



# **National Automotive Finance Association**

## **Current Legal Issues**

*Fort Worth, Texas*

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# Agenda

- Red Flags Update
- Federal Legislative Activity
- Selected Litigation



# Red Flags Update

- FTC delays enforcement until 8/1/2009
- Rule was effective 1/1/2008
- Compliance was mandatory on 11/1/2008
- Synthetic ID Theft Issues



# Federal Legislation

- **HR 627/SA 1058 – Credit Cardholder’s Bill of Rights Act of 2009**
  - Bans double-cycle billing, which eliminates the interest-free period for consumers who move from paying the full balance monthly to carrying a balance;
  - Prohibits retroactive rate increases unless the cardholder is at least 60 days behind in paying the bill;
  - Requires lenders to restore the lower rate after six months if the cardholder has paid monthly bills on time;
  - Requires lenders to post their credit card agreements on the Internet;



# Federal Legislation

- **HR 627/SA 1058**
  - Requires that customers receive 45 days notice before rates are increased;
  - Requires anyone under 21 to prove that they can repay the money before being given a card, or have a parent or guardian promise to pay off their debt if they default;
  - Prohibits over-the-limit fees unless a cardholder elects to be allowed to go over a limit;
  - Requires lenders to say how much time it would take and how much money in interest would be paid if only the minimum monthly payments are made; and
  - Bans “pay-to-pay” fees, which are charged when someone pays the bill by phone or on the Internet.



# Federal Legislation

- HR 1105 – Omnibus Appropriations Bill
  - Permits state attorneys general to bring actions to enforce any provision of the Truth in Lending Act.
  - Entitles state AGs to obtain penalties under TILA and any rule promulgated thereunder.



# Federal Legislation

- **HR 1020 – Arbitration Fairness Act**
  - No predispute arbitration agreement is valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights.
  - Requires the validity or enforceability of an agreement to arbitrate to be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.



# Federal Legislation

- HR 1610 – Interest Rate Equity Act
  - Limits the APR that may be charged by recipients of financial assistance under the Emergency Economic Stabilization Act of 2008 with respect to consumer credit card accounts.



# Federal Legislation

- **HR 1640/S 582 – Interest Rate Reduction Act**
  - Amends TILA to prohibit the APR applicable to any consumer credit transaction from exceeding 15% on unpaid balances, inclusive of all finance charges.
  - Authorizes the Fed to establish an APR ceiling exceeding the 15% annual rate for periods not to exceed 18 months if it determines that:
    - money market interest rates have risen over the preceding six-month period; and
    - prevailing interest rate levels threaten the safety and soundness of individual lenders, as evidenced by adverse trends in liquidity, capital, earnings, and growth.



# Federal Legislation

- HR 1640/S 582
  - Does not apply to insured credit unions
  - Provides for civil penalties



# Federal Legislation

- HR 2309 – Consumer Credit and Debt Collection Act
  - Provides authority to the FTC to expedite rulemakings concerning consumer credit or debt and to direct the Commission to examine and promulgate rules with regard to debt settlement and automobile sales.



# Federal Legislation

- HR 2309
  - Directs the FTC to adopt rules that prevent unfair and deceptive practices by dealers regarding credit and lending.



# Federal Legislation

- HR 2309
  - The FTC must "consider" adopting rules that would:
    - restrict post-sale changes in financing terms;
    - give consumers the right to rescind a sales contract within a specified period after receiving the final information regarding the terms of the sale or financing; and
    - limit the ability of dealers to receive compensation for arranging financing or assigning a credit contract based on the interest rate, the APR, or the amount financed.



# Federal Legislation

- S 255 – Empowering States' Right To Protect Consumers Act of 2009
  - Amends TILA to limit the APR applicable to any consumer credit transaction (other than a residential mortgage transaction), including any associated fees, to the maximum rate permitted by the laws of the state in which the consumer resides.
  - Would empower the states to set the maximum annual percentage rates applicable to consumer credit transactions.



# Federal Legislation

- S 257 – Consumer Credit Fairness Act
  - Amends federal bankruptcy law to require the bankruptcy court to disallow any claim arising from a “high cost consumer credit transaction.”
  - For secured creditors, the disallowance of the claim will extinguish their lien on the collateral securing the transaction, leaving such creditors with no claim against the bankruptcy estate or the collateral.



# Federal Legislation

- S 257
  - High cost consumer credit transaction:
    - An extension of credit resulting in a consumer debt with an applicable APR, including related costs and fees, that exceeds, at any time while the credit is outstanding, the lesser of:
      - the sum of 15% and the yield on U.S. Treasury securities having a 30-year period of maturity; or
      - 36%



# Federal Legislation

- S 257
  - Excludes the petition for relief of a debtor with any debts arising from a high cost consumer credit transaction from mandatory consideration for dismissal, or conversion to a case under chapter 11 or 13, based upon a finding of substantial abuse.



# Federal Legislation

- S 500 – Protecting Consumers from Unreasonable Credit Rates Act of 2009
  - Establishes a new “fee and interest rate calculation” (“FAIR”).
  - May require creditors to disclose the FAIR instead of the traditional APR on consumer credit transactions subject to TILA.
  - Cap the rate at 36%, as calculated in accordance with FAIR (which includes such items as credit insurance, default fees, ancillary products, etc.), on all consumer credit transactions subject to TILA.



# Federal Legislation

- S 500
  - FAIR calculation is
    - All finance charges under TILA, *plus*
    - Late fees/NSF fees that exceed certain amounts, *plus*
    - and other fees triggered by a breach or default, *plus*
    - any credit insurance premiums (whether optional or required), *plus*
    - any charges and costs for ancillary products sold in connection with or incidental to the credit transaction.



# Federal Legislation

- S 500
  - **Civil Liability.** In addition to current remedies available under TILA section 130(a):
    - Obligation is null and void, and not enforceable by any party.
    - Creditor or any subsequent holder must promptly return to the consumer any principal, interest, charges, and fees, and void any security interest associated with the transaction.



# Federal Legislation

- S 500
  - Notwithstanding any statute of limitations or repose, a violation of the rate cap may be raised as a matter of defense by recoupment or setoff to an action to collect the debt or repossess related security at any time.



# Federal Legislation

- § 500
  - **Criminal Liability:**
    - One year in prison.
    - Fine in an amount equal to three times the amount of the total accrued debt or \$50,000, whichever is greater



# Federal Legislation

- S 566 – Financial Product Safety Commission Act of 2009
  - Establishes the Financial Product Safety Commission.



# Federal Legislation

- S 566 – FPSC directed to:
  - promulgate consumer financial product safety rules;
  - establish a best practices guide for all providers of consumer financial products;
  - conduct continuing studies and investigations of consumer financial products industry practices;
  - award grants or enter into contracts for the conduct of such studies and investigations;



# Federal Legislation

- S 566 – FPSC directed to:
  - assist public and private organizations or groups of consumer financial product providers, administratively and technically, in the development of safety standards or guidelines that would assist them in complying with any FPSC rule;
  - comment on selected agency rulemakings affecting consumer financial products; and
  - establish a consumer financial product customer hotline.



# Selected Litigation

- **PMSI/Negative Equity Trends**
  - Split decisions in the courts on whether negative equity is covered by the creditor's purchase money security interest.
  - Two circuit courts have now held it is
  - Cases are trending in favor of creditors, but some concerns still exist



# Selected Litigation

- **Goldman Sachs Settlement**

- Massachusetts AG reached a settlement with Goldman Sachs to resolve potential claims stemming from the Attorney General's investigation of the role of investment banks in the origination and securitization of subprime loans in Massachusetts.
- Goldman will provide a \$50 million loan restructuring program to Massachusetts subprime borrowers, designed to enable subprime borrowers to replace problem loans with new, more affordable loans that take into account the current value of their properties.
- Goldman also agreed to pay \$10 million to the Commonwealth of Massachusetts and will continue to cooperate with the Attorney General's ongoing investigation of subprime lending and securitization practices.



# Selected Litigation

- **Goldman Sachs Loan Restructuring Program**

- GS will significantly reduce principal balances to allow borrowers to refinance or sell their homes.
- GS will reduce the principal of first mortgages by up to 35% and second mortgages by 50% or more for loans held by Goldman entities, .
- Borrowers with “significantly delinquent” first mortgages will be required to make a reasonable monthly payment while seeking a refinancing or sale.



# Selected Litigation

- **Goldman Sachs Loan Restructuring Program**
  - If a borrower cannot find financing or sell his home in 6 months, Goldman will reduce the principal owed on the existing loan to assist the borrower.
  - GS will assist qualified borrowers with finding refinancing options and other alternatives to foreclosure where loans are not held by GS, but serviced by its affiliated servicing company, Litton Loan Servicing.



# Selected Litigation

- **Notables**
  - Goldman Sachs admitted no wrongdoing.
  - Goldman Sachs had not been sued.
  - Can this creep into auto finance securitizations?



# Selected Litigation

- ***In re Clark Contracting Services***
  - CIT financed Clark vehicles and noted its lien on the titles
  - Wells Fargo acquires the financing contracts from CIT and take assignment of lien but does not re-title to note its lien
  - Clark files Chapter 11
  - Bankruptcy court voids WF liens because it didn't re-title
  - WF left with no collateral and an unsecured claim.



# Selected Litigation

- ***In re Clark Contracting Services***
  - Significant ramifications for securitization
  - Appeal should be filed by the end of the month.
  - Legislation (TX SB 1592) on the Governor's desk to make clear subsequent holders do not need to re-title to preserve their lien



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