Comments of the

National Consumer Law Center
(On behalf of its Low-Income Clients)

and

Center for Responsible Lending
Consumers Union
National Association of Consumer Advocates
U.S. Public Interest Research Group

Regarding

Notice of Proposed Rulemaking
Truth in Lending

Federal Reserve System
12 CFR Part 226

Docket No. R-1286

These comments are submitted by the National Consumer Law Center (on behalf of its low income clients),[1] Center for Responsible Lending,[2] Consumers Union,[3] National Association of Consumer Advocates,[4] and U.S. Public Interest Research Group.[5]

---

[1] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws, including Truth In Lending, (6th ed. 2007) and Cost of Credit (3rd ed. 2005) as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws. These comments are written by Chi Chi Wu, Carolyn Carter and Lauren Saunders of NCLC.

[2] The **Center for Responsible Lending** is dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. A non-profit, non-partisan research and policy organization, CRL promotes responsible lending practices and access to fair terms of credit for low-wealth families. CRL is affiliated with the Center for Community Self-Help, one of the nation's largest non-profit community development financial institutions.

[3] **Consumers Union** is a nonprofit organization that advances the interests of consumers by providing information and advice about products and services and about issues affecting their welfare, and by advocating a consumer point of view. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and

These comments are filed in response to the Board's May 19, 2008 Notice of Proposed Rulemaking (May 2008 NPRM) on changes to Regulation Z's credit card/open-end credit provisions. The May 2008 NPRM contains a number of proposed changes to Regulation Z and the Official Staff Commentary that are in addition to, and in some cases revise, the Board's proposal to revise Reg. Z in its June 14, 2007 Notice of Proposed Rulemaking (June 2007 NPRM). We appreciate the Board's efforts to improve Regulation Z, and more importantly, to issue proposals prohibiting unfair and deceptive credit card practices using its authority under Section 18(f) of the Federal Trade Commission Act, 15 U.S.C. § 57a(f). As we will discuss in forthcoming comments, we strongly support many of the proposals in the Regulation AA NPRM.

I. TIMING AND FORMAT OF DISCLOSURES

A. "Any Time, Any Reason" Electronic Disclosures of Fees Does Not Adequately Protect Consumers (Proposed Comments 5(a)(1)(ii)(A)-1; 5(a)(1)(iii)-1; 5(b)(1)(ii)-1; and 9(c)(2)(ii)-1).

In its June 2007 NPRM, the Board proposed loosening the disclosure requirements for any fee that is not on the list set forth in proposed § 226.6(b)(4). Creditors would not be required to disclose these non-226.6(b)(4) fees at account opening, but could disclose them at any time before imposing them. Furthermore, creditors could disclose these fees either orally or in writing.

In this current May 2008 NPRM, the Board has proposed permitting creditors to disclose these non-226.6(b)(4) fees electronically without complying with the E-Sign Act, at the time the service is used, if the consumer requests the service electronically. The Board proposes permitting electronic disclosure of these fees in Comments (a)(1)(ii)(A)-1; 5(a)(1)(iii)-1; 5(b)(1)(ii)-1 and 9(c)(2)(ii)-1.

We reiterate our vehement opposition to the Board's proposal to permit "any time, any reason" disclosure of fees. We believe it is a dangerous and ill-advised

---

fees. Consumers Union's publications and services carry no outside advertising and receive no commercial support. Consumers Union's Financial Services Campaign Team works to promote fair conditions in the consumer financial services marketplace. Consumers Union has been engaged in consumer credit and other financial services issues since its inception in 1936, and in consumer advocacy on these issues since the 1970s. Consumers Union filed shorter comments addressing some elements of this proposed rule on July 2, 2008. Those comments are posted at: http://www.consumersunion.org/pub/core_financial_services/005849.html. Consumers Union is pleased to join in these more detailed and comprehensive comments

[4] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[5] The **U.S. Public Interest Research Group** serves as the federal advocacy office and federation of the non-profit and non-partisan state Public Interest Research Groups. The PIRGs have a longstanding interest in ensuring a fair financial marketplace for their one million members and other consumers. The PIRGs have conducted numerous surveys of deposit account and credit card fees and have also published a variety of educational financial literacy materials.

proposal that will encourage creditors to shift their profit centers to new fees that are not required to be disclosed in the account opening table. The Board should require all fees to be disclosed in the account opening disclosures, even if not in the mandatory table.

Furthermore, electronic disclosures without the protections of the E-Sign Act are far inferior to written disclosures, because even if the consumer indicates that s/he has Internet access by requesting the service electronically, the Comments do not require that the consumers will actually receive these disclosures or will be able to retain them. For instance, the creditor could provide the disclosure in a "pop-up" box that is not able to be printed or saved, and might even be blocked by the consumer's Internet browser. Thus, we urge the Board to require that any electronic disclosures must be provided in a format which can be printed and retained, and they must be delivered to the consumer, which means emailing them to the consumer's designated email address, rather than requiring the consumer to go find them. These are the same recommendations that we made to the Board in our comments to the June 2007 NPRM.

B. Timing of Account Opening Disclosures

In its June 2007 NPRM, the Board made several revisions to the timing of account opening disclosures. In general, these account opening disclosures must be provided prior to the first transaction on an account. Reg. Z and the Commentary permit the creditor to assess a membership fee or obtain the consumer's promise to pay a fee before account opening disclosures, so long as the consumer can reject the plan after receiving the disclosures. In the May 2008 NPRM, the Board makes several more changes that we address.

i. The Board should require creditors to provide account opening disclosures before issuing the first cash advance (Proposed Comment 5(b)(1)(i)-1).

The Board has re-organized Comment 5(b)(1)(i)-1 for clarity. This re-organization has indeed made this paragraph clearer, and made us realize that the Board should change the timing of account opening disclosures for cash advances. Under the current Comment, creditors must give account opening disclosures before the consumer receives a first cash advance. However, if creditors provide account opening disclosures along with the first cash advance check, they are still timely as long as the consumer can return the cash advance without obligation.

We believe consumers should have the information about critical terms of an account before they commit to a cash advance, especially because these advances often carry significant fees and higher APRs. A right to return a cash advance is not as good as receiving the disclosures in advance, because once consumers have taken an action, it is harder to undo the transaction. The consumer might end up spending the check or negotiating it before having the chance to read the account opening disclosures or learning of his/her right to return the advance. Even if she hasn't spent or negotiated the check, the consumer must locate the correct address to send back the check, and will

probably need to go to the post office to avoid sending the check via unsecured regular mail.

The need for advance disclosures is especially true in light of the Board's June 2007 proposal to permit creditors to disclose a range of APRs in the solicitation disclosures. While many creditors currently use a fixed APR for cash advances, there is nothing preventing them from disclosing a range of APRs (e.g., 12%-25% APR) in the Schumer box for cash advances, then assigning the high APR in the account opening disclosures.

Furthermore, the Board has not established any disclosure requirements regarding the right to return the cash advance without obligation. Thus, a consumer who is unpleasantly surprised by the actual APR disclosed in the account opening disclosures will have no way of knowing that they can return the cash advance without paying any charges. At a minimum, the Board should require disclosure of the right to return a cash advance when the check is issued along with the account opening disclosures. The Board should mandate formatting requirements for this disclosure to ensure that it is not hidden in tiny print in a long document.

ii. Any fees imposed or for which the consumer is obligated before the account opening disclosures should be "rejectable," but the definition of membership fees should not be broadened to include any fee for the issuance or availability of credit (Proposed Reg. Z § 226.5(b)(1)(iv) and Comment 5(b)(1)(iv)-1).

Both the current Commentary and the Proposed Reg. Z require that, if a creditor assesses a membership fee or obtains the consumer's agreement to pay a membership fee before sending the account opening disclosures, the consumer must have the right to reject the plan after receiving the disclosures and not be obligated for such a fee. The Board has proposed clarifying that any fee imposed or for which the consumer is obligated before the account opening disclosures must be refunded, or the consumer relieved of any obligation for such fee, if the consumer rejects the account after receiving the account opening disclosures. We strongly support these provisions.

However, as part of these revisions, the Board has proposed in the May 2008 NPRM to define "membership fees" as fees for the issuance or availability of credit in proposed Reg. Z § 226.5(b)(1)(iv) and Comment 5(b)(1)(iv)-1. The rationale for this change is remove ambiguity that if a consumer rejects a plan, the consumer could nevertheless be obligated for fees or charges other than a ''membership fee.'' While we support the expanding the scope of "rejectable" fees, we strongly oppose expanding the scope of the term "membership fee." "Membership fees" are currently only one of two fees permitted to be imposed or obligated for prior to the account opening disclosures (the other is application fees). The phrase "fee for the issuance or availability of credit," however, is much broader than the current concept of a "membership fee." It is broad enough to encompass a number of fees, which have nothing to do with "membership" in a particular organization or entity.

Thus, this change could significantly expand the ability of creditors to charge additional types of fees prior to account opening disclosures. It could allow (or legitimize in the case of fee-harvester cards) the practice of charging multiple fees before account opening disclosures, which are called different names. For example, the creditor could impose a "membership" fee, an "account opening fee, a "start-up" fee, and a "participation fee," all prior to the account-opening disclosures.

We recommend a narrower definition of "membership fee," but subjecting such fees to a general rule that any fees imposed or agreed upon prior to account opening disclosures must be "rejectable." In fact, this is the approach taken in the Board's proposed Reg. Z § 226.5(b)(iv) and Comment 5(b)(1)(iv)-2. Both of these provisions require creditors to refund or not hold the consumer liable for any membership fees *"or any other fee or charge"* imposed or obligated before the account opening disclosures. We support this language, and believe it to be adequate to make all these fees "rejectable" without explicitly allowing creditors to pile on fee after fee before the account opening disclosures are made.

iii. We agree that activation of a card or imposition of fees should not be considered acceptance of the card, but believe that payment of fees should also not be considered acceptance (Proposed Comment 5(b)(1)(iv)-2).

The Board has proposed adding a new comment 5(b)(1)(iv)-2 that would clarify that a consumer is not deemed to have "used" an account and thus accepted it when:

- The consumer activates the account, such as for security purposes.
- The creditor assesses fees, including start-up fees, credit insurance premiums, or debt cancellation/suspension program fees.
- The credit assesses late fees, other fees or interest on an outstanding balance on an account that the consumer has not paid and there is no activity on the account.

The proposed Comment also makes clear that a consumer *does* use the account when the consumer obtains an extension of credit after receiving the account opening disclosures.

We strongly support this new proposed Comment, and commend the Board for issuing it. However, we believe it should go further and state that payment of fees shown on the first billing statement also does NOT constitute acceptance of the account. A consumer should only be considered to have used an account by his or her affirmative actions in utilizing the credit, such as making a purchase or obtaining a cash advance. Use of the account should not be evidenced by the actions of the creditor, by the consumer's inaction or lack of response, or by simply paying a fee on the first bill.

iv. Consumers should be informed if the creditor will close an account after 60 days of inactivity (Proposed Reg. Z § 226.5(b)(1)(iv) and Comment 5(b)(1)(iv)-1).

The Board has proposed permitting a creditor to consider an account "rejected" if the consumer does not use an account or make a payment on the account within 60 days after the mailing of the account opening disclosures. We do not object to this proposal, but believe that creditors should disclose to consumers if they are going to make use of this safe harbor, *i.e.*, they should inform the consumer that the account will be considered rejected if not used or a payment made within 60 days. This disclosure is actually more important for cards that do NOT impose a fee when the account is opened. A consumer who receives a credit card that does not carry a fee may not make any transactions or payments on the account for the several months, especially if the card is a "backup" or secondary credit card. This consumer may be unpleasantly surprised to learn that the card is canceled. Furthermore, opening the account and then having it canceled could negatively affect the consumer's credit score.

Also, we believe reducing the safe harbor time period to 30 days would be too short, given that it may take 5-7 days for the disclosures to be received (or even more when the account opening disclosures are sent by presorted standard mail, *i.e*., bulk mail). A consumer might only have 2-3 weeks to use a card if the time period were reduced to 30 days.

We would strenuously oppose any proposal that a consumer is deemed to have *accepted* a card if s/he does not reject the card within a certain time period. A consumer's inaction should never be considered "acceptance" or "use" of an account.

C. <u>Creditors for All Forms of Open-End Credit (Non-Home Secured) Should Be Required to Provide Account Opening Disclosures in a Table Format (Proposed Reg. Z § 226.6(b)(4) and Model Form G-17(D))</u>.

In its June 2007 NPRM, the Board proposed requiring creditors of all forms of open-end credit (other than home-secured credit to be dealt with in a separate rulemaking) provide an account opening disclosure that summarized critical terms in a table format. The Board has rejected requests from industry to limit this account opening summary table to credit cards only. We strongly support this decision, and believe it will benefit consumers.

It is true that credit cards form the majority of open-end credit that is not home secured. However, there are still creditors making unsecured lines of credit that are not credit cards, and we have seen abuses with these products as well. For example, certain creditors offer unsecured lines of credit to pay for medical debts. These creditors provide only account opening disclosures for these lines of credit, making it difficult for the patients to understand the terms of their credit. Some consumers were shocked to find that their medical bills had been sold to a bank, which then used small print, poorly formatted account opening disclosures which didn't even properly disclose that the creditor would impose a 10% APR on the debt after 6 months (see Exhibit A).

As for the Model Form proposed by the Board for non-card open-end credit, we are not opposed to the existence of such a form. However, the Board should make clear that if a non-card open-end product imposes fees, such as fees for the issuance or availability of credit, that are required to be disclosed under proposed § 226.6(b)(4) but do not appear on Model Form G-17(D), those must be disclosed in the table regardless of what appears on the Model Form.

II. CONTENTS OF DISCLOSURES

A. Switching Away from the Term "Grace Period" May Cause Confusion (Proposed Reg. Z §§ 226.5(a)(2)(iii), 226.5a(b)(5), 226.6(b)(4)(iv), OSC § 226.16(h)(3)).

The Board has proposed switching away from the term "grace period," which has been required for two decades,[6] to a new language. While the Board has documented that consumers are confused about the meaning of the term "grace period," the proposed new language also has significant flaws. In particular, the new language is likely to be far less effective in highlighting the *absence* of a grace period.

Under present Regulation Z, the grace period for purchases must be disclosed in the Schumer box, using the term "grace period."[7] The Board's original proposal also required the term "grace period" to be used in the Schumer box.[8]

The May 2008 NPRM deletes the requirement that the term "grace period" be used in the Schumer box. Proposed § 226.5(a)(2)(iii). Instead, on applications and solicitations the Schumer box is to state:

> (5) *Grace period.* The date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge due to a periodic interest rate and any conditions on the availability of the grace period. If no grace period is provided, that fact must be disclosed. If the length of the grace period varies, the card issuer may disclose the range of days, the minimum number of days, or the average number of days in the grace period, if the disclosure is identified as a range, minimum, or average. When an issuer is disclosing a grace period in the tabular format, the phrase "How to Avoid Paying Interest on Purchases," or a substantially similar phrase, shall be used as the heading for the row describing the grace period. If no grace period on purchases is offered, when an issuer is disclosing this fact in the tabular format, the

---

[6] This requirement was added by the Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960 (Nov. 3, 1988).

[7] 15 U.S.C. § 1632(c)(2)(C) requires the disclosure of the grace period in the Schumer box for applications and solicitations to use the term "grace period" in either the heading or the text. Existing Reg. Z § 226.5a(a)(2)(iii) requires the disclosure of the grace period in the Schumer box on applications and solicitations to use the term "grace period."

[8] June 2007 NPRM §§ 226.5(a)(2), (b)(3), 226.6(b)(4)(iv).

phrase "Paying Interest," or a substantially similar phrase, shall be used as the heading for the row describing the grace period.

This requirement is explained further in § 5a(b)(5)-1 of the proposed Commentary:

> 1. *How grace period disclosure is made*: The card issuer must state any conditions on the applicability of the grace period. An issuer that conditions the grace period on the consumer paying his or her balance in full by the due date each month, or on the consumer paying the previous balance in full by the due date the prior month[9] will be deemed to meet these requirements by providing the following disclosure: "Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you interest on purchases if you pay your entire balance (excluding promotional balances) by the due date each month."
>
> 2. *No grace period*. The issuer may use the following language to describe that no grace period is offered, as applicable: "We will begin charging interest on purchases on the transaction date."

Under proposed § 226.5a(b)(4)(iv), the Schumer box at account opening is to state:

> (iv) *Grace period*. An explanation of whether or not any time period exists within which any credit that has been extended may be repaid without incurring a finance charge. When disclosing in the tabular format whether or not there is a grace period, the phrase "How to Avoid Paying Interest on [the applicable feature]" or a substantially similar phrase, shall be used as the row heading when a feature on the account has a grace period. When disclosing in the tabular format the fact that no grace period exists for any feature of the account, the phrase "Paying Interest" or a substantially similar phrase shall be used as the new heading.

We appreciate the Board's desire to improve the disclosure of grace periods. As the Board's consumer testing documented, the term "grace period" has several potential meanings: the period during which a promotional rate is in effect, the period before a late charge is imposed, or the period during which the balance may be paid without incurring a finance charge. However, the consumer testing performed by the Board and other organizations has produced highly divergent results. For example, some testing showed that consumers understood "interest-free period," while other testing showed they did not; some testing showed that they understood "grace period" when the term was placed in context but other testing showed they did not.[10]

---

[9] Query whether this language should read "*in* the prior month"?

[10] *See* May 2008 NPRM, 73 Fed. Reg. at 28873-4.

While we would support a change if the results consumer testing were clear and consistent, this record is insufficient to override the Congressional mandate that the term "grace period" be used. We urge the Board to reconsider this retreat from a term that has been mandated for decades.

We are particularly concerned about the disclosure when the creditor does *not* provide a grace period. The Board is now proposing to require creditors to disclose this important fact with the language "Paying Interest: We will begin charging interest on purchases on the transaction date." Our concern is that nothing in this language draws the consumer's attention to it. Instead, it reads like boilerplate. Consumers are likely to ignore it, since it appears merely to state the obvious fact that the consumer will be charged interest. Since the proposed language *is not tied in any way to the payment period*, consumers are unlikely to think of the grace period when (if) they notice the disclosure.

A major benefit of the term "grace period" is that it is a *label*. Even if the label has some ambiguity, it should be clear to any consumer that a grace period is better than "No grace period." The Board's proposal eliminates this label in favor of a circumlocution.[11]

Further, we question the Board's conclusion from its consumer testing that consumers understood the newly-proposed language. We submit that one key drawback of the newly-proposed language is that consumers are unlikely to understand it, or even notice it, unless their attention is drawn to it. If the consumer testers drew the participants' attention to the new language--especially the language describing the absence of a grace period--as part of the testing, the Board should not draw any conclusions from the test results.

We strongly object to the Board's refusal to release the report of its March 2008 testing, which would have provided details about the testing. Instead, the Board apparently expects the public to rely on the summary of the testing that it included in the May 2008 NPRM, and to accept at face value its conclusions from the testing. This approach undermines the purpose of improving proposed rules by allowing the public to analyze and comment on the support for the rules. To release the report only when the final rule is announced is like presenting evidence only when the verdict is announced instead of at trial. NCLC has submitted a Freedom of Information Act request for this information, and we reserve the right to submit supplemental comments once we receive details about the March 2008 testing.

In short, we object to the proposal to revise the manner of referring to the grace period or the absence of one. In particular, we urge the Board to add a requirement of a statement such as "No grace period."

[11] Just as we were once required to refer to a singer as "The Artist Formerly Known as Prince," perhaps we will have to talk about credit cards with the term "The Interval Formerly Known as Grace Period."

B. The Board Has Improved Its Proposal by Requiring that the Penalty APR for Permanent Account Termination Be Disclosed (Proposed Reg. Z §§ 226.5a(b)(1) and 226.6(b)(2)).

The Board's June 2007 NPRM proposed much improved disclosures of penalty rates, but included a dangerous loophole--an exception for penalty rates that are imposed when a consumer's account is permanently terminated. That proposal did not require this penalty rate to be disclosed on applications and solicitations or at account opening even when this penalty rate was higher than the penalty rate imposed in other circumstances.

In its May 2008 NPRM, the Board has wisely proposed to close this potential loophole. We commend the Board for revising proposed §§ 226.5a(b)(1) and 226.6(b)(2) to require that the penalty rate imposed upon permanent account termination be disclosed if it is different from the usual penalty rate.

Creating an exception for penalty rates imposed upon permanent account termination served no purpose, and invited creditors to impose a higher rate in this circumstance. Such a penalty rate would have been completely invisible and would have served as a trap for vulnerable consumers. We urge the Board to adopt the revised version of § 226.5a(b)(1) and 226.6(b)(2).[12]

C. The Board Should Not Create An Exception for $1 Monthly Finance Charges (Proposed Reg. Z §§ 226.5a(b)(3) and 226.6(b)(4)(iii)).

The Board has proposed to amend Reg. Z §§ 226.5a(b)(3) and 226.6(b)(4)(iii) to allow creditors to charge up to $1 per month as a finance charge without disclosing it on applications and solicitations or at account opening. Under the language of the Board's proposal, this $1 monthly fee could be imposed whether or not the consumer incurred any interest charge during the previous month. Thus, it could function not only as a means of "rounding up" interest charges of less than a dollar, but could also serve as a $12 annual fee in disguise, imposed it without disclosure even on consumers who pay the full balance within the grace period.

We strongly oppose this ill-advised proposal. In particular, by allowing a minimum monthly finance charge up to $1 not to be disclosed, the Board would be providing a great boon to fee-harvester credit cards.

Experience has shown that, when a charge can fly under the radar with little disclosure, it becomes a standard feature in the credit card world. An example is over-

[12] Note that the Board's Regulation AA proposal (and parallel OTS/NCUA proposals) prohibit retroactive application of penalty rates unless the consumer is over 30 days late. Since this penalty rate only applies when an account is terminated, if the Reg. AA proposal is adopted, this rate can never be imposed on a forward looking basis. Thus, this rate will be imposed only if the consumer is over 30 days late, except in the case of creditors who are not covered by Regulation AA or the parallel OTS/NCUA rule, such as state-chartered credit unions. It is still important to disclose this termination penalty rate because it may affect consumers whose accounts are terminated when they are over 30 days late or if they are customers of state-chartered credit unions.

limit charges, for which very weak disclosure is currently required. While annual fees (for which better disclosures are required) have all but disappeared over the past 20 years, over-limit fees have widespread, commonplace, and significant in dollar amount. The GAO found that, as of 2005, 73% of the top credit card issuers impose an over-limit fee, while only 25% impose an annual fee.[13] The average over-limit fee increased 138% from 1995 to 2005, reaching $30.81 in 2005.[14]

It flies in the face of this history to excuse disclosure of a monthly minimum finance charge up to $1 per month. By allowing this charge not to be disclosed, the Board would invite creditors to make it the norm.

A $1 monthly charge is particularly significant in the context of high-fee, low-credit-limit credit cards. These "fee-harvester" credit cards typically provide tiny amounts of available credit. Even with the prohibitions proposed in the Board's Regulation AA rulemaking, creditors will be permitted to offer fee-harvester cards that charge significant fees. For example, a fee-harvester creditor could provide a credit limit of $100, of which $25 can be consumed by fees charged when the consumer receives the card, leaving just $75 in available credit.[15] A $1 monthly charge for $75 of credit is a significant charge. Assuming that the consumer uses the full $75 available line of credit, the $1 charge alone, *without any other interest or charges*, amounts to an annual percentage rate of 16%.

Allowing a $1 monthly minimum charge without disclosure would allow these predatory card issuers to advertise an extremely low interest rate—2%, 1%, or even 0%--and yet, without disclosure, collect a monthly fee equivalent to 16%. Indeed, the Board's proposal documents a credit card that does not charge an interest rate, but imposes a fixed monthly charge. 73 Fed. Reg. at 28,866, 28,871 (May 19, 2008). The Board's proposal invites such deceptive tactics to become more widespread.

The Board reports that, in its consumer testing, participants did not make decisions based on the existence of a minimum monthly charge. However, since such charges are currently rare, the consumers may not have given them much importance. Also, the impact of a $1 monthly charge is much greater if the amount of credit extended is low.

Since the Board has refused to release the report of its March 2008 consumer testing, we and other commenters cannot evaluate whether the Board tested the importance of this disclosure in the context of low-balance fee-harvester credit cards where the fee would loom large.[16] If the Board did not test the impact of this disclosure

---

[13] Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, GAO-06-929, September 2006, *available at* www.gao.gov/new.items/d06929.pdf, at 21, 23.
[14] *Id*. at 20.
[15] Rick Jurgens, Chi Chi Wu, National Consumer Law Center, *Fee-Harvesters: Low-Credit High-Cost Cards Bleed Consumers* (Nov. 2007), *available at www.nclc.org*.
[16] We have submitted a Freedom of Information Act request for the report of the March 2008 testing, and reserve the right to supplement these comments once we have access to it.

in that context, it should not draw conclusions about the disclosure. The Board should not create an exception to the requirement that minimum monthly charges be disclosed.

D. The Board Is Right to Require Disclosure of Foreign Transaction Fees on Applications and Solicitations (Proposed Reg. Z § 226.5a(b)(4)).

Under the Board's June 2007 NPRM, foreign transaction fees were not required to be disclosed in applications and solicitations. However, that proposal did require these fees to be disclosed at account opening, and creditors had the option of following the account-opening disclosure rules for applications and solicitations. The result would have been that some applications and solicitations would show foreign transaction fees, but others would not disclose them even when they were charged. As a result, consumers who were concerned about foreign transaction fees would have no way of determining which card to apply for, and could easily apply for a card that did not list foreign transaction fees only to find out that they were indeed charged.

We commend the Board for revising its proposed § 226.5a(b)(4) to eliminate this error. Foreign transaction fees are finance charges, pure and simple. For consumers who spend time in other countries or make purchases on-line from foreign vendors, foreign transaction fees are a major component of the cost of credit. This is especially true for immigrant groups. Foreign transaction fees should be disclosed both on applications and solicitations and at account opening.

The Board's original proposal also built inefficiency and confusion into the disclosure regime. It allowed disclosures on applications and solicitations to be slightly different from those at account opening, and gave creditors an incentive (the ability to conceal foreign transaction fees) to take advantage of the difference. The revised proposal avoids this multiplicity of rules and forms, and is more true to the goals of simplicity and uniformity.

The Board should, however, go one step further and eliminate the final inconsistency between disclosures on applications and solicitations and disclosures at account opening. It should require that account opening disclosures, as well as applications and solicitations, include a statement in the case of charge cards that the balance is due upon billing. Under the Board's original proposal, § 226.5a(b)(7) requires this disclosure on applications and solicitations, but there is no comparable requirement for account-opening disclosures.

E. Disclosure of Balance Computation Methods (Proposed Reg. Z § 226.5a(b)(6)).

In its Regulation AA NPRM, the Board has proposed banning the two-cycle or "double cycle" balance computation method. The Board states, however, that it will not delete this method from the list in proposed § 226.5a(g) because there are a handful of creditors, such as state-chartered credit unions, that will not be subject to the ban on double cycle billing.

As we will discuss in our comments to the Regulation AA NPRM, we support the Board's proposal to ban the double cycle billing method. We have no objection to the retention of this method in the list; however, the Board should consider requiring a "Surgeon General"-type warning for those plans permitted to use double cycle billing such as "This method is the most expensive balance computation method and is prohibited for most credit card issuers." In addition, we reiterate our suggestion that the Board adopt the "Energy Star" approach suggested by the Center for Responsible Lending.[17] Even without the double cycle billing method, some balance calculations are still more expensive than others, and the Board's own research found that "consumers did not understand explanations of balance computation methods." 73 Fed. Reg. 28,904, 28,922 (May 19, 2008). Consumers should have simple and clear information about these methods, which is possible with a rating or "Energy Star" system.

F. The Board Should Require Creditors to Disclose Which of the Regulation AA Payment Allocation Methods They Use (Proposed Reg. Z § 226.5a(b)(15) and 226.6(b)(4)(iv)).

In its Regulation AA NPRM, the Board has proposed limitations on how creditors may allocate payments to credit card balances. If the account has a promotional rate, any payment in excess of the minimum payment must be allocated to other balances, with certain exceptions. If there is no promotional rate, creditors can use one of three methods to allocate payments in excess of the minimum payment: 1) apply the payment to the highest rate balance, 2) apply the payment in equal amounts (i.e., $10, $10, $10) to each balance, or 3) apply the payment in pro rata amounts to each balance. 73 Fed. Reg. 28,904, 28,914-17 (May 19, 2008).

In general, we support the Board's Regulation AA payment allocation proposal, although we do have suggestions for improvement that we will discuss in our forthcoming comments to that NPRM. However, if the Board adopts its Reg. AA proposal, we suggest that the Board should retain a payment allocation disclosure. The Board should require creditors to disclose which of the three payment allocation methods they will use when there is no promotional rate on an account. In addition, creditors should be required to make disclosures as to how they apply the minimum payment. These disclosures could be outside of the Schumer box, but it should be required.

We understand that most consumers may not understand this payment allocation disclosure. However, some consumers will understand it, and it will benefit those consumers. Also, these disclosures could serve another function besides generally informing consumers: they allow entities such as Consumer Action or media outlets to review and rate the terms of a credit card to recommend to consumers. If such entities have information about what type of payment allocation method the issuer uses, they can tell consumers that "X" card has better terms than "Y" card when it comes to payment

[17] Center for Responsible Lending, Comments to the Federal Reserve Board's Advanced Notice of Proposed Rule-making, Regulation Z Open-end Review, Docket No. R-1217 (Mar. 28, 2005), at 19-20, *available at* http://www.responsiblelending.org/pdfs/Comment_FRB032805.pdf.

allocation. Finally, the disclosure will ensure that creditors will make and honor their selection of payment allocation method.

G. Creditors Should be Required to Disclose the Expiration Date of Any Promotional Rate for Convenience Checks (Proposed Reg. Z § 226.9(b)(3)(C)).

The Board has proposed adding an additional disclosure for convenience checks: creditors must disclose any expiration date by which a consumer must use a convenience check to receive a teaser rate. This expiration date information would be added to the list of disclosures for convenience checks proposed by the Board in its June 2007 NPRM.

We support this additional disclosure. It will prevent any bait & switch by an unscrupulous creditor who would send convenience checks promoting a teaser rate that only lasts a short time, then impose the much higher cash advance rate for consumers who use the check past that date.

H. Change-in-Term Disclosures (Proposed Reg. Z § 226.9(c)(2)(iii)).

The Board's May 2008 NPRM adds a paragraph to the disclosure requirements when there is a change-in-terms. This paragraph requires creditors who increase an APR to disclose the balance to which the increase pertains and, if applicable, the balances to which the current rate will continue to apply. This paragraph is intended to be consistent with the substantive restrictions under Regulation AA prohibiting certain rate increases from being imposed retroactively on existing balances.

We support the goal of making clear to consumers the differing rates that apply to different balances. In order to make the disclosures more understandable to consumers, however, we suggest revising the language in Sample G-20.

The proposed sample contains the following example: "Beginning 2/15/09, any rate increase described below will apply to transaction made on or after 1/15/09. Current rates will continue to apply to transactions made before 1/15/08." This bland statement, with its different dates and failure to list the prior or new rates, is unlikely to have much meaning for most consumers.

We suggest instead a more specific statement in more plain language:

> The current purchase APR of 12.99% will apply to all purchases made before 1/15/08. The new purchase APR of 16.99% will apply to purchases made after that date. The cash advance APR of 29% and the balance transfer APR of 10.99% are unchanged.

We believe that it is particular important to disclose the prior rate in the notice of change of terms so that consumers will have an indication of the magnitude of the change and its impact on their finances. Otherwise, consumers will have to go hunting for their prior rate, which they may not readily find. In addition, the notice should remind

consumers about the other APRs that apply, because many consumers will not readily remember that the purchase APR is not the only one.

I. Penalty Rate Disclosures (Proposed 226.9(g)).

The Board's May 2008 NPRM revises the penalty rate disclosure proposal by requiring creditors to disclose the balance to which a penalty rate increase will apply and the implications of failing to make a payment within 30 days of the due date. As with change-in-terms notices, we recommend that the Board require the disclosures to include the specific rates and how they have changed. We also urge the Board to require the notice to describe the reason for triggering the penalty rate.

Reg. Z section 226.9(g)(3)(i)(A) would be amended to read:

(A) A description of the consumer's actions and a statement that those actions have triggered the delinquency or default rate or penalty rate, as applicable.

Paragraphs (D) and (E) would read:

(D) A statement indicating to which balances the delinquency or default rate or penalty rate will be applied, the prior rate that applied to those balances, and the current rates for any balances for which the rates remain unchanged.

(E) If applicable, a statement that balances to which the current rates remain unchanged may increase if the consumer fails to make a required minimum periodic payment within 30 days from the due date for that payment or, in the future, the consumer fails to make a required minimum periodic payment within 30 days from the due date for that payment.

As with the language of Sample G-20, the notice in Sample G-21 is confusing and its implications are not readily apparent. The notice is meaningless to most consumers unless it describes the specific rates and how they will change. We suggest:

G-21 Penalty Rate Increase Sample

You have triggered the Penalty APR of 28.99% by paying your bill late. We will apply this 28.99% Penalty APR to new transactions made on or after 1/15/08. The standard APRs (12.99% for purchases, 17.99% for balance transfer and 20.99% for cash advances) will continue to apply to your balances incurred prior to 1/15/08.

You currently have a promotional APR of 0% for your existing balance transfer. You will lose that promotional APR on 2/15/08 and the standard balance transfer APR of 17.99% will apply.

> Please be aware that all rates may be increased to the Penalty APR if your payment is not received within 30 days of the due date, or if you are 30 days late with a payment in the future.

Note that in our Comments to the Board's Regulation AA proposal, we will be urging the Board to use the same 30-day late rule for the loss of a promotional rate as for the imposition of a penalty rate. There is the same harm and unfairness to consumers when creditors remove a promotional rate on already incurred balances as there is in the penalty rate context. Issuers should be prevented from advertising deceptively low promotional APRs and then using opaque, hair trigger rules to ensure that those rates will rise. This recommendation also has the added benefit of simplifying the disclosures and making them more understandable. If the Board follows this recommendation, the second paragraph of Sample G-21 could be deleted.

III. FEE-HARVESTER PROVISIONS

The Board has proposed a number of changes to Regulation Z that specifically affect subprime credit cards that charge high fees, which we call "fee-harvester cards." In conjunction with these Reg. Z changes, the Board has proposed substantive limits on fee-harvester cards in its Regulation AA NPRM, which we will discuss in our forthcoming comments to that rulemaking.

In general, we support the Board's changes, although we urge that they be strengthened.

A. The Board Should Lower the Threshold for the Special Disclosures in Order to Harmonize Them with the Regulation AA Proposal. (Proposed Reg. Z § 226.5a(b)(16) and 226.6(b)(4)(vii)).

If the proposed Reg. AA provisions regarding fee-harvester cards are adopted, the Board has stated that it will make appropriate revisions to the special disclosure required when a creditor imposes fees or a security deposit when the account is opened that exceeds 25% of the account's credit limit. One of the most logical revisions is to lower the threshold for disclosures. We urge the Board to require that the special fee-harvester disclosure be made whenever fees or security deposits consume over 5% of the credit line. This is the same threshold we had urged the Board to adopt in our comments to its June 2007 NPRM.

The Regulation AA proposal prohibits the creditor from charging fees or security deposits that consume over 50% of the credit limit during the first 12 months, or consume over 25% of the credit limit at account opening. Thus, if the Reg. AA proposal is adopted, *there will be very few credit cards for which a creditor imposes fees or security deposits at account opening that consume over 25% of the credit limit*. As a result, the special disclosure for these cards will be nearly useless without lowering the threshold, because it will apply to only the handful of issuers that do not have to comply with the Reg. AA (or corresponding OTS or NCUA) provisions.

We reiterate our other comments to the June 2007 ANPRM regarding the special fee-harvester disclosure, such as:

- Optional fees should be counted toward the threshold.
- The Board should add language to prevent creditors from evading the special disclosure by calling a fee something else to avoid inclusion in the threshold.
- We recommend that the language of the special disclosure be shortened and a percentage be disclosed, as follows:

> "AVAILABLE CREDIT: The fees charged when you open this account will be $25 (or $40 with an additional card), which is 10% (or 16% with an additional card) of the minimum credit limit of $250. If you receive a $250 credit limit, you will have $225 in available credit (or $210 with an additional card)."

For account opening disclosures at § 226.6(b)(4)(vii), this special disclosure should use the actual credit limit assigned to the consumer.

B. <u>We Support A Requirement That Creditors Must Disclose The Consumer's Right To Reject An Account Without Paying Fees (Proposed Reg. Z § 226.6(b)(4)(vii)).</u>

In its June 2007 NPRM, the Board proposed adding language in Comment 226.5(b)(1)(i)-1 clarifying that if the only activity on an account is the creditor's assessment of fees, the consumer is not considered to have accepted the account. We had supported this change, but urged the Board to require a disclosure to inform consumers that they may reject the account and decline to pay the fees, especially for fee-harvester cards.

We are gratified that the Board has proposed requiring such a disclosure in Proposed Reg. Z § 226.6(b)(4)(vii). We strongly support this disclosure. We believe that all credit card consumers should be entitled to this disclosure. For example, consumers who receive a card with an annual fee should be informed they have the right to reject the account and not pay the annual fee. However, the disclosure is most critical for accounts that carry high fees, which we believe are fees that exceed 5% of the consumer's credit limit. In addition, we urge the Board to require that this disclosure also be placed on the first periodic statement, because that is the document on which consumers are most likely to notice the fees imposed by the creditor.

Also, as stated in Section I.B.iii, we believe that the consumer should have the right to reject the plan even after s/he has paid a fee shown on the first billing statement. We recommend that the disclosure be modified accordingly.

We have additional comments on the general right to reject a plan without paying fees in Proposed Reg. Z § 226.5(b)(iv), which we discuss in Section I.B.

C. We Support Requiring Creditors To Make The Special Fee-Harvester Disclosure Orally During Telephone Solicitations (Proposed Reg. Z § 226.5a(d)(1)).

The Board has proposed requiring creditors to make an oral disclosure of the special fee-harvester disclosures, when applicable, during telephone solicitations for a credit card. We support this proposal, as it will protect consumers who are pitched fee-harvester cards. We believe telemarketing is one of the methods used by fee-harvester card issuers to promote these abusive high cost cards.

We note that the Board has rejected the recommendation in our comments to the June 2007 NPRM to require creditors to make all of the disclosures required by §§ 226.5a(b)(1) to 226.5a(b)(17), because the Board is concerned about information overload. The solution to information overload, however, is not to deprive the consumer of critical information when making the decision whether to apply for a card. The solution is to require a written application to be made whenever there is a telephone solicitation. A written follow-up application would also address the problems of identity theft and unauthorized account openings posed by telephone applications described by various court decisions and in our comments to the June 2007 NPRM. We also reiterate our position that application disclosures should be made regardless of whether it is the consumer or the creditor who initiates the call.

IV. EFFECTIVE APR (Proposed Reg. Z § 226.14).

The Board has stated it has not made a decision as to whether it will retain the effective APR. This is one of the most critical issues in the Board's wholesale revision of Regulation Z, and we have written extensively about the topic in our comments to the June 2007 NPRM. In summary, our comments discuss how:

- *Eliminating the effective APR would undermine transparency in consumer credit markets*. The effective APR is the ***only*** APR in open end credit that reflects the price imposed by fees and non-periodic interest finance charges, which are a growing share of the pricing of consumer credit. Without an effective APR, consumers do not know the actual cost of their credit and are impeded in attempts to shop for the cheapest credit. Creditors are incentivized to place the costs of credit outside the interest rate into fees.

- *TILA mandates the effective APR as a key component to the full disclosure of the cost of credit.* The effective APR and its calculation are mandated by Section 1606 of TILA. Eliminating it would contravene the explicit requirements of TILA.

- *Eliminating the effective APR provides incentives for deception.* Creditors, including payday and other high cost lenders, will exploit the lack of an effective APR to offer products with only fixed or transaction fees but no periodic interest. Both the Board and industry trade groups admit that the effective APR is "a hedge

against creditors shifting their pricing from periodic rates to transaction-triggered fees and charges." 72 Fed. Reg. 32,948, 32,998 (June 14, 2007).

- *Consumer confusion about the effective APR can be addressed by standardized language and a short, clear description.* The Board is considering eliminating the effective APR because of claims that consumers are confused by it. However, the Board has not previously required uniformity in the labeling of the effective APR, resulting in inconsistent labels, such as "effective APR" or "historic APR" or "actual APR." The Board's first round of testing conducted for the Board suggested that standard clear terminology and a short explanation could dramatically increase consumer understanding of the effective APR.

We understand that the Board has conducted another round of testing on the effective APR and consumer comprehension of the "fee-inclusive APR" label. As discussed in Section II.A, we strongly object to the Board's refusal to release the report of the March 2008 testing, which would provide details about how consumers were presented with the fee-inclusive APR and what questions they were asked. We have submitted a Freedom of Information Act request for this testing, and reserve the right to submit supplemental comments once we receive details about the March 2008 testing.

V. PAYMENT POSTING/CUT-OFF TIMES (Proposed Reg. Z § 226.7(b)(11) and § 226.10)

A. The 5 p.m. Cut-Off Time Should Apply to All Types of Payments

The Board's revised proposal specifies that a creditor's payment requirements must be reasonable and enable most consumers to make conforming payments. The rule specifies that, for payments by mail, a cut-off time before 5 p.m. in the location specified for receipt of payment is not reasonable.

We applaud the Board for requiring more than disclosures of payment cut-off times as had in the June 2007 NPRM. The Board has moved from an approach, which allowed creditors to trick consumers by setting early cut-off times, to a clear, fair rule that payments received within normal business hours should be credited as timely. It is also appropriate that the cutoff time be based on the local time zone at the payment location, since this also corresponds to normal business hours and is the rule that most consumers would anticipate. This proposal meets the goal of requiring clear, understandable rules that conform to consumer expectations and are not traps for the unwary. Clear rules such as this one also eliminate incentives for creditors to develop complicated rules for their products, which customers will not be aware when they shop for a credit card.

To fully meet these goals, however, the 5 p.m. cutoff time should also apply to in person, telephone and electronic payments. Having different cutoff times is confusing to consumers, creates the need for elaborate and incomprehensible disclosures, and provides incentives for creditors to devise traps. A creditor who imposes a 10:00 a.m. cutoff time for electronic payments should not enjoy the profit of earning late fees over a competitor

who has uniform, fair, and understandable cutoff times. Businesses are normally open until 5 p.m. (except on holidays, dealt with in proposed section 226.10(d)), and consumers would normally expect that a payment made before that time, by any method, would be timely.

Moreover, consumers *have no control over the time when their electronic payments are posted.* Consumers who set up their payments ahead of the due date can specify and see the date, but not the time, when electronic payments are made. Nor can a customer prove the time when an electronic payment was made. Exhibit B shows an electronic receipt with proof of the date a credit card payment was made but no mention of the time. Thus, an early cut-off time for electronic payments would not meet the general rule that a creditor's payment requirements should "enable most consumes to make conforming payments."

The Board expressed concern that, for payments other than by mail, creditors have different internal processes, systems, as well as work with different vendors and services providers, making a one-size-fits-all approach infeasible. However, a uniform minimum 5 p.m. cutoff time would not require the creditors to process and post the payments on the same day, or to change their systems. It would merely prohibit the creditor from *penalizing the consumer by imposing a late fee*. A creditor who saves money by failing to invest in efficient processing systems should not be able to further profit from that decision by charging a late fee.

Again, having a clear, uniform rule prohibiting a late fee if the payment is received by 5 p.m. local time, whether by personal delivery, mail, telephone or electronically, furthers the goal of leveling the playing field, simplifying credit card rules, and enabling consumers to compare and choose cards based on terms they can understand.

B. <u>Holiday and Weekend Due Dates (Proposed Reg. Z § 226.10(d)).</u>

We support the Board's proposal to require creditors to treat as timely any payment received by mail the next business day after a due date that falls on a date the creditor does not receive payments by mail. These dates would include weekends or holidays on which the U.S. Postal Service does not deliver or the creditor does not accept mail.

However, this rule should be extended to all forms of payment methods, including payments made electronically, by personal delivery and by telephone. The Board's goal should be to adopt rules that ensure practices that are simple for consumers to understand, conform to consumer expectations, and eliminate tricks and traps that serve as an excuse to impose penalty fees. These goals are only served by a uniform rule that governs all forms of payment. A uniform rule would be consistent with TILA's mandate to require prompt posting of payments, and would eliminate unfair and deceptive practices,

Indeed, consumers often do not know by what method their payment arrives. A consumer who sets up a payment through her bank's online banking system does not know if the bank will make the payment electronically or will mail a check (as some banks do).

A consumer who tries to make a payment by personal delivery certainly should not be penalized if the creditor is closed and cannot accept it. A consumer who pays by telephone or by other electronic methods – through either the consumer's bank or the creditor's online system – does not know if the timing of arrival and crediting will be affected by the unavailability of personnel or systems (at either the consumer's bank or the creditor) on a weekend or holiday.

It is unreasonable and unfair to expect consumers to be aware of the different due dates for different payment systems. The most fair and most simple rule is to prohibit late fees if the payment is received the next business day when a due date falls on a date the creditor does not receive payments by mail. Mail delivery should still be the guidepost for invocation of the rule, since it is a clear, understandable standard that comports with consumer expectations as to when the creditor is unavailable.

A uniform weekend/holiday rule, regardless of the form of payment, is standard in other systems with which consumers are familiar. The deadlines for filing tax returns, court papers, and even papers filed with the Federal Reserve Board are all extended when the last day is a Saturday, Sunday, or Federal holiday.[18] These rules have not changed with the advent of electronic filing. Consumers are very familiar with the IRS rule and with the common courtesy in private business settings of adding a day when a deadline falls on weekend or holiday. They would have no reason to expect a different rule for credit card payments.

The Board asks whether this rule will impose burdens on creditors. The only burden is a simple one: to program the computer add a day to the due date based on a downloadable calendar – something they will have to do for the mail rule at any rate. This is a very simple task in today's electronic world. Moreover, the burden of putting an automated system into place is undoubtedly less of a burden than the time and expense of handling customer service calls from consumers complaining about late fees imposed after a Sunday or holiday and adjusting statements when the fee is removed as a courtesy.

---

[18] *See* 26 U.S.C.A. § 7503 (deadlines under internal revenue laws); Federal Rules of Civil Procedure Rule 6(a)(3); 12 C.F.R. § 263.12 (papers filed with Federal Reserve Board of Governors).

VI. SPECIAL CREDIT CARD PROTECTIONS AND BILLING ERROR PROCEDURES

A. The Board Should Ban Credit Card "Flips" from Store Cards to General Purpose Cards, and Should Limit Substitutions after 180 Days of Inactivity (Proposed Comment 12(a)(2)-2.v).

The Board has proposed a narrow limitation on the ability of a creditor to substitute a general purpose card for a store card if the account has been inactive for 24 months. While we are gratified that the Board has decided to address this issue, we believe it must go much further to protect consumers from the risk of identity theft and unwarranted intrusion posed by "flips" from a store card to a general purpose card. We urge the Board to take stronger action, since these flips will only become more common in a struggling economy where retailers who go out of business sell their credit card portfolios as part of their liquidation.

In general, we believe that the Board should ban "flips" from store cards to general purposes cards. These "flips" implicate the very reasons for the prohibition against unsolicited issuance of credit cards, *i.e.*, that unsolicited cards encourage consumers to incur unmanageable debt, spur bankruptcy filings, intrude into consumers' lives and family affairs, and encourage theft.[19] A creditor that unilaterally "flips" a store card into a general purpose card creates exactly these problems. With the recent surges in the number of financially distressed consumers unable to repay loans, including increased credit card defaults, the last thing the Board should do is permit a tactic that significantly increases the likelihood that consumers will incur more debt. Yet the purpose of a "flip" is exactly to encourage consumers to spend and borrow more by expanding the card's use from one retailer to the universe of merchants that accept cards -- and to incur cash advances.

We also believe the period of inactivity after which a substitution is prohibited should be much shorter – 180 days. Two years is simply way too long a period of time for a consumer to receive what is essentially a brand new credit card in the mail, without a request or prior notice. By that time, the consumer might not even remember the existence of the prior credit card. Many consumers, especially renters and younger consumers such as students, also move residences on a yearly basis, and thus cards may be sent to old, invalid addresses for these consumers.

Given that Proposed Reg. Z § 226.11(b)(1) will permit issuers to terminate an account after three months of inactivity, we believe that setting the time limit three months after a potential termination ensures that the existence of the credit card account is reasonably fresh in the consumer's memory. Alternatively, we suggest that the a time period for permissible substitution be tied to the creditor's affirmative actions, not the consumer's inaction, by permitting substitution up to three months after the creditor sends a periodic statement to the consumer, if the creditor has been sending regular periodic statements for the past year. Receiving regular periodic statements informs the

---

[19] Senate Report 91-739 (March 13, 1970), at 2-5.

consumer that s/he has an active credit card account that she may not be using. The arrival of a new card after receiving periodic statements should not unreasonably surprise a consumer.

At a minimum, a creditor should be prohibited from sending a substitute card more than three months after the date on which the physical credit card has expired. While we agree with the Board's position in proposed Comment 226.11(b)(1)-1 that an account does not "expire" even if the physical credit card's expiration date has passed, most consumers still treat an account as unusable or suspended if they do not receive a new credit card after the expiration date. A consumer who assumes an account has been terminated or suspended will be unduly surprised to find a new card from a new issuer that arrives a year or more after the old card has "expired."

B. Cardholders Should be Protected from Unauthorized Use Without Being Forced to Sign a Fraud Affidavit or Police Report (Proposed Comment 12(b)-3).

Under current Comment 12(b)-3, a creditor may not automatically deny a cardholder's claim of unauthorized use on the basis that the cardholder has failed or refused to comply with a particular request. The Board has proposed adding as an example of such request "providing an affidavit or filing a police report."

We strongly support this proposal. A creditor should not be able to deny an unauthorized use claim because the consumer has failed to obtain a police report or sign an affidavit. With respect to police reports, we have heard of too many instances of police departments still refusing to accept police reports for identity theft, even after many years of public education on the issue. It would be unconscionable to allow a creditor to impose liability on an innocent victim of fraud or identity theft because of a recalcitrant police department. Furthermore, in some cases a victim of fraud or identity theft is reluctant to file a police report because the thief is a family member. In fact, creditors have even insisted on police reports when the victim is also a survivor of domestic violence, and the thief was the abuser, despite the victim's real fears of retribution if she filed a police report. We do not think TILA contemplated that cardholders must be willing to risk violence from an abusive spouse before being held harmless for unauthorized use.

With respect to fraud affidavits, we have seen complaints about creditors who demand that consumers sign overly broad fraud affidavits. For example, one credit card company requires cardholders complaining of unauthorized use to sign a fraud affidavit stating that all of the charges on a particular account after a certain date were unauthorized*, even if the cardholder is making a complaint about only one (1) particular unauthorized charge*.[20]

Finally, in the credit reporting context, we have seen instances of creditors demanding both a police report and fraud affidavit, or trying to whipsaw consumers by demanding whatever document the consumer has not provided. Thus, if the consumer

[20] Email from Andrew Pizor, Consumer Law Group, LLC, dated July 15, 2007, on file with NCLC.

provides a fraud affidavit, the creditor will insist on a police report, but if the consumer provides a police report, the creditor will insist on a fraud affidavit. [21]

Thus, we support the Board's proposed language for Comment 12(b)-3 and strongly urge the Board to adopt it.

C. We Strongly Support the Retention of the Text of Footnote 31 (Proposed Comment 13(f)-3).

In its June 2007 NPRM, the Board had proposed deleting footnote 31, which states:

> If a consumer submits a billing error notice alleging either the non-delivery of property or services under paragraph (a)(3) of this section or that information appearing on a periodic statement is incorrect because a person honoring the consumer's credit card has made an incorrect report to the card issuer, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the property or services were actually delivered, mailed, or sent as agreed or that the information was correct.

In our prior comments, we had objected to the deletion of footnote 31, because we were concerned it would encourage issuers to lessen the scope of their efforts in billing error investigations. The Board has proposed retaining the text of footnote 31, but moving it into Proposed Comment 13(f)-3(ii). We strongly support this proposal and commend the Board for making it. This proposal will ensure that creditors conduct substantive investigations into billing disputes, as Congress intended when it passed the Fair Credit Billing Act.

D. The Board Should Provide Guidance on Conducting a Reasonable Billing Investigation, and Should Develop Guidance for All Types of Billing Error Disputes (Proposed Comment 13(f)-3).

The Board has proposed adding new Comment 13(f)-3, which would provide guidance to creditors on conducting reasonable investigations in billing error disputes. We support the general concept of providing such guidance to creditors, so long as that guidance requires more than verification of the creditor's own computer records. Any guidance should require creditors to undertake steps such as contacting third parties, calling the consumer, and/or examining original documents (*e.g.*, the credit card application, canceled checks, sales receipts, telephone records, etc.)

The proposed guidance in Comment 13(f)-3(i) specifically deals with investigations of unauthorized transactions, and mirrors the guidance in Comment 12(b)-3 for unauthorized use investigations under Section 1643 of TILA. Reproducing the guidance from Comment 12(b)-3 into Proposed Comment 13(f)-3(i) makes logical sense. Both investigations concern the same issue – unauthorized use.

[21] Email from Steve Hofer, UAW Legal Services, dated April 30, 2008, on file with NCLC.

The Board provides additional guidance for two other types of billing error disputes: (A) non-delivery of goods and services (Proposed Comment 13(f)(3)(ii)) and (B) incorrect information by merchants (Proposed Comment 13(f)(3)(iii)). As stated above, we strongly support Proposed Comment 13(f)(3)(ii), which was formerly the text of Footnote 31.

Proposed Comment 13(f)(3)(iii) simply requires that creditors conduct a reasonable investigation of merchant error without stating more. We suggest that this Proposed Comment include guidance on how the creditor should conduct a reasonable investigation, for example, by examining a copy of the consumer's copy of a charge slip and comparing it to the merchant's copy; obtaining any recordings that exist for telephone transactions, or examining the merchant's records.

Finally, we urge the Board to develop similar guidance for other types of billing errors, such as late delivery of goods, refusal of delivery for non-compliance with a contract, failure to credit a payment or refund to the account, computational error, and a request for additional clarification.

VII. TEASER/PROMOTIONAL RATES AND DEFERRED INTEREST OFFERS

A. The Board's Revised Treatment of Teaser Rates and Checks in Advertisements Is an Improvement in Some Ways But Also Raises New Problems. (Proposed Reg. Z §§ 226.9(b)(3)(A), 226.16(e)(2), (3), (4)).

The Board has also revised its proposed rules for disclosure of introductory rates in advertisements and promotional materials. The original proposal treated all teaser rates the same, regardless of whether the teaser rate applied to a new account or to an existing account.

The revised proposal defines "promotional rate" to cover teaser rates in both situations, and "introductory rate" as a subcategory encompassing teaser rates for new accounts. The Board's proposal requires only the latter to be identified as an "introductory" rate, but otherwise applies the same requirements to the two types of teaser rates, *i.e.* for both types the creditor must state the date the promotional rate will end or the promotional period, and the APR that will apply at the end of the promotional period. Revised proposed § 226.16(e)(4).

We are not convinced that distinctions this fine are necessary, but we consider this refinement not to be harmful. We commend the Board for continuing to require the end of the promotional period and the non-promotional rate to be disclosed in both situations. We also commend the Board for eliminating the ambiguity in the original proposal's reference to the "advertised" rate, a concern that we expressed in our comments in response to the June 2007 NPRM. *See* 73 Fed. Reg. at 28884.

The Board's proposed revisions, however, eliminate one important feature of its original proposal. In its original proposal, all of the rates that fell into the original definition of "introductory rate" had to be labeled as "Intro" or "Introductory" in immediate proximity to the rate. Under the revised proposal, this requirement only applies to the smaller subcategory of "introductory" rates. It does not apply to other "promotional rates," *i.e.* temporarily low rates offered to existing cardholders. As a result, these teaser rates will not be prominently identified with a label. We suggest requiring that non-introductory promotional rates be identified with the label "Promotional" or "Promo."

B. <u>The Board Should Require the Limits on the Teaser Rate To Be Disclosed in the Same Font and Color as the Teaser Rate</u>.

We are disappointed that the Board has not chosen to correct the proposal in the June 2007 NPRM that the information about the end of the promotional period and the non-promotional APR be set forth only in the same type size as the promotional rate. Proposed Comment § 226.16-2. The Board should have required that the information be set forth not only in the same type size, but also in the same font and color. By failing to make this correction, the Board leaves the door open for deliberate downplaying of this important information. We are also disappointed that the Board has not revised its original proposal to require this important information to be included on all the documents in a mailing that mention the promotional rate. (See our comments to the June 2007 NPRM at p. 86).

C. <u>The Board Should Require Identification of Teaser Rates in Telephone, Radio, and Television Advertisements</u>.

We strongly urge the Board to apply the teaser rate rules to telephone, radio, and television advertisements. Teaser rates have become nearly universal in credit card marketing precisely because they are deceptive. Creditors focus the consumer's attention on the teaser rate, so the consumer enters into the transaction with the teaser rate in mind rather than the rate that will ultimately apply. The result is excessively risky lending and great consumer harm as consumers quickly find themselves over their heads in credit card debt.

It is particularly important to apply these rules to telephone, radio, and television advertisements in the context of subprime credit cards, which are heavily marketed through telemarketing and sometimes television. If the teaser rate rules are not applied to telephone, radio, and television advertising, the likely result is that credit card marketers will simply switch advertising dollars away from written and electronic advertisements and into media that do not require these disclosures.

D. Deferred Interest Offers are Inherently Deceptive and Should be Banned (Proposed Reg. Z § 226.16(h)(1)).

The Board has proposed a new disclosure for "deferred interest offers," which are offers that promote "no interest" or "no payments" until a certain date, but fail to adequately inform consumers that they will be retroactively assessed interest starting from the purchase date if they do not pay off the entire purchase balance by the deferred interest date. We appreciate the fact that the Board is willing to address the issue of deferred interest offers, which are inherently deceptive in the way they are advertised. Many consumers do not understand that they will be subject to interest charges starting from the purchase date if they do not pay off the balance in full by the advertised date.

While the proposed disclosure is an improvement, we believe that the better course is for the Board to limit the advertisement of deferred interest offers under Regulation AA. The Board should prohibit the use of the terms "no interest," "no interest until X date," or "no payments until X date" when in fact there will be retroactive interest charges if the balance is not paid in full by a X date. These statements are inherently deceptive. Like payment allocation methods, it is very difficult to explain the problem with deferred interest offers to many consumers. We are concerned that the complexity of the issue makes it almost impossible to formulate a short, simple disclosure necessary to adequately prevent consumers from being deceived. We urge the Board to undertake testing to confirm whether this is so, as part of the next round of testing or on a stand-alone basis if there is no next round of testing.

Furthermore, we believe that deferred interest offers are often pitched to consumers when they purchase big ticket items, such as electronics or furniture. These are the same types of purchases often involved in spurious open-end credit schemes. Potentially, a consumer who purchases a sofa on credit could face two types of deception. First, she will be deceived into thinking that she will not pay interest on that sofa for the deferred interest period without understanding the pitfall of the retroactively assessed interest. Second, she will be deceived by not receiving closed-end disclosures showing the real cost of interest on the purchase. The disclosures in proposed § 226.16(b)(2) only partially ameliorate the latter problem, as we discuss in our comments to the June 2007 NPRM.

If the Board is not willing to ban deferred interest offers, we make the following suggestions in the next sections to improve the disclosure of these programs.

E. Timing and Format of Deferred Interest Offer Disclosures

i. *All advertisements should be required to include the special deferred interest disclosures (Proposed Reg. Z § 226.16(h)(1)).*

The Board has asked whether the proposed disclosure for deferred interest offers should be applied to non-written or electronic advertisements, such as radio or television advertisements or telephone solicitations. We support requiring the deferred interest

disclosure to be made for all these forms of advertisements. We think it is particularly important for television and radio advertisements, because these appear to be the predominant media in which deferred interest offers are promoted. A consumer literally cannot watch a week's worth of commercial television without seeing an advertisement such as "pay no interest until July 2009" for a bedroom set, carpeting or flooring, or a big screen television.

ii. The deferred interest period or date should be disclosed adjacent to or immediately before or after the triggering phrase (Proposed Comment 16(h)-2).

The Board has proposed requiring the deferred interest period to be disclosed in "immediate proximity" to each listing of the phrase "no interest" "no payments" or "deferred interest." However, as with the Board's proposal regarding promotional or introductory rates, the Board proposes a safe harbor, *i.e.*, that the disclosure of the deferred interest period or date in the "same phrase" as the triggering phrase is deemed to be in "immediate proximity."

As we similarly stated in our comments to the June 2007 NPRM, we believe that the safe harbor, as proposed, is inappropriate. The term "same phrase" is ambiguous, and could extend to a lengthy phrase that does not disclose the requisite date in "immediate proximity" to the triggering phrase. The only appropriate safe harbor is a strict one such as "adjacent" or "immediately before or immediately after."

iii. The special deferred interest offer disclosure should be either side-by-side with or immediately under or above the triggering phrase (Proposed Comment 16(h)-3).

The Board has proposed requiring that the special deferred interest offer disclosure be place in a prominent location "closely proximate" to the triggering phrase. However, proposed Comment 16(h)-3 states that that information will be considered in a "prominent location closely proximate" if it is "in the same paragraph" as the triggering phrase, but will not be if it is in a footnote. The discussion in the Supplementary Information describes this as a safe harbor.

As with the Board's similar proposal in the June 2007 NPRM on the location of promotional rate information, we disagree strongly with this proposal. A paragraph can be very long, and need not even begin and end on the same page. This safe harbor could easily be abused to obscure information that the Board intends to highlight.

If the Board is to take the "safe harbor" approach, the only appropriate safe harbor is the one that we suggested in our comments to the June 2007 NPRM, *i.e.*, that "prominent location closely proximate" be interpreted as either side-by-side with or immediately under or above the triggering phrase. That location is clearly "closely proximate"; the Commentary's standard is not.

iv. The special deferred interest offer disclosure should be on every document in a mailing that includes a triggering phrase (Proposed Reg. Z § 226.16(h)(4) and Comment 16(h)-4).

The Board has proposed requiring the special deferred interest offer disclosure to be provided closely proximate to the "first statement" of a triggering phrase. Proposed Comment 16(h)-4 states that the first statement is the most prominent listing on the front side of the principal promotional document.

For a single page mailing or document, the Board's proposal will mean that the most prominent statement of a triggering phrase on the front side of the document, or the first statement if none is more prominent than the others, be deemed the "first statement" requiring the special deferred interest disclosure. We agree with this concept, and with the Board's rationale that consumers are drawn to the most prominent statement, not necessarily the first one on the page.

We disagree with the Board's proposal that, in a multi-page document, the special deferred interest offer disclosure need only be given on the "principal promotional document." The purpose of giving consumers this information is to enable them to avoid being misled by a deferred interest offer. They need this information on every document in a solicitation that includes the triggering phrase. Creditors would not include additional documents in the mailing unless they expected consumers to pay attention to them. Allowing creditors to choose only one document on which to give complete information while giving undue emphasis to the inherently deceptively "no interest" or "no payment" pitches on other documents does not adequately protect consumers.

v. A special deferred interest disclosure should be included on all periodic statements.

Since deferred interest offers involve a balance being carried from month to month (or cycle to cycle), periodic statements are required under Reg. Z § 226.5(b)(2). We urge the Board to require a special disclosure for each periodic statement during the time when there is a deferred interest balance. This disclosure should clearly state the amount that must be paid, and by what date, to ensure that interest will not be imposed for the deferred interest period. This disclosure should be prominent and in plain language, something such as: "You must pay $[balance] by [deferred interest period/date] in order to avoid owing interest on this balance back to the original purchase date."

A disclosure on a periodic statement will most adequately inform consumers, because most consumers check their periodic statements when they receive them. Regular reminders about the pitfalls of the deferred interest offer will ensure that there are adequate opportunities for the consumer to actually see the special disclosure, even if consumers overlook it in the solicitation.

vi. The special deferred interest offer disclosure should be required for envelopes, Internet banner advertisements, and pop-up advertisements (Proposed Reg. Z § 226.16(h)(5)).

The Board proposes to exclude envelopes, electronic banner and pop-up advertisements from the disclosure requirements for deferred interest offers. We disagree with this proposal. Consumers should be given full information about the drawbacks of a deferred interest offer at every opportunity. Since there is no statutory exclusion for envelopes, we urge the Board to require full disclosure on those as well. Envelopes are often used as an advertising medium for credit card offers.

F. <u>Contents of the Deferred Interest Offer Disclosure: The Model Disclosure Could Be Improved (Proposed Reg. Z § 226.16(h)(4) and Sample G-22).</u>

As we discuss above, one of the problems with deferred interest offers is that the entire concept behind them is confusing, and even the best disclosures may not adequately convey the necessary information. Nonetheless, we believe that the Board's model disclosure could be improved so that a few more consumers might understand it. We suggest the following:

> "You will be charged interest on your purchase starting back to the original purchase date if you don't pay off the entire balance by [deferred interest period/date], you make a late payment, go over your limit, or otherwise violate your account terms. [Making only the minimum payment on your account will not pay off the purchase in time to avoid interest]."

VIII. CONCLUSION

We commend the Board and staff for its continued efforts to address credit card abuses and improve disclosures. While we may not agree with all of its proposals, we appreciate the care and thoughtfulness that the Board and staff took to draft them.

ATTACHMENT 1

TORREY PINES BANK

PRIVACY DISCLOSURE NOTICE

We Respect Your Privacy: TORREY PINES BANK takes every precaution to ensure that your personal information remains private.

Our Privacy Disclosure Policy: We collect non-public personal information about you from the following sources:

- Information we receive from you on application or other account forms.
- Information about your transactions with us, our affiliates, or others.
- Information we receive from a consumer reporting agency.
- We may disclose all of the information we collect, as described above, to companies that perform marketing services on our behalf or to other financial institutions with whom we have joint marketing agreements.

Categories of Information We Disclose: We do not disclose any non-public personal information about our customers or former customers to anyone, except as permitted by law.

Confidentiality & Security: We restrict access to non-public personal information about you to those employees who need to know that information to provide products or services to you. We maintain physical, electronic and procedural safeguards that comply with federal regulations to guard your non-public personal information.

If you ever have questions or concerns about the integrity of your account information, please contact us.

REVOLVING LOAN ACCOUNT INFORMATION

Finance Charges: We will assess FINANCE CHARGES consisting of an interest charge. Interest will be charged by applying the Daily Periodic Rate ("DPR") shown on the front of the Billing Statement to the "Average Daily Balance" of your Revolving Loan Account. We charge interest on each Advance from the date it is posted to your Revolving Loan Account. There is no "grace" period within which you may pay the "New Balance" in full to avoid interest charges.

Balance Computation Method: We calculate the interest charge on your Revolving Loan Account by applying the DPR to the "Average Daily Balance" of your Revolving Loan Account (including current transactions). This DPR corresponds to an initial ANNUAL PERCENTAGE RATE ("APR"), as shown on the front of this billing statement. To compute the DPR, we divide the APR by 365. To get the "Average Daily Balance," we take the beginning balance of your Revolving Loan Account each day, add any new advances, and subtract any payments or credits, unpaid finance charges, and late charges. This gives us the daily balance. Then we add up all the daily balances for the billing cycle and divide the total by the number of days in the billing cycle. This gives us the "Average Daily Balance." Once we have determined the "Average Daily Balance," we compute the interest charges by multiplying the "Average Daily Balance" by the DPR for the number of days in the billing cycle.

BILLING RIGHTS SUMMARY

In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a seperate sheet at the address shown on your bill after the words: "Send Inquiries To." Mail it as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights. In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- A description of the error along with an explanation of why you believe there is an error. If you need more information, describe the item that you are unsure about.

You do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. While investigating your question, we cannot report you as delinquent or take any action to collect the amount you question.

CHANGE OF ADDRESS INFORMATION:

Name: ______________________________

Account Number: ______________________________

Address: ______________________________

City: ____________________ State: ____________ Zip Code: ________

Phone Number: (______) ________-________ Email: ______________@____________

ATTACHMENT 2

Bill History

Bill Detail

Biller Name	Account	Amount	Pay Date	Confirmation	Status
Chase Card Services UA Visa *42461	Premium Rel Ckg *43976	$4,346.39	06/24/2008	7W32X-WJ1T4	Paid

Your payment from your Premium Rel Ckg *43976 account was sent to Chase Card Services on 06/23/2008. The money was withdrawn from your account on 06/24/2008. Chase Card Services usually applies an electronic payment to your account on the next business day. If you have a question about your bill or about crediting the payment to your account, please contact Chase Card Services directly.

If you have a question about this payment, you can send us a payment inquiry .