

## Not Your Grandma's Billing Statement: Recent Changes to the Periodic Statement Disclosures

By: Dixie K. Hieb

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In their most recent attempt to make credit card billing statements more understandable, federal banking regulators have created a sales dilemma for credit card issuers -- how best to introduce and gain acceptance of this "new and improved" disclosure model. While the 2010 periodic statement has some shiny new features, there is a significant risk that cardholders may not appreciate the statement's revamped design and added disclosures. The revisions to the periodic statement requirements, found at Regulation Z Section 226.7(b), become effective July 1, 2010, and those issuers who prepare and educate cardholders prior to implementing the new statement design will have more satisfied customers and

fewer calls to customer service representatives.

What's New in the 2010 Model? So much that it is likely to make the consumer's head spin, and certainly more than we can cover in this article. One of the most significant changes is the addition of "Interest" disclosures. Having finally identified a term they believe consumers will understand, the regulators wholeheartedly adopt this disclosure requirement. The new periodic statement must include a disclosure of all finance charges attributable to periodic rates, itemized and totaled by type of transaction (e.g., purchases and cash advances), using the term *Interest Charge*,

*(continued on page 2)*

## U.S. Treasury Unveils Capital Assistance Program; Door Open for More Investments by Federal Government in Major Banks

By: Charles D. Gullickson

The economic turmoil of recent months continues to result in unprecedented involvement by the federal government in the U.S. financial services industry. One of the latest in this string of developments is the federal government's Capital Assistance Program which was announced in late February 2009 by the United States Treasury Department and the federal banking regulators. As a re-

sult of the program, the country's largest bank holding companies will undergo a "stress test" of their capital adequacy in the coming months by the banking regulators. Some bank holding companies, as a result of the assessment, may receive an injection of capital from the federal government, and possibly even over their own objections.<sup>1</sup>

*(continued on page 3)*

<sup>1</sup> The initial announcement of CAP from the U.S. Treasury and the federal banking regulators referred to it as the Capital Assistance Program, but there have also been releases from the federal regulators that refer to it as the Capital Assessment Program.

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and grouped together under the heading *Interest Charge*. Further a total of finance charge attributable to periodic rates, using the term *Total Interest*, for both the statement period and the year to date, must be disclosed.

Fees also gain prominence. The new periodic statement requires disclosure of any other charge imposed under the plan, itemized, identified by feature or type (e.g., late fees and cash advance fees), and grouped together under the heading *Fees*. The statement must also include a total of these other charges, again using the term *Fees*, for the statement period and for the year to date.

Also new for 2010 is the late payment disclosure. The new periodic statement must disclose not only the payment due date, but also the amount of any late payment fee and penalty APR that may be imposed as a result of late payment. The items must be disclosed on the front of the first page of the statement in close proximity to one another.

In an apparent effort to ensure that cardholders really consider the wisdom of carrying a credit card balance, the new periodic statement also provides an expanded minimum payment disclosure. Card issuers are given three alternatives for making this disclosure: (1) provide a warning about making only the minimum payment, a hypothetical example, and a toll-free number to obtain generic repayment estimates, (2) provide a warning about making only the minimum payment and a toll-free number to obtain actual repayment disclosures, or (3) provide the actual (cardholder-specific) repayment disclosures. The revised regulation also provides sample minimum payment disclosures, and to catch the attention of cardholders whose minimum payments result in negative amortization, states: Minimum Payment Warning: You will never pay off the outstanding balance shown on this statement if you only pay the minimum payment.

Finally, if a card issuer includes on or with a periodic statement a change-in-terms notice or a notice of a rate increase (due to delinquency or default or as a penalty), the issuer must also include a tabular summary of the key changes on the front of the periodic statement.

What's Gone? While the 2010 periodic statement has added many new features, it has eliminated little from past models. Cardholders may notice the elimination of FINANCE CHARGE disclosures, formerly required to be more conspicuous than other disclosures and now abandoned completely. Further, periodic rate disclosures are gone (other than the Annual Percentage Rate), as are terms such as "corresponding APR" and "effective Annual Percentage Rate."

Has Anything Stayed the Same? Not much, but cardholders should recognize features such as transactions, credits, and Annual Percentage Rates (together with the range of balances and types of transactions to which each applies). Also familiar will be the disclosures regarding previous balance, grace period, address for notice of billing errors, closing date, and new balance.

Selling the 2010 Billing Statement. Those card issuers who invest the up-front time and effort to develop an easily understood, consumer-friendly periodic statement will have the greatest success with the new 2010 model. Cardholder satisfaction with the 2010 model will also depend upon the issuer's efforts to assist cardholders in understanding the new disclosures and revised format, including pre-change communications explaining the changes and well-trained customer service representatives to respond to questions and address concerns.

Time will tell if the 2010 periodic statement model has staying power, or if instead the banking regulators head back to the drawing board, adding even more bells and whistles to this important cardholder disclosure. DEHS

## U.S. Treasury Unveils Capital Assistance Program; Door Open for More Investments by Federal Government in Major Banks *(continued from page 1)*

The newly announced Capital Assistance Program should not be confused with the Treasury Department's Capital Purchase Program which was announced last October as a part of the Troubled Asset Relief Program mandated by the Emergency Economic Stabilization Act of 2008. The CPP was one of the first efforts by the Treasury Department under TARP to provide fresh capital to, and restore confidence in, the U.S. banking industry.

The Capital Assistance Program has a somewhat different focus – it is an exercise undertaken by the U.S. federal banking regulators to determine if the largest U.S. banking organizations have sufficient capital to withstand a sustained recession in the U.S. economy. Under the program the federal banking regulators will conduct an exhaustive analysis of the capital structure and risk profile, on a case-by-case basis, of all bank holding companies in the country with more than \$100 billion in assets (which amounts to roughly the 20 largest banking organizations in the country). The assessment by the regulators will cover two economic scenarios: a baseline scenario and a more adverse scenario. The baseline scenario represents a consensus view about the depth and duration of the current recession among various economic professionals and forecasters, while the more adverse scenario presumes a deeper and longer recession than that currently predicted by a majority of economic analysts.

If the federal banking regulators determine a bank holding company does not have sufficient capital to weather the more adverse scenario it will be required to raise more capital. The institution will be given up to six months to raise private capital, and if it fails to do so it would be required to receive a capital injection from the federal government in the form of convertible preferred securities which could be converted into common equity shares on an as-needed basis. Only bank holding companies with more than \$100 billion in assets will be required to participate in CAP. However, smaller U.S. bank holding companies are eligible to participate in the program if they so desire (and thus would be eligible for an investment of capital by the U.S. government if the CAP

assessment determines that they lack sufficient capital). The deadline for smaller banking organizations to apply for participation in CAP is May 25, 2009. Unlike the Capital Purchase Program (for which the deadlines for participation are now expired), it does not appear at this point that the Treasury Department will unveil separate versions of CAP for privately held organizations and S corporations – only publicly traded banking organizations will be eligible for the potential investment by the federal government under CAP.

The Capital Assessment Program is just one of multiple efforts by the federal government to inject more capital in the banking industry and pump more liquidity into the credit markets. In recent weeks the federal government has also worked at refining its Term Asset-Backed Securities Lending Facility, pursuant to which the Federal Reserve will purchase securities backed by consumer debt such as car loans and credit card receivables and also commercial debt such as equipment leases, and the federal government is also working on the creation of one or more investment funds, which also would involve the injection of private capital and private sector managers, to purchase bad loans and distressed assets from financial institutions.

Even a careful observer may have difficulty keeping track of the numerous programs unveiled in recent months by the federal government to deal with the country's financial crisis. For those who want assistance in keeping track of these federal programs and initiatives there is a helpful section on the website of the Federal Reserve Bank of St. Louis which may be found at this link: <http://timeline.stlouisfed.org/>. The website serves as a repository of information concerning the various programs undertaken by the federal government to deal with the country's economic troubles. It also provides a timeline of events going back to early 2007, links to websites for the various programs, and numerous articles and papers that cover different aspects of the current financial crisis. DEHS

## LITIGATION UPDATE: Plains Commerce Bank vs. Long Family Land & Cattle Company, Inc. (Tribal Court jurisdiction over Bank)

By: Roberto A. Lange

In late June of 2008, the Supreme Court of the United States issued its opinion in *Plains Commerce Bank v. Long Family Land & Cattle Company, Inc.* The Court reversed a tribal court judgment against Plains Commerce Bank for \$750,000.00 plus equitable relief, in a decision that addressed tribal court jurisdiction over banks and banking activities.

Plains Commerce Bank loaned \$750,000 to Long Family Land & Cattle Company, Inc. (“the Long Family”). The Long family was comprised of members of the Cheyenne River Sioux Tribe and owned some land (not in trust, but “fee land”) on the reservation. Plains Commerce Bank had taken a mortgage to secure the debt.

When the Long family defaulted on the loan, Plains Commerce Bank and the Long family negotiated a workout arrangement. The Long family deeded 2,230 acres to Plains Commerce Bank in lieu of foreclosure on the mortgage, and the Bank cancelled some of the debt and agreed to make additional operating loans. The Long family received a two-year lease on the 2,230 acres with an option to purchase the land at the end of the term for \$468,000.00. The Long family experienced cattle losses in 1996 and 1997, and was unable to purchase the acreage when the lease expired. The Bank initiated eviction proceedings in state court and petitioned the Cheyenne River Sioux Tribal Court for a Notice to Quit. The Bank also sold portions of the land to non-tribal members.

The Long family sued Plains Commerce Bank in Cheyenne River Tribal Court claiming that the Bank had breached its contract, had acted in bad faith, had violated Tribal law, and had discriminated against the Long family because they were Native American by selling the land on more favorable terms to non-tribal members than what had been offered to the Long family. The case was tried in Tribal Court and resulted in a judgment against the Bank in the sum of \$750,000.00. The Tribal Court later supplemented the judgment to award the Longs the option to purchase 960 acres of land, notwithstanding the fact that the Bank had already sold that land. The verdict was affirmed by the Cheyenne River Sioux Tribal

Court of Appeals. The Bank then filed an action in the United States District Court for the District of South Dakota challenging tribal court jurisdiction. Both the District Court and later the United States Court of Appeals for the Eighth Circuit found there to be jurisdiction since the Bank had entered into a consensual relationship with the Long family involving a matter of tribal interest.

The Bank appealed to the Supreme Court of the United States, focusing its appeal on the absence of consent or conduct that entitled the Tribal Court to try the discrimination claim. The decision of the Supreme Court of the United States clarified somewhat the limited jurisdiction that tribal courts have over non-tribal members, including banks. The Supreme Court reaffirmed the rule that Tribes do not possess authority over non-Indians who come within their borders.

The Court recognized two exceptions under which the Tribes may exercise civil jurisdiction over non-Indians on their reservations. First, a Tribe “may regulate through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Second, a Tribe may exercise “civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.” The Supreme Court found that neither exception extends jurisdiction over a discrimination claim. The Court further declared that the Tribe lacks civil authority to regulate the sale of land in fee simple by Plains Commerce Bank, because tribal sovereign interests are confined to managing tribal land, protecting tribal self-government, and controlling internal relations. Although the holding was that the Tribe lacked jurisdiction over the discrimination claim, the entire judgment was reversed because the monetary award could have stemmed from a discrimination finding and because the requirement to allow an option to re-purchase land certainly stemmed from the Court’s determination of discrimination against the Tribal members. DEHS

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## Federal Legislation Amending Chapter 13 Provisions Regarding Home Mortgages

By: Robert E. Hayes and Keith A. Gauer

Recently legislation was introduced in both the House (H.R. 1106) and the Senate (S. 61) making revisions to the Bankruptcy Code specifically dealing with home mortgages. The legislation is entitled the “Helping Families Save Their Homes in Bankruptcy Act of 2009.” There has been a fair amount of publicity surrounding the principal provisions of the Bills which would permit Chapter 13 bankruptcy debtors to deal with all mortgages secured by a Debtor’s principal residence as they generally can with all other secured debts. Specifically it would, depending upon the value of their residence, permit debtors to bifurcate the lender’s claim between a secured claim and an unsecured claim, and would no longer require payment in full of the first mortgage balance if the debtor proposes to retain the home when the value of the residence is less than the mortgage balance.

There are, however, other provisions of some importance. First, Bankruptcy Code provisions applicable to Chapter 13 provide limitations on the amount of secured and unsecured debt a person may have in order to qualify as a Chapter 13 debtor. The new legislation removes from that calculation “debt secured by the debtor’s principal residence if the current value of that residence is less than the secured debt limit”; and debt secured by real property which was sold in foreclosure or which the debtor surrendered, “if the current value of such real property is less than the secured debt limit.” If enacted, this language would have the effect of increasing the number of debtors eligible for Chapter 13 reorganizations.

The new legislation also disallows the claim of a creditor if it “is subject to any remedy for damages or rescission due to failure to comply with any applicable requirement under the Truth in Lending Act, or any other provision of applicable State or Federal consumer protection law that was in force when the noncompliance took place, notwithstanding a prior entry of a foreclosure judgment.” It isn’t particularly clear what is meant by a claim which is “subject to” a remedy under these consumer protection laws. Presumably the Bankruptcy Court will have to determine whether the claim for such a remedy is valid before disallowing the creditor’s claim. Perhaps more

importantly, this provision will allow a debtor who did not raise the claim in the foreclosure proceeding to now raise it in their bankruptcy proceeding, although presumably only for the purpose of disallowing the claim of the creditor.

The legislation also contains provisions which it says pertain to “combating excessive fees” whereby the debtor and his property aren’t liable for a fee, cost, or charge “incurred while the case is pending” and arising from a debt that is secured by the Debtor’s principal residence unless the holder of the claim files notice of the fee, cost or charge, with the court on the earlier of a year after it is incurred or sixty days before the case is closed, and the fee, cost or charge is found to be “lawful under applicable non-bankruptcy law, reasonable, and provided for in the applicable security agreement” AND “secured by a property the value of which is greater than the amount of the debt claim including the fee, cost or charge.” If the notice isn’t given, the fee, cost or charge is deemed to be waived and any attempt to collect it will be deemed a violation of the automatic stay or the discharge injunction. Finally, this same provision allows a Chapter 13 debtor to “provide for the waiver of any prepayment penalty on a claim secured by the debtor’s principal residence.”

One other provision which does not appear to have garnered much attention is language which permits a Chapter 13 debtor to extend the repayment period for claims secured by a first mortgage on the debtor’s principal residence to “the longer of 40 years (reduced by the period for which such loan has been outstanding) or the remaining term of such loan . . .” Obviously, this provision could authorize a Court to approve an amortization of a home mortgage loan significantly beyond the term of the initial note.

The House passed H.R. 1106 on March 6, 2009. News reports indicate that the bill may have a more difficult time passing in the Senate. On March 11, 2009, the bill was referred to the Senate Committee on Banking, Housing, and Urban Affairs. Senate Republicans and banking lobbyists are pushing for amendments to the bill to restrict its impact. [\[DEHS\]](#)

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## FFIEC Issues Remote Deposit Guidance

By: *Matthew W. McNamee*

On January 14, 2009, the Federal Financial Institutions Examination Council (FFIEC) issued its guidance for financial institutions, examiners, and technology service providers to identify risks, evaluate controls, and assess risk management practices related to remote deposit capture (RDC) products (the Guidance). All financial institutions currently offering or considering establishing RDC would be well-served to review the Guidance and seek the assistance of competent counsel to address any areas of potential concern.

The Guidance emphasizes that the determination of a financial institution to offer RDC should be the result of a contemplative and comprehensive risk management evaluation at the highest internal levels. The process should include identifying and addressing legal, compliance, reputation and operational risk, as well as the integration of the product into the financial institution's overall business strategies. After all, and as the Guidance points out, the board and senior management are ultimately responsible for safe and sound operations, including RDC products and services.

With respect to the decision to offer RDC, it is reasonable to assume that examiners will be seeking to determine whether the financial institution's RDC offerings fit into the bank's overall payments strategy, and the extent to which the bank can document that it has undertaken strategic planning and risk assessment. Operational risks, such as physical and logical access controls over RDC systems, original deposit items at customer locations, electronic files and retained nonpublic personal information should be addressed. Cooperation and involvement of multiple bank personnel is required, including senior management and the board. Policies and procedures here are a must, and should help demonstrate that the financial institution has carefully considered whether and how to offer RDC.

Risk mitigation and control is also a key consideration. For example, those customers to whom RDC will be offered should also be carefully considered, as remote deposit capture is probably not appropriate for every customer. One practice might be to approach RDC as you would a credit relationship: if you would not extend this customer an unsecured loan in the aggregate amount of the checks you would be accepting through RDC, perhaps you should not offer it RDC in the first place. A financial institution can and should be selective as it determines whether RDC is appropriate for a

given customer, and might take into consideration information taken from the customer identification and due diligence procedures in fulfillment of the BSA/AML program, as well as the contents of any existing credit relationship. In any event, the bank should always negotiate the right to conduct on-site audits of a customer, to evaluate the appropriateness of an RDC relationship.

Contractual relationships are perhaps the most important risk mitigation and control tools available. Indeed, the Guidance outlines many areas which should be addressed by agreement, and for which your examiner will be looking. Such provisions should include, for example, expectations concerning deposit limitations and availability, image quality, record retention and security, audit rights, and, perhaps most important, the allocation of liability, warranties, indemnification and dispute resolution. Note that the original depository agreement entered into with the customer at the beginning of the relationship is not sufficient to support the RDC relationship. We are aware that many vendors of RDC software and hardware will offer form customer agreements. Resist the temptation to use these without independent legal review. Because the circumstances and parameters of each financial institution's decision to offer RDC are different, as are its customers, these well-intentioned agreements are not particularly valuable, and may in fact be dangerous.

According to the Guidance, once your RDC program is up and running, the financial institution must exercise on-going measuring and monitoring of all aspects of it. This would include exercising your audit rights on customers, and/or having them engage in periodic self-assessments, as well as continuing IT monitoring. Management should establish key operational performance benchmarks, and monitor performance through reports and conducting reviews and operational risk assessments. All of this will help procedures are reflected in practice.

We have not attempted to recreate the details of the newly-issued Guidance in this Bulletin. Rather, we want our clients to be aware of the main themes of the Guidance: risk assessment; risk mitigation and control, and monitoring and measuring. We expect the FFIEC to release an updated Retail Payment Systems booklet early this year, from which financial institutions might expect further information. DEHS

## Update on Unlawful Internet Gambling Enforcement Act of 2006

By: David L. Rezac

The Federal Reserve Board and the Secretary of the Treasury issued their Final Rule implementing the Unlawful Internet Gambling Enforcement Act of 2006 (the “Act”) in late in 2008. The Rule became effective on January 19, 2009; however, compliance is not required until December 1, 2009. The Final Rule subjects the following five payment systems (and their non-exempt participants) to the Act’s requirements relating to the identification and prevention of illegal internet gambling: 1) Automated Clearing House (ACH) Systems; 2) Check Collection Systems; 3) Wire Transfer Systems; 4) Card Systems; and 5) Money Transmitting Businesses.

For ACH, wire transfer and check collection systems, the Final Rule requires participating financial institutions to evaluate prospective commercial customers before opening an account for such customers to determine if they are likely to be engaged in an illegal internet gambling business. If the financial institution can’t immediately determine there is only a minimal risk, applicant certification or proof are required. With regard to existing commercial customers, a participating financial institution must provide notice that “restricted transactions” are prohibited, but it does not need to screen or evaluate existing customers unless it has actual knowledge of illegal gambling activities.

Unlike ACH transactions, check transactions and wire transfers, card system transfers are required to be monitored on a transaction-by-transaction basis. Fortunately, most of the burdens of the Act are placed on the card system operator, i.e. the card network (e.g. VISA or MasterCard), and not the other participants in the card system.

Money transmitting businesses are also subject to the Act. However, money transmitting businesses include only those businesses that engage in the transmission of funds remotely from a location other than a physical office of the money transmitting business, and do not include businesses providing only such services as check cashing, currency exchange, or the issuance or redemption of money orders, travelers’ checks, and other similar instruments. In addition, the Final Rule excludes depository banks.

While the compliance requirements under the Final Rule may vary based on the particular circumstances of a participating financial institution, the primary duties imposed on such institutions (other than card system operators) are: 1) the implementation of risk-based due diligence screening procedures regarding commercial customer account openings; 2) giving existing commercial customers notice that restricted transactions are prohibited; and 3) following the policies and procedures of their card system operator if they participate in a card system.

If you have any questions about the Act or the Final Rule, please contact Monte Walz or David Rezac.

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### Davenport Firm News

We are pleased to announce that our law partner Roberto A. Lange has been recommended for appointment as federal United States District Court Judge. Bob will remain an active partner with the firm pending the U.S. Senate confirmation process so the exact date of his departure is uncertain. Bob joined the firm in 1989 and has practiced extensively in the areas of commercial and complex litigation, insurance litigation, labor and employment law, products liability, and other business disputes for both smaller and nationally known clients. His litigation experience has included representation of financial institutions. Bob has represented clients in arbitrations and in a variety of courts, including a successful argument before the United States Supreme Court in 2005. DEHS

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Davenport, Evans, Hurwitz & Smith, LLP was founded in 1939. Since that time, the firm has grown steadily and is now one of the largest firms in South Dakota. For more than fifty years, the firm has assisted clients in banking and financial services matters. The firm acts as counsel to many South Dakota banks, financial institutions, and holding companies. DEHS also regularly acts as counsel to businesses who contract with banks, including various servicing and marketing firms.

The firm handles all aspects of banking law, from entity formation, acquisitions, and branching to operational issues involving lending, compliance, creditors' rights, payment processing (check, ACH, wire transfer), general commercial law, and trust administration. The firm represents banks in all phases of state and federal banking regulation and deals extensively with state and federal banking regulators. The firm understands that keeping up with new regulatory developments is a major challenge for banks today and helps its clients respond to that challenge effectively and efficiently.

South Dakota has become a major center for financial services, with approximately a half dozen credit card processing centers located in the Sioux Falls area alone. The firm has served as counsel to many of these entities and has particular experience and expertise in the areas of credit card and stored value card issuance, compliance, and receivables securitization.

The firm also represents its bank clients in bankruptcy matters and complex mediations, foreclosures, and commercial litigation on a regular basis. DEHS often acts as counsel to lenders in loan workouts and bankruptcy cases filed in South Dakota. The firm's banking and financial services lawyers, together with the firm's strong litigation practitioners, also handle commercial litigation such as bank shareholder disputes, complex lender liability cases, bank-marketer disputes, federal compliance cases, employment disputes and many other litigation cases. Our employment law attorneys assist clients with personnel issues, discrimination claims, and immigration matters. The firm's benefits lawyers develop both qualified and non-qualified benefit and retirement plans.

Numerous out-of-state and nationwide lenders also retain the firm for review of loan documents, compliance with state and federal law, and assistance in completing major real estate and commercial loans. The firm also assists out of state individuals and entities in the formation and operation of trust companies.

If you have any questions or desire assistance on any matter, please feel free to contact us at your convenience.

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