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## Common Compliance Challenges

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**Disclaimer:** This presentation does not constitute legal advice or a legal opinion on any matter discussed. This presentation is for educational purposes only. If you have a specific legal question, please consult with an attorney of your own choice.

# Today's Presenter – Steven Van Beek

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Steve Van Beek is an attorney at Howard & Howard Attorneys PLLC where he concentrates his practice in the area of financial regulations. He assists financial institutions throughout the country manage and reduce compliance, legal, and reputation risks.

Prior to joining Howard & Howard, he served as the Vice President of Regulatory Compliance at the National Association of Federal Credit Unions (NAFCU). He received his Bachelor's from Hope College and his J.D. from George Mason University School of Law and is a member of the American Bar Association.

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# Overview

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- Change-in-Terms Notices
  - Special Rules for Credit Cards
  - Credit Card APR Reevaluations
- Email Marketing – CAN-SPAM Act
- One-Click Rule for Electronic Advertisements
- Latest Litigation Risks
  - Multiple NSF Fees
  - Multiple Fees by ATM Operator

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# Open-End Credit: Change-in-Terms Notices

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- Credit unions must provide a Change-in-Terms Notice when a “significant change in account terms” is made:
  - Change in a term required to be disclosed under 1026.6(b)(1) or 1026.6(b)(2) or 1026.6(b)(4);
  - Increase in the required minimum periodic payment; or
  - The acquisition of a security interest.
- Notice must be provided in writing and must be provided at least 45 days prior to the effective date of the change.

# Change-in-Terms – Regulation Z

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- Notice not required (open-end credit and credit cards)
  - Reduction of any finance or other charge
    - But, see Renewal Notices (1026.9(e)) for credit cards
  - Suspension or termination of credit access
    - But, consider whether an adverse action notice is triggered
  - End of properly disclosed introductory or promotional period
    - **Rationale:** Details of offer have been provided in advance
  - Increase in APR due to index change on variable-rate account
    - Member was made aware of variable-rate terms when account was opened
    - There cannot be a floor rate (“under the CU’s control”)

# Open-End Credit: Variable Rate Exception

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- Variable Rates
  - APR consists of index and margin
  - **Example:** Prime rate plus 8% margin
  - **Example:** Prime rate plus 10% margin
- If the **index** increases, the credit union can increase the APR applicable to the borrower's line of credit or CC
  - No advance notice is required

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# Open-End Credit: Variable Rate Exception

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- In order for the exception to be available, the index cannot be under creditor's control
  - Under the creditor's control if:
    - Index is the creditor's own prime rate or cost of funds
    - Variable rate is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index
      - **Floor Rate Example:** If the index is 4% and the margin is 8% (thus, the variable rate is 12% APR), and if the agreement will not allow the APR to decrease below 12% - even if the index decreases below 4% - the index is under the creditor's control

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# Open-End Credit: Variable Rate Exception

- If index is not under the creditor's control, the credit union can apply increases in the index without advance notice
  - And, the APR increase can apply to existing balances
  - **Example:** 12% variable rate APR (4% index + 8% margin). If the index increases to 4.5%, the creditor can apply the 12.5% APR to the LOC – including to the existing balance
- Borrower have already been informed that the APR for the LOC or credit card is a variable rate



# Open-End Credit: Change-in-Terms Notices

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- Changes not covered by 1026.6(b)(1) or (b)(2)
  - For changes to fees – including adding new fees – that are not “significant changes in account terms”, the credit union may either:
    - Follow the change-in-terms notice requirements; **or**
    - Provide notice of the amount of the fee or charge before the borrower agrees to or becomes obligated to pay the fee or charge
      - Provided the notice is at a time and in a manner the borrower would likely notice the disclosure
        - **Example:** Updated Fee Schedule

# Open-End Credit: Change-in-Terms Notices

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- Format Requirements
  - Regulation Z requires a tabular format
    - Except for the following changes:
      - Summary of increase in minimum payment
      - Summary of term required to be disclosed under 1026.6(b)(4)
      - Description of any security interest to be acquired
  - Use the Model Forms as a guide (but confirm requirements)
  - Notice can be included on the periodic statement or provided separately (if on the first page)

# Open-End Credit: Change-in-Terms Notices

## G-20 Change-in-Terms Sample (Increase in Annual Percentage Rate)

### Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, any changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, any changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

# Open-End Credit: Change-in-Terms Notices

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## G-21 Change-in-Terms Sample (Increase in Fees)

### Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. These changes will take effect on 5/10/12. For more detailed information, please refer to the booklet enclosed with this statement.

You have the right to reject these changes, unless you become more than 60 days late on your account. However, if you do reject these changes you will not be able to use your account for new transactions. You can reject the changes by calling us at 1-800-xxx-xxxx.

Revised Terms, as of 5/10/12	
Late Payment Fee	Up to \$35.
Returned Payment Fee	Up to \$35.

# Change-in-Terms – Regulation Z

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- Changes to Credit Cards – 1026.9(c)(2)
  - Written notice for “significant changes in account terms” at least 45 days in advance
    - Tabular format required
    - Notice may be on or with periodic statement or may be provided separately (such as a letter)
    - Content of disclosure – 12 CFR 1026.9(c)(2)(iv)(A)
    - **Right to Reject** – 1026.9(c)(2)(iv)(B) and 1026.9(h)
      - Does not apply to minimum payment increases or APR increases (existing balances are already protected); **does** apply to fee increases

# Change-in-Terms – Regulation Z

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- **Content of disclosure – 12 CFR 1026.9(c)(2)(iv)(A)**
  1. A summary of the changes made to terms required by 1026.6(b)(1) and (b)(2) or (b)(4), a description of any increase in the required minimum periodic payment, and a description of any security interest being acquired by the creditor;
  2. A statement that changes are being made to the account;
  3. For non-credit cards (and only as applicable), a statement indicating the consumer has the right to opt out of the changes;
  4. The date the changes will become effective;
  5. If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice;

# Change-in-Terms – Regulation Z

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- **Content of disclosure – 12 CFR 1026.9(c)(2)(iv)(A)**
  6. If the credit union is changing a rate on the account, other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate contained in the notice will not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate;
  7. If the change in terms being disclosed is an increase in an APR, the balances to which the increased rate will be applied. If applicable, a statement identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms; and
  8. If an APR increase for credit cards, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

# Change-in-Terms – Regulation Z

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- Reasons for Credit Card APR Increases
  - Between one and four principal reasons
  - Must accurately describe the reason for the increase
  - May be described in general terms
    - A decline in your creditworthiness
    - A decline in your credit score
    - A change in market conditions
  - Violations of the terms of the account should be specific
    - Because you made a late payment with us



# APR Rate Reevaluations

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- Review Increased APRs for Credit Cards – 1026.59
  - Must review every six months
    - Review actual factors for the rate increase; or
    - Factors the CU currently uses for new accounts
  - **Example:** Across the board APR increase
    - Review the factors every six months
    - Document current pricing
    - Document review process
  - Review obligation applies to both individual APR increases and “across the board” increases

# APR Rate Reevaluations

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- **Special Merger Situation – 1026.59(g)**
  - If prior CU had increased the APR, the continuing credit union still has the obligation to review
    - Do you know the factors the other CU used for the increase?
- **Optional Process – 1026.59(g)(2)**
  - Within six months of acquiring the accounts, review all accounts using the factors that the CU currently considers for new credit card accounts
    - Place acquired accounts in *your* credit card tiers
    - Review obligation ends **except** for increases resulting from *your* CU's review

# APR Rate Reevaluations

## 59(g)(2) Review of Acquired Portfolio

1. *Example—general.* A card issuer acquires a portfolio of accounts that currently are subject to annual percentage rates of 12%, 15%, and 18%. Not later than six months after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to similar new credit card accounts. As a result of that review, the card issuer decreases the rate on the accounts that are currently subject to a 12% annual percentage rate to 10%, leaves the rate applicable to the accounts currently subject to a 15% annual percentage rate at 15%, and increases the rate applicable to the accounts currently subject to a rate of 18% to 20%. Section 1026.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts for which the rate has been increased to 20%. The card issuer is not required to review the accounts subject to 10% and 15% rates pursuant to §1026.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

# APR Rate Reevaluations

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- Citibank Consent Order
  - Failure to reevaluate and reduce APR for 1.75 **million** cardholders
  - Correct practices and pay \$335 million in restitution
  - CFPB did not issue Civil Money Penalty (in part because Citi self-reported and self-initiated remediation)
  - Examples:
    - FICO Score;
    - Fixed to Variable Accounts; and
    - Multiple Rate Increases.
- [https://files.consumerfinance.gov/f/documents/bcfp\\_citibank-na\\_consent-order\\_2018-06.pdf](https://files.consumerfinance.gov/f/documents/bcfp_citibank-na_consent-order_2018-06.pdf)

# Website Advertising

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## Is your website an advertisement? YES

- “(b) Advertisement means a commercial message, appearing in any medium, that promotes directly or indirectly...the availability or terms of, or a deposit in, a new account;”
  - Truth in Savings: 12 CFR 707.2(b)
- “(2) Advertisement means a commercial message in any medium that promotes, directly or indirectly, a credit transaction.”
  - Regulation Z: 12 CFR 1026.2(a)(2)

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# Email Marketing

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- Email marketing must follow the same requirements as printed marketing
  - For example, requirements for an email “letter” are the same as if that same “letter” was sent by mail
- However, email marketing does have some nuances
  - One-Click Rule may be utilized for certain disclosures
  - CAN-SPAM Act requirements must be followed

# CAN-SPAM Act

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- CAN-SPAM Act applies to all “commercial messages” which are defined as:
  - “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service”
    - Including email that promotes content on commercial websites
    - No exception for business-to-business email
- Exclusion for “transactional or relationship content”
  - Such emails facilitate an already agreed-upon transaction or provide updates about an ongoing transaction (for example, a notification that a statement is ready or that a requested credit limit increase has been granted)
- If a combination message, analyze the “primary purpose” of the email

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# CAN-SPAM Act

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- CAN-SPAM Act requirements:
  - Email cannot use false or misleading header information (the “From”, “To”, “Reply-To”)
  - Email cannot use deceptive subject lines
  - Email message must be identified as an ad
  - Email must include a valid physical postal address for the sender
  - Email message must include a clear and conspicuous explanation of how a recipient can opt out of getting email from the sender in the future
    - Can provide options to allow a recipient to opt out of certain types of messages; however, you must include an option to stop all messages (you can also explain that transactional messages will continue)
  - Opt-out requests must be honored promptly
    - Must fulfill request within 10 business days; cannot require information beyond an email address
- Credit union is responsible for monitoring third-party vendors

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# One-Click Rule

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- Electronic advertisements including online, a credit union's website *and* social media
  - Rather than include the “additional disclosures” in the advertisement itself, the credit union can:
    - Provide the additional disclosures on a separate page available via a direct hyperlink (“one-click”)

# One-Click Rule

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## “One-Click Rule”

“If an electronic advertisement displays a **triggering term**, the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, an advertisement that includes a bonus or annual percentage yield may be accompanied by a link that directly takes the consumer to the additional information.”

*Comment 9 to OSC to 12 C.F.R. 707.8(a)*

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# One-Click Rule

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- Allowed for:
  - Reg Z additional disclosures (loans)
    - Credit card, HELOC, auto loans, mortgages
  - TISA additional disclosures (accounts)
    - Checking, savings, certificates
- Not allowed for (must be on the ad itself):
  - NCUA insurance disclosure
  - Equal Housing Lender (or Opportunity) disclosure

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# One-Click Rule

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- *What about other disclosures and conditions?*
  - Generally, credit unions can place those disclosures and conditions on the “linked” webpage
  - However, credit unions must consider special regulatory rules and UDAAP considerations. Examples:
    - Introductory or Promotional Offers
    - Limited Time Offer (“Must open account by...”)
    - Details to prevent ad from being misleading (e.g., conditions to have fee(s) waived or obtain the advertised rate)

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# Multiple NSF/Returned Item Fees

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## ■ Class Action Litigation

- Claims CU violated Member Agreement/Fee Schedule by charging multiple NSF fees for the same “item”
  - Example: Check presented and returned; NSF; check presented and returned; NSF
  - Example: ACH debit submitted and rejected; NSF; resubmission; rejected; NSF
- Claim there is only one “item”; so only one fee allowed
- Claim breach of contract
- Claim unfair or deceptive acts or practices

# Multiple ATM Fees

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- Similar Claim
  - Claim that CU's EFT Agreement and Fee Schedule are not clear that a member could incur multiple ATM fees by a non-CU ATM operator during the same ATM session
    - Example: Insert card; PIN; balance inquiry; fee; withdrawal; fee
  - Claim breach of contract
  - Claim unfair or deceptive acts or practices
- How do we reduce these risks?

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## Questions?

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