

The Proposed Federal Reserve Rules Key Issues and Questions

Presentation for
The Consumer Bankers Association
Private Loan Workshop
March 18, 2009

Robert S. Lavet
Principal
Powers Pyles Sutter & Verville, PC

Tom Levandowski
Senior Vice President and Assistant General Counsel, Law Department
Wells Fargo & Company

ACCEPTANCE/CANCELLATION OPERATIONAL ISSUES

- Can web- based process be designed to complete actual process in 4 days?
 - Borrower accepts disclosures on creditor website; accepts the loan and creditor disburses funds three days later.
- Can self-certification form be part of this creditor web-based process?
- Compliance risks with borrower self-certification.

ANNUAL PERCENTAGE RATE (“APR”) AND INTEREST RATES

- Emphasis on prominence of interest rates is a sharp departure from fundamental TILA approach.
- Will this promote teaser rates?
- Calls into question continuing validity of rule on credit advertising as it applies to private education loans.

APPLICATION /SOLICITATION DISCLOSURE

- Rates actually offered.
 - Rates on creditor web-site, a trap for the unwary?
- Paragraph 38(a)(1(i) states that for disclosures made on an internet web site, the rates must be the actual rates in effect when viewed by the public.

ASSUMPTIONS

- Proposed rule provides uniform assumptions about principal amount and maximum interest rate for purposes of disclosures.
- Maximum interest rate of 21% where maximum rate cannot be determined, i.e., creditor's state has no usury caps and there is no maximum rate in loan documents.
- \$10,000 loan amount unless creditor does not offer loans in that amount, in which case, \$5,000 used as loan amount.

BORROWER SELF-CERTIFICATION

- Who can provide?
- Manner of Collection?
- Can borrower fill in data for self-certification during on-line session?
- If creditor already has a private loan certification from school on its system, can it use data to populate self-certification form?

CO-BRANDING

- Restrictions on co-branding do not apply if creditor and school have a preferred lender arrangement.
 - If preferred lender arrangement, only restriction is that creditor must make clear that it is making loan not the school.
 - Draft recognizes that where creditor and school have preferred lender arrangement, a disclosure by creditor that school does not endorse its loans would be incorrect.
- Co-branding restrictions apply to “marketing” which includes a promissory note.
 - If no preferred lender arrangement and creditor merely lists name of the school in the application section of prom note, must creditor make disclosure under 226.39(b) that school does not endorse its loans?
- Does preferred lender arrangement exist where school simply states that lender has made private education loans to students attending school? DCL on FFEL loans suggests this is not a preferred lender arrangement.

CONSOLIDATION LOANS

- Draft confirms they are subject to the new disclosure regime.
- Fed recognizes that certain required disclosures and the self-certification form are inapplicable to consolidation loans.

CONSOLIDATION OF DISCLOSURES

- Draft provides for collapsing application and approval disclosures where application taken over the phone.
- If creditor process allows for application and approval in the same on-line session, and provided creditor offers borrowers alternative means of acceptance, can the application and approval disclosures be combined?

CONSUMMATION

- HEOA literal language does not work; creditor cannot simultaneously provide disclosure at disbursement and not disburse funds until 3 days after disclosure consummation.
- Fed definition resolves HEOA by defining consummation as after acceptance and at least 3 days before disbursement.
- Will courts defer to Fed definition of consummation rather than state law?

COVERED EDUCATIONAL INSTITUTION

- Includes non-accredited institutions.
- Recognizes that self-certification form does not apply if school is not accredited.
- Other disclosures inapplicable where school is not accredited?

CREDITOR

- Seems to include schools that extend credit to students through institutional loan or deferred payment plans if they engaged in 25 transactions in prior calendar year.
- Applicability to entities that market private education loans.
 - Rule uses broad Regulation Z definition of creditor that includes persons in business of soliciting private education loans.
 - But 37(b) definitions state “solicit” does not include general advertising or invitations to apply for credit.
 - Exemption of conduct vs. exemption as to persons?

MULTI-PURPOSE LOANS

- Subject to disclosure rules only if consumer expressly indicates on application that loans will be used for postsecondary education expenses.
- Raises compliance issues for creditors that have large diversified product sets.
- Inadvertent triggers.

Powers Pyles Sutter & Verville, P.C.
1501 M Street, NW, 7th Floor
Washington, DC 20005
Ph. 202-872-6747
Fax. 202-785-1756
E-mail: Rob.Lavet@ppsv.com

Robert S. Lavet

Rob Lavet joined PPSV's Education Practice Group in 2008 as a Principal. Mr. Lavet counsels schools and financial institutions on a wide range of transactions, litigation and regulatory compliance matters, as well as the resolution of audits and government investigations. Prior to joining the firm, he was General Counsel to SLM Corporation (Sallie Mae). At Sallie Mae, Mr. Lavet managed the Legal, Corporate Compliance and Student Loan Servicing Policy functions. He regularly advised board members and senior management on securities disclosures and corporate debt offerings; oversaw significant litigation and regulatory matters; led due diligence on numerous acquisitions and transactions; and integrated legal teams of acquired businesses in multiple locations. He and his team of attorneys took on leadership roles in postsecondary education as they developed strategies to address the emerging array of regulatory, legislative, corporate, and transactional challenges facing the nation's student loan programs. He successfully litigated the only federal court case involving the Department of Education's attempted application of the prohibited inducement section of the Higher Education Act to a lender.

Prior to joining Sallie Mae, Mr. Lavet served as a trial attorney in the Civil Division of the U.S. Department of Justice, and as a partner with the law firm Cole, Corette & Abrutyn, where he specialized in complex commercial litigation, and securities litigation. He is a member of the bar of the District of Columbia. He served as a past President of the Washington Metropolitan Area Corporate Counsel Association and as a member of the Board of Directors of the Association of Corporate Counsel.

Mr. Lavet graduated with honors from the University of Pennsylvania in 1976 and received his law degree with honors, from Georgetown University Law Center in 1979.

Wells Fargo & Company
Wells Fargo Law Department
1485 Wellington Way
Eagan, MN 55122
Office: 651-454-4152
Email: Tom.Levandowski@wachovia.com

Tom P. Levandowski

Tom Levandowski is Senior Vice President & Assistant General Counsel for Wells Fargo & Company. Prior to his current position with Wells Fargo, Tom served as Legal Counsel and Director of Legal and Regulatory Affairs for Educaid (1994-1999), and before then held various positions within the Higher Education Assistance Foundation (1986-1993). Tom is the chair of the Consumer Banker's Association Education Funding Privacy Subcommittee and chair of the Legal Affairs Committee for the National Council of Higher Education Loan Programs. Tom served as the primary negotiator representing for-profit lenders in the U.S. Department of Education negotiated rulemaking sessions held in 2007 and 2008, and is an alternate negotiator for for-profit lenders in the 2009 session. Tom received his J.D. from William Mitchell College of Law in 1994 and a B.A. in History from St. John's University (MN) in 1986.