup>18</sup> Similarly, TILA advertising rules for closed-end credit require that, if an advertisement states a rate of finance charge, it must state the rate as an Annual Percentage Rate, using that term.<sup>19</sup>

*Electronic Fund Transfer Act (EFTA):* A program that involves the use of electronic fund transfers must meet the applicable disclosure and other requirements of EFTA and Regulation E.<sup>20</sup> EFTA requires disclosures,<sup>21</sup> prohibits creditors from mandating that loans be repaid by "preauthorized electronic fund transfers,"<sup>22</sup> and allows customers to withdraw authorization for "preauthorized fund transfers."<sup>23</sup>

*Truth in Savings Act (TISA):* A program that involves a consumer's deposit account must meet the disclosure requirements of TISA and Regulation DD.<sup>24</sup> Under TISA, deposit account disclosures must include the amount of any fee that may be imposed in connection with the account and the conditions under which the fee may be imposed.<sup>25</sup> TISA also prohibits a bank from making any advertisement, announcement, or solicitation relating to a deposit account that is inaccurate or misleading or that misrepresents their deposit contracts.<sup>26</sup> TISA disclosures enable consumers to make informed decisions about their deposit accounts at a bank. A consumer is entitled to receive TISA disclosures at account opening, when the terms of the consumer's account are changed, and when a periodic statement is sent.

*Equal Credit Opportunity Act (ECOA):* Under ECOA and Regulation B, creditors are prohibited from discriminating against an applicant on a prohibited basis in any aspect of a credit transaction.<sup>27</sup> This prohibition applies to deposit advance products. The creditor's discretion,

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<sup>17</sup> 15 U.S.C. 1601 *et seq.* TILA is implemented by Regulation Z, 12 CFR Part 1026.

<sup>18</sup> See 12 CFR 1026.16(b)(1).

<sup>19</sup> See 12 CFR 1026.24(c).

<sup>20</sup> 15 U.S.C. 1693 *et seq.* EFTA is implemented by Regulation E, 12 CFR Part 1005.

<sup>21</sup> See, e.g., 12 CFR 1005.7, 1005.8, and 1005.9.

<sup>22</sup> See 12 CFR 1005.10(e).

<sup>23</sup> See 12 CFR 1005.10(c).

<sup>24</sup> 12 U.S.C. 4301 *et seq.* TISA is implemented by Regulation DD at 12 CFR Part 1030 for banks and federal savings associations.

<sup>25</sup> See 12 CFR 1030.4(b)(4).

<sup>26</sup> See 12 CFR 1030.8.

<sup>27</sup> 15 U.S.C. 1691 *et seq.* ECOA is implemented by Regulation B, 12 CFR Part 1002. ECOA prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to

for example in determining the application of eligibility requirements, loss mitigation options, and fee waivers, may raise fair lending risk.<sup>28</sup> Steering or targeting certain customers on a prohibited basis toward deposit advance products while offering other customers more favorable credit products may also raise fair lending risk. Additionally, providing different product terms or conditions and different servicing or loss mitigation options to similarly situated customers on a prohibited basis may also violate ECOA.

In addition to the general prohibition against discrimination, ECOA and Regulation B contain specific rules concerning procedures and notices for credit denials and other adverse actions. Regulation B defines the term “adverse action,” and generally requires a creditor who takes an adverse action to send a notice to the consumer providing, among other things, the reasons for the adverse action.<sup>29</sup>

### **Supervisory Expectations**

Deposit advance lending presents significant consumer protection and safety and soundness concerns, irrespective of whether the products are issued by a bank directly or by a third party. The OCC will take appropriate supervisory action to address any unsafe or unsound banking practices associated with these products, to prevent harm to consumers, and to ensure compliance with all applicable laws. Examinations will focus on potential safety and soundness issues and compliance with applicable consumer protection statutes.

Examiners will assess credit quality, including underwriting and credit administration policies and practices. In addition, examiners will assess the adequacy of capital, reliance on fee income, and adequacy of the allowance for loan and lease losses (ALLL). Compliance with applicable federal consumer protection statutes, management’s oversight, and relationships with third parties will also be assessed.

*Credit Quality:* The Uniform Retail Credit Classification and Account Management Policy (Retail Classification Policy) establishes guidelines for classifying consumer loans, such as deposit advance loans, based on delinquency, but also grants examiners the discretion to classify individual retail loans that exhibit signs of credit weakness, regardless of delinquency status. An examiner also may classify consumer portfolios, or segments thereof, in which underwriting standards are weak and present unreasonable credit risk.

Deposit advance loans often have weaknesses that may jeopardize the liquidation of the debt. Customers often have limited repayment capacity. A bank should adequately review repayment

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contract), the fact that all or part of the applicant’s income derives from a public assistance program, and the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

<sup>28</sup> See Interagency Fair Lending Examination Procedures (August 2009) at 9–13.

<sup>29</sup> See 12 CFR 1002.2(c) and 1002.9.

capacity to assess whether a customer will be able to repay the loan without needing to incur further deposit advance borrowing.

Deposit advance loans that have been accessed repeatedly or for extended periods of time could be evidence of inability to repay and inadequate underwriting. A bank should monitor for repeated or extended use, as will be discussed in greater detail in the discussion of underwriting expectations below.

*Underwriting and Credit Administration Policies and Practices:* As part of the credit quality review, examiners will assess underwriting and administration policies and practices for deposit advance loan products. Eligibility and underwriting criteria for deposit advance loans, consistent with eligibility and underwriting criteria for other bank loans, should be well documented in the bank's policy. The criteria should be designed to assure that the extension of credit, including all associated fees and expenses, can be repaid according to its terms while allowing the customer to continue to meet typical recurring and other necessary expenses such as food, housing, transportation, and healthcare, as well as other outstanding debt obligations. Additionally, criteria should ensure that customers can meet these requirements without needing to borrow repeatedly. Banks should maintain appropriate criteria to prevent churning and prolonged use of these products. Underwriting for deposit advance products should occur prior to opening such accounts and should be monitored on an ongoing basis. Repetitive deposit advance borrowings could indicate weak underwriting and may be criticized in the Report of Examination and then taken into account in a bank's ratings, as appropriate.

Bank policies regarding the underwriting of deposit advance loan products should be written and approved by the bank's board of directors, and be consistent with the bank's general underwriting standards and risk appetite. Factors a bank should address in its written underwriting policies for deposit advance products include the following:

- *The Length of a Customer's Deposit Relationship With the Bank.* A bank should ensure that the customer relationship is of sufficient duration to provide the bank with adequate information regarding the customer's recurring deposits and expenses in order to prudently underwrite deposit advance loans. The OCC will consider sufficient duration to evaluate a customer's deposit advance eligibility to be no less than six months.
- *Classified Credits.* Customers with delinquent or adversely classified credits with the bank that is offering the deposit advance product should be ineligible.

- *Financial Capacity.* In addition to any eligibility requirements, the bank should conduct an analysis of the customer's financial capacity including income levels.<sup>30</sup> Underwriting assessments should consider the customer's ability to repay a loan without needing to borrow repeatedly from any source, including re-borrowing, to meet necessary expenses. The financial capacity assessment should include:
  - An analysis of the customer's account for recurring deposits (inflows) and checks/credit/customer withdrawals (outflows) over at least six consecutive months. Lines of credit of any sort, including overdrafts, and drafts from savings should not be considered inflows. In reviewing a customer's transactions to determine deposit advance eligibility, the bank should consider the customer's net surplus or deficit at the end of each of the preceding six months, and not rely on a six-month transaction average.
  - After conducting the above-described analysis, determine whether an installment repayment is more appropriate.
- *Cooling Off Period.* Each deposit advance loan, along with all applicable fees, should be repaid in full before the extension of a subsequent deposit advance loan, and a bank should not offer more than one loan per monthly statement cycle.<sup>31</sup> A cooling off period of at least one monthly statement cycle after the repayment of a deposit advance loan should be completed before another advance may be extended in order to avoid repeated use of the short-term product.
- *Increasing Deposit Advance Credit Limits.* The amount of credit available to a customer should not be increased without a full underwriting reassessment in compliance with the bank's underwriting policies and in accordance with the factors discussed in this Guidance. Additionally, any increase in the credit limit should not be automatic and should be initiated by a request from the customer.
- *Ongoing Customer Eligibility.* As part of underwriting for this product, a bank should, no less than every six months, reevaluate the customer's eligibility and capacity for this product. Additionally, a bank should identify risks that could negatively affect a customer's eligibility to receive additional deposit advances. For example:
  - Repeated overdrafts (establish/set a certain number during a specified number of

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<sup>30</sup> While a bank may choose to obtain and review a customer's credit report for the purposes of assessing financial capacity or ongoing eligibility, obtaining a customer's credit report to assess ability to repay is not expected pursuant to this Guidance.

<sup>31</sup> The Interagency "Expanded Guidance for Subprime Lending Programs" (2001) states that loans to borrowers who do not demonstrate the capacity to repay the loan, as structured, from sources other than the collateral pledged, in this case the customer's direct deposit, are generally considered unsafe and unsound. Such lending practices should be criticized in the Report of Examination as imprudent.

months).

- o Evidence that the customer is overextended with respect to total credit obligations.

Additionally, a bank should monitor for repeated customer usage, which may indicate a need for alternative credit arrangements or other services, and inform customers of these available options when appropriate.

*Capital Adequacy:* Higher capital requirements generally apply to loan portfolios that exhibit higher-risk characteristics and are subject to less stringent loan underwriting requirements. Loans exhibiting subprime credit characteristics are higher-risk loans and may require higher levels of capital.

*Over-Reliance on Fee Income:* Fees associated with deposit advance products should be based on safe and sound banking principles. A bank should monitor for any undue reliance on the fees generated by such products for its revenue and earnings.

*ALLL:* Examiners will assess whether the ALLL is adequate to absorb estimated credit losses within the deposit advance loan portfolio. Examiners will also determine whether a bank engaged in deposit advance lending has methodologies and analyses in place that demonstrate and document that the level of the ALLL is appropriate.

*Consumer Compliance:* A bank should implement effective compliance management systems, processes and procedures to mitigate risks appropriately. Examiners will review a bank's program with respect to deposit advance products for compliance with applicable consumer protection statutes and regulations, including TILA, EFTA, TISA, ECOA, and Section 5 of the FTC Act.

*Operational Risk and Third-Party Relationships:* A bank is responsible for ensuring that the processes and systems, and the associated internal controls are appropriate for the delivery of products to the customer in a safe and sound manner, and in compliance with laws and regulations, whether performed by the bank or a third party. In the review of a bank's relationships with third parties, the OCC's primary supervisory concern is whether the bank is assuming more risk than it can identify, monitor, and manage. Management should allocate sufficient qualified staff to monitor for significant third-party relationships, excessive usage by customers, and excessive risk taking by the bank. Therefore, examiners will review the risks associated with all material third-party relationships and activities together with other bank risks. In certain high-risk situations, examiners may conduct on-site third-party reviews under specific authorities granted to the OCC.

*Management Oversight:* Examiners will assess bank management's ability to administer a

deposit advance program and board oversight of the program. Furthermore, examiners will determine whether bank management has established controls and implemented a rigorous analytical process to identify, measure, monitor, and manage the risks associated with deposit advance products.

A bank should maintain adequate oversight of deposit advance programs and adequate quality control over those products and services to minimize exposure to potential significant financial loss, reputation damage, and supervisory action. The bank's compliance management system should ensure continuing compliance with applicable federal and state laws, rules and regulations, as well as internal policies and procedures.

Management should provide the appropriate oversight and allocate sufficient qualified staff to monitor deposit advance programs. Results of oversight activities—including identified weaknesses that, should be documented and promptly addressed— should be reported periodically to the bank's board of directors or designated committee.

#### **Responsible Products To Meet Small-Dollar Credit Needs**

The OCC recognizes consumers' need for responsible small-dollar credit products. A number of banks are currently offering reasonably priced small-dollar loans at reasonable terms to their customers. If such loans are structured properly, they can provide a safe and affordable means for customers to transition from reliance on high-cost debt products that do not appropriately serve their needs. The OCC encourages banks to continue to offer these products, in a manner consistent with safety and soundness and other supervisory considerations, and encourages other banks to consider offering such products. Properly managed small-dollar loan products offered with reasonable terms and at a reasonable cost do not pose the same level of supervisory risk as deposit advance products. The OCC encourages banks to develop new or innovative programs to effectively meet the need for small-dollar credit that do not exhibit the risks associated with deposit advance products and payday loans.

End of Guidance.

Dated: November 20, 2013.

**Thomas J. Curry,**

*Comptroller of the Currency.*



## Assignment 18: Student Loans

### Problem 18.1

#### 34 C.F.R. §668.401, Scope and Purpose.

This subpart applies to an educational program offered by an eligible institution that prepares students for gainful employment in a recognized occupation, and establishes the rules and procedures under which—

- (a) The Secretary determines that the program is eligible for title IV, HEA program funds;
- (b) An institution reports information about the program to the Secretary; and
- (c) An institution discloses information about the program to students and prospective students.

#### 34 C.F.R. §668.402, Definitions.

The following definitions apply to this subpart.

*Annual earnings rate.* The percentage of a GE program's annual loan payment compared to the annual earnings of the students who completed the program, as calculated under § 668.404.

*Classification of instructional program (CIP) code.* A taxonomy of instructional program classifications and descriptions developed by the U.S. Department of Education's National Center for Education Statistics (NCES). The CIP code for a program is six digits.

*Cohort period.* The two-year cohort period or the four-year cohort period, as applicable, during which those students who complete a program are identified in order to assess their loan debt and earnings. The Secretary uses the two year cohort period when the number of students completing the program is 30 or more. The Secretary uses the four year cohort period when the number of students completing the program in the two-year cohort period is less than 30 and when the number of students completing the program in the four-year cohort period is 30 or more.

*Credential level.* The level of the academic credential awarded by an institution to students who complete the program. For the purposes of this subpart, the undergraduate credential levels are: Undergraduate certificate or diploma, associate degree, bachelor's degree, and post-baccalaureate certificate; and the graduate credential levels are graduate certificate (including a postgraduate certificate), master's degree, doctoral degree, and first professional degree (e.g., MD, DDS, JD).

*Debt-to-earnings rates (D/E rates).* The discretionary income rate and annual earnings rate as calculated under § 668.404.

*Discretionary income rate.* The percentage of a GE program's annual loan payment compared to the discretionary income of the students who completed the program, as calculated under § 668.404.

*Four-year cohort period.* The cohort period covering four consecutive award years that are—

(1) The third, fourth, fifth, and sixth award years prior to the award year for which the D/E rates are calculated pursuant to § 668.404. For example, if D/E rates are calculated for award year 2014–2015, the four-year cohort period is award years 2008–2009, 2009–2010, 2010–2011, and 2011–2012; or

(2) For a program whose students are required to complete a medical or dental internship or residency, the sixth, seventh, eighth, and ninth award years prior to the award year for which the D/E rates are calculated. For example, if D/E rates are calculated for award year 2014–2015, the four-year cohort period is award years 2005–2006, 2006–2007, 2007–2008, and 2008–2009. For this purpose, a required medical or dental internship or residency is a supervised training program that—

(i) Requires the student to hold a degree as a doctor of medicine or osteopathy, or a doctor of dental science;

(ii) Leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers post-graduate training; and

(iii) Must be completed before the student may be licensed by a State and board certified for professional practice or service.

*Gainful employment program (GE program).* An educational program offered by an institution under § 668.8(c)(3) or (d) and identified by a combination of the institution's six-digit Office of Postsecondary Education ID (OPEID) number, the program's six-digit CIP code as assigned by the institution or determined by the Secretary, and the program's credential level.

*Length of the program.* The amount of time in weeks, months, or years that is specified in the institution's catalog, marketing materials, or other official publications for a student to complete the requirements needed to obtain the degree or credential offered by the program.

*Metropolitan Statistical Area (MSA).* The Metropolitan Statistical Area as published by the U.S. Office of Management and Budget and available at [www.census.gov/population/metro/](http://www.census.gov/population/metro/) or its successor site.

*Poverty Guideline.* The Poverty Guideline for a single person in the continental United States as published by the U.S. Department of Health and Human Services and available at <http://aspe.hhs.gov/poverty> or its successor site.

*Prospective student.* An individual who has contacted an eligible institution for the purpose of requesting information about enrolling in a GE program or who has been contacted directly by the institution or by a third party on behalf of the institution about enrolling in a GE program.

*Student.* An individual who received title IV, HEA program funds for enrolling in the GE program.

*Title IV loan.* A loan authorized under the Federal Perkins Loan Program (Perkins Loan), the Federal Family Education Loan Program (FFEL Loan), or the William D. Ford Direct Loan Program (Direct Loan).

*Two-year cohort period.* The cohort period covering two consecutive award years that are—

- (1) The third and fourth award years prior to the award year for which the D/ E rates are calculated pursuant to § 668.404. For example, if D/E rates are calculated for award year 2014–2015, the two-year cohort period is award years 2010–2011 and 2011–2012; or
- (2) For a program whose students are required to complete a medical or dental internship or residency, the sixth and seventh award years prior to the award year for which the D/E rates are calculated. For example, if D/E rates are calculated for award year 2014–2015, the two-year cohort period is award years 2007–2008 and 2008– 2009. For this purpose, a required medical or dental internship or residency is a supervised training program that—
  - (i) Requires the student to hold a degree as a doctor of medicine or osteopathy, or as a doctor of dental science;
  - (ii) Leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers post-graduate training; and
  - (iii) Must be completed before the student may be licensed by a State and board certified for professional practice or service.

34 C.F.R. §668.403, Gainful employment program framework.

(a) *General.* A program provides training that prepares students for gainful employment in a recognized occupation if the program—

- (1) Satisfies the applicable certification requirements in §668.414; and
- (2) Is not an ineligible program under the D/E rates measure.

(b) *Debt-to-earnings rates (D/E rates).* For each award year and for each eligible GE program

offered by an institution, the Secretary calculates two D/E rates, the discretionary income rate and the annual earnings rate, using the procedures in §§ 668.404 through 668.406.

*(c) Outcomes of the D/E rates measure.*

(1) A GE program is “passing” the D/E rates measure if—

- (i) Its discretionary income rate is less than or equal to 20 percent; or
- (ii) Its annual earnings rate is less than or equal to eight percent.

(2) A GE program is “failing” the D/E rates measure if—

- (i) Its discretionary income rate is greater than 30 percent or the income for the denominator of the rate (discretionary earnings) is negative or zero; and
- (ii) Its annual earnings rate is greater than 12 percent or the denominator of the rate (annual earnings) is zero.

(3) A GE program is “in the zone” for the purpose of the D/E rates measure if it is not a passing GE program and its—

- (i) Discretionary income rate is greater than 20 percent but less than or equal to 30 percent; or
- (ii) Annual earnings rate is greater than eight percent but less than or equal to 12 percent.

(4) For the purpose of the D/E rates measure, subject to paragraph (c)(5) of this section, a GE program becomes ineligible if the program either—

- (i) Is failing the D/E rates measure in two out of any three consecutive award years for which the program’s D/E rates are calculated; or
- (ii) Has a combination of zone and failing D/E rates for four consecutive award years for which the program’s D/E rates are calculated.

(5) If the Secretary does not calculate or issue D/E rates for a program for an award year, the program receives no result under the D/E rates measure for that award year and remains in the same status under the D/E rates measure as the previous award year; provided that if the Secretary does not calculate D/E rates for the program for four or more consecutive award years, the Secretary disregards the program’s D/E rates for any award year prior to the four-year period in determining the program’s eligibility.

## Problem 18.2

### 20 U.S.C. §1087(e)(m), Repayment Plan for Public Service Employees.

(1) *In general.* The Secretary shall cancel the balance of interest and principal due, in accordance with paragraph (2), on any eligible Federal Direct Loan not in default for a borrower who—

(A) has made 120 monthly payments on the eligible Federal Direct Loan after October 1, 2007, pursuant to any one or a combination of the following—

(i) payments under an income-based repayment plan under section 1098e of this title;

(ii) payments under a standard repayment plan under subsection (d)(1)(A), based on a 10-year repayment period;

(iii) monthly payments under a repayment plan under subsection (d)(1) or (g) of not less than the monthly amount calculated under subsection (d)(1)(A), based on a 10-year repayment period; or

(iv) payments under an income contingent repayment plan under subsection (d)(1)(D); and

(B)

(i) is employed in a public service job at the time of such forgiveness; and

(ii) has been employed in a public service job during the period in which the borrower makes each of the 120 payments described in subparagraph (A).

(2) *Loan cancellation amount.*

After the conclusion of the employment period described in paragraph (1), the Secretary shall cancel the obligation to repay the balance of principal and interest due as of the time of such cancellation, on the eligible Federal Direct Loans made to the borrower under this part.

(3) *Definitions.* In this subsection:

(A) *Eligible Federal Direct Loan*

The term “eligible Federal Direct Loan” means a Federal Direct Stafford Loan, Federal Direct PLUS Loan, or Federal Direct Unsubsidized Stafford Loan, or a Federal Direct Consolidation Loan.

(B) *Public service job.* The term “public service job” means—

(i) a full-time job in emergency management, government (excluding time served as a

member of Congress), military service, public safety, law enforcement, public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, social work in a public child or family service agency, public interest law services (including prosecution or public defense or legal advocacy on behalf of low-income communities at a nonprofit organization), early childhood education (including licensed or regulated childcare, Head Start, and State funded prekindergarten), public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services, or at an organization that is described in section 501(c)(3) of title 26 and exempt from taxation under section 501(a) of such title; or

(ii) teaching as a full-time faculty member at a Tribal College or University as defined in section 1059c(b) of this title and other faculty teaching in high-needs subject areas or areas of shortage (including nurse faculty, foreign language faculty, and part-time faculty at community colleges), as determined by the Secretary.

*(4) Ineligibility for double benefits.*

No borrower may, for the same service, receive a reduction of loan obligations under both this subsection and section 1078–10, 1078–11, 1078–12, or 1087j of this title.

34 C.F.R. §685.219, Public Service Loan Forgiveness Program.

(a) General. The Public Service Loan Forgiveness Program is intended to encourage individuals to enter and continue in full-time public service employment by forgiving the remaining balance of their Direct loans after they satisfy the public service and loan payment requirements of this section.

(b) Definitions. The following definitions apply to this section:

AmeriCorps position means a position approved by the Corporation for National and Community Service under section 123 of the National and Community Service Act of 1990 (42 U.S.C. 12573).

Eligible Direct loan means a Direct Subsidized Loan, Direct Unsubsidized Loan, Direct PLUS loan, or a Direct Consolidation loan.

Employee or employed means an individual who is hired and paid by a public service organization.

Full-time (1) means working in qualifying employment in one or more jobs for the greater of—

(i)

(A) An annual average of at least 30 hours per week, or

(B) For a contractual or employment period of at least 8 months, an average of 30 hours per week; or

(ii) Unless the qualifying employment is with two or more employers, the number of hours the employer considers full-time.

(2) Vacation or leave time provided by the employer or leave taken for a condition that is a qualifying reason for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2612(a)(1) and (3) is not considered in determining the average hours worked on an annual or contract basis.

Government employee means an individual who is employed by a local, State, Federal, or Tribal government, but does not include a member of the U.S. Congress.

Law enforcement means service performed by an employee of a public service organization that is publicly funded and whose principal activities pertain to crime prevention, control or reduction of crime, or the enforcement of criminal law.

Military service, for uniformed members of the U.S. Armed Forces or the National Guard, means “active duty” service or “full-time National Guard duty” as defined in section 101(d)(1) and (d)(5) of title 10 in the United States Code, but does not include active duty for training or attendance at a service school. For civilians, “Military service” means service on behalf of the U.S. Armed Forces or the National Guard performed by an employee of a public service organization.

Peace Corps position means a full-time assignment under the Peace Corps Act as provided for under 22 U.S.C. 2504.

Public interest law refers to legal services provided by a public service organization that are funded in whole or in part by a local, State, Federal, or Tribal government.

Public service organization means:

(1) A Federal, State, local, or Tribal government organization, agency, or entity;

(2) A public child or family service agency;

(3) A non-profit organization under section 501(c)(3) of the Internal Revenue Code that—

(i) Is exempt from taxation under section 501(a) of the Internal Revenue Code; and

(ii) Is not an organization engaged in religious activities, unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing;

(4) A Tribal college or university; or

(5) A private organization that—

(i) Provides the following public services: Emergency management, military service, public safety, law enforcement, public interest law services, early childhood education (including licensed or regulated child care, Head Start, and State funded pre-kindergarten), public service for individuals with disabilities and the elderly, public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, public library services, school library or other school-based services; and

(ii) Is not a business organized for profit, a labor union, a partisan political organization, or an organization engaged in religious activities, unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing.

(c) Borrower eligibility.

(1) A borrower may obtain loan forgiveness under this program if he or she—

(i) Is not in default on the loan for which forgiveness is requested;

(ii) Is employed full-time by a public service organization or serving in a full-time AmeriCorps or Peace Corps position—

(A) When the borrower makes the 120 monthly payments described under paragraph (c)(1)(iii) of this section;

(B) At the time of application for loan forgiveness; and

(C) At the time the remaining principal and accrued interest are forgiven;

(iii) Makes 120 separate monthly payments after October 1, 2007, on eligible Direct loans for which forgiveness is sought. Except as provided in paragraph (c)(2) of this section for a borrower in an AmeriCorps or Peace Corps position, the borrower must make the monthly payments within 15 days of the scheduled due date for the full scheduled installment amount; and



(iv) Makes the required 120 monthly payments under one or more of the following repayment plans—

(A) Except for a parent PLUS borrower, an income-based repayment plan, as determined in accordance with § 685.221;

(B) Except for a parent PLUS borrower, an income-contingent repayment plan, as determined in accordance with § 685.209;

(C) A standard repayment plan, as determined in accordance with § 685.208(b); or

(D) Any other repayment plan if the monthly payment amount paid is not less than what would have been paid under the Direct Loan standard repayment plan described in § 685.208(b).

(2) If a borrower makes a lump sum payment on an eligible loan for which the borrower is seeking forgiveness by using all or part of a Segal Education Award received after a year of AmeriCorps service, or by using all or part of a Peace Corps transition payment if the lump sum payment is made no later than six months after leaving the Peace Corps, the Secretary will consider the borrower to have made qualifying payments equal to the lesser of—

(i) The number of payments resulting after dividing the amount of the lump sum payment by the monthly payment amount the borrower would have made under paragraph (c)(1)(iv) of this section; or

(ii) Twelve payments.

(d) Forgiveness Amount. The Secretary forgives the principal and accrued interest that remains on all eligible loans for which loan forgiveness is requested by the borrower. The Secretary forgives this amount after the borrower makes the 120 monthly qualifying payments under paragraph (c) of this section.

(e) Application.

(1) After making the 120 monthly qualifying payments on the eligible loans for which loan forgiveness is requested, a borrower may request loan forgiveness on a form provided by the Secretary.

(2) If the Secretary determines that the borrower meets the eligibility requirements for loan forgiveness under this section, the Secretary—

(i) Notifies the borrower of this determination; and

(ii) Forgives the outstanding balance of the eligible loans.

(3) If the Secretary determines that the borrower does not meet the eligibility requirements for loan forgiveness under this section, the Secretary resumes collection of the loan and grants forbearance of payment on both principal and interest for the period in which collection activity was suspended. The Secretary notifies the borrower that the application has been denied, provides the basis for the denial, and informs the borrower that the Secretary will resume collection of the loan. The Secretary may capitalize any interest accrued and not paid during this period.

### **Problem 18.3**

#### 12 C.F.R. §1026.47(a), Content of disclosures.

(a) Application or solicitation disclosures. A creditor shall provide the disclosures required under paragraph (a) of this section on or with a solicitation or an application for a private education loan.

#### **(1) Interest Rates.**

(i) The interest rate or range of interest rates applicable to the loan and actually offered by the creditor at the time of application or solicitation. If the rate will depend, in part, on a later determination of the consumer's creditworthiness or other factors, a statement that the rate for which the consumer may qualify will depend on the consumer's creditworthiness and other factors, if applicable.

(ii) Whether the interest rates applicable to the loan are fixed or variable.

(iii) If the interest rate may increase after consummation of the transaction, any limitations on the interest rate adjustments, or lack thereof; a statement that the consumer's actual rate could be higher or lower than the rates disclosed under paragraph (a)(1)(i) of this section, if applicable; and, if the limitation is determined by applicable law, that fact.

(iv) Whether the applicable interest rates typically will be higher if the loan is not co-signed or guaranteed.

#### **(2) Fees and default or late payment costs.**

(i) An itemization of the fees or range of fees required to obtain the private education loan.

(ii) Any fees, changes to the interest rate, and adjustments to principal based on the consumer's defaults or late payments.

(3) Repayment terms.

(i) The term of the loan, which is the period during which regularly scheduled payments of principal and interest will be due.

(ii) A description of any payment deferral options, or, if the consumer does not have the option to defer payments, that fact.

(iii) For each payment deferral option applicable while the student is enrolled at a covered educational institution:

(A) Whether interest will accrue during the deferral period; and

(B) If interest accrues, whether payment of interest may be deferred and added to the principal balance.

(iv) A statement that if the consumer files for bankruptcy, the consumer may still be required to pay back the loan.

(4) Cost estimates. An example of the total cost of the loan calculated as the total of payments over the term of the loan:

(i) Using the highest rate of interest disclosed under paragraph (a)(1) of this section and including all finance charges applicable to loans at that rate;

(ii) Using an amount financed of \$ 10,000, or \$ 5000 if the creditor only offers loans of this type for less than \$ 10,000; and

(iii) Calculated for each payment option.

(5) Eligibility. Any age or school enrollment eligibility requirements relating to the consumer or cosigner.

(6) Alternatives to private education loans.

(i) A statement that the consumer may qualify for Federal student financial assistance through a program under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.).

(ii) The interest rates available under each program under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.) and whether the rates are fixed or variable.

(iii) A statement that the consumer may obtain additional information concerning Federal student financial assistance from the institution of higher education that the student

attends, or at the Web site of the U.S. Department of Education, including an appropriate Web site address.

(iv) A statement that a covered educational institution may have school-specific education loan benefits and terms not detailed on the disclosure form.

(7) Rights of the consumer. A statement that if the loan is approved, the terms of the loan will be available and will not change for 30 days except as a result of adjustments to the interest rate and other changes permitted by law.

(8) Self-certification information. A statement that, before the loan may be consummated, the consumer must complete the self-certification form and that the form may be obtained from the institution of higher education that the student attends.

Official Interpretation to 12 C.F.R. §1026.47(a)(1)(i).

1. RATES ACTUALLY OFFERED.

The disclosure may state only those rates that the creditor is actually prepared to offer. For example, a creditor may not disclose a very low interest rate that will not in fact be offered at any time. For a loan with variable interest rates, the ranges of rates will be considered actually offered if:

For disclosures in applications or solicitations sent by direct mail, the rates were in effect within 60 days before mailing;

For disclosures in applications or solicitations in electronic form, the rates were in effect within 30 days before the disclosures are sent to a consumer, or for disclosures made on an Internet Web site, within 30 days before being viewed by the public;

For disclosures in printed applications or solicitations made available to the general public, the rates were in effect within 30 days before printing; or

For disclosures provided orally in telephone applications or solicitations, the rates are currently available at the time the disclosures are provided.

2. CREDITWORTHINESS AND OTHER FACTORS.

If the rate will depend, at least in part, on a later determination of the consumer's creditworthiness or other factors, the disclosure must include a statement that the rate for which the consumer may qualify at approval will depend on the consumer's creditworthiness and other factors. The creditor may, but is not required to, specify any additional factors that it will use to determine the interest rate. For example, if the creditor will determine the interest rate based on information in the consumer's or cosigner's credit report and the type of school

the consumer attends, the creditor may state, “Your interest rate will be based on your credit history and other factors (cosigner credit and school type).”

### 3. RATES APPLICABLE TO THE LOAN.

For a variable-rate private education loan, the disclosure of the interest rate or range of rates must reflect the rate or rates calculated based on the index and margin that will be used to make interest rate adjustments for the loan. The creditor may provide a description of the index and margin or range of margins used to make interest rate adjustments, including a reference to a source, such as a newspaper, where the consumer may look up the index.

#### 12 C.F.R. §1026.48, Limitations on private education loans.

##### (a) Co-branding prohibited.

(1) Except as provided in paragraph (b) of this section, a creditor, other than the covered educational institution itself, shall not use the name, emblem, mascot, or logo of a covered educational institution, or other words, pictures, or symbols identified with a covered educational institution, in the marketing of private education loans in a way that implies that the covered education institution endorses the creditor’s loans.

(2) A creditor’s marketing of private education loans does not imply that the covered education institution endorses the creditor’s loans if the marketing includes a clear and conspicuous disclosure that is equally prominent and closely proximate to the reference to the covered educational institution that the covered educational institution does not endorse the creditor’s loans and that the creditor is not affiliated with the covered educational institution.

(b) Endorsed lender arrangements. If a creditor and a covered educational institution have entered into an arrangement where the covered educational institution agrees to endorse the creditor’s private education loans, and such arrangement is not prohibited by other applicable law or regulation, paragraph (a)(1) of this section does not apply if the private education loan marketing includes a clear and conspicuous disclosure that is equally prominent and closely proximate to the reference to the covered educational institution that the creditor’s loans are not offered or made by the covered educational institution, but are made by the creditor.

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## Assignment 19: Banking Transactions

### Problem 19.1

#### 12 C.F.R. §229.12, Availability schedule.

(a) Effective date. The availability schedule contained in this section is effective September 1, 1990.

(b) Local checks and certain other checks. Except as provided in paragraphs (d), (e), and (f) of this section, a depository bank shall make funds deposited in an account by a check available for withdrawal not later than the second business day following the banking day on which funds are deposited, in the case of—

(1) A local check;

(2) A check drawn on the Treasury of the United States that is not governed by the availability requirements of §229.10(c);

(3) A U.S. Postal Service money order that is not governed by the availability requirements of §229.10(c); and

(4) A check drawn on a Federal Reserve Bank or Federal Home Loan Bank; a check drawn by a state or unit of general local government; or a cashier's, certified, or teller's check; if any check referred to in this paragraph (b)(4) is a local check that is not governed by the availability requirements of §229.10(c).

(c) Nonlocal checks—(1) In general. Except as provided in paragraphs (d), (e), and (f) of this section, a depository bank shall make funds deposited in an account by a check available for withdrawal not later than the fifth business day following the banking day on which funds are deposited, in the case of —

(i) A nonlocal check; and

(ii) A check drawn on a Federal Reserve Bank or Federal Home Loan Bank; a check drawn by a state or unit of general local government; a cashier's, certified, or teller's check; or a check deposited in a branch of the depository bank and drawn on the same or another branch of the same bank, if any check referred to in this paragraph (c)(1)(ii) is a nonlocal check that is not governed by the availability requirements of §229.10(c).

(2) Nonlocal checks specified in appendix B-2 to this part must be made available for

withdrawal not later than the times prescribed in that Appendix.

(d) Time period adjustment for withdrawal by cash or similar means. A depository bank may extend by one business day the time that funds deposited in an account by one or more checks subject to paragraphs (b), (c), or (f) of this section are available for withdrawal by cash or similar means. Similar means include electronic payment, issuance of a cashier's or teller's check, or certification of a check, or other irrevocable commitment to pay, but do not include the granting of credit to a bank, a Federal Reserve Bank, or a Federal Home Loan Bank that presents a check to the depository bank for payment. A depository bank shall, however, make \$ 400 of these funds available for withdrawal by cash or similar means not later than 5:00 p.m. on the business day on which the funds are available under paragraphs (b), (c), or (f) of this section. This \$ 400 is in addition to the \$ 100 available under §229.10(c)(1)(vii).

(e) Extension of schedule for certain deposits in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. The depository bank may extend the time periods set forth in this section by one business day in the case of any deposit, other than a deposit described in §229.10, that is—

(1) Deposited in an account at a branch of a depository bank if the branch is located in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands; and

(2) Deposited by a check drawn on or payable at or through a paying bank not located in the same state as the depository bank.

(f) Deposits at nonproprietary ATMs. A depository bank shall make funds deposited in an account at a nonproprietary ATM by cash or check available for withdrawal not later than the fifth business day following the banking day on which the funds are deposited.

## **Problem 19.2**

### 12 C.F.R. §1005.2, Definitions.

Except as otherwise provided in subpart B, for purposes of this part, the following definitions apply:

(a)

(1) "Access device" means a card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers.

(2) An access device becomes an "accepted access device" when the consumer:

(i) Requests and receives, or signs, or uses (or authorizes another to use) the access device



to transfer money between accounts or to obtain money, property, or services;

(ii) Requests validation of an access device issued on an unsolicited basis; or

(iii) Receives an access device in renewal of, or in substitution for, an accepted access device from either the financial institution that initially issued the device or a successor.

(b)

(1) “Account” means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.

(2) The term includes a “payroll card account” which is an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer’s wages, salary, or other employee compensation (such as commissions), are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution or any other person. For rules governing payroll card accounts, See § 1005.18.

(3) The term does not include an account held by a financial institution under a bona fide trust agreement.

(c) “Act” means the Electronic Fund Transfer Act (Title IX of the Consumer Credit Protection Act, 15 U.S.C. 1693 et seq.).

(d) “Business day” means any day on which the offices of the consumer’s financial institution are open to the public for carrying on substantially all business functions.

(e) “Consumer” means a natural person.

(f) “Credit” means the right granted by a financial institution to a consumer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.

(g) “Electronic fund transfer” is defined in § 1005.3.

(h) “Electronic terminal” means an electronic device, other than a telephone operated by a consumer, through which a consumer may initiate an electronic fund transfer. The term includes, but is not limited to, point-of-sale terminals, automated teller machines (ATMs), and cash dispensing machines.

(i) “Financial institution” means a bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services, other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376.

(j) “Person” means a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.

(k) “Preauthorized electronic fund transfer” means an electronic fund transfer authorized in advance to recur at substantially regular intervals.

(l) “State” means any state, territory, or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; or any political subdivision of the thereof in this paragraph (l).

(m) “Unauthorized electronic fund transfer” means an electronic fund transfer from a consumer’s account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit. The term does not include an electronic fund transfer initiated:

(1) By a person who was furnished the access device to the consumer’s account by the consumer, unless the consumer has notified the financial institution that transfers by that person are no longer authorized;

(2) With fraudulent intent by the consumer or any person acting in concert with the consumer; or

(3) By the financial institution or its employee.

12 C.F.R. §1005.17, Requirements for overdraft services.

(a) Definition. For purposes of this section, the term “overdraft service” means a service under which a financial institution assesses a fee or charge on a consumer’s account held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account. The term “overdraft service” does not include any payment of overdrafts pursuant to:

(1) A line of credit subject to Regulation Z (12 CFR part 1026), including transfers from a credit card account, home equity line of credit, or overdraft line of credit;

(2) A service that transfers funds from another account held individually or jointly by a consumer, such as a savings account; or

(3) A line of credit or other transaction exempt from Regulation Z (12 CFR part 1026) pursuant to 12 CFR 1026.3(d).

(b) Opt-in requirement. (1) General. Except as provided under paragraph (c) of this section, a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution:

(i) Provides the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service;

(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;

(iii) Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and

(iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.

(2) Conditioning payment of other overdrafts on consumer's affirmative consent. A financial institution shall not:

(i) Condition the payment of any overdrafts for checks, ACH transactions, and other types of transactions on the consumer affirmatively consenting to the institution's payment of ATM and one-time debit card transactions pursuant to the institution's overdraft service; or

(ii) Decline to pay checks, ACH transactions, and other types of transactions that overdraw the consumer's account because the consumer has not affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions.

(3) Same account terms, conditions, and features. A financial institution shall provide to consumers who do not affirmatively consent to the institution's overdraft service for ATM and one-time debit card transactions the same account terms, conditions, and features that it provides to consumers who affirmatively consent, except for the overdraft service for ATM and one-time debit card transactions.

(c) Timing.

(1) Existing account holders. For accounts opened prior to July 1, 2010, the financial institution must not assess any fees or charges on a consumer's account on or after August 15, 2010, for paying an ATM or one-time debit card transaction pursuant to the overdraft service, unless the institution has complied with § 1005.17(b)(1) and obtained the consumer's affirmative consent.

(2) New account holders. For accounts opened on or after July 1, 2010, the financial institution must comply with § 1005.17(b)(1) and obtain the consumer's affirmative consent before the institution assesses any fee or charge on the consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service.

(d) Content and format. The notice required by paragraph (b)(1)(i) of this section shall be substantially similar to Model Form A-9 set forth in Appendix A of this part, include all applicable items in this paragraph, and may not contain any information not specified in or otherwise permitted by this paragraph.

(1) Overdraft service. A brief description of the financial institution's overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed, including ATM and one-time debit card transactions.

(2) Fees imposed. The dollar amount of any fees or charges assessed by the financial institution for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, including any daily or other overdraft fees. If the amount of the fee is determined on the basis of the number of times the consumer has overdrawn the account, the amount of the overdraft, or other factors, the institution must disclose the maximum fee that may be imposed.

(3) Limits on fees charged. The maximum number of overdraft fees or charges that may be assessed per day, or, if applicable, that there is no limit.

(4) Disclosure of opt-in right. An explanation of the consumer's right to affirmatively consent to the financial institution's payment of overdrafts for ATM and one-time debit card transactions pursuant to the institution's overdraft service, including the methods by which the consumer may consent to the service; and

(5) Alternative plans for covering overdrafts. If the institution offers a line of credit subject to Regulation Z (12 CFR part 1026) or a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state that fact. An

institution may, but is not required to, list additional alternatives for the payment of overdrafts.

(6) Permitted modifications and additional content. If applicable, the institution may modify the content required by § 1005.17(d) to indicate that the consumer has the right to opt into, or opt out of, the payment of overdrafts under the institution's overdraft service for other types of transactions, such as checks, ACH transactions, or automatic bill payments; to provide a means for the consumer to exercise this choice; and to disclose the associated returned item fee and that additional merchant fees may apply. The institution may also disclose the consumer's right to revoke consent. For notices provided to consumers who have opened accounts prior to July 1, 2010, the financial institution may describe the institution's overdraft service with respect to ATM and one-time debit card transactions with a statement such as "After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)."

(e) Joint relationships. If two or more consumers jointly hold an account, the financial institution shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account. Similarly, the financial institution shall treat a revocation of affirmative consent by any of the joint consumers as revocation of consent for that account.

(f) Continuing right to opt in or to revoke the opt-in. A consumer may affirmatively consent to the financial institution's overdraft service at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section. A consumer may also revoke consent at any time in the manner made available to the consumer for providing consent. A financial institution must implement a consumer's revocation of consent as soon as reasonably practicable.

(g) Duration and revocation of opt-in. A consumer's affirmative consent to the institution's overdraft service is effective until revoked by the consumer, or unless the financial institution terminates the service.

### **Problem 19.3**

#### 12 C.F.R. §1005.20(b)(2), Requirements for gift cards and gift certificates.

(b) Exclusions. The terms "gift certificate," "store gift card," and "general-use prepaid card", as defined in paragraph (a) of this section, do not include any card, code, or other device that is:

(1) Useable solely for telephone services;

(2) Reloadable and not marketed or labeled as a gift card or gift certificate. For purposes of this paragraph (b)(2), the term "reloadable" includes a temporary non-reloadable card issued solely in connection with a reloadable card, code, or other device;

- (3) A loyalty, award, or promotional gift card;
- (4) Not marketed to the general public;
- (5) Issued in paper form only; or
- (6) Redeemable solely for admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services in conjunction with admission to such events or venues, either at the event or venue or at specific locations affiliated with and in geographic proximity to the event or venue.

12 C.F.R. §1005.20(f)(2), Requirements for gift cards and gift certificates.

(f) Additional disclosure requirements for gift certificates or cards. The following disclosures must be provided in connection with a gift certificate, store gift card, or general-use prepaid card, as applicable:

- (1) Fee disclosures. For each type of fee that may be imposed in connection with the certificate or card (other than a dormancy, inactivity, or service fee subject to the disclosure requirements under paragraph (d)(2) of this section), the following information must be provided on or with the certificate or card:
  - (i) The type of fee;
  - (ii) The amount of the fee (or an explanation of how the fee will be determined); and
  - (iii) The conditions under which the fee may be imposed.
- (2) Telephone number for fee information. A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain information about fees described in paragraphs (d)(2) and (f)(1) of this section must be disclosed on the certificate or card.

## Assignment 20: Online Transactions

### Problem 20.3

Cal. Civ. Code §1670.8, Prohibition against provision waiving consumer's right to make statement regarding seller or lessor, or concerning goods or services, in specified consumer contract.

(a)

(1) A contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer's right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.

(2) It shall be unlawful to threaten or to seek to enforce a provision made unlawful under this section, or to otherwise penalize a consumer for making any statement protected under this section.

(b) Any waiver of the provisions of this section is contrary to public policy, and is void and unenforceable.

(c) Any person who violates this section shall be subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for the first violation, and five thousand dollars (\$5,000) for the second and for each subsequent violation, to be assessed and collected in a civil action brought by the consumer, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred. When collected, the civil penalty shall be payable, as appropriate, to the consumer or to the general fund of whichever governmental entity brought the action to assess the civil penalty.

(d) In addition, for a willful, intentional, or reckless violation of this section, a consumer or public prosecutor may recover a civil penalty not to exceed ten thousand dollars (\$10,000).

(e) The penalty provided by this section is not an exclusive remedy, and does not affect any other relief or remedy provided by law. This section shall not be construed to prohibit or limit a person or business that hosts online consumer reviews or comments from removing a statement that is otherwise lawful to remove.

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## Assignment 21: Creditor Remedies

### Problem 21.2

#### Iowa Code §626.12, Form of Execution.

The execution must intelligibly refer to the judgment, stating the time when and place at which it was rendered, the names of the parties to the action as well as to the judgment, its amount, and the amount still to be collected thereon, if for money; if not, it must state what specific act is required to be performed. If it is against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of property of the debtor subject to execution.

#### Iowa Code §626.16, Receipt and return.

Every officer who receives an execution shall provide a receipt, if required, stating the hour when the same was received, and shall make sufficient return of the execution, together with the money collected, on or before the one hundred twentieth day from the date of its issuance.

#### Iowa Code §626.20, Entry on encumbrance book.

If real estate is levied upon, except by virtue of a special execution issued in cases foreclosing recorded liens, the officer making the levy shall make an entry in the encumbrance book in the office of the clerk of the district court of the county where the real estate is located, which entry shall constitute notice to all persons of such levy. Such entry shall contain the number and title of the case, date of levy, date of the entry, amount claimed, description of the real estate levied upon, and signature of the officer.

#### Iowa Code §626.50, Duty to levy—notice of ownership or exemption—notice to defendant.

An officer is bound to levy an execution on any personal property in the possession of, or that the officer has reason to believe belongs to, the defendant, or on which the plaintiff directs the officer to levy, after having received written instructions for the levy from the plaintiff or the attorney who had the execution issued to the sheriff, unless the officer has received notice in writing under oath from some other person, or that person's agent or attorney, that the property belongs to the person, stating the nature of the person's interests in the property, how and from whom the person acquired the property, and the consideration paid for the property; or from the defendant, that the property is exempt from execution.

The officer making the levy shall promptly serve written notice of the levy on the defendant. The notice shall be served in the same manner as provided for original notice.

Iowa R. Civ. P. 1.1018, Execution; duty of officer.

An officer receiving an execution must execute it with diligence. The officer shall levy on such property of the judgment debtor as is likely to bring the exact amount, as nearly as practicable. The officer may make successive levies if necessary. The officer shall collect the things in action, by suit in the officer's own name if need be, or sell them. The officer shall sell sufficient property levied on and garnish sufficient funds, or property of sufficient value, to satisfy the execution, paying the proceeds, less the officer's own costs, to the clerk.

Iowa R. Civ. P. 1.1019, Endorsement.

The officer shall endorse on the execution, the day and hour the officer receives it; and the levy, sale, or other act done by virtue of it, with the date thereof; and the date and amount of any receipts or payments toward its satisfaction. Each endorsement shall be made at the time of the act or receipt; but no levy or sale under the execution shall be impaired by failure to make any such endorsement at the time here provided.

Iowa R. Civ. P. 1.1020, Levy on personalty.

Levy on personalty may be made under an attachment or general execution by either of the following methods, but no lien is created until compliance with one of them.

(1) By the officer taking possession of the property, and signing and appending to the execution its exact description at length, with the date of the levy.

(2) If the creditor or the creditor's agent first so requests in writing, the officer may view the property, prepare a written inventory of its exact description at length, and append the inventory to the execution, with the officer's signed statement of the number and title of the case, the names of the debtor and judgment creditor, the amount claimed under the execution, the exact location of the property and in whose possession, and the last known address of the judgment debtor. A certified transcript of the inventory and statement shall be filed with the secretary of state. Such filing shall be accepted by the secretary of state and shall be marked, indexed and certified in the same manner as a financing statement, and shall be constructive notice of the levy to all persons. If the writ is satisfied or the levy discharged the officer shall file a termination statement with the secretary of state. The fees normally charged by the secretary of state for the filing of a financing statement and the filing of a termination statement shall be paid by the officer and shall be taxed as a part of the costs of the levy.

**Problem 21.3**

UCC §9-609, Secured Party's Right to Take Possession After Default.

(a) [Possession; rendering equipment unusable; disposition on debtor's premises.] After default, a secured party:

(1) may take possession of the collateral; and

(2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610.

(b) [Judicial and nonjudicial process.] A secured party may proceed under subsection (a):

(1) pursuant to judicial process; or

(2) without judicial process, if it proceeds without breach of the peace.

(c) [Assembly of collateral.] If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

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## Assignment 22: Debtor Rights

### Problem 22.1

#### 16 C.F.R. §444.1, Definitions.

- (a) Lender. A person who engages in the business of lending money to consumers within the jurisdiction of the Federal Trade Commission.
- (b) Retail installment seller. A person who sells goods or services to consumers on a deferred payment basis or pursuant to a lease-purchase arrangement within the jurisdiction of the Federal Trade Commission.
- (c) Person. An individual, corporation, or other business organization.
- (d) Consumer. A natural person who seeks or acquires goods, services, or money for personal, family, or household use.
- (e) Obligation. An agreement between a consumer and a lender or retail installment seller.
- (f) Creditor. A lender or a retail installment seller.
- (g) Debt. Money that is due or alleged to be due from one to another.
- (h) Earnings. Compensation paid or payable to an individual or for his or her account for personal services rendered or to be rendered by him or her, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.
- (i) Household goods. Clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the consumer and his or her dependents, provided that the following are not included within the scope of the term "household goods":
  - (1) Works of art;
  - (2) Electronic entertainment equipment (except one television and one radio);
  - (3) Items acquired as antiques; and
  - (4) Jewelry (except wedding rings).

(j) Antique. Any item over one hundred years of age, including such items that have been repaired or renovated without changing their original form or character.

(k) Cosigner. A natural person who renders himself or herself liable for the obligation of another person without compensation. The term shall include any person whose signature is requested as a condition to granting credit to another person, or as a condition for forbearance on collection of another person's obligation that is in default. The term shall not include a spouse whose signature is required on a credit obligation to perfect a security interest pursuant to State law. A person who does not receive goods, services, or money in return for a credit obligation does not receive compensation within the meaning of this definition. A person is a cosigner within the meaning of this definition whether or not he or she is designated as such on a credit obligation.

16 C.F.R. §444.2, Unfair credit practices.

(a) In connection with the extension of credit to consumers in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is an unfair act or practice within the meaning of Section 5 of that Act for a lender or retail installment seller directly or indirectly to take or receive from a consumer an obligation that:

(1) Constitutes or contains a cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon.

(2) Constitutes or contains an executory waiver or a limitation of exemption from attachment, execution, or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest executed in connection with the obligation.

(3) Constitutes or contains an assignment of wages or other earnings unless:

(i) The assignment by its terms is revocable at the will of the debtor, or

(ii) The assignment is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment, or

(iii) The assignment applies only to wages or other earnings already earned at the time of the assignment.

(4) Constitutes or contains a nonpossessory security interest in household goods other than a purchase money security interest.

16 C.F.R. §444.3, Unfair or deceptive cosigner practices.

(a) In connection with the extension of credit to consumers in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is:

(1) A deceptive act or practice within the meaning of section 5 of that Act for a lender or retail installment seller, directly or indirectly, to misrepresent the nature or extent of cosigner liability to any person.

(2) An unfair act or practice within the meaning of section 5 of that Act for a lender or retail installment seller, directly or indirectly, to obligate a cosigner unless the cosigner is informed prior to becoming obligated, which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed, of the nature of his or her liability as cosigner.

(b) Any lender or retail installment seller who complies with the preventive requirements in paragraph (c) of this section does not violate paragraph (a) of this section.

(c) To prevent these unfair or deceptive acts or practices, a disclosure, consisting of a separate document that shall contain the following statement and no other, shall be given to the cosigner prior to becoming obligated, which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed:

Notice to Cosigner

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record.

This notice is not the contract that makes you liable for the debt.

16 C.F.R. §444.4, Late charges.

(a) In connection with collecting a debt arising out of an extension of credit to a consumer in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is an unfair act or practice within the meaning of section 5 of that Act for a creditor, directly or

indirectly, to levy or collect any delinquency charge on a payment, which payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period, when the only delinquency is attributable to late fee(s) or delinquency charge(s) assessed on earlier installment(s).

(b) For purposes of this section, “collecting a debt” means any activity other than the use of judicial process that is intended to bring about or does bring about repayment of all or part of a consumer debt.

## **Problem 22.2**

### 15 U.S.C. §1672, Definitions.

For the purposes of this title [15 USCS §§ 1671 et seq.]:

(a) The term “earnings” means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term “disposable earnings” means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term “garnishment” means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

### 15 U.S.C. §1673, Restriction on garnishment.

(a) Maximum allowable garnishment. Except as provided in subsection (b) and in section 305 [15 USCS § 1675], the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 [29 USCS § 206(a)(1)] in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) Exceptions.

(1) The restrictions of subsection (a) do not apply in the case of—

(A) any order for the support of any person issued by a court of competent jurisdiction or in



accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of title 11 of the United States Code [11 USCS §§ 1301 et seq.]

(C) any debt due for any State or Federal tax.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.

(c) Execution or enforcement of garnishment order or process prohibited. No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

### **Problem 22.3**

#### **11 U.S.C. §362, Automatic Stay.**

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
  - (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
  - (4) any act to create, perfect, or enforce any lien against property of the estate;
  - (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
  - (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
  - (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
  - (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.
- (b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], does not operate as a stay—
- (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
  - (2) under subsection (a)—
    - (A) of the commencement or continuation of a civil action or proceeding—
      - (i) for the establishment of paternity;
      - (ii) for the establishment or modification of an order for domestic support obligations;
      - (iii) concerning child custody or visitation;
      - (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
      - (v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 USCS § 666(a)(16)];

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 USCS § 666(a)(7)];

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act [42 USCS §§ 664 and 666(a)(3)] or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act [42 USCS §§ 601 et seq.];

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 USCS § 546(b)] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title [11 USCS § 547(e)(2)(A)];

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(5) [Deleted]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of

any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559 [11 USCS § 559]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559 [11 USCS § 559]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 [46 USCS §§ 53701 et seq.] or section 109(h) of title 49 [49 USCS § 109(h)], or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46 [46 USCS §§ 53701 et seq.];

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 [20 USCS § 1085(j)] or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560 [11 USCS § 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560 [11 USCS § 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986 [26 USCS § 401, 403, 408, 408A, 414, 457, or 501(c)], that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1108(b)(1)] or is subject to section 72(p) of the Internal Revenue Code of 1986 [26 USCS § 72(p)]; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5 [5 USCS §§ 8431 et seq.], that satisfies the requirements of section 8433(g) of such title [5 USCS § 8433(g)];

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d) [26 USCS § 414(d)], or a contract or account under section 403(b) [26 USCS § 403(b)], of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 [11 USCS § 544] and that is not avoidable under section 549 [11 USCS § 549];

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361 [11 USCS § 361]) for the secured claim of such authority in the setoff under section 506(a) [11 USCS § 506(a)];

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act [42 USCS § 1320a-7b(f)] pursuant to title XI or XVIII of such Act [42 USCS §§ 1301 et seq. or 1395 et seq.]).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.



## Assignment 23: Debt Collection Abuses

### Problem 23.1

#### 15 U.S.C. §1692a, Definitions.

As used in this subchapter—

- (1) The term “Bureau” means the Bureau of Consumer Financial Protection.
- (2) The term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.
- (3) The term “consumer” means any natural person obligated or allegedly obligated to pay any debt.
- (4) The term “creditor” means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
- (5) The term “debt” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
- (6) The term “debt collector” means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—
  - (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term “location information” means a consumer’s place of abode and his telephone number at such place, or his place of employment.

(8) The term “State” means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

15 U.S.C. §1692c, Communication in connection with debt collection.

(a) Communication with the consumer generally: Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o’clock antemeridian and before 9 o’clock postmeridian, local time at the consumer’s location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C. §1692d, Harassment or abuse.

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the

general application of the foregoing, the following conduct is a violation of this section:

- (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
- (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
- (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) [1] of this title.
- (4) The advertisement for sale of any debt to coerce payment of the debt.
- (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
- (6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

Cal Civ. Code §1788.2, Definitions and rules of constructions.

- (a) Definitions and rules of construction set forth in this section are applicable for the purpose of this title.
- (b) The term "debt collection" means any act or practice in connection with the collection of consumer debts.
- (c) The term "debt collector" means any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection, but does not include an attorney or counselor at law.
- (d) The term "debt" means money, property or their equivalent which is due or owing or alleged to be due or owing from a natural person to another person.
- (e) The term "consumer credit transaction" means a transaction between a natural person and another person in which property, services or money is acquired on credit by that natural person from such other person primarily for personal, family, or household purposes.
- (f) The terms "consumer debt" and "consumer credit" mean money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction.

(g) The term “person” means a natural person, partnership, corporation, limited liability company, trust, estate, cooperative, association or other similar entity.

(h) Except as provided in Section 1788.18, the term “debtor” means a natural person from whom a debt collector seeks to collect a consumer debt which is due and owing or alleged to be due and owing from such person.

(i) The term “creditor” means a person who extends consumer credit to a debtor.

(j) The term “consumer credit report” means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for (1) credit or insurance to be used primarily for person, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under any applicable federal or state law or regulation. The term does not include (a) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (b) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (c) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to that request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under any applicable federal or state law or regulation.

(k) The term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages, in whole or in part, in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer credit reports to third parties, and which uses any means or facility for the purpose of preparing or furnishing consumer credit reports.

Cal Civ. Code §1788.12, Communication of information regarding debt.

No debt collector shall collect or attempt to collect a consumer debt by means of the following practices:

(a) Communicating with the debtor’s employer regarding the debtor’s consumer debt unless such a communication is necessary to the collection of the debt, or unless the debtor or his attorney has consented in writing to such communication. A communication is necessary to the collection of the debt only if it is made for the purposes of verifying the debtor’s employment, locating the debtor, or effecting garnishment, after judgment, of the debtor’s wages, or in the case of a medical debt for the purpose of discovering the existence of medical insurance. Any

such communication, other than a communication in the case of a medical debt by a health care provider or its agent for the purpose of discovering the existence of medical insurance, shall be in writing unless such written communication receives no response within 15 days and shall be made only as many times as is necessary to the collection of the debt. Communications to a debtor's employer regarding a debt shall not contain language that would be improper if the communication were made to the debtor. One communication solely for the purpose of verifying the debtor's employment may be oral without prior written contact.

(b) Communicating information regarding a consumer debt to any member of the debtor's family, other than the debtor's spouse or the parents or guardians of the debtor who is either a minor or who resides in the same household with such parent or guardian, prior to obtaining a judgment against the debtor, except where the purpose of the communication is to locate the debtor, or where the debtor or his attorney has consented in writing to such communication;

(c) Communicating to any person any list of debtors which discloses the nature or existence of a consumer debt, commonly known as "deadbeat lists", or advertising any consumer debt for sale, by naming the debtor; or

(d) Communicating with the debtor by means of a written communication that displays or conveys any information about the consumer debt or the debtor other than the name, address and telephone number of the debtor and the debt collector and which is intended both to be seen by any other person and also to embarrass the debtor.

(e) Notwithstanding the foregoing provisions of this section, the disclosure, publication or communication by a debt collector of information relating to a consumer debt or the debtor to a consumer reporting agency or to any other person reasonably believed to have a legitimate business need for such information shall not be deemed to violate this title.

## **Problem 23.2**

### 15 U.S.C. §1692c, Communication in connection with debt collection.

#### (a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication: If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C. §1692g, Validation of debts.

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in

the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.



(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by title 26, title V of Gramm-Leach-Bliley Act [15 U.S.C. 6801 et seq.], or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

**Problem 23.3**

15 U.S.C. §1692e, False or misleading representations.

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
- (2) The false representation of—
  - (A) the character, amount, or legal status of any debt; or
  - (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
- (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
- (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
- (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
- (6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

- (A) lose any claim or defense to payment of the debt; or
  - (B) become subject to any practice prohibited by this subchapter.
- (7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
- (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
- (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
- (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
- (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
- (12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
- (13) The false representation or implication that documents are legal process.
- (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
- (15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
- (16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

## Assignment 24: Public Enforcement

### Problem 24.3

#### 12 U.S.C. §5481(25), Definitions.

(25) Related person. The term “related person”—

(A) shall apply only with respect to a covered person that is not a bank holding company (as that term is defined in section 2 of the Bank Holding Company Act of 1956 [12 USCS § 1841]), credit union, or depository institution;

(B) shall be deemed to mean a covered person for all purposes of any provision of Federal consumer financial law; and

(C) means—

(i) any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person;

(ii) any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person; and

(iii) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any—

(I) violation of any provision of law or regulation; or

(II) breach of a fiduciary duty.

#### 12 U.S.C. §5531, Prohibiting unfair, deceptive, or abusive acts or practices.

(a) In general. The Bureau may take any action authorized under subtitle E [12 USCS §§ 5561 et seq.] to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking. The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

(c) Unfairness.

(1) In general. The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) Consideration of public policies. In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(d) Abusive. The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of—

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

(e) Consultation. In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

(f) Consideration of seasonal income. The rules of the Bureau under this section shall provide, with respect to an extension of credit secured by residential real estate or a dwelling, if documented income of the borrower, including income from a small business, is a repayment source for an extension of credit secured by residential real estate or a dwelling, the creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.

Fed. R. Civ. P. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions.

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

## Assignment 25: Private Enforcement

### Problem 25.1

#### 15 U.S.C. §1640, Civil Liability.

(a) Individual or class action for damages; amount of award; factors determining amount of award. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under section 125, subsection (f) or (g) of section 131, or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title [15 USCS §§ 1667 et seq.], 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$ 200 nor greater than \$ 2,000, (iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of \$ 500 and a maximum of \$ 5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures;[,] or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$ 400 or greater than \$ 4,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$ 1,000,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 125 or 128(e)(7) [15 USCS § 1635 or 1638(e)(7)], the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 129 [15 USCS § 1639], paragraph (1) or (2) of section 129B(c) [15 USCS § 1639b(c)], or section 129C(a) [15 USCS § 1639c(a)], an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 127 [15 USCS § 1637], a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125 [15 USCS § 1635], [section] 127(a) [15 USCS § 1637(a)], or any of paragraphs (4) through (13) of section 127(b) [15 USCS § 1637(b)], or for failing to comply with disclosure requirements under State law for any term or item that the Bureau has determined to be substantially the same in meaning under section 111(a)(2) [15 USCS § 1610(a)(2)] as any of the terms or items referred to in section 127(a), or any of paragraphs (4) through (13) of section 127(b) [15 USCS § 1637(b)]. In connection with the disclosures referred to in subsection (c) or (d) of section 127 [15 USCS § 1637(c) or (d)], a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 127(c)(1)(A)(ii)(I) or section 127(c)(4)(A)(i) or who uses the credit card or charge card. In connection with the disclosures referred to in section 128, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125, of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 128(a), or section 128(b)(2)(C)(ii), of subparagraphs (A), (B), (D), (F), or (J) of section 128(e)(2) (for purposes of paragraph (2) or (4) of section 128(e)), or paragraph (4)(C), (6), (7), or (8) of section 128(e) [15 USCS § 1638(e)], or for failing to comply with disclosure requirements under State law for any term which the Bureau has determined to be substantially the same in meaning under section 111(a)(2) as any of the terms referred to in any of those paragraphs of section 128(a) or section 128(b)(2)(C)(ii). With respect to any failure to make disclosures required under this chapter or chapter 4 or 5 of this title, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 131.

(b) Correction of errors. A creditor or assignee has no liability under this section or section 108 or section 112 for any failure to comply with any requirement imposed under this chapter or chapter 5, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 108(e)(1) or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the



person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors. A creditor or assignee may not be held liable in any action brought under this section or section 125 for a violation of this title if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this title is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors. When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) for a violation of this title.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement. Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation or, in the case of a violation involving a private education loan (as that term is defined in section 140(a)), 1 year from the date on which the first regular payment of principal is due under the loan. Any action under this section with respect to any violation of section 129, 129B, or 129C may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this title [15 USCS §§ 1601 et seq.] in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 129, 129B, 129C, 129D, 129E, 129F, 129G, or 129H of this Act may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 108 and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may—

(1) intervene in the action;

(2) upon intervening—

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Bureau or with interpretation or approval of duly authorized official or employee of Federal Reserve System. No provision of this section, section 108(b), section 108(c), section 108(e), or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose. The multiple failure to disclose to any person any information required under this chapter or chapter 4 or 5 of this title to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, and consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 125.

(h) Offset from amount owed to creditor or assignee; rights of defaulting consumer. A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this title has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this title as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this title.

(i) Class action moratorium.

(1) In general. During the period beginning on the date of the enactment of the Truth in Lending Class Action Relief Act of 1995 [enacted May 18, 1995] and ending on October 1, 1995, no court may enter any order certifying any class in any action under this title—

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor—

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 128;

(ii) to properly make any other disclosure required under section 128 as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 125(a) due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Bureau or from among forms based on such model forms.

(2) Exceptions for certain alleged violations. Paragraph (1) shall not apply with respect to any action—

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 107(c) [15 USCS § 1606(c)]; or

(B) described in paragraph (1)(B)(iii), if—

(i) no notice relating to rescission rights under section 125(a) was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

(j) Private educational lender. A private educational lender (as that term is defined in section 140(a)) has no liability under this section for failure to comply with section 128(e)(3).

(k) Defense to foreclosure.

(1) In general. Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor,

assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of paragraph (1) or (2) of section 129B(c), or of section 129C(a), as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).

(2) Amount of recoupment or setoff.

(A) In general. The amount of recoupment or set-off under paragraph (1) shall equal the amount to which the consumer would be entitled under subsection (a) for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney's fee.

(B) Special rule. Where such judgment is rendered after the expiration of the applicable time limit on a private action for damages under subsection (e), the amount of recoupment or set-off under paragraph (1) derived from damages under subsection (a)(4) shall not exceed the amount to which the consumer would have been entitled under subsection (a)(4) for damages computed up to the day preceding the expiration of the applicable time limit.

(l) Exemption from liability and rescission in case of borrower fraud or deception. In addition to any other remedy available by law or contract, no creditor or assignee shall be liable to an obligor under this section, if such obligor, or co-obligor has been convicted of obtaining by actual fraud such residential mortgage loan.

## Assignment 26: Alternative Dispute Resolution

### Problem 26.1

15 U.S.C. §1679c, Disclosures.

(a) Disclosure required. Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed:

“Consumer Credit File Rights Under State and Federal Law

“You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any ‘credit repair’ company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

“You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

“You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.

“You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.

“Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur.

“You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau.

“If the credit bureau’s reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you.

“The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact:

“The Public Reference Branch

“Federal Trade Commission

“Washington, D.C. 20580”.

(b) Separate statement requirement. The written statement required under this section shall be provided as a document which is separate from any written contract or other agreement between the credit repair organization and the consumer or any other written material provided to the consumer.

(c) Retention of compliance records.

(1) In general. The credit repair organization shall maintain a copy of the statement signed by the consumer acknowledging receipt of the statement.

(2) Maintenance for 2 years. The copy of any consumer’s statement shall be maintained in the organization’s files for 2 years after the date on which the statement is signed by the consumer.

15 U.S.C. §1679h, Administrative enforcement.

(a) In general. Compliance with the requirements imposed under this title with respect to credit repair organizations shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission.

(b) Violations of this title treated as violations of Federal Trade Commission Act.

(1) In general. For the purpose of the exercise by the Federal Trade Commission of the Commission's functions and powers under the Federal Trade Commission Act, any violation of any requirement or prohibition imposed under this title [15 USCS §§ 1679 et seq.] with respect to credit repair organizations shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act.

(2) Enforcement authority under other law. All functions and powers of the Federal Trade Commission under the Federal Trade Commission Act shall be available to the Commission to

enforce compliance with this title by any person subject to enforcement by the Federal Trade Commission pursuant to this subsection, including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of any Federal Trade Commission trade regulation rule, without regard to whether the credit repair organization—

(A) is engaged in commerce; or

(B) meets any other jurisdictional tests in the Federal Trade Commission Act.

(c) State action for violations.

(1) Authority of States. In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this title, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover damages for which the person is liable to such residents under section 409 as a result of the violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Commission.

(A) Notice to Commission. The State shall serve prior written notice of any civil action under paragraph (1) upon the Federal Trade Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action.

(B) Intervention. The Commission shall have the right—

(i) to intervene in any action referred to in subparagraph (A);

(ii) upon so intervening, to be heard on all matters arising in the action; and

(iii) to file petitions for appeal.

(3) Investigatory powers. For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation. Whenever the Federal Trade Commission has instituted a civil action for violation of this title, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission for any violation of this title that is alleged in that complaint.

9 U.S.C. §2, Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.