

New Open-end Lending Requirements- Effective August 20, 2009

Prepared by:

CREDIT UNION NATIONAL ASSOCIATION

Jeff Bloch, Senior Assistant General Counsel
Mike McLain, Senior Compliance Counsel
August 5, 2009

This memo was developed to provide background and compliance information to help credit unions address two issues in the Federal Reserve Board's interim final regulations on open-end lending, which are effective August 20, 2009. CUNA cannot provide legal advice and does not have knowledge of your individual credit union operations to address how your credit union should comply with these changes. Your credit union will need to discuss appropriate compliance steps with your data processor, forms supplier and the attorney you rely upon in providing open-end lending products to your membership. For further information, contact your league or us at cucomply@cuna.com. CUNA Mutual Group, not CUNA, sponsors the "LoanLiner" program, so questions about how these new requirements impact LoanLiner should be addressed to your CUNA Mutual representative.

TABLE OF CONTENTS

- I. BACKGROUND (P. 2)**
- II. WHAT CREDIT UNIONS MUST DO TO COMPLY WITH THE 21-DAY REQUIREMENT**
 - A. Overview of the Regulatory Requirements (P. 4)**
 - B. Alternative Compliance Approaches Credit Unions Are Considering (P. 5)**
 - C. Frequently Asked Questions (P. 10)**
- III. WHAT CREDIT UNIONS MUST DO TO COMPLY WITH THE 45-DAY CHANGE-IN-TERMS REQUIREMENT**
 - A. Overview of the Regulatory Requirements (P. 18)**
 - B. Frequently Asked Questions (P. 22)**

I. BACKGROUND

On July 22, 2009, the Federal Reserve Board (Fed) published in the *Federal Register* an interim final rule to amend Regulation Z to implement two provisions of the Credit Card Accountability Responsibility and Disclosure (CARD) Act. The interim regulations are effective August 20, 2009, but are open to a public comment period that closes on September 21, 2009. This memo explains the regulatory requirements, provides information to credit unions on compliance options, and responds to questions we have received from credit unions.

While most of the Credit CARD Act is effective Feb. 22, 2010, two provisions were singled out to become effective 90 days after the law was enacted, and are therefore effective August 20th. Section 101 of the new law *applies only to credit cards* and requires that change-in-term notices be provided at least 45 days in advance before increasing the annual percentage rate (APR) or changing significant terms, rather than the current 15-day notice period.¹

The second provision, found in Section 106 of the Credit CARD Act and also effective August 20th, *applies to all open-end credit*, in addition to credit card accounts, and requires that periodic statements be provided at least 21 days before the payment due date (or the end of a grace period) in order for the credit union to charge a late fee, report the account as delinquent to credit bureaus, or impose a penalty rate. The application of these provisions to all open-end credit plans, combined with the upcoming August 20th effective date, presents significant compliance challenges for credit unions and will require for most major changes in programs and procedures that have been in place for over a quarter of a century.

Enactment of the Credit CARD Act

As we understand it, the 21-day requirement was one of many provisions drafted over the weekend of May 16-17 by the Senate Banking Committee. The bill was then passed by the Senate on May 19, passed by the House without amendment on May 20, and signed into law on May 22. As a result, no hearings were held on this bill and no input was possible by credit unions or others. To add to this confusion, Senator Dodd had a week earlier voiced his support for a 21-day requirement *applicable to credit cards*, and the industry was surprised to then learn that this requirement would apply to all open-end credit.

¹ As a reminder, comprehensive changes to Regulation Z's open-end disclosure rules were previously adopted by the Fed in January, 2009, and are still scheduled to become effective July 1, 2010, including a requirement that 45 days notice will have to be given for changing terms of all open-end loans. Other provisions of the comprehensive Regulation Z changes and the unfair or deceptive acts or practices rules that were also issued this past January will be revised to the extent there are provisions that are inconsistent or duplicative with the CARD Act.

Since all but one other section of the CARD Act limits coverage to credit cards (the other section being minimum payment disclosures), CUNA has inquired as to whether this language was a drafting error, perhaps as a result of the compressed time period in which some of these provisions were drafted. We have not received a definitive answer as to whether this provision was intentional or not.

We have also learned that some consumer advocates that CUNA has met with were also surprised by the scope, although some are pleased that this will apply to open-end credit beyond credit cards. While we understand that banks were also surprised, their operational concerns are not as extensive since they generally do not use consolidated periodic statements.

CUNA's Efforts to Address This Problem

CUNA's goal has been working nonstop with the Fed and Congress to limit the scope of these provisions to credit cards or, at a minimum, extend the effective date for open-end plans other than credit card accounts. CUNA has contacted the Fed numerous times in an effort to convince the agency to extend the effective date beyond August 20th for open-end loans other than credit cards. We have met with Federal Reserve Governor Duke and sent letters to all the Federal Reserve Board Governors, other key Fed staff, and NCUA. Through this process, we outlined the unique compliance problems that result from consolidated statements and multi-featured open-end lending programs and urged the Fed to use its authority under Section 105(a) of the Truth in Lending Act to provide relief, such as more time for compliance.

The Fed regularly uses this TILA authority to make similar changes and used it several times in the interim final rule. For example, the rule excludes coverage of home-secured credit cards from application of the 45-day advance notice requirement, contrary to the language of the law that applies to all credit cards. However, our efforts to change these provisions have been an uphill battle. This is especially true in light of the current political environment in which the Fed has been heavily criticized for not protecting consumers, culminating in the current proposal to create a new consumer protection agency.

CUNA's efforts on Capitol Hill and with the regulators will continue, but we cannot at this time provide any assurances that there will be relief from these provisions. As a result, credit unions need to proceed now with their decision making process and compliance efforts. The interim final regulation remains effective August 20th and will be open for a 60-day comment period, which ends September 21, 2009. This is well after credit unions need to proceed with their efforts to comply with these provisions. **CUNA is therefore urging credit unions to submit their comments to the Fed *immediately* on the operational burden created by the interim final regulation and the lack of adequate compliance guidance.** CUNA's letter will be completed shortly and posted on our website. It is our understanding that the Fed will finalize the interim regulation before year-end, perhaps as part of the whole package of regulations that will implement the rest of the Credit CARD Act. Here is a link to a copy of CUNA's Regulatory

Comment Call: http://cuna.org/reg_advocacy/reg_call/rcc_073009.html. The contact information for the Fed is included in the CUNA Comment Call.

II. WHAT CREDIT UNIONS MUST DO TO COMPLY WITH THE 21-DAY REQUIREMENT

A. Overview of the Regulatory Requirements

The new regulation on the 21-day requirement generally restates the law. Click [here](#) for the interim final rule, as published in the Federal Register. The following provision provides additional clarifications with regard to the provision in the law on grace periods:

“Section 226.5(b)(2)(ii). Creditors must adopt reasonable procedures designed to ensure that periodic statements are mailed or delivered at least 21 days prior to the payment due date and the date on which any grace period expires. A creditor that fails to meet this requirement shall not treat a payment as late for any purpose or collect any finance or other charge imposed as a result of such failure. For purposes of this paragraph, ‘grace period’ means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate.” (page 36094, first column)

To address concerns about the short compliance period, the Fed will allow creditors to meet compliance obligations with the 21-day rule “for a short period of time” by including language on or with the periodic statement that payments are not due until at least 21 days after the statement is delivered, regardless of the due date that is reflected on the statement. This is not in the rule, but is outlined in the “Supplementary Information” (page 36082, first column).

B. Alternative Compliance Approaches Credit Unions Are Considering

Over the past several weeks, CUNA staff has discussed the problems associated with the 21-day requirement extensively with individual credit unions, CUNA’s Lending Council, and the Leagues. We have hosted two audio conference calls in which these problems were discussed, and had numerous follow-up questions from participants. One of the Fed’s lawyers who co-authored the interim regulation participated in the second audio-conference on July 28 (the [audio-conference is archived](#) on CUNA’s website.)

Unfortunately, every compliance option available to credit unions involves substantial costs and/or disruptions to business practices. For this reason, plus others, CUNA cannot lay out a blueprint on how your credit union should comply with the 21-day requirement. CUNA cannot give legal advice, and does not have knowledge of your individual operations. The business decisions that your credit union makes on how to comply will depend on many factors, including your reliance on consolidated statements, the capabilities of your data processing system, the compliance costs you will have to incur by pursuing different options, contractual constraints, staffing considerations, and other factors. As noted above, the Fed has provided a transitional compliance option of

including an insert or language with your periodic statement (see FAQ #10) for “a short period of time” (see FAQ # 12). This should provide some level of protection if compliance is not possible by August 20th, although the Fed has not provided any clarification as to what constitutes a “short period of time.” Our goal is to convince the Fed that this period of time will be however long it takes to comply (within reason), as long as the credit union is proceeding in good faith in these efforts.

We identify in this section five approaches credit unions are considering for complying with the 21-day requirement for open-end loan programs. (Credit unions have expressed no concern with being in compliance for their credit card programs because their credit cards operate under different systems with separate mailings, so we are not addressing credit card issues in this memo.) Pros and Cons are listed with each approach, based on input we have received from various credit unions and observations from the Fed attorneys.

How your credit union decides to comply is a business decision. NCUA is responsible for enforcing compliance with Truth in Lending regulations for federal credit unions, and does so through the normal examination process, unless problems are reported by members). The Federal Trade Commission (FTC) has similar enforcement authority over state chartered credit unions, since the FTC does not have examiners, state chartered credit unions are rarely subject to examination on these issues, unless problems are reported by members. Truth in Lending, including compliance with the 21-day rule, is also enforced by private lawsuits, which is always a potential concern.

We do note that one alternative that is being pursued by some credit unions, but that most would likely find unacceptable, is to not charge late fees or take other adverse actions against the borrower if the credit union does not comply with the 21-day requirement. We must emphasize that the credit union would not be able to treat the payment as “late” in any way that imposes a financial or other cost on the borrower, which would include not reporting the payment as delinquent to credit bureaus and not increasing the annual percentage rate if the payment is indeed late. There is also an issue as to the extent the credit union would be able to pursue collection efforts. For some credit unions, these actions may be automated and changing them would present additional operational burdens.

Possible alternative approaches:

1. Change Due Dates to Establish a Uniform Payment Due Date

One option for credit unions that provide consolidated statements is to change the mandatory payment due dates for all the loan accounts of a member to one date that is at least 21 days after the statement is mailed or delivered. Members could voluntarily make their payments earlier in the month if they choose to do so and could continue paying on the same cycles they do now, as long as the mandatory payment due date is at least 21 days after the statement is mailed.

For example, if statements are sent at the beginning of the month, due dates could be changed to a date near the end of the month in order to provide at least 21 days between the mailing of the periodic statement and the due date (or the end of any grace period). Credit unions could print a notice on the statement mailed at the beginning of September that the payment due date is changing to the 27th day of the month.

Pros

- This method complies with the requirements of the new law. It parallels how Congress envisioned compliance will work for credit card accounts and Fed staff has commented favorably on this approach.
- The periodic statement in this instance could contain all open-end loans and continue to include share and share draft information.
- Members could continue making voluntary partial or full payments on other dates as long as the entire payment is made by the new due date. No change-in-terms notice is required under Regulation Z to change the payment due date.
- Different members could have different mandatory due dates which would allow a credit union to stagger the mailing of the periodic statements, as long as the 21-day requirement was met. Staggering mailing dates so all payments would not be due the same date would help manage cash flow issues and demands on member service representatives.
- Member education can help explain how the credit union is maintaining payment options for the member, while complying with the new requirements.

Cons

- This would require a number of changes in credit unions' systems, such as aggregating voluntary payments made more often than monthly.
- Bi-weekly, weekly, or semi-monthly payment due dates that are set by contract will have to be changed to one contractual payment due date in order to conform to the 21-day timing requirement.
- Especially for smaller credit unions, cash flow could become an issue if payments actually come around the same time of the month.
- Large credit unions typically send out periodic statements in cycles throughout the month which may make designating dates more challenging.
- Demands on member service representatives might spike at month-end if most payments are due around the same date.
- Member education will be needed to explain why a uniform payment due date is being established.

Caution

- Credit unions need to review the language in their loan documents concerning the right to make certain changes, how they characterize loan repayment terms, etc.

- Credit unions should check with their legal counsel to determine whether any notice of changes in payment due dates may be required by state law (this is not a problem under Regulation Z).

2. Print on the Periodic Statement the Current and Following Month's Payment Due Dates

Under this method, a credit union would not change any of its payment due dates, but rather print on the current periodic statement the current month's payment due date(s), which in many cases will not comply with the 21-day timing requirement from the date the statement is mailed, as well as the due date(s) for the following month.

This approach appears to comply with the language of the law, since all of next month's payment due dates are certainly more than 21 days after the periodic statement is mailed and the current due dates would be disclosed in the prior month's periodic statement. However, Fed attorneys and others have indicated that this may not comply with the "spirit" of the law and regulation. It is possible the Fed may in the future indicate in a more formal manner (such as through the Commentary at the time the interim rule is finalized) that this option is not compliant with the rule. CUNA will advocate in our comment letter that the Fed should acknowledge this compliance approach is acceptable.

To implement this approach, a credit union may need a "transitional" month in which it either skips charging late fees (and not take other actions for late payments) or supplies the permitted temporary notice on the periodic statement or the statement insert. After the transition, the credit union will then be on track to indicate each future due date on both the current and previous month's periodic statement.

Here is an example of how the credit union can do this. A statement is generated and mailed September 30th and reflects an upcoming due date of October 15th and the due date for the following month, which would be November 15th. Although the October 15th due date is less than 21 days from the periodic statement mailing date September 30th, the November 15th due date is more than 21 days from the statement mailing date, and the October 15th due date would have been disclosed in the prior month's statement, which also would be in compliance with the 21-day requirement. Credit unions that require bi-weekly (or weekly or semi-monthly) payments by contract are also considering posting several payment due dates on their monthly statements to address the issue of having different due dates for loans that are listed on consolidated statements.

Pros

- This approach may be the lowest cost method for compliance.
- It may be the easiest to accomplish operationally.

- Some credit unions have obtained legal opinions from their counsel saying this approach complies with the new requirement.

Cons

- This may generate confusion from members, which will require substantial member education about these changes.
- Fed staff believes this method may be contrary to the intent of the law. The Fed may in the future indicate in a more formal manner that this option is not compliant with the rule. If this happens, credit unions that have adopted this option would be required to adopt a different option at further expense and may be exposed to liability for the period they are using this approach.

Caution

- Consultation with the credit union's attorney is an appropriate step.
- This will require a transition time after August 20th, in which case the credit union would either not be able to treat the payment as late or would use the alternative that the Fed provides for "a short period of time" in which it indicates that the consumer has 21 days to make the payment, regardless of the due date on the statement.

3. Retain Existing Due Dates and Send Out Additional Periodic Statements

Under this option, credit unions would establish multiple billing cycles with corresponding periodic statements mailed on different dates so that each individual periodic statement is mailed at least 21 days prior to a specific due date or range of due dates. For example, a periodic statement mailed on the 3rd of September covering the billing cycle from the 1st day of August to the 31st day of August would be provided at least 21 days prior to payment due dates ranging from the 24th through the 30th of September (actual dates will vary depending upon the number of days in a particular month). The end result of trying to "batch" loans with approximately the same due date probably would be to send out separate periodic statements for many, if not all, loans.

Pros

- This method complies with the requirements of the new law.
- Members would retain existing loan payment due dates for loans with monthly payments.
- Share and share draft information could be mailed in a separate periodic statement if members desire such information be provided on a monthly basis. Otherwise it could be included along with loan information for a particular billing cycle.
- For members with multiple loans, those loans with payment due dates that are within a range of payment due dates for each periodic statement/billing cycle could be combined on the same periodic statement.

Cons

- A credit union's mailing and process costs would increase dramatically.
- Bi-weekly, weekly, or semi-monthly contractual payment due dates still would have to be changed to one contractual due date in order to comply with the 21-day timing requirement.
- Members used to consolidated statements could receive numerous statements, increasing their confusion and questions.
- Four or more separate billing cycles may be necessary to accommodate all payment due dates.

Caution

- A credit union that retains existing due dates and changes the date of its statements based upon new or existing multiple billing cycles will need to closely review the requirements of Regulation Z regarding "billing cycles" to determine if a change-in-terms notice is required.

4. Use the Special Notice on the Periodic Statement Throughout the Fall and Investigate Alternatives While Final Regulations Are Being Developed

Under this approach, a credit union would provide on the first periodic statement issued after August 20th the special notice allowed by the Fed which states that, regardless of the payment due dates printed on the periodic statement, the member has 21 days to pay without penalty (see FAQ # 10 and #11 for details). In light of CUNA's continuing efforts to have the law or rule amended and uncertainty with regard to how to comply, it is understandable credit unions that are pressed for resources (especially smaller credit unions) may want to wait to see what specific requirements are ultimately imposed by a final regulation based on the comments provided during the formal comment period. However, the Fed has indicated it expects credit unions that provide this special notice to also make a reasonable and good faith effort to comply with the requirements of the new law within "a short period of time." (see FAQ # 12).

Pros

- A credit union that chooses this approach will have the benefit of assessing what other credit unions have done in the weeks and months after August 20th to determine what is cost-effective and what has resulted in the least problems with systems conversion and membership confusion.
- This approach protects a credit union from implementing a compliance program that the Fed later decides is unacceptable, which would require additional changes in operational systems.
- This approach might allow the credit union to do a comprehensive assessment of what other changes should be made in its systems to prepare for the other open-end changes effective July 1, 2010.
-

Cons

- Legislative or regulatory relief that would totally eliminate this compliance requirement is highly uncertain.
- A credit union choosing this approach would need to closely monitor any automated systems to make sure that actions are not taken inconsistent with the special notice provided to members, such as triggering late payment fee assessments based on the date printed on the periodic statement, and take steps to communicate with members on their rights to have 21 days to make a payment under any open-end loan.
- A credit union that does not appear to be making a reasonable attempt to comply with the requirements of the law may face an increased risk of litigation or an enforcement action by the NCUA or the FTC.

C. FREQUENTLY ASKED QUESTIONS

1. What loans are covered by the 21-day requirement?

The 21-day requirement applies to all open-end credit, not just credit card accounts. Therefore, the 21-day requirement applies to general lines of credit, overdraft lines of credit, signature loans, home equity lines of credit (HELOCs) and all other open-end loans made under multi-featured open-end lending programs, such as automobile and other vehicle loans. Although HELOCs are subject to the 21-day requirement, they are not subject to the 45-day notice requirement that is also effective August 20th. Consistent with the current exemptions under Regulation Z, loans over \$25,000 and loans to non-consumers are *not* covered by this rule.

2. Will a credit union have to comply with the 21-day requirement for a periodic statement that is mailed on or before August 19, 2009 if the payment due date falls on or after August 20th?

No, the requirements of the interim final rule do not apply to periodic statements that are mailed or delivered before August 20, 2009. Therefore, this requirement will generally take effect beginning with the September statements for credit unions with monthly mailings.

3. How is the 21-day period determined?

The revised official staff commentary [(b)(2)(ii)1] makes clear that the credit union is not required to determine the specific date on which the periodic statement is actually mailed (or delivered). The credit union will know the closing date of the billing cycle and needs to have “reasonable procedures” in place to ensure that the statement is mailed typically a certain number of days after the closing date, in which case the due date would be 21 days plus the number of those days between the end of the billing cycle and the mailing of the statements. For example, a credit union has procedures to mail its periodic

statement three days after the closing date of a billing cycle which is the 2nd day of the month, in which case the mailing date will be the 5th of the month. In order to comply, the credit union must indicate a payment due date no earlier than the 26th of the month.

The credit union will not have to prove its mailings are actually delivered on time each month, but only that it has a standard procedure to reasonably achieve these delivery times. All calendar days are included in counting the 21 day period, including weekends, holidays and days on which the credit union is closed.

4. Is the due date counted as part of the 21 days?

No, the CARD Act states that the periodic statement must be mailed at least 21 days before the payment due date. For example, if a credit union has established reasonable procedures to ensure periodic statements are mailed or delivered no later than the 4th of the month, the payment due date may be no earlier than the 25th of the month.

5. What action does a credit union have to take to assure “delivery” when the member has elected an electronic periodic statement?

Under the CARD Act and the interim final rule, the 21-day period will apply to statements delivered and payments made electronically. The Fed issued final rules in 2007 that addressed providing electronic disclosures under Regulation Z and the other consumer protection rules that the Fed administers. The final rules deleted certain provisions regarding electronic communications that were included in the earlier 2001 interim final rules. These included the requirement to send disclosures to a consumer’s email address, or post the disclosures on a website and then send a notice alerting the consumer that the disclosures have been posted.

However, a Fed staff attorney suggested it would be a “best practice” to send an email to notify the accountholder when a credit union makes periodic statements available on its website. CUNA strongly opposed this requirement when it was proposed in 2001 as it would have involved significant compliance and recordkeeping burdens and were pleased that it was deleted in the final rules. We will raise this issue again in our comment letter that we will submit to the Fed on this issue.

6. If the payment due date stated on the periodic statement falls within the 21-day period, but our credit union provides an extra period before we assess a late payment that would fall beyond the 21-day requirement, does this comply with the 21-day requirement?

No. The official staff commentary [(b)(2)(11)3] states that the actual payment due date is the date that must be used for determining whether the 21-day timing

requirement has been met, which is the “due date according to the legal obligation between the parties” even if state law mandates, or the credit union provides, a courtesy period before a late fee is assessed.

A courtesy period, as opposed to the legal payment date, is a period of time that is either set forth in the account agreement or provided as an informal policy or practice and is immediately following the payment due date during which no late fee will be imposed. For example, if the periodic statement is mailed on the fifth of the month and the statement lists the payment due date as the 20th, but the credit union provides a courtesy period of ten days and will not assess a late fee until the 30th of the month, this courtesy date will not comply with the new 21-day requirement.

7. The regulations refer not only to a “payment due date” but also to a “grace period.” How does that work?

A grace period is defined by the Commentary[(b)(2)(ii)4] as a “a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate.” The Fed has said that a borrower must be given 21 days after mailing of the statement to take advantage of any grace period. This is typically a provision of credit card programs - if the borrower pays the balance in full within the grace period, he owes no interest. In talking to credit unions, grace periods don’t seem to be used often with other types of open-end loans - the finance charge applies to every date a balance is outstanding. Therefore, we make no further mention of grace periods in this memo, but it is something a credit union should discuss internally if it offers grace periods with any open-end loans other than credit cards.

8. Do periodic statements have to be provided for purposes of complying with the 21-day requirement, or may payment coupon books or billing notices be provided to members, such as for a car loan?

A coupon book or billing notice cannot be substituted for the required periodic statement. The final rule is specific in that a periodic statement must be provided to a member shortly after the end of a billing cycle, and it is the time between the provision of the periodic statement and the payment due date that determines whether a credit union has complied with the 21-day timing requirement.

Note that the law indicates that a periodic statement includes all the information required by section 127(b), which is implemented by Section 226.7. This requires, to the extent applicable, information on the previous balance, identification of transactions, credits to the account during the billing cycle, periodic rates, balance on which the finance charge was computed, the amount of finance charge, the APR, other charges debited to the account during the billing cycle, closing date, and any free-ride period. This may also limit credit unions in finding solutions on complying with the 21-day requirement.

- 9. The regulation says that if the credit union fails to allow at least 21 days after the mailing date for the member to pay on the open-end loan, the credit union cannot treat the payment “as late for any purpose.” What does this actually mean?**

Although this includes not charging the late fee, it also includes not raising the annual percentage rate or reporting the payment as delinquent to credit bureaus, according to the official staff commentary [at (b)(2)(ii)2]. Although not stated, there is the concern as to whether this applies to collection efforts, which can include calling the member about the payment, sending him or her a letter about the late payment, repossessing the collateral, freezing a line of credit, or transferring funds from other accounts, assuming these actions are otherwise permissible. The Fed attorney on CUNA’s recent audio-conference seemed to recognize that not all collections efforts should be prohibited, and we will pursue clarification of this issue in our comment letter.

CUNA’s view is that the types of actions enumerated in the interim regulation are penalty actions to increase costs of the loan or to make it more difficult or costly for the member to borrow from another source. Efforts to collect the actual overdue loan are not punitive and should be allowed. Again, we will pursue this issue with the Fed so that credit unions may continue to pursue collection efforts under these circumstances without the threat of a legal challenge.

- 10. There is no way that my credit union can change all the inter-related systems we have in place any time soon as it will take many months to reprogram, conduct trial testing, and so forth. So what steps should we take in the interim?**

First, start documenting everything you are doing to try to comply with this unreasonable timetable imposed under the new law. This will be important in case you are ever sued for non-compliance. TILA has spawned many lawsuits, and we are concerned about business hungry lawyers or people who want to make examples of “bad lenders.” The Fed is requesting information on “any costs, compliance requirements, or changes in operating procedures arising from the application of the interim final rule to small entities” as part of the comment process that ends September 21, 2009 and that information will be helpful in persuading the Fed to provide flexibility. CUNA has also written to NCUA and is discussing with that agency the implications of this new regulatory burden, requesting that the agency refrain from elaborate oversight for compliance at this point. Again, documentation will be important if you are challenged by an examiner.

Second, the Fed has provided in the “Supplementary Information” an option for credit unions to provide the “special notice,” which is the notice on or with the periodic statement that indicates the consumer has 21 days to pay, regardless of

the due date reflected on the statement. If your credit union plans to send such a special notice, check to see if your envelope has a postmark so the member has an idea of when the 21-day clock started to run.

11. What should the special notice on the periodic statement – or insert -- say?

Credit unions typically have a small field available on the periodic statement for short marketing or other messages. We suggest inserting language there, starting with statements mailed on or after August 20th. There probably is not space to indicate much more than: “We will not consider your payment late if it is received within 21 days of the date on the postmark, regardless of payment due date(s) printed on this statement.” Note that the Fed says the notice has to be “prominently” displayed, so you may want to use a different font, ink color, asterisks, or other means to bring attention to this notice.

Whatever you write will undoubtedly be cryptic and puzzling to your members. If you enclose an insert, you will have more room to explain how a new federal law requires consumers to have 21 days after the statement is mailed to make a payment on outstanding loans, but the effective date of the law has not allowed the credit union adequate time to complete a complex revision. You may want to list the types of open-end loan products (by the name used by your credit union) the message applies to. You will want to include a statement that the credit union is committed to complying with all laws and regulations and is moving ahead as quickly as possible to change due dates on the actual statement. CUNA suggests you not mention the “Credit CARD Act” by name, since that will only further confuse your members.

If you decide to provide a brief message on the periodic statement, please consider the merits of including a story in the credit union’s next quarterly newsletter to explain what is being done to comply with a very complicated government requirement, that the credit union is moving forward in good faith to change periodic statements as quickly as possible, how these changes may require the credit union to take steps that are not necessarily what the member would prefer, and that the member should contact the credit union if he or she has concerns about being charged an unwarranted late fee.

An educational piece is not only good membership service, but may help to persuade a judge that the credit union took reasonable steps to comply if the credit union is subject to a TILA lawsuit.

12. The Fed has said that we can use this special notice on the periodic statement, or an insert, “for a short period of time after August 20”. What time period does the Fed have in mind?

The term "short period of time" is not defined by the Fed, and the Fed attorney on our audio-conference was helpful in assuring credit unions that no specific

timetable exists. He recognized that many procedural and system changes will need to be made in order to comply with the 21-day timing requirement.

As CUNA has explained to the Fed, credit unions are the financial institutions most seriously impacted by this new disclosure requirement because of the use of consolidated periodic statements and multi-featured lending programs. These types of statements and programs have been in place for decades, so it is unrealistic to think that these programs can be reviewed and reconfigured in a matter of a few months, even with a tremendous redirection of resources that are needed to comply.

Credit unions have told CUNA that under the best of circumstances, it will take them at least six months to change all the programs they now have in place that are triggered by delinquencies and to create new systems to aggregate bi-weekly payments to track the new single “payment due date”. Delinquencies for other loans may automatically trigger credit bureau reporting, automated late-notice communications, stopping further advances on a line of credit if an automobile payment is late, and other automated actions. This is in contrast to credit card programs in which compliance appears to be easier.

Again, the Fed has provided no indication as to what period of time would be considered “short” for purposes of this temporary alternative for complying with the 21-day provisions. In CUNA’s opinion, it is reasonable to interpret this period of time as consisting of however long it reasonably takes for a credit union to proceed diligently and in good faith to come into compliance with the provisions of the interim final rule. This time period will likely vary among credit unions.

We will urge the Fed in our comment letter to clarify that this is an acceptable interpretation of the term “short period of time” and will also continue to persuade the Fed to extend the effective date to recognize the time needed to comply.

13. Will changing the due date require a change-in-terms notice?

No. The Fed has said that the payment due date is not one of the required initial disclosures, so no change-in-terms notice is required.

14. Can I change the payment due date on a home equity line of credit?

The official staff Commentary on HELOCs (section 226.5b(f)(3)(v)) states that changing a payment due date is considered an insignificant change, and a credit union can therefore change the payment due date without the member’s written consent. However, credit unions should check with their legal counsel to determine whether any contract issues apply or if any notice may be required by contract or other law. This should include a review of the language in a credit union's loan documents concerning the right to make certain changes.

15. Is a notice of change-in-terms required if a credit union establishes new billing cycles and corresponding periodic statements or changes the date its periodic statements are provided in order to comply with the 21-day timing requirement?

Regulation Z defines “billing cycle” as the interval between the days or dates of regular periodic statements. Although billing cycles must generally be equal, there is a permissible variance to account for weekends, holidays and differences in the number of days in different months. The definition states that an interval will be considered equal if the number of days in the cycle does not vary by more than four days from the regular day or date of the periodic statement.

However, the official staff commentary to Regulation Z at 2(a)(4) states that “[T]he requirement that intervals be equal does not apply to the transitional billing cycle that can occur when the creditor occasionally changes its billing cycles so as to establish a new statement day or date.” In this situation, Regulation Z would require a notice of change in terms if any of the terms that are disclosed at account opening are affected or the minimum payment is increased as a result of the change in the billing cycle date or dates. For example, a notice of change in terms must be provided if the credit union initially disclosed a 25-day grace period and the member will have fewer days during the billing cycle change.

Prior to August 20, 2009, a credit union would only have to provide a 15-day advance notice of change in terms. Any notice of change in terms sent in connection with a billing cycle date change after August 20th would have to be sent at least 45 days prior to the effective date of the change.

16. How can a credit union comply with the 21-day timing requirement if a member pays weekly, bi-weekly, or semi-monthly?

If the credit union has established these payment periods by contract, it will need to consult its lawyer to determine how to make changes to comply with the new 21-day requirement.

However, in most cases these short payment periods are established for the convenience of borrowers who take advantage of voluntary payroll deductions. Members may continue to make payments based on their current schedules, and a payment will only be considered late when the amount due for the month fails to be paid by the due date, which must be at least 21 days after the monthly periodic statement was mailed. This will take data processing changes to track the time that payments are credited as measured against the official payment due date.

There is the possibility that there may have to be one transition month in setting up the new 21-day payment due date to match periodic statement mailings in

which the credit union may have to forego late payment fees. This will present the problems of manually monitoring and reversing the late payment fees.

17. My credit union only sends quarterly statements. Do I have to change to monthly statements?

We do not believe a credit union will be able to comply with the 21-day requirement where there are monthly payments due without providing a periodic statement on a monthly basis.

As discussed under possible alternative approaches above, some credit unions may decide to include multiple due dates on the periodic statements to cover payments due in the current and next month in order to address concerns about bi-weekly payments and other credit union payment programs. The Fed staff has questioned whether these payments would comply when there are dates for two months that are disclosed and, therefore, it may be very difficult to advocate that quarterly statements would be acceptable in which even more future dates are disclosed.

18. Is there any provision under Regulation Z's open-end rules that prohibits the first payment due date from being more than 45 days after the date the account is opened?

A number of credit unions have raised concerns that there is some limitation under Regulation Z, such as when the first payment under a car loan made at the beginning of one month is not due until the end of the next month. There is no such restriction under Regulation Z's open-end rules.

19. If a member's loan is currently delinquent, and the payment due date is actually June 27th, what payment due date should we list on the periodic statement mailed after August 20th?

The 21-day timing requirement refers to the time period between the date a specific periodic statement is mailed or delivered and the next payment due date for the month the statement is provided. For those loans that are delinquent, it is not the delinquency due date that is listed on the periodic statement, it is the due date in the month the statement is provided that is printed on the statement. Based on the facts in the question, the date that should be listed on the next periodic statement mailed in early September for the month of August, should be September 27th. This date is in no way an indication of a member's delinquency, only the very next payment due date. A credit union that wanted to provide some notice that a member's account was delinquent could provide a brief note in the statement such as: "Your loan is two payments late."

20. If a member's loan is currently delinquent on a payment due June 28th and we mail out statements on September 5th, can the account still be reported to the credit bureau as delinquent and can the credit union impose a late fee?

Since the account is already delinquent at the time September's periodic statement is mailed showing the next payment due date of September 28th, it is assumed that the credit union has already reported the member's delinquent account to a credit bureau and that does not have to be changed. The issue arises with regard to how to report payment history to credit bureaus when the member is making late payments if the credit union is not in compliance with this rule after August 20th. We recognize the operational complexities as to how this is reported, especially after the credit union becomes compliant with the 21-day provisions. We will raise these issues with the Fed and would appreciate any information credit unions may provide with regard to these issues

III. What Credit Unions Must Do to Comply With the 45-Day Change-In-Terms Requirement

A. Overview of the Regulatory Requirements

CUNA has received very few questions about the other provision that goes into effect next month. Under the CARD Act, starting on August 20th, the credit union must provide a 45-day advance notice if it increases the interest rate or makes other significant changes to the terms of the credit card agreement. There must also be a disclosure of the borrower's right to cancel the account prior to the effective date of the rate increase or the change in the significant term. This section summarizes the provisions of the interim final regulation, also out for comment until September 21, 2009.

The interim final rule will apply to change-in-terms notices that are issued on or after August 20, 2009. The rule will not apply to notices issued before that date, even if the change is effective after August 20th. However, for promotional rate programs that end after August 20th, a creditor will not be able to raise the rate after the promotional period, unless the creditor has previously disclosed the term and the rate or type of rate that will apply after the term ends, regardless of whether the notice is provided before or after August 20th. Also, the exception described for payments that are more than 60 days late will apply even if the 60-day period began before August 20th.

Exceptions

The CARD Act and the interim final rule provide the following three exceptions to the requirement to provide the notice of a rate increase:

- If the change is due to an expiration of a specified period of time, provided that the length of this time period and the rate that would then apply were disclosed to the consumer before this time period began. The disclosure must be in writing, and the rate that applies after the period ends may not exceed the rate before this time period began. Card issuers offering deferred interest or similar programs may use this exception.

- If the rate is variable and is increased according to the operation of a publicly available index that is not under the control of the creditor.
- If the rate increase is due to the completion of, or failure to comply with, the terms of a workout or temporary hardship arrangement, as long as the terms were disclosed in writing to the consumer before the commencement of the agreement. The rate that would then apply must not be higher than the rate that applied before the workout or temporary hardship arrangement. All these rates need to be disclosed and any rates disclosed that are variable must state that the rate may vary and how it is determined. The disclosure must also state that the consumer must make timely minimum payments to remain eligible for this arrangement, if applicable.

Notice of Right to Cancel

These notices must include a brief description of the right to cancel the account before the effective date of the rate increase or other change disclosed in the notice. The CARD Act also states that closing or cancelling the account pursuant to this right to cancel will not constitute a default under the existing cardholder agreement and does not trigger an obligation to immediately repay the obligation in full. The borrower who cancels the card has to be given the right to repay the outstanding balance through a method no less beneficial than either:

- A payment schedule that amortizes the balance over five years or more; or
- A minimum payment that is a percentage of the balance that is no more than twice the percentage that applied before the cancellation of the account.
- The method of repayment currently required by the account agreement.

Types of Loans Covered

Unlike the requirement to provide periodic statements 21 days before the due date, this provision on providing a 45-day notice before a rate increase or other significant change in the terms of a credit agreement will only apply to credit cards not secured by a home under the August 20, 2009 effective date. The Fed is excluding HELOCs accessed through a credit card device because the agency has already started looking at these accounts separately under a rulemaking that was announced in late July. Note that the existing 15-day change-in-terms notice requirements will continue to apply to home-equity plans and other open-end plans that are not credit card accounts. However, with the exception of home-secured credit lines, open-end lines of credits that are not credit card accounts will be subject to the revised change-in-terms notice requirements that are outlined in the Regulation Z rule that was issued in January 2009 and which is effective as of July 1, 2010.

Significant Changes

The interim final rule identifies the “significant changes” that will require the 45-day notice, which include:

- APRs for purchases, cash advances, or balance transfers. This includes any discounted initial rate, premium initial rate, or penalty rate.
- Fees in connection with the issuance and availability of a credit card account, including fees for account activity or inactivity.

- Fixed finance charges or a minimum interest charge if it exceeds \$1.
- Transaction charges imposed for use of the account.
- Grace periods.
- Balance computation methods.
- Cash advance, late payment, over-the-limit, and balance transfer fees, as well as returned payment fees.
- Required insurance, debt cancellation, or debt suspension fees.

Insignificant Changes

For terms that are not “significant,” creditors may disclose these changes by either giving the 45-day advance notice or providing 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 the consumer would likely notice this disclosure. Examples of changes that are not “significant” include: Charges for documentary evidence; reduction in finance charges; suspension of future credit privileges; termination of an account or plan; or when the change results from an agreement involving a court proceeding.

Content of Notice

The 45-day notice must include the following information:

- A description of the change and a statement that the change is being made to the account.
- The date the change becomes effective.
- The consumer’s right to reject the change prior to the effective date, unless the change is an increase in the required minimum payment or the consumer fails to make a required minimum payment within 60 days after the due date.
- Instructions for rejecting the change, along with a toll-free telephone number the consumer may use to notify the creditor of the rejection.
- If applicable, a disclosure that if the consumer rejects the change, then the consumer’s further use of the account will be terminated or suspended.

The 45-day notice is also required when the rate is increased due to a delinquency, default, or penalty and must be provided after the occurrence of the event that led to the rate increase. This notice will not be required for home equity plans accessible by credit cards. The notice in connection with a delinquency, default, or penalty must state the following:

- The increased rate has been triggered and the date that it will apply.
- The circumstances in which the increased rate will no longer apply.
- The consumer’s right to reject the penalty rate prior to the effective date, unless the consumer makes a payment that is more than 60 days late.
- Instructions for rejecting the change, including a toll-free number that the consumer may use.
- If applicable, that the consumer’s further use of the account will be terminated or suspended if he or she rejects the increased rate.

When Notice is Not Required

This notice will not be required for rate increases due to the consumer's failure to comply with the terms of a workout or temporary hardship arrangement. For penalty rates imposed when a consumer exceeds the credit limit, this notice is not required if a consumer already received a 45-day notice in situations in which the creditor decides to decrease the credit limit and impose a penalty rate if this decreased limit is exceeded.

Consumer's Right to Reject the Changes

Whether provided in connection with a rate increase, change in significant terms, or due to delinquency or default, the interim final rule provides consumers with the substantive right to reject the change if the creditor is notified before the effective date. This expands the CARD Act provisions, which only included the disclosure requirements. If the change is rejected, the creditor may not apply that change, increase a rate, impose a fee, or otherwise treat the account as being in default. Creditors may, however, terminate or suspend the account if the consumer rejects the rate increase or changed term.

Effect of Rejection of Changes

For a rate increase, change in significant terms, or for delinquencies or defaults, the creditor also may not require repayment of the account in full or in a manner any less beneficial than amortizing the balance for at least five years or no more than doubling the minimum percentage due each month, or the repayment method that is currently in the account agreement as described above. However, a previously disclosed "floor" for minimum payments may still be imposed if at some point the floor exceeds the payment that would apply under one of these two repayment methods. In the alternative, creditors may use the repayment method that applied to the account before the change was made. For the five-year amortization period, creditors are also not required to recalculate these payments if the consumer makes more than the minimum payment, and payments may be adjusted if a variable rate changes to ensure that payments are completed by the end of the five-year period.

As mentioned above, these protections will not apply for accounts that are more than 60-days delinquent or for transactions that occur more than 14 days after the notice is provided. The creditor may also place reasonable requirements on how consumers may reject the change, such as requiring the primary accountholder to provide notification of the rejection or requiring the accountholder to supply the account number.

The official staff commentary clarifies that a consumer does not forfeit the right to reject the change or rate increase, or revoke a rejection, if transactions are made prior to the effective date, although creditors may also apply the terms of a pre-existing promotional rate or deferred interest or similar program in situations in which the consumer rejects the rate increase or changed term. However, if the account is used for transactions that occur more than 14 days after the notice is provided, then the creditor may apply the rate increase or changed term to those specific transactions even if the consumer rejects the change or increased term prior to the effective date. This is to mitigate the effects if a consumer deliberately conducts transactions after receiving the notice and then rejects the increased rate or changed term shortly before the effective date to ensure that the change

does not apply to these recent transactions. Creditors may use the date the transaction is charged to the account to determine if it meets the 14-day requirement, as opposed to when the transaction is posted to the account.

Creditors may not apply the increased rate to the time period before the effective date of the change and other changes can only apply to transactions occurring after that time, not the entire account. For example, an increase in a transaction fee can apply to specific transactions, but an increase in a monthly fee cannot be imposed because it would apply to the entire account and not to a specific transaction.

B. Frequently Asked Questions Concerning the 45-Day Requirement

1. Does the 45-day notice apply to an increase in the APR from a standard rate to a penalty rate as a result of the borrower's delinquency?

Yes, credit card issuers will be required to provide a 45-day advance notice before increasing the Annual Percentage Rate (APR) on any credit card account, except in cases in which a card agreement has already disclosed that the APR is a variable rate, the current rate will expire at a specific time such as when an introductory rate terminates, or the APR is increased either as a result of the completion of a temporary workout arrangement or is increased due to the failure of the borrower to comply with the terms of a workout plan. Therefore, a 45-day notice would have to be provided before a standard rate can be increased to a penalty rate as a result of the borrower's delinquency. The 45-day notice would be required even if a penalty rate increase is disclosed in the account opening agreement.

2. The 45-day notice requirement applies when a creditor makes any significant change in the terms of the cardholder agreement. Does a creditor also have to provide a 45-day notice of change-in-terms prior to changing an "insignificant" term?

Not necessarily at this time. A 45-day prior notice will be required on or after August 20, 2009 before card issuers may make any significant change in the terms of the credit card agreement, such as an increase in any fee or finance charge. The term "significant change" has been defined in the interim final rule, as described above.

For changes that are considered "insignificant" after August 20, 2009, a credit union has two options. It may either provide a 45-day prior notice of change-in-terms or provide notice of the amount of the fee or charge at a time and in a manner that a member would be likely to notice the disclosure. This disclosure may be provided either orally or in writing. Prior to August 20th, such changes are covered by the current Regulation Z requirements and would require a 15-day prior notice.

3. Is any other information required to be provided with the 45-day notice of change-in-terms?

Yes. The 45-day notice provided to comply with these requirements must include a statement that the card can be cancelled by the borrower before the specific change goes into effect.

4. Will the 45-day change-in-terms notice be required for changing the due dates?

No, change-in-terms notices are only required for terms that are disclosed at the time the account is opened, and the due date is not one of those terms.

5. Is the 45-day change-in-terms notice required if the rate changes based on a “Prime Rate Index?”

No, the notice is not required if the rate is variable and is increased according to the operation of a publicly available index that is not under the control of the credit union. The “Prime Rate Index” would qualify as such an index and, therefore, the notice would not be required.

6. Please explain the “14-day rule” in which an increased rate may apply even if the member rejects the rate increase?

If the account is used for transactions that occur more than 14 days after the change-in-terms notice is provided, then the credit union may apply the rate increase to those specific transactions even if the member rejects the change or increased term prior to the effective date. This is to mitigate the effects if a member deliberately conducts transactions after receiving the notice and then rejects the increased rate or changed term shortly before the effective date in an attempt to ensure that the change does not apply to these recent transactions.

7. Can an annual fee continue to be charged if the member rejects a change outlined in the change-in-terms notice if an outstanding balance remains?

Yes, the fee may continue to be charged, but cannot be increased even if the credit union is increasing the fee for all the other accountholders.

#