Comments of the

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

and

Center for Consumer Affairs - Univ. of Wisconsin-Milwaukee
Consumer Action
Consumer Federation of America
National Association of Consumer Advocates

Regarding

Notice of Proposed Rulemaking
Review of the
Open-End (Revolving) Credit Rules of Regulation Z

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] the Center for Responsible Lending,[2] the Center for Consumer Affairs,[3]

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[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, Lauren Saunders, Alys Cohen, and Margot Saunders of NCLC, and Kathleen Keest of Center for Responsible Lending.

[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] The **Center for Consumer Affairs** is part of the School of Continuing Education at the University of Wisconsin in Milwaukee.

Consumer Action,[4] Consumer Federation of America,[5] and the National Association of Consumer Advocates.[6]

We appreciate the Board's efforts in undertaking a thorough top to bottom revision of Regulation Z's provisions governing open-end credit. The Board has proposed several measures that we believe will significantly enhance open-end disclosures under the Truth in Lending Act (TILA). However, the Board is also proposing or considering the option of several measures that will drastically reduce or even eliminate critical "price tag" disclosures for credit cards. These proposals will leave consumers with less information and give creditors huge loopholes to create new fees and perpetrate new abuses on consumers.

Most problematically, the Board's proposal does little to address substantive credit card abuses. Even where the Board has clear authority to enact substantive regulation, it has chosen disclosures over real protection. We urge the Board to use its rulemaking authority to enact substantive protections for consumers, or to ask Congress to enact protections against the worst abuses of the credit card industry.

We first address the issue of what the Board's proposal does not do to remedy the rampant abuses perpetrated by the credit card industry. We then comment on the proposed rule, primarily on a section by section basis. However, certain issues are discussed by topic rather than by section order, such as spurious open end credit, electronic disclosures and subprime credit card issues. The comments are organized as follows:

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[4] **Consumer Action (www.consumer-action.org)** is a national non-profit consumer education and advocacy organization founded in San Francisco in 1971. The organization's hallmark is its free multilingual consumer education materials distributed through a national network of 9,000-plus non-profit and community-based agencies. In addition, Consumer Action serves consumers and its members nationwide by advancing consumer rights, referring consumers to complaint-handling agencies and training community group staff on the effective use of its educational materials. Consumer Action also advocates for consumers in the media and before lawmakers and compares prices on credit cards, bank accounts and long distance services.

[5] **Consumer Federation of America (CFA)** is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy, and education.

[6] 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.

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I. THE PROPOSED RULE DOES NOT ADDRESS KEY ABUSIVE PRACTICES IN THE CREDIT CARD INDSUTRY

A. Disclosure is Not Sufficient to Protect Credit Card Consumers

Before commenting on the specific proposals, we feel that it is important to point out the failure in the proposed rules to make significant reforms that get to the root of the problems in the credit world. The proposed rules are woefully short because the Board has failed to use its authority to ban unfair and deceptive practices or to make major changes to ensure that TILA's disclosures are meaningful and relevant.

In our previous comments, we addressed the myriad of abusive credit card practices that have flourished in the absence of substantive regulation. These practices have received considerable congressional attention lately. The Board has the authority to ban banking practices that are unfair or deceptive under the Federal Trade Commission Act, 15 U.S.C. § 57a(f), yet it has taken no action to address these abuses. We urge the Board to commence a new rulemaking to declare abusive practices to be unfair or deceptive. We also urge the Board to use its substantial influence to weigh in with Congress to ask for true reform of the credit industry.

The Board's failure to act is particularly glaring in light of the preemption of substantive state law protections. Thirty years ago, states protected consumers from abusive banking practices. Today, a combination of Supreme Court decisions and federal banking agency rules has eliminated those protections *without replacing them with any parallel federal protections.*

Disclosures alone will never adequately protect consumers. Financial institutions are too clever and too able to defeat disclosures by hiding abusive fees and practices in packages that are not apparent to consumers.

The banks' reaction to the 1996 *Smiley* decision preempting state laws regulating credit card fees is a case in point.[7] Before *Smiley*, the primary costs of a credit card were reflected in the annual fee and the interest rate. Those two items are well understood by consumers, and the TILA disclosure rules have done a good job of highlighting them in ways that enable consumers to comparison shop.

After being given a green light to violate state consumer protection laws, with no federal protections to replace them, the credit card issuers began shifting the costs of a credit card away from the front end -- the annual fee and periodic interest rate - and towards the back end, with increasing, new, and more complicated fees that consumers do not understand or appreciate. The annual fee and periodic interest rate – the two items consumers still focus on – have gone down, but consumers are shopping based on price tags that are increasingly irrelevant.

[7] Smiley v. Citibank (S.D.), Nat'l Assn., 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996).

The disclosures have not caught up with these changes *and never will* for two fundamental reasons. First, revisions to disclosure rules will always be several years behind market changes. The incentive is for creditors to bury costs in ways that defeat existing disclosure rules. Second, creditors have an incentive to create credit plans that are too complicated to explain and compare easily, and that impose costs that consumers do not focus on when shopping for cards.

The difficulty that the Board is having in coming up with clear disclosures of the current, complicated scheme proves the point that creditors are smart enough to circumvent any disclosures. Credit card issuers have shifted away from interest rates – which can easily be disclosed, understood and compared – to a myriad of flat fees precisely because those fees are not captured by the interest rate, are not aggregated, and are not easily translated into a uniform measure that can be compared across cards.

Similarly, even if creditors clearly disclosed costs like penalty rates or over-limit charges, consumers do not plan to default when taking out a new card, and do not focus on the hair trigger standards used to impose those fees. The sheer number of different fees and policies, even if all disclosed, makes it unlikely that a consumer will understand or focus on any of them, especially when their impact is cumulative.

The only way to give consumers adequate protection is to replace the state law protections that were taken away with substantive federal protections.

First, the Board needs to ban specific practices that are unfair or deceptive.

Second, to the extent that the Board is relying on disclosures, the rules need to change the incentives. Instead of giving creditors an incentive to move their fees into more and more hidden crevices, the rules must help consumers to understand the full cost of credit and must assist the market in using competition to drive down the cumulative costs for consumers.

Finally and most fundamentally, the Board should use its considerable influence to urge Congress to reinstate substantive regulation of credit cards.

B. The Proposal Fails to Ban Several Unfair and Deceptive Practices

The proposed rule fails to address any of the following abusive practices that we have documented in our previous comments to the Board's Advance Notice of Proposed Rulemaking.[8] The Board has authority to regulate these practices under its general FTC Act authority to ban unfair and deceptive practices, and in some cases under TILA itself. Some of these issues below are also discussed in other sections in connection with specific proposed rules.

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[8] National Consumer Law Center, et al., *Comments to the Federal Reserve Board's Advance Notice of Proposed Rulemaking--Review of the Open-End (Revolving) Credit Rules of Regulation Z*, Docket No. R-1217 (Mar. 28, 2005), available at www.consumerlaw.org/issues/credit_cards/content/open_end_final.pdf. [hereinafter "2005 NCLC Comments"].

Junk Fees Unrelated to Costs.[9] A significant contributor to snowballing credit card debt is the enormous increase in both the number and amount of "junk" fees, such as fees for late payments, going over-limit, cash advance, balance transfer, wire transfer, foreign transactions, and more. Banks now impose these fees – not as a way to curb undesirable behavior or to cover their costs – but as a significant source of revenue hidden outside of the interest rate. *The Board should ban fees or ask Congress to ban fees that are not reasonably related to costs.*

Penalty Rates.[10] Banks market low APRs – even to consumers chosen because they have gone through bankruptcy – but then impose penalty rates as high as 30% to 40% if the consumer pays late, exceeds the credit limit, or otherwise defaults. If a consumer is having trouble managing credit, the responsible banker approach is to restrict future credit, not to encourage continued borrowing but shove the consumer deeper in the hole with rates that make it harder to pay off the current balance. Penalty rates do far more than cover the risk to the bank of nonpayment; defaulting consumers are the most profitable. A rule restricting penalty rates would also encourage bankers to assess ability to pay more responsibly at the outset before extending credit. *The Board should ban as unfair practices excessive penalty rates and penalty rates that apply retroactively, or ask Congress to do so.*

Universal Default or Adverse Action Repricing.[11] The practice of universal default, or its latest variant, "adverse action repricing," penalizes the consumer not for any behavior on the issuer's account but for problems with another creditor or a decrease in the consumer's credit score. Consumers who are living up to the terms of a credit agreement should be rewarded, not punished or pushed into default because of troubles elsewhere or changes in a perhaps inaccurate credit report. *The Board should ban as unfair fees or rate increases not directly linked to the actual credit account.*

Manipulation of Payment Allocation.[12] Many credit card companies heavily advertise low APRs in their solicitations that are only applicable to one category of transactions. They then allocate payments first to the balances with lower APRs – in the exact opposite way that a responsible consumer would do by paying off high cost credit first. Permitting this practice also encourages deceptive advertising. The Board should issue regulations under Section 1666c of TILA to prohibit payment allocation abuse. *The Board should dictate that payments must be first posted to the balance that carries the highest rate.*

Late Payment Triggers.[13] Not only have late fees increased, but credit card lenders have been quicker to impose them, often using hair trigger tactics such as noon cutoff times, or payment due dates that fall on a holiday. Again, this is a deceptive way of increasing profits, and it encourages creditors to induce consumers into paying late, rather than helping them to pay on time. Instead, the Board should exercise its authority under

[9] *See* 2005 NCLC Comments at 7-9,11-16, 27.
[10] *See* 2005 NCLC Comments at 7-9, 16-18, 27.
[11] *See* 2005 NCLC Comments at 16-18, 27.
[12] *See* 2005 NCLC Comments at 18-19.
[13] *See* 2005 NCLC Comments at 19.

Section 1666c to issue regulations governing prompt posting of payments. *The Board should ban late payment fees if the payment is postmarked as of the due date or, if that date is a Sunday or holiday, on the next business day. The Board should ask Congress to amend 1666b to require that periodic statements be sent at least 25 days before the payment due date.*

Unilateral/Retroactive Change-in-Terms.[14] The nature of credit cards is that the borrower signs an agreement at one point in time, but continues to draw upon the credit line thereafter. Creditors are allowed to change any term of a credit card virtually at will, needing only to provide some advance notice. Permitting these unilateral changes completely defeats the usefulness of any disclosures made when the consumer is shopping for cards. The changes are particularly abusive when they apply retroactively to balances incurred before a rate change. *The Board should ban any changes to the credit agreement – other than variable rate increases agreed to in the original agreement – until a new credit card is issued, and any future changes should apply prospectively only, not retroactively to existing balances.*

Over-Limit Fees.[15] Creditors encourage consumers to use their cards to the maximum extent and regularly approve purchases that are over the credit limit. For wealthier consumers, creditors simply adjust the credit limit upward without penalty when it is exceeded. For moderate and low-income consumers, however, creditors view over limit purchases as another opportunity to extract fees that are not included in the interest rate. Over limit fees often multiply; the fees can keep the balance over limit indefinitely, triggering more fees and an endless cycle. Instead, if a creditor does not want a consumer to exceed a limit, the transaction should be denied, not viewed as a profit opportunity. *The Board should ban over limit fees on transactions that the creditor approves.*

Class Action Waivers Should be Banned. Credit card agreements now routinely prohibit individuals from joining class action lawsuits. The only purpose of these clauses is to prevent consumers from redressing legal violations that are too small, on an individual basis, to attract a lawyer. Class action bans have no legitimate justification, and serve only to encourage violations on a scale of millions. *The Board should prohibit class action bans as an unfair waiver of consumers' rights under Section 1640(a).*[16]

Mandatory arbitration clauses, which are discussed below, would also be on this list, but we recognize that the Board likely does not have the authority to issue rules that would conflict with Federal Arbitration Act.

On issues within its jurisdiction, however, the Board needs to send a message to creditors that abusive practices will not be tolerated. The Board's failure to use its authority to ban unfair and deceptive credit card practices is unjustifiable.[17]

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[14] *See* 2005 NCLC Comments at 16, 22-25, 27.
[15] *See* 2005 NCLC Comments at 15-16, 27.
[16] Mandatory arbitration clauses are equally unfair, but Congressional action is needed to address that issue, as discussed below.
[17] *See* Letter from Rep. Barney Frank and Rep. John Dingell to Chairman Ben S. Bernanke, et al. (May 11, 2007).

In addition, the Board should support legislation in Congress to make the prohibition against unfair and deceptive practices in Section 5 of the FTC Act privately enforceable. Even with full vigilance on the Board's part, the agency will never be able to respond adequately to every abusive practice by every creditor. Private enforcement by those most affected – consumer victims – would save agency resources, give consumers meaningful relief, and put creditors on notice that they will be held accountable even before a practice has spread to the point that it justifies a national prohibition.

C. The Proposed Rules Tinker with Disclosures While Omitting Important Changes to Keep TILA's Disclosures Meaningful and Relevant.

The proposed rule focuses entirely on disclosures. Some of the changes improve TIL disclosures, but the proposed rule fails to make more fundamental changes to make disclosures meaningful and relevant. These changes are especially important in light of the total reliance on disclosures as a regulatory mechanism.

1. *The Rules Fail to Disclose a Complete Price Tag.*

We urge that the Board reconsider its decision rejecting two important reforms to ensure that the costs of credit are disclosed to consumers in a complete and meaningful way: 1) a "typical" effective APR in solicitations/applications and account opening; and 2) including key fees in the effective APR disclosed on monthly statements (and in fact, the Board proposes to weaken or eliminate that disclosure).

The typical APR would be the sum of all of the effective APRs disclosed on the periodic billing statements over the last three years for all customers with credit card accounts of the same or similar product type to that being offered to the new customer, divided by the number of these effective APRs disclosed to these other customers. That is, a typical APR would give consumers an understanding of the cumulative impact of the various fees and rates in the real world, as experienced by real consumers.

A typical effective APR would be a far more accurate and meaningful price tag for consumers who are shopping for credit, and would enable consumers to make comparisons between offers with different price structures. Including a typical effective APR is the only meaningful way to enable disclosures to perform their primary functions: to give consumers realistic information, and to allow market competition to improve products for consumers. A responsible consumer is far better served by choosing a card with a *total* cost the consumer understands and can manage, than by succumbing to the allure of a deceptively low periodic APR padded by fees.

We discuss our opposition to the Board's proposal for the effective APR disclosed on monthly statements at greater length in Section XI below. But we wish to highlight here the Board's failure to heed our call to include annual or other periodic fees, late payment fees, over the limit fees, and a few others, in the effective APR. Congress's entire rationale for developing the APR was to enable consumers to have an annualized, percentage-based price tag to provide a uniform, meaningful understanding of the cost of credit. Excluding major elements of that cost deprives the APR of its relevance.

Banks themselves have articulated well why fees are a component of interest rates and must be treated as such. In the *Smiley* case, they explained to the Supreme Court that fees "must be counted against a state ceiling on 'interest' ... otherwise, state limitations on 'interest' could be evaded with impunity."[18] Flat fees like late fees and periodic interest rates "are interdependent as a matter of both law and economics" and both are a form of "loan compensation."[19] Even in an era without usury caps, removing fees from the APR permits creditors to avoid disclosing the true price of the card with impunity.

For example, the same creditor recently sent two different, separate credit card solicitations to the same potential customer; one carried a periodic rate of 9.99% but had late fees, one had a periodic rate of 13.9% but had no late, over-the-limit, or other fees. An unwitting consumer would think that the 9.99% card was the better bargain, even though the creditor knows that they are the same for the typical consumer. If a typical APR were disclosed alongside the periodic rate, the similarity of the two cards would be apparent, and the consumer would be able to choose the better card by considering whether she is more or less likely to incur fees.

Forcing creditors to disclose in an understandable manner the total costs of hidden fees to their customers also shifts the incentives. Creditors who manipulate hair trigger policies to impose fees that consumers did not understand will be forced to reveal the true costs of their products. Honest creditors who are up front about their charges will not be penalized by comparison to an unrealistically low APR.

Without a typical APR up front and an inclusive effective APR on statements to aggregate all costs of credit, the entire exercise of tinkering with disclosures of individual fees and policies is meaningless. Consumers will continue to be given a misleadingly low APR and creditors will continue to have incentives to use subterfuge to induce customers to pay more and more fees excluded from the APR.

2. *The Board Should Recommend Inflation Adjustments to TILA's Jurisdiction and Remedies.*

The proposed rules adjust two items for inflation: the *de minimis* triggers for sending a statement and for calculating an effective APR. We supported these changes – which benefit creditors – because the trigger amounts have not been adjusted since Reg. Z was adopted in 1969 and adjustments are justified by inflation.

We regret that the Board has not heeded our suggestion to urge that Congress adjust much more important dollar figures in TILA: the jurisdictional amount and the penalties. The

[18] Brief for the Respondent, *Smiley v. Citibank*, No. 95-860, 1996 WL 143294 (Mar. 29, 1996).
[19] Amici Curiae Brief Of American Bankers Association *et al.*, *Smiley v. Citibank*, No. 95-860, 1996 WL 144104 at *6 (Mar. 29, 1996).

erosion of these figures has already affected TILA's effectiveness. If they are not updated, soon TILA itself will become increasingly irrelevant.

Most car loans are already outside the $25,000 jurisdictional cap and are therefore exempt from TILA. With inflation, this $25,000 cap will affect more and more types of credit. In 1968, when TILA was enacted, $25,000 was a huge amount and covered virtually all consumer lending. The same inflation adjustment that the Board used on the *de minimis* triggers would bring the jurisdictional limit to roughly $150,000, though we recommend raising the limit to $250,000 to account for future inflation.

TILA's statutory penalties of $1,000 per violation similarly were significant in 1968 but are a slap on the wrist today. These penalties are not a significant deterrent to violating the Act. An increase to $6,000 would bring the penalties up to 2007 dollars, though we recommend an increase to $10,000 to account for future inflation.

Similarly, the Fair Credit Billing Act provides that any creditor who fails to comply with the Act forfeits any right to collect the disputed amount up to $50, an amount not adjusted since 1974. According the Department of Labor's cost of living calculator, the value of $50 in 2007 dollars is the equivalent of $11.86 in 1974 dollars. Instead of increasing the amount, we ask the Board to recommend that the cap be eliminated. The remedies in FCBA are particularly important to consumers because they are meant to resolve billing disputes without requiring consumers to first hire an attorney or file suit in the courts.

We recognize that these changes require action from Congress and are outside of the Board's current authority. But they are essential to this entire enterprise. The Board is in a position to educate Congress on the importance of making these basic inflationary adjustments to ensure that TILA continues to be an important consumer protection statute, and does not instead become an archaic remnant in the dusty codes.

D. The Board Should Support Meaningful Credit Reforms in Congress.

As we discussed in our earlier comments, the abuses in the credit marketplace and the proliferation of unaffordable, destructive debt mandate reforms that go far beyond adjusting the TILA framework. Though these reforms must be made by Congress, we again urge the Board to work with Congress to go back to the old fashioned standard of fair, affordable lending and access to justice when the law is broken.

1. *Reinstate Interest Rate Caps.*

The complete elimination of interest rate caps on many types of lending has been a complete disaster. Subprime credit cards, payday loans, and overdraft loans made by mainstream banks have resulted in an explosion of triple and even quadruple digit interest rates that would have been criminal at a previous time.

While a certain amount of market freedom should be permitted, there comes a point where credit is purely predatory and destructive, and should not be allowed. We do not permit people to buy dangerous products even if full and accurate disclosures are made, and we should not permit credit at astronomical interest rates, which is also clearly harmful to individuals, families, and communities.

The Board should recommend to Congress that it reinstate a national interest rate cap.

2. *Require Real Underwriting Based on Ability to Pay.*

The subprime foreclosure crisis has shown the folly of lending that is not based on sound underwriting and the consumer's ability to pay. The same reckless and irresponsible lending has been happening in the credit card market. Though it has not affected the stock market in the same way, the harm to consumers is also substantial. Indeed, exploding credit card debt is often what drives consumers to refinance their homes or to rob their equity through home equity lines of credit.

Creditors may be able to spread the risk of abusive lending by charging high enough rates, just as an investor in junk bond funds does not care if many of the bonds fail as long as others pay off handsomely. But even if creditors can profit from reckless lending, we should not allow practices that wreck American families.

Creditors are also increasingly targeting college students, and inducing them to incur a mountain of debt before they take their first job.

The Board should urge Congress to require underwriting for all consumer credit, and to end reckless lending to youth.

3. *Ban Mandatory Arbitration Clauses.*

No matter how extensive the legal protections for consumers, those protections are meaningless if they cannot be enforced. Consumer credit agreements now routinely force consumers to waive their constitutional right of access to the courts. Most credit card agreements force consumers to arbitrate any disputes before a specific forum that has a vested financial interest in siding with creditors. Mandatory arbitration is secretive, lawless, unreviewable and biased.

Congress is beginning to recognize the abuses of mandatory arbitration clauses. In the last few years, Congress banned mandatory arbitration clauses in contracts between car dealers and car manufacturers (but not in contracts between consumers and car dealers), and in credit agreements with military service members. It should now do so for all consumers, and the Board should support this reform. All of the TILA reforms in the world will be meaningless if the primary enforcement mechanism is an arbitrator whose paycheck is paid by creditors.

II. COVERAGE ISSUES: DEFINITIONS (REG. Z § 226.2) AND EXEMPT TRANSACTIONS (REG. Z § 226.3)

We turn now to the specifics of each of the Board's proposal, in a section by section analysis based primarily on numerical order. The first sections addressed involve TILA's definitions and exemptions.

A. The Definition of "Billing Cycle" (Comment 226.2(a)(4)-3).

The Board has proposed amending Comment 226.2(a)(4)-3 to permit creditors to have an irregular (unequal) billing cycle when an account is first opened and when the creditor occasionally changes its billing cycles. We have no objection to an irregular first billing cycle when the creditor first establishes an account, so long as the variance is less than a full billing cycle. We believe the Proposed Comment should contain this limitation. Furthermore, there should be some limitation as to how often a creditor can change its billing cycle, such as once per year. We suggest the revised Comment 226.2(a)(4)-3 state:

> The requirement that intervals be equal does not apply to the first billing cycle on an open-end account *(so long as the first billing cycle is not greater than twice the length of the regular billing cycle for that account)* or to a transitional billing cycle that can occur if the creditor occasionally changes its billing cycles so as to establish a new statement day or date. *An occasional change for such purposes is less than once per year.*

B. The Definition of "Cardholder" Should Include Identity Theft Victims (Reg. Z § 226.2(a)(8)).

We note the Board has not made any change to the definition of cardholder. We reiterate our request that Reg. Z be amended to provide that a cardholder includes the victim of identity theft, so that the victim is entitled to the protections of Reg. Z § 226.12(b) (unauthorized use). The failure to make such a change also undercuts new proposed Comment 226.12(b)(1)-4, in which the Board appears to intend to include identity theft as unauthorized use. The Board should fix the definition of "cardholder" at Reg. Z § 226.2(a)(8) to fully protect identity theft victims from liability by adding:

> *Cardholder also means a person in whose name a card is issued, but such card has been issued as a result of identity theft.*

C. The Definition of "Credit Card" Should Include Convenience Checks and Should Continue to Include Coupon Books (Reg. Z § 226.2(a)(15)).

The Board has essentially left the definition of credit card untouched, except for deleting the reference to a "coupon book." We oppose the deletion of the reference to coupon books. First, this reference is in the Act itself, 15 U.S.C. § 1602(k). Other than its view that coupon books are no longer on the market, the Board has articulated no rationale for deviating from Congress' decision to include these devices. Even if the Board is correct that such products are not currently prevalent, the Board's deletion of "coupon books" from the definition of a credit card could provide an incentive to develop them.

Furthermore, the deletion of coupon books must be viewed in light of the Board's explicit refusal to include checks that access a credit card account from the definition of "credit card." The Board essentially admits that it does not want the possibility that a booklet of checks could be considered a coupon book, and thus a credit card. 72 Fed. Reg. 32,948, 32,960 (June 14, 2007). Despite the plain language of the Act covering coupon books, the Board proposes to deprive consumers who receive such products of the protections against unauthorized use and unsolicited issuance. This could include instances when a creditor issues a booklet of checks instead of a card that accesses an open-end credit account. The Board's action will permit creditors to send these booklets unsolicited, without application/solicitation disclosures, and to impose liability for unauthorized use unless the consumer follows the strict procedures of the billing error provisions.

Furthermore, we oppose the Board's decision to let Reg. Z continue excluding checks that access a credit card account from the definition of credit card. These "convenience checks" clearly fall within the statutory definition of a credit card as "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." 15 U.S.C. § 1602(k). It is only Reg. Z that excludes them because they cannot be used "from time to time."

The Board's decision to exclude convenience checks does not adequately protect consumers. Credit extended via these checks faces many of the same security issues (if not more so) than plastic credit cards. They also create the potential of unmanageable debt and intrude into consumers' lives, the very reason why the prohibition against unsolicited issuance was enacted.[20]

Also, if the Board is updating Reg. Z and the Commentary to reflect modern technology, we propose that the Board also add a new example. Some companies offer programs that permit consumers to use cell phones as a payment mechanism, e.g., Obopay.[21] Currently these programs use funds on deposit with the company, and thus do not involve an extension of credit. However, if there is a deferral of payment or credit involved, the program would convert the cell phone account into a credit card account. The Board should add this as an example in Comment 226.2(a)(15)-2.

Finally, the Board has declined at this point to amend Reg. Z to cover plans for which there is no physical device. Yet it has permitted the use of biometric devices for the purpose of identifying consumers when imposing the $50 liability for unauthorized use. 72 Fed. Reg. 33,016. Such an approach seems contradictory and arbitrary. We again urge the Board to amend Reg. Z § 226.2(a)(15) to state:

> (15) ''Credit card'' means any card, plate, coupon book, or other single credit device that may be used from time to time to obtain credit. *A device is any item, whether tangible or*

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[20] *See* discussion in Senate Report 91-739 (March 13, 1970), at 2-5.
[21] www.obopay.com

intangible, that is used to identify a consumer for purposes of accessing credit on an open-end account. A device can be a physical object or a method or process.

D. Open-End Plans Comprised of Closed-End Features (Comments 226.2(a)(20)-2, -3).

We support the proposed revision to Comment §226.2(a)(20), requiring that sub-accounts be independently assessed to determine whether they are open-end or closed-end. There is no meaningful, functional difference between a customer who gets a conventional car loan from her bank versus one who receives a sub-account from an open-end program. The only difference is that the first customer generally gets the more accurate and complete information that comes with closed-end disclosures.

To the extent a sub-account loan has fixed payments, fixed terms, and no replenishing line (as may be the case with a credit union car loan), it is functionally indistinguishable from any other closed-end loan. It seems as though only tradition, not reason, has allowed this form of disguised closed-end credit to persist this long. There is no legitimate basis to continue such a charade into the 21st Century.[22]

E. Exempt Transactions (Reg. Z § 226.3(a)) - The Board Properly Proposed to Require That Determination as to Whether the Account is Business or Consumer Should be Made When the Account is Opened or Renewed.

The Board has proposed a new comment clarifying that the determination as to whether a credit card account is primarily for consumer purposes or business purposes should be made when the account is opened, rather than on a transaction-by-transaction basis. Proposed Comment 226.3(a)–2 provides that transactions made for business purposes on a consumer-purpose credit card are covered by TILA and, conversely, that purchases made for consumer purposes on a business-purpose credit card are exempt from TILA. This Proposed Comment reflects existing caselaw and is logical.

III. FINANCE CHARGE (REG. Z § 226.4)

A. The Board Should Include Frequently Imposed Fees in the Scope of Finance Charge Coverage.

In our comments to the Board's ANPR, we urged the Board to return truth to lending by acknowledging that the statutory finance charge definition is inclusive, with the exception of those fees expressly excluded by Congress. We described the Board's contribution to the current Swiss cheese result that renders the APR less effective as a shopping tool.[23]

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[22] Self-Help credit unions, with which the Center for Responsible Lending is affiliated, in fact treat new loans as if they were closed-end accounts for disclosure purposes, even if nominally under an open-end plan.
[23] 2005 NCLC Comments at 28-48.

We suggest that the litmus test for categorizing credit related fees unveiled in a recent article is the best approach for reversing the inconsistencies and confusion created by the Board's "fee-by-fee" approach.[24] Indeed, the Board itself recognizes that addressing fees one by one as brought to its attention has not been "sufficient to both facilitate compliance by credit card issuers and promote understanding by consumer."[25]

The litmus test consists of a single question which faithfully accounts for the elements of the statutory definition of a finance charge:

> If the consumer were not obtaining, accessing, or repaying the extension of credit, would the consumer be paying the fee directly or indirectly?

When applying this test to fees currently identified in Regulation Z and the Commentary, a number of current exceptions would be eliminated, more fees would be treated as finance charges, and the APR's vitality would be revived.

As for the Board's proposal, we are disappointed that the Board chose not to include annual, over-limit, late payment and other frequently imposed fees within the scope of the finance charge. We support the Board's proposals to treat as finance credit card charges transaction fees, foreign exchange fees, debt suspension fees, and credit insurance fees

In general, the Board modestly expanded finance charge coverage and eliminated the "non-other" category of fees. However, the Board has nullified the positive impact of these changes by creating closed lists for fees that must be disclosed at account opening (discussed Section VI.L) and with its proposals for the effective APR (discussed in Section XI). Without an effective APR or a requirement that all finance charges be included in the effective APR, the expansion of finance charge coverage has no meaningful impact whatsoever.

B. Credit Card Transaction Fees Should be Included in The Finance Charge; the Comparable Cash Transaction Analysis Does Not Apply for Non-Purchase Money Transactions.

The Board has proposed including one category of charges as finance charges that were in some cases previously excluded - transaction fees for a credit card. Proposed Comment 226.4(a)-4 would provide that transaction charges are finance charges, whether or not the creditor imposes the same charge for withdrawal of funds from a deposit account. This Proposed Comment would treat ATM fees and foreign currency transaction fees as finance charges. We strongly support this Proposed Comment. The answer to the litmus question stated above in Section III.A for such fees is yes.

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[24] *See* Elizabeth Renuart & Diane Thompson, *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth In Lending*, working paper, provided in conjunction with these comments as Attachment 2, at 64-70.

[25] 72 Fed. Reg. at 32,964.

However, we believe the Board should have taken the same action with respect to a number of other charges. The Board's discussion of this issue is notable for the tortuous intellectual exercise in which it must engage in its attempt to navigate the "comparable cash transaction" analysis. The analytical difficulty arises because the comparable cash transaction analysis has no logical application in the context of non-purchase money credit. The intent of TILA's "comparable cash transaction" exception is to provide neutrality between cash and credit transactions. While it is easy to envision a cash transaction that is comparable to a credit sale, the notion of a cash transaction comparable to a loan of money breaks down conceptually.

Indeed, these same analytical difficulties are inherent with another type of cash loan — overdraft loans ("bounce protection"). As we have repeatedly pointed out, the Board has construed the comparable cash transaction exclusion far too broadly in this context. In general, charges for payment mechanisms (checks, ATM withdrawals) are *not* comparable to charges for an extension of credit. Overdraft loans are the prime illustration of the pitfalls of trying to equate the two. NSF charges and overdraft loan fees are not cash and credit alternative means of completing the same transactions; they are associated with entirely different transactions, in both concept and reality.

C. Coverage of Debt Suspension Fees

The Board also suggests adding debt suspension fees to the exclusionary rule currently found in Reg. Z § 226.4(d). We have no dispute with this plan under the current statutory regime that permits credit insurance products to be excluded if certain conditions are met, though we believe Congress should eliminate this exception.

We also support the additional disclosure the Board requires in the case of debt suspension agreements, *i.e*., to inform the consumer, where applicable, that the obligation to pay loan principal and interest is only suspended and that interest will continue to accrue during the period of suspension. We urge the Board to amend the model credit insurance disclosure forms to include a sample of this information.

IV. FORMAT RULES - (REG. Z § 226.5): THE BOARD'S PROPOSAL FOR THE FORMAT OF APPLICATION/SOLICITATION AND ACCOUNT OPENING DISCLOSURES IS A SIGNIFICANT STEP FORWARD, BUT FURTHER IMPROVEMENT IS NECESSARY.

A. Requiring a Schumer Box Throughout the Stages of the Account Will Be an Enormous Improvement.

The Board's proposal to require a Schumer-type box not just in applications and solicitations, but also at account opening, is a profound improvement over the current disclosure rules. Mandating a Schumer box at account opening, with specific requirements for format, will mean that consumers will get readable, comprehensible information about the terms of the credit cards they receive.

Under the current disclosure rules, the Schumer box is the only disclosure of account terms that actually conveys any information to the consumer.[26] Because there have not been meaningful format requirements for account-opening disclosures and change-of-terms notices, those disclosures have obeyed the race-to-the-bottom or lowest-common-denominator rule. They are uniformly presented in tiny, dense, unreadable type and written in legalese, with the key terms buried among paragraphs of prose that are designed not to communicate but to obscure information. The absence of meaningful disclosure at these stages has facilitated bait-and-switch tactics.

B. Mandating Uniformity in the Schumer Box Disclosures is Critical, But the Board Should Explicitly Mandate the Order in Which Disclosures Are Presented and Should Set a Stricter Uniformity Standard for Descriptors.

1. *Mandating Greater Uniformity Will Greatly Improve Schumer Box Disclosures.*

The Board's more prescriptive approach to credit card disclosures is an extremely important part of its proposal. In contrast to the previous approach, the current proposal mandates the order, language, font size, and format of key disclosures.

Mandating uniformity will produce many benefits. If the format is uniform it means that, as consumers gain experience with the new credit card disclosures, they will become more skilled at finding the information that is useful to them. Uniformity will thus help overcome the difficulty that consumers have in extracting information from disclosures, which the Board's consumer testing has documented.[27] A uniform format will also make it easier for consumers to make a head-to-head comparison of one credit card to another, which may increase beneficial competition on credit card terms.

Another laudable feature of the Board's proposal is that it requires the account-opening disclosures to include almost the same items of information as the consumer receives in the application or solicitation. (The account opening disclosures require a few additional pieces of information, but Proposed Comment § 226.5a(a)-2 allows creditors to include those additional items in the application and solicitation disclosures as well.) Getting the same information at both stages will expose and deter bait-and-switch tactics, because consumers will be able to compare the offered terms to the terms they actually receive. It will also make it easier for consumers to compare the terms of the credit cards they receive to other available cards.

Requiring specific terms to be used in the Schumer box is a particularly important element of uniformity. Through its consumer testing, the Board is determining what specific descriptors help consumers understand disclosures. After making these findings, it would make no sense to allow creditors to revert to descriptors that consumers do not understand. Requiring uniform language also prevents creditors from obscuring onerous terms by choosing less clear language to describe them.

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[26] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at 9, 11 (May 16, 2007).
[27] *See id.* at 18.

Mandating the format of disclosures will also save time and money for credit card issuers. An approach that allowed issuers to determine the format and language of disclosures would simply be a full employment bill for in-house legal departments. Mandating the format of disclosures also reduces creditors' potential liability, as there are fewer opportunities for them to make mistakes.

2. *The Board Should Explicitly Require that Disclosures Be Made in the Order Listed.*

One omission in the Board's proposal is that it is not crystal clear that the proposal mandates the *order* in which disclosures are presented. Such a requirement may be implicit in the proposed requirement in Proposed Reg. Z §§ 226.5a(a)(2)(i) and 226.6(b)(4)(i)(A) that the disclosures follow the "format" of the model forms, but it should be made explicit. The Board should also explicitly require *that the disclosures be made in the order* shown on the model forms.

Allowing creditors to vary the order of disclosures would enable them to bury disadvantageous terms in places where they will be least prominent. It would also undermine the goals of enabling consumers to find information quickly in the disclosures and helping them compare the terms of different credit cards.

3. *The Board Should Require a Stronger Standard Than "Substantially Similar" for the Schumer Box Headings.*

The requirement at Proposed Reg. Z §§ 226.5a(2)(i) and 226.6(b)(4)(i) that creditors use the headings set forth in the model form is a critical element of uniformity. The Board's consumer testing has shown that some descriptive terms are confusing to consumers.[28] After having developed a set of descriptive terms that consumers have been shown to understand, the Board should not allow creditors to use different terms. Allowing creditors to invent their own headings would inevitably result in divergent descriptors and would undermine the goals of increasing consumer understanding and facilitating head-to-head comparison of credit card terms.

For some disclosures, the Board's proposal requires the use of specific terms – "penalty rate," "grace period," and "required" insurance coverage. (Proposed Reg. Z § 226.5(a)(2)(iii)). Mandating specific language in this fashion will be very helpful to consumers.

However, for other disclosures the terms need only be "substantially similar" to the language used in the model forms. (Proposed Reg. Z §§ 226.5a(2)(i), 226.6(b)(4)(i); Proposed Comment § 226.5a(a)(2)-7, 226.6(b)(4)-3). The Board should require that all headings use language identical to those in the model form.

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[28] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at iii-vi (May 16, 2007) (testing of terms such as "variable rate," "fixed rate," "penalty APR," "minimum interest charge").

C. The Board Deserves Praise for Proposing a 10-Point Type Requirement for Schumer Box Disclosures, But Should Also Impose a Font-Size Requirement for Other Disclosures.

We support the requirement at Proposed Comment § 226.5(a)(1)-3 that creditors use a ten-point font for the disclosures that are required to be presented in tabular format. In response to the Board's ANPR on open-end credit, we submitted an example of a disclosure notice that was in no more than 4 ½-point type (the typeface was so small that it was difficult to measure accurately).[29] The use of an unreadable typeface makes a mockery of disclosure.

However, the Board should set a minimum font size for all disclosures, not just certain disclosures that it requires to be highlighted. In particular, under the Board's proposal, there are no font size requirements for account-opening disclosures that are not in the Schumer box. Nor are there font size requirements for change-in-term notices except for a few highlighted terms. Indeed, the Board is proposing to delete existing Comment 226.5a(a)(2)-1, which formerly imposed a very weak font size requirement that stated only that "disclosures in less than 8-point type would likely be too small" to satisfy the clear and conspicuous standard.

By deleting any font size requirement except for a few highlighted disclosures, the Board would condone and encourage the industry's practice of making these disclosures in unreadable type. Disclosures that consumers cannot read may fulfill a legalistic requirement, but if the goal is to communicate information they achieve nothing. Throughout the Board's consumer testing, consumers made it clear that they do not and cannot read disclosures that are presented in small typefaces.[30] The Board should restore Comment 226.5a(a)(2)-1, and strengthen it by rephrasing it to read "disclosures in less than *9-point* type *are* too small" to meet the clear and conspicuous standard. The Board should also move this comment to § 226.5(a), so that it is applicable to all disclosures, not just the disclosures governed by § 226.5a.

V. TIMING OF DISCLOSURES (REG. Z § 226.5(b))

A. Account Opening Disclosures.

1. *A Creditor's Assessment of Fees Should Not Constitute Acceptance of an Account.*

The Board has proposed language 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. Proposed Comment 226.5(b)(1)(i)-1 would require that the consumer must receive a billing statement and make a payment before being considered to have accepted the account. The Board has stated that this Proposed Comment would provide consumers "an opportunity to review their account-opening disclosures and decide whether to reject the account and decline to pay the fees." 72 Fed. Reg. at 32,971.

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[29]Attachment 2 to 2005 NCLC Comments.
[30] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at x, 11 (May 16, 2007).

We support the Board's proposed change. We also urge the Board to require creditors to disclose to consumers that they may reject the account and decline to pay the fees. As the Board rightly notes, this issue is particularly important with respect to subprime credit cards, which often impose enormous upfront fees when the account is opened. Consumers are unpleasantly surprised when they receive their credit cards to find the assessment of hundreds of dollars in fees on low-balance accounts. The ability to reject the account and decline payment of fees would help consumers to avoid the abuses of subprime cards. However, consumers need to be informed that they have this ability, and this disclosure must be made in a meaningful way.

We propose that in cases where the only activity on the account is the assessment of fees, that the creditor must disclose on the billing statement in the identification of transaction for those fees that "If you have not made any purchases or taken a cash advance yet, you have the right to reject the account and to decline paying this fee. If you reject the account, you will not be able to use this card and it will be canceled." The Board could limit this disclosure to subprime credit cards, *i.e.*, those cards required to make the special disclosure in Proposed Reg. Z § 226.5a(b)(16).

2. *Consumers Should Be Informed of the APR They Will Actually Be Receiving Before Initiating a Balance Transfer.*

The Board has revised the Commentary on timing of account opening disclosures with respect to balance transfers to accommodate its proposal to allow creditors to disclosure multiple APRs or a range of APRs in application or solicitation disclosures. Current Comment 226.5(b)(1)-5 requires the creditor to send the account opening disclosures before a balance transfer occurs. The Board has proposed changing this Comment (renumbered 226.5(b)(1)(i)-5) to require the disclosures be sent in time to allow the consumer the opportunity to cancel the transfer. This change was compelled because under the Board's proposal for application/solicitation disclosures, the creditor is permitted to disclose a range of APRs or multiple APRs in the tabular format. Thus, the consumer will not know at the time she is applying for the card and initiating the balance transfer what her actual APR will be.

We are extremely concerned that the Board's proposals taken together will have a significant adverse impact on consumers. As we discuss in Section VI.F, we are opposed to the general concept of permitting creditors to disclose a range of APRs or multiple APRs in the application/solicitation disclosures, permitting them to wait until account opening to disclose the actual APR that applies to an account. Consumers should be able to know what the APR is for the card they are signing up for before they are locked into the account. This is *especially true* with respect to balance transfers, where consumers often transfer balances of hundreds of dollars or more, thus committing themselves to significant liability under the terms of the account. Consumers should not be forced to make the decision to transfer hundreds of dollars in debt blindly, just so that is more convenient for creditors to engage in risk-based pricing.

The Board's proposal will permit creditors to play bait and switch. For example, the creditor could send a solicitation pitching "balance transfers as low as 0% APR", and disclose APRs of 0% 10% and 20% in the Schumer box. The application could include a box (as is common) for requesting a balance transfer. The creditor could then decide on the basis of the consumer's credit score to impose the 20% APR. The consumer is shocked to find that her balance will be transferred to a card with an APR of 20%, which might be even higher than her prior account.

Proposed Comment 226.5(b)(1)(i)-5 does include a new requirement that the creditor must send the account opening disclosures sufficiently in advance of the transfer to permit the consumer to cancel it. While the addition of this requirement might help a little, once consumers have taken an action, it is *much* harder both psychologically and practically to undo that transaction than to avoid it in the first place. A "negative option" or "opt out" right simply will not protect a consumer in this circumstance as much as a simple requirement to provide the actual APR – or at least the balance transfer APR – with the solicitation disclosures.

Furthermore, the Board has not established any disclosure requirements regarding the right to cancel the balance transfer. Thus, a consumer who is unpleasantly surprised by the actual APR will have no way on knowing that the balance transfer can be canceled. Even if creditors voluntarily disclose this right, which is unlikely if they are profiting from this practice, there are no formatting requirements to ensure that it is not disclosed in tiny print, hidden in a long document. Finally, there will be issues of timing required to meaningfully allow the consumer to cancel. How many days are sufficient, and how does the time for mailing figure into that time period? It would be simpler, clearer, and easier to require that the actual balance transfer APR be disclosed in the solicitation disclosures.

3. *Creditors Should Not Be Permitted to Delay Sending Account Opening Disclosures Until After an Account is Opened for Telephone Purchases.*

The Board has proposed a new exception for telephone sales involving open-end credit. Proposed Reg. Z § 226.5(b)(1)(iii) would permit retailers who establish open end credit plans to provide account opening disclosures after the first transaction (sale of the goods) if they (1) permit the consumer to return the goods and reject the plan after receiving the account opening disclosures and (2) inform consumers about this return policy.

We are strongly opposed to this exception for several reasons. First, as stated above, providing a right to cancel (opt out) after learning of unfavorable terms of credit is much less protective of consumers' rights than simply providing the information about the cost of credit ahead of time. Second, the consumer who returns the goods will be required to incur shipping charges to mail them back to the retailer, which is a cost that could be avoided if the consumer received the information first.

The reason cited for this telephone purchase exception is that retailers must delay the shipment of goods until the consumer has received the account opening disclosures. This seems to be a flimsy reason for depriving consumers of their right to know how much credit will cost them before becoming committed, for all practical purposes, to that credit.

Finally, we note that there are no formatting requirements for the disclosure of the right to return the goods and reject the plan. Thus, the proposal fails to ensure that the information is not disclosed in tiny print hidden in a long document. Also, there are timing issues if the consumer is to have a meaningful opportunity to return the goods. How many days are sufficient, and how does the time for mailing figure into that time period? It would be simpler, clearer, and easier to leave the current rule, which is that the account opening disclosures must be sent first.

B. Timing for Periodic Statements.

1. *An Account Should Be Considered "Uncollectible" Only if the Creditor or a Debt Collector Has Actually Ceased Collection Efforts.*

Currently, creditors are not required to send periodic statements on accounts that are "uncollectible." Reg. Z § 226.5(b)(2). The Board has requested comment on whether additional guidance would be helpful.

We believe that the Board should provide additional guidance regarding the term "uncollectible." The Board should clarify that an account is not "uncollectible" simply because the creditor has "charged off" the account, *i.e.*, has treated the account as a loan loss for accounting or safety and soundness requirements. Only if the creditor has ceased collection efforts, either directly or through a third party, may the account be deemed "uncollectible." Such an interpretation is only logical – a loan cannot be considered "uncollectible" if the creditor or debt collector is attempting to collect it.

The periodic statement is important to a consumer whose account is delinquent, but still subject to collection, because it shows what interest is accruing and whether the consumer's payments have been credited. Otherwise, the consumer may not receive information about either of these critical facts.

2. *The Board Deserves Praise for its Proposal to Limit "Collection Proceedings" to Court Actions or Other Adjudicatory Proceedings.*

Creditors are not required to provide periodic statements for accounts in which "delinquency collection proceedings" have been instituted. The Board has proposed adding Comment 226.5(b)(2)-3 to provide that a "delinquency collection proceeding" entails filing of a court action or other adjudicatory process with a third party. Proposed Comment 226.5(b)(2)-3 would also provide that assignment to a debt collector does not constitute instituting a collection action.

We strongly support this proposal. As we stated above, if a creditor (or a debt collector to whom a creditor has assigned a debt) is continuing to collect a debt, it should provide periodic statements, since the creditor or collector will often continue to impose finance charges on that debt.[31] The need for periodic statements is especially great in the case of "zombie" credit cards, in which debt collectors offer credit cards that revive previously delinquent credit card debt.[32] Consumers who receive these credit cards should certainly be entitled to periodic statements.

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[31] *See, e.g.*, Olvera v. Blitt & Gaines, P.C., 431 F.3d 285 (7th Cir. 2005) (assignee debt buyer permitted to collect interest at same rate as creditor).
[32] *See, e.g.*, Carbajal v. Capitol One, F.S.B., 2003 WL 22595265 (N.D. Ill. Nov. 10, 2003).

3. *The Board Should Ask Congress to Require that Creditors Mail Statements 25 Days Prior the Payment Due Date.*

TILA Section 1666c(a) requires creditors, if they provide a grace period, to mail the periodic statement 14 days before the grace period ends. The Board has asked whether it should ask Congress to increase this time period. Of course we support increasing the time period. Like the Board, we have learned of instances in which consumers received statements only a few days before the grace period ends. Indeed, if the creditor sends periodic statements by bulk mail, it may take up to three (3) weeks for delivery. We recommend that creditors who offer grace periods be required to send periodic statements at least 25 days before the grace period ends.

However, we believe that there are many other changes that the Board should seek from Congress, discussed in Section I above. Frankly, grace period issues tend to primarily impact convenience users of credit cards. These are consumers who have the means to pay off their balances every month and are therefore often higher income. Other legislative changes limiting fee and penalty rate abuses are far more critical on the priority list. Finally, a change that would benefit revolvers, as well as convenience users, would be to require that periodic statements be sent at least 25 days before the *payment due date*, not just the end of the grace period.

VI. CONTENT OF DISCLOSURES - THE BOARD'S PROPOSAL WILL IMPROVE THE CONTENT OF THE SCHUMER BOX AND ACCOUNT-OPENING DISCLOSURES, BUT ADDITIONAL REVISIONS ARE NECESSARY.

A. Introduction

The content of the Schumer box is extremely important. The terms disclosed in the Schumer box are likely the *only* terms that consumers will notice.[33] Relegating a disclosure to the area outside the table means that few consumers will ever find it and it will be subject to little if any competitive pressure. Credit terms that are difficult for consumers to detect evade competitive pressures and tend to become more and more unfavorable.

The Board's proposal to require more credit card fees to be included in the Schumer box is particularly important in light of the dramatic growth in fees as a source of credit card lenders' income. This growth of fees has likely been exacerbated by the existing rules, which allow many fees to be concealed in small print while the periodic rate is highlighted prominently.

More information can be communicated using a tabular format than a prose format, particularly if the tabular format is uniform so that consumers gain experience with it and learn where to find the information most important to them.[34] For this reason, the Schumer box, particularly with the Board's more prescriptive approach, can accommodate more information.

[33] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at x (May 16, 2007).
[34] *Id.* at 18.

There are still limits, however, on the amount of information that can be displayed without overwhelming the consumer with details. For credit terms that cannot be clearly and concisely communicated to consumers, but that are potentially abusive, disclosure is an ineffective approach. Instead, those terms should be substantively regulated.

Since the content of the Schumer box is nearly the same for applications/solicitations and at account opening, the comments that follow relate to both stages.

B. The Board Should Standardize the Language and Structure of the Regulation Regarding Schumer Box Disclosures.

For many of the Schumer box disclosures, there are subtle differences in the way the same disclosure is described in the application/solicitations regulation, Proposed Reg. Z § 226.5a(b), and the account opening regulation, Proposed Reg. Z § 226.6(b)(4). These differences create ambiguities that should be avoided by redrafting the two sections of the regulation so that they are more uniform.

For example, for applications and solicitations, the cash advance fees that must be disclosed in the Schumer box are described as "any fee imposed for an extension of credit in the form of cash or its equivalent." Proposed Reg. Z § 226.5a(b)(8). For account-opening disclosures, the cash advance charges that must be disclosed are described as "any transaction charge imposed … for cash advances." Proposed Reg. Z § 226.6(b)(4)(iii)(B). Does the specific limitation of the latter to any "transaction charge," while the former encompasses "any fee," mean that the former is broader? Does the use of the term "cash or its equivalent" in the former, while the latter refers only to "cash," mean that the latter is narrower? Probably not, but differences like this raise a host of questions that can easily be avoided by standardizing the language.

In addition to standardizing the language used to describe the disclosures, the Board should consider standardizing the order in which the Schumer box disclosures are addressed in Proposed Reg. Z §§ 226.5a(b) and 226.6(b)(4). The former lists them one by one, while the latter groups all the fees into a subcategory. The result is that the Schumer box section of the applications/solicitations regulation lists seventeen disclosures, while the Schumer box section of the account opening disclosures regulation lists ten. These differences do not affect consumers directly, since disclosures can be clear regardless of the complexity of the regulation requiring them. However, it would facilitate compliance and enforcement of the disclosure requirements if the format of the different sections of the regulation were more uniform.

C. The Board Should Consider Requiring Even Greater Uniformity Between the Schumer Box for Applications/Solicitations and Account Opening.

The Board's proposal requires *almost* the same Schumer box disclosures on applications/solicitations and at account opening. We recommend that the Board give serious consideration to requiring the very same items to be included at both stages.

It appears that the only two differences between the proposed Schumer box disclosures at the two stages are that: 1) foreign transaction fees must be disclosed at account opening but not on applications/solicitations (Proposed Reg. Z § 226.6(b)(4)(iii)(B)); and 2) a statement that the balance on a charge account is due upon billing is required on applications/solicitations but not at account opening (Proposed Reg. Z § 226.5a(b)(7)). The Board's rationales for these two differences are not very compelling (and, in fact, the section-by-section analysis does not set forth any rationale for requiring the charge account disclosure only on applications and solicitations). On the other hand, as discussed above, complete uniformity brings many benefits and efficiencies. We therefore recommend that the Board reevaluate the decision to introduce these minor differences between the disclosures required at the two stages.

D. The Board Has Made a Number of Sound Judgments Regarding the Items to Include in the Schumer Box, But Improvements Are Still Necessary.

The Board's proposal for the content Schumer box includes many significant improvements. However, there are several important deficiencies – the closed list of fees, the failure to require disclosure of security interests, the credit limit, the disclosure of a range of APRs or multiple APRs in applications/solicitations, and the weak approach to deceptive balance calculation and payment allocation methods.

The proposed list of items that must be disclosed in the Schumer box are reviewed one-by-one below, in the order listed in Proposed Reg. Z § 226.5a(b), concluding with a discussion of the one item, foreign transaction fees, that is required at account opening but not in applications and solicitations. Several items that require more lengthy discussion are only mentioned briefly here, and are discussed in more detail in Sections VI.E through VI.L of these comments.

Annual percentage rate (Proposed Reg. Z §§ 226.5a(b)(1) and 226.6(b)(4)(ii)). The Board's proposals regarding the Schumer box disclosure of the APR is discussed in Sections VI.E and VI.F of these comments.

Annual and other periodic fees (Proposed Reg. Z §§ 226.5a(b)(2)(i)) and 226.6(b)(4)(iii)(A)). It is important, as the Board has done, to continue the requirement that annual and other periodic fees be highlighted by disclosure in the Schumer box. It is true that annual fees have become less prominent in recent years, but that may be *because* Regulation Z has required that they be highlighted in the Schumer box. If Regulation Z allowed annual fees to be disclosed in a more obscure manner, they would likely grow once again.

The importance of continuing to require annual and other periodic fees to be disclosed is illustrated most clearly by the open-end payday loan product recently introduced (and even more recently prohibited by injunction) in Pennsylvania.[35] Borrowers were charged an annual interest rate of slightly less than 6% per year, but a *monthly* fee of $149.95, for a $500 line of credit. With the monthly fee, the annual percentage rate for this product is 365%, even for a borrower

[35] Pa. Dept. of Banking v. NCAS of Del., LLC, 2007 WL 2176116 (Pa. Commw. Ct. July 31, 2007).

who incurs the lowest possible finance charge by using the full $500 and paying the full balance in just one month.[36]

The Pennsylvania payday loan example illustrates how periodic fees can dwarf the interest rate. The Board is right to continue to require their prominent disclosure. It is also important, as the Board has proposed, to continue to require the annualized dollar amount to be disclosed. Otherwise, creditors could minimize the impact of periodic fees by disclosing just the monthly or quarterly charge, making it more difficult for consumers to make apple-to-apple comparisons.

Fees for issuance of credit card (Proposed Reg. Z §§ 226.5a(b)(2)(ii) and 226.6(b)(4)(iii)(A)). The Board has proposed, in Reg. Z § 226.5a(b)(2)(ii), to require disclosure in the Schumer box of fees for issuance of credit cards. We strongly support this important improvement to Regulation Z's disclosure requirements. As discussed in Section V.III of these comments, fees for issuance of credit cards play an important role in fraudulent subprime credit card marketing.

Minimum finance charge (Proposed Reg. Z §§ 226.5a(b)(3) and 226.6(b)(4)(iii)(D)). The Board proposes, in § 226.5a(b)(3), to retain the requirement that any minimum finance charge be included in the Schumer box disclosures. We support this decision. Even though minimum finance charges are relatively uncommon at present, it is likely that they would become more common and would grow in amount, and that predatory lenders would move to them, if they could be imposed without prominent disclosure.

Transaction charges (Proposed Reg. Z §§ 226.5a(b)(4) and 226.6(b)(4)(iii)(B)). The Board proposes, in Proposed Reg. Z § 226.5a(b)(4), to retain the existing requirement that transaction charges imposed by the card issuer for the use of the card for purchases be disclosed in the Schumer box. We support this decision. As with disclosure of minimum finance charges, moving this charge out of the Schumer box would encourage creditors to shift the cost of credit into transaction charges. Creditors would gain a competitive advantage by shifting more of the cost of credit to charges that consumers would be unlikely to notice.

Grace period or absence of a grace period (Proposed Reg. Z §§ 226.5a(b)(5) and 226.6(b)(4)(iv)). Grace periods are of great importance for the substantial portion of consumers who do not carry credit card balances. Continuing to require that the grace period—or the absence of a grace period—be highlighted by inclusion in the Schumer box will deter credit card issuers from deceiving these consumers.[37]

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[36] This is an unusual scenario, as the average payday loan borrower is unable to repay the debt so quickly. The open-end credit product is particularly likely to foster perpetual indebtedness, since the $149.95 fee will be charged every month unless the borrower not only pays off the balance but also acts affirmatively to cancel the line of credit.

[37] One disturbing effect of grace periods is that they increase the indirect subsidy that revolvers (a group composed disproportionately of low-income consumers) pay to non-revolvers. In order to make money from non-revolvers, credit card lenders impose interchange fees, which have to be large enough to cover both the transaction costs and the "float" that results from grace periods. Merchants recoup those interchange fees by increasing the price of goods that all consumers—both revolvers and non-revolvers—pay. However, this policy issue has no bearing on disclosure: grace periods should be accurately and clearly disclosed regardless of whether they are a good policy.

However, if the issuer does not provide a grace period, the Board should mandate specific language that draws the consumer's attention to this fact. Proposed Comment 226.6(b)(1)-1 allows issuers to conceal the absence of a grace period in a prose-y statement such as "interest begins on the date the transaction is posted to your account." Instead, the Board should require that issuers use language such as "no grace period."

Balance computation method (Proposed Reg. Z §§ 226.5a(b)(6) and 226.6(b)(4)(ix)). The balance computation method, which the proposed rule would move outside the Schumer box, is discussed in Section VI.I of these comments.

Statement that charge card payments are due upon billing. Proposed Reg. Z § 226.5a(b)(7) requires that the Schumer box for applications and solicitations for charge cards disclose that the consumer's payment is due upon receipt of the bill. This disclosure is not required in the Schumer box for account opening. The Board's section-by-section analysis does not mention § 226.5a(b)(7) or state a rationale for requiring it at the application/solicitation stage but not at account opening. It seems that this disclosure is of equal importance at account opening. In addition, even if the disclosure were of greater importance at one of the two stages, the benefits of uniformity discussed above probably outweigh any minor benefit that would be achieved by eliminating it at one stage.

Cash advance fees (Proposed Reg. Z §§ 226.5a(b)(8) and 226.6(b)(4)(iii)(B)). The Board's addition of cash advance fees to the Schumer box requirements is extremely important. Cash advances can be extremely expensive forms of credit, in large part because of the per-transaction fees. While the per-transaction fee alone does not express the true cost of credit, it is an important term that should be highlighted in the Schumer box.

Late payment fees (Proposed Reg. Z §§ 226.5a(b)(9) and 226.6(b)(4)(iii)(C)). Late payment fees have grown enormously, from an average of $14 in 1996 to $32 in 2004.[38] Penalty fee income grew from $1.7 billion in 1996 to $24.4 billion in 2004,[39] and now constitutes about 10% to 13% of profits for creditors.[40] Creditors have been accused of manipulating payment-posting times in order to generate late fees.[41] Over one third (35%) of cardholders were charged late fees in 2005.[42] Yet under current Reg. Z, late fees need not be highlighted in the Schumer box. We commend the Board for proposing to rectify this situation.

Over-limit fees (Proposed Reg. Z §§ 226.5a(b)(10) and 226.6(b)(4)(iii)(C)). Over-limit fees have perhaps been applied even more abusively than late fees. As discussed in Section VIII of these comments, over-limit fees are a key part of fraudulent subprime credit card schemes:

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[38] Cardweb.com, *Late Fees* (Jan. 28, 2005), at http://www.cardweb.com/cardtrak/news/2005/january/28a.html.
[39] Cardweb.com, *Fee Party* (Jan. 13, 2005), at http://www.cardweb.com/cardtrak/news/2005/january/13a.html.
[40] Government Accountability Office, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, GAO-06-929, September 2006, at 67 and 72, available at www.gao.gov/new.items/d06929.pdf.
[41] *In re* Providian Nat'l Bank, No. 2000-53 (Dept. of the Treasury, Office of the Comptroller of the Currency June 28, 2000), available at www.occ.treas.gov/FTP/EAs/ea2000-53.pdf.
[42] Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, GAO-06-929, at 33. September 2006, *available at* www.gao.gov/new.items/d06929.pdf

the consumer receives a card with a credit limit that is already almost completely consumed by up-front fees, so that virtually any use of the card will generate over-limit fees. Rather than being a source of credit, these cards are simply mechanisms for generating over-limit fee income for the creditor.

Like late charges, over-limit fees have grown dramatically in recent years, both in the amount of the fee and as a percentage of creditor income.[43] A significant deficiency of the current version of Reg. Z is that it does not require these fees to be highlighted in the Schumer box. We support the Board's proposal to require them to be included there. However, disclosure alone is insufficient. As discussed in Section I.B of these comments, the Board should exercise its authority under the FTC Act to prohibit over-limit fee abuses.

Balance transfer fees (Proposed Reg. Z §§ 226.5a(b)(11) and 226.6(b)(4)(iii)(B)). We support the Board's proposal to require disclosure of balance transfer fees in the Schumer box. Balance transfers are aggressively marketed. Yet determining the cost of a balance transfer is complex, particularly because payment allocation rules increase interest costs in a hidden way.[44] While balance transfer fees are only one piece of the equation, it is important to highlight them so that consumers have clear information about at least one piece of the cost of balance transfers.

Returned payment fees (Proposed Reg. Z §§ 226.5a(b)(12) and 226.6(b)(4)(iii)(C)). Returned payment fees are probably less common than the other fees the Board is proposing to require in the Schumer box. However, they disproportionately affect low-income consumers. In addition, a returned payment fee can trigger a penalty rate. For these reasons, we strongly support the Board's decision to require this disclosure in the Schumer box.

Cross-reference to penalty rate (Proposed Reg. Z §§ 226.5a(b)(13) and 226.6(b)(4)(iii)(C)). Penalty rates create a trap for consumers. Credit card issuers lure consumers with prominently-marketed low interest rates, but a high interest rate is waiting in the wings. If the consumer makes a single misstep, the high interest rate leaps into place.

We support the Board's proposal to require a cross-reference to the penalty rate along with the disclosure of the creditor's penalty fees. The Board's consumer testing showed that consumers did not always realize that they would have to pay not only a penalty fee but also possibly a penalty rate if they paid late, went over their credit limits, or incurred a returned check fee.[45] Making this clearer in credit card disclosures is a positive step. However, as discussed in Section XIII.B of these comments, disclosure is an insufficient approach to penalty rates, which need substantive regulation if not abolition.

Required insurance, debt cancellation or debt suspension coverage (Proposed Reg. Z §§ 226.5a(b)(14) and 226.6(b)(4)(v)). We support the proposal to require creditors to include a disclosure in the Schumer box if insurance, debt cancellation, or debt suspension coverage is required. However, as discussed in Section VI.H of these comments, we also urge the Board to

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[43] Cardweb.com, *Overlimit Fees* (Feb. 2, 2005), at http://www.cardweb.com/cardtrak/news/2005/february/2a.html; Cardweb.com, *Fee Party* (Jan. 13, 2005), at http://www.cardweb.com/cardtrak/news/2005/january/13a.html.
[44] *See* Section VI.I of these comments, *infra*.
[45] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at v (May 16, 2007).

require a disclosure in the Schumer box if the creditor requires a security deposit or intends to take a security interest in the items purchased.

Payment allocation disclosure (Proposed Reg. Z §§ 226.5a(b)(15) and 226.6(b)(4)(vi)). This issue is discussed in Section VI.J of these comments.

Disclosure of available credit ((Proposed Reg. Z §§ 226.5a(b)(16) and 226.6(b)(4)(vii)) . Proposed Reg. Z § 226.5a(b)(16), which would require special disclosures when 25% or more of the credit limit is consumed by up-front fees, is discussed in Section VIII of these comments.

Reference to Board's website (Proposed Reg. Z §§ 226.5a(b)(17) and 226.6(b)(4)(vii)). We support the requirement that a reference to the Board's website be included in the Schumer box. Credit card pricing and terms are complex, and it will be helpful to give consumers easy access to additional information. However, we suggest an alternative information source for those consumers who lack Internet access, such as a toll-free number at which consumers can obtain a free copy of similar information.

Foreign transaction fees. The proposed regulation requires foreign transaction fees to be included in the Schumer box only at account opening, but *prohibits* this disclosure in the Schumer box on applications and solicitations. Proposed Reg. Z §§ 226.5a(b)(4)(ii), 226.6(b)(4)(iii)(B). As noted in Section VI.C of these comments, we question the utility of this distinction. Consumers as well as the industry would be better served by eliminating the few differences between the disclosures required at the two stages.

E. Many of the Board's Proposals Regarding Disclosure of the Interest Rate are Unobjectionable, But It Should Improve the Font Requirement and Require a Disclosure Regarding Any Cap on Adjustable Rate Increases.

The Board is proposing a number of changes in the disclosure of the interest rate. Many of these are positive or neutral, but other portions of the proposal are troubling.

16-Point Font Requirement. The Board proposes to allow creditors to disclose the annual percentage rate for purchases in 16-point type instead of 18-point type. (Proposed Reg. Z. §§ 226.5a(b)(1), 226.6(b)(4)(ii)). Since the Board's consumer testing demonstrated that 16-point type was sufficient to attract consumers' attention, we have no quarrel with this decision.

However, the Board should explicitly prohibit creditors from disclosing temporary discounted rates in 16-point type. A teaser rate should not be presented on an equal footing with the permanent rate. Allowing a teaser rate to be disclosed as prominently as the permanent rate distracts consumers from the true cost of credit. In the alternative, if the Board does not explicitly prohibit disclosure of teaser rates in 16-point type, it should allow this only if the penalty rate is also disclosed in 16-point type.

Penalty rates. As discussed in Section VI.D, we applaud the Board's efforts to heighten and improve disclosure of penalty rates. We also support the requirement to include a brief description in the Schumer box of the specific event or events that may result in a penalty rate or in revocation of a discounted initial rate, and the subsequent rate that will apply. Proposed Reg. Z § 226.5(b)(1)(iv); Proposed Comment 226.5a(b)-4, -5; Proposed Model Forms G-10(B), G-10(C). Highlighting this information in a specific way makes this disclosure more meaningful than a useless generic statement that penalty rates may apply "under certain circumstances."

However, the Board has retained – and moved from the Commentary to Reg. Z – the statement that the creditor need not disclose the increased rate that would be imposed if credit privileges are permanently terminated. Proposed Reg. Z § 226.5a(b)((iv). This is inconsistent with the Board's other efforts to ensure that consumers are aware of penalty rates. Creditors should be required to disclose this information in the Schumer Box, at least if the rate is different than the penalty rate that otherwise applies.

Disclosure of periodic rate. The Board proposes to eliminate the requirement that the periodic rate, *i.e.* the monthly or daily rate, be separately disclosed. Proposed Reg. Z. § 226.5a(b)(1); Proposed Comment 226.6(b)(4)(ii)-1). We do not oppose this proposal. Since the periodic rate is the mathematical equivalent of the annual rate, it provides no additional information at the application/solicitation or account opening stage. Disclosing the periodic rate risks causing confusion, as consumers may inadvertently compare a monthly rate to an annual rate.

Variable rate disclosures. The Board's proposal for variable rate disclosures has some positive elements. We do not oppose the Board's proposal to eliminate details about the calculation of adjustable rates from the Schumer box. Proposed Reg. Z. §§ 226.5a(b)(1)(i), 226.6(b)(4)(ii)(A). The amount of the margin is certainly less important than the rate itself. As long as consumers know what the fully-indexed rate will be, they will be able to decide whether they are willing to pay that rate. How it is calculated – how many points above an index rate it is, and what index rate is used – is less germane. The Board's consumer testing also showed that some consumers misinterpreted the statement of the margin and thought it stated the rate they would pay.[46] On the other hand, a disclosure of "prime plus 7%" may be helpful to some consumers, as it concisely conveys whether they are getting a good rate or not.

Regardless of the Board's decision about disclosure of the margin, it should require creditors to disclose any cap on rate increases – or the absence of a cap – in the Schumer box. This information is highly germane to consumers, and it could be disclosed very succinctly as part of the variable rate disclosure, such as "your rate will vary based on the prime rate but will not exceed 25%" or "your rate will vary based on the prime rate, with no cap." Since the existence or non-existence of a cap on variable rate increases is a relatively simple concept to communicate and has a significant effect on consumers' economic risk, it should be highlighted in the Schumer box. Prominent disclosure might also induce competition on this important term. Instead of prohibiting this disclosure (Proposed Comment § 226.5a(b)(1)-2),[47] the Board should mandate it.

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[46]Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at iv (May 16, 2007).

[47] The discussion of Reg. Z § 226.5a(b)(1) in the Board's section-by-section analysis states: "the Board proposes to revise the Commentary to prohibit the disclosure of the rate floor and ceilings in the table." 72 Fed. Reg. at 32,977. We cannot find anything in the Proposed Commentary that does so, but we are assuming that we are either overlooking some part of the Commentary or that the Board intends to add this prohibition.

F. The Board Should Not Permit Creditors to Disclose a Range of Rates or Multiple Rates in Applications and Solicitations.

We strongly oppose the Board's Proposed Reg. Z § 226.5a(b)(1)(v), which would allow creditors to disclose a range of rates or multiple rates in applications and solicitations, so that the creditors can make a post-application review of the consumer's creditworthiness. Creditors would be permitted to delay disclosure of the actual rate until the consumer receives the account opening disclosures (and often the credit card). Instead, the Board should require that applications and solicitations disclose the actual interest rate that the creditor is offering.

The Board's own proposed model form reveals the absurdity of this proposal. Model Form G-10(B) presents the following as a model disclosure of the APR for purchases:

Annual Percentage Rate (APR) for Purchases	**8.99%** to **19.99%** when you open your account, based on your creditworthiness. After that, your APR will vary with the market based on the Prime Rate.

This disclosure provides no helpful information to the consumer. It does not tell the consumer what he or she is applying for. There is an 11% spread in these rates, which is a huge difference. On a $1,000 balance, that is an annual difference of over $100 in interest.

The Board's rule that the APR for purchases must be disclosed in 16-point type is a recognition that the APR is a key – if not *the* key – piece of information for consumers. It makes no sense to require this disclosure in 16-point type, and at the same time allow creditors to render the disclosure meaningless by disclosing a range of rates. Allowing such a meaningless disclosure not only permits bait-and-switch tactics, it promotes them.

Creditors' desire to engage in risk-based pricing is not an excuse for this approach. As an initial matter, basing credit terms on credit score information is deeply flawed: credit scores are based on credit reports that are riddled with inaccuracies,[48] and the predictive value of credit scores is questionable. Imposing unfavorable terms on consumers with lower credit scores tends to cause rather than predict default, and has a disparate racial impact.[49]

Nonetheless, if a creditor wants to use a credit score, it can do so before sending the consumer a solicitation, through prescreening. Or the creditor can offer a rate; if the consumer

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[48] *See* Section X.III.B, *infra*.

[49] Numerous studies have shown significant racial disparities in credit scoring. *See, e.g.*, Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006; Raphael W. Bostic, Paul S. Calem, and Susan M. Wachter, *Hitting the Wall: Credit as an Impediment to Homeownership*, Joint Center for Housing Studies of Harvard University, February 2004; Freddie Mac, *Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families*, September 1996, at 27.

does not qualify, the creditor can reject the application or make a counteroffer with a meaningful notice that the counteroffer was based on the consumer's credit score.

Regulation Z should be amended to require the Schumer box to disclose the actual interest rate (and the actual other terms) that the creditor is offering. The Board should delete Proposed Reg. Z § 226.5a(b)(v) and Proposed Comment 226.5a(b)(1)-5, and replace then with the following language:

> *In applications and solicitations the disclosure must reflect the actual terms offered, not a range of terms.*

G. The Board Should Not Rely Exclusively on a Closed List to Identify the Fees That Must be Disclosed in the Schumer Box.

As noted above, the Board's proposal will greatly improve the Schumer box by requiring disclosure of the fees that are most common today in credit cards. However, relying on a static list is a mistake in a market that is as changeable as the credit card market. The past decade has demonstrated creditors' inventiveness in devising new types of fees. Relying on a closed list to identify the fees that must be disclosed in the Schumer box gives creditors an incentive to invent new fees that can be charged without disclosing them so prominently.

We urge the Board to go beyond the closed list approach. In addition to the closed list of fees, any fee that a creditor charges to more than 5% of the cardholders of the card should be required to be disclosed in the Schumer box. This provision would give flexibility to Reg. Z, while still retaining precision.

H. The Board Should Require Creditors to Disclose Any Security Interest or Security Deposit in the Schumer Box.

We urge the Board to require a disclosure in the Schumer box if the creditor requires a security deposit or intends to take a security interest in the items purchased.

At present, the Board's proposal requires disclosure that the creditor will take a security interest in the items purchased only at account opening, not in applications and solicitations, and only outside the Schumer box. (Proposed Reg. Z § 226.6(c)(2)). In our experience, many consumers are completely unaware that a credit card issuer has taken a security interest in the items purchased. Allowing disclosure only at account opening, and only outside the Schumer box, would perpetuate this problem.

As to security deposits, they serve a function very similar to required insurance coverage. Like insurance coverage, it is an additional outlay by the consumer that reduces the creditor's risk. There is little rationale for requiring disclosure only of required insurance coverage but not a required security deposit. The fact that a security deposit will be required is a particularly important fact for the consumer to know before responding to an application or solicitation.

I. Instead of Proposing a Weak Disclosure, the Board Should Ban Deceptive Balance Calculation Methods.

The Board proposes to relegate the disclosure of the balance computation method to outside the Schumer box.[50] We support the Board's decision to delete this disclosure from the Schumer box, because the balance computation method is far too complex for meaningful disclosure. However, by treating the issue as solely a question of disclosure, the Board is abandoning any pretense of protecting consumers. Instead of throwing in the towel, the Board should use its authority under the FTC Act to prohibit abusive balance calculation methods.

The limits of disclosure are perfectly illustrated by balance calculation methods. The balance calculation methods used by creditors are mathematically complex. Their implications for a particular consumer are even more complex, as the effect depends on whether the consumer carries a balance and when the consumer makes payments. The Board's consumer testing showed that consumers do not understand balance calculation methods.[51]

Yet the balance calculation method can make a major difference in the cost of credit. As shown by a study by the Federal Reserve Bank of Philadelphia, a double-cycle balance calculation method can *double* the amount of interest charged for a month in which a consumer moves from a non-revolving to a revolving state.[52]

The fact that the balance calculation method is too complex for consumers to understand makes it a perfect device for creditors to use to increase the cost of credit. It is a term that can be added to a credit agreement without significant consumer awareness. Since it increases the cost of credit in an invisible way, it undermines other disclosures of the cost of credit.

The Board has proposed to remove the balance calculation method from the Schumer box. This step is unobjectionable, and in fact improves the Schumer box by deleting information that is not understandable or useful to consumers. But then, instead of devising a new approach, the Board is merely proposing to continue to require disclosure – a weaker disclosure that will make it even easier for creditors to impose abusive balance calculation methods.

Instead of requiring a weak, obscure disclosure of the balance calculation method, the Board should ban double-cycle balance calculation methods. These methods go against reasonable consumer expectations. While consumers expect that the interest charged will vary depending on the *amount* of the balance, few if any consumers expect that the interest will increase because the card was used in a month when their balance was zero.

[50] Proposed Reg. Z § 226.5a(b)(6) requires the balance computation method to be disclosed, but the prefatory language of § 226.5a(b) excludes it from the list of disclosures that are required to be in the Schumer box.
[51] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at v-vi, 10 (May 16, 2007).
[52] Mark Furletti, Credit Card Pricing Developments and Their Disclosure at 16 (Federal Reserve Bank of Philadelphia Jan. 2003).

In the alternative, the Board should have considered the "Energy Star" approach suggested by the Center for Responsible Lending.[53] This approach would have rated the balance calculation methods from most consumer-friendly to least consumer-friendly. Such an approach would at least give consumers some usable information, and might give a competitive advantage to creditors who used more consumer-friendly balance calculation methods. The Board's section-by-section analysis does not indicate that it even considered this approach.

J. The Board Should Ban Deceptive Payment Allocation Rules.

The Board deserves praise for recognizing that payment allocation rules need to be addressed. Many card issuers allocate payments first to balances that carry the lowest APR. This practice has two negative effects for consumers. First, for a consumer who transfers a balance to a credit card, it effectively eliminates the grace period on purchases.

Second, this practice increases the interest that consumers pay, because the balance is disproportionately weighted toward the high-rate credit. For example, one consumer, Mr. W, applied for a Capital One credit card advertising a 1.9% APR for balance transfers. Upon transferring over $7,000 to the new account, Mr. W was assessed a balance transfer fee of about $250. The balance transfer fee was recorded as a "purchase," and the standard APR of 18.9% for purchases was then applied to that fee. After Mr. W had made several payments, he noticed that the outstanding balance on the transfer fee was actually above $250. Apparently, only a tiny fraction of his monthly payment was being applied to the balance transfer fee, so the balance on that charge was actually increasing under the 18.9% APR while the balance on the transferred amount at the much lower APR was declining. Mr. W determined that if he had continued paying the amounts he was paying on the card, the Purchases balance would not have been paid off for over three years, and he could have paid nearly $250 in additional interest on the transfer fee of $250. The true cost of the balance transfer was about 7.9%, far different from the 1.9% advertised by Capital One.[54]

The Board proposes to require a disclosure of the payment allocation method in the Schumer box. *See* Proposed Reg. Z § 226.5a(b)(15). The Board deserves praise for recognizing that payment allocation rules can increase the cost of credit in a way that is undetectable by consumers. The Board's proposed disclosure, however, addresses only one of the two effects of payment allocation rules—the effective nullification of the grace period. In addition, as the preceding example shows, payment allocation rules increase the total amount of interest that consumers pay, effectively nullifying the low interest rates that creditors trumpet in their solicitations.

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[53] 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 [hereinafter "2005 CRL Comments"].

[54] Taken from *Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, and Their Impact on Consumers: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 110th Cong. (2007) (statement of Michael D. Donovan, Partner, Donavan Searles, LLC), *available at* www.consumerlaw.org/action_agenda/credit_cards/content/DonovanTestimony.pdf.

The Board also mistakenly focuses on just one narrow subset of situations in which payment allocation rules increase the cost of credit in a hidden way. The proposed disclosure would only apply when 1) the balance transfer or cash advance rate is the *lower rate*; and 2) the low balance transfer or cash advance rate is a *temporary rate*. Instead, the Board should have addressed *any* payment allocation rule that applies payments first to lower-rate credit, regardless of the type of product the lower rate applies to and regardless of whether the lower rate is temporary or permanent.

More fundamentally, a disclosure approach is unlikely to have any success, as the payment allocation concept and its effect on the cost of credit is simply too complex to communicate to consumers. In fact, trying to explain the effect of payment allocation rules would likely detract from the other disclosures by creating information overload. The Board's consumer testing, which focused only on the effect on grace periods, found that most consumers did not understand its attempted explanation.[55]

Instead of a disclosure approach, the Board should use its authority under TILA or the FTC Act to ban deceptive payment allocation rules. Allocating payments first to balances that carry the lowest APR is deceptive because it makes the disclosed APR and grace period illusory.

There is ample precedent for regulating payment allocation methods. As long ago as 1968, the Uniform Consumer Credit Code included a requirement that creditors use a first-in-first-out method for allocating payments among multiple purchases. Many states have adopted such a rule, either by adopting the UCCC or as part of another statute.[56] Because of federal preemption and rate exportation, these statutes currently have limited effect, yet there has been no action on the federal level to replace them with comparable protections. The Board should address this vacuum by prohibiting payment allocation methods that apply the consumer's payments first to the lowest-rate credit.

Both TILA and the FTC Act give the Board authority to regulate payment allocation methods. 15 U.S.C. § 1666c provides: "Payments received from an obligor under an open end consumer credit plan by the creditor shall be posted promptly to the obligor's account *as specified in regulations of the Board*." This broad language gives the Board statutory authority to regulate not only the time at which the payment is credited to the obligor's account, but also the manner in which it is allocated.

If the Board, however, requires a disclosure of the payment allocation rules, the disclosure should be greatly simplified. It should not attempt to explain *how* the payment allocation method affects the consumer's cost of credit, but should just state *what* that effect is.

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[55] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at vi, 31, 40 (May 16, 2007).

[56] *States adopting UCCC FIFO rule*: Colo. Rev. Stat. §§ 5-5-103, 5-3-203; Idaho Code Ann. § 28-43-303; Ind. Code § 24-4.5-2-409; Iowa Code § 537.3303; Kan. Stat. Ann. § 16a-3-303; Me. Rev. Stat. Ann. tit. 9-A, § 3-303; Okla. Stat. tit. 14A, §§ 2-409, 5-103(4); Wis. Stat. § 422.418; Wyo. Stat. Ann. § 40-14-243.
Other state FIFO laws: Ala. Code § 5-19-9; Alaska Stat. § 45.10.100; Cal. Civ. Code § 1804.3; D.C. Code § 28-3805, 28-3813; Fla. Stat. § 520.351; Haw. Rev. Stat. §§ 476-17, 476-24; Mass. Gen. Laws ch. 255D, § 18; N.J. Stat. Ann. § 17:16C-29 (West); N.M. Stat. § 56-1-2(M); N.C. Gen. Stat. § 25A-27; N.D. Cent. Code § 9-12-07; Ohio Rev. Code Ann. § 1317.071 (West); W.Va. Code § 46A-2-109.

For example, a more effective disclosure would be: "Because of the way that we apply your payments, if you carry a balance that includes any purchases, all of the interest you pay will be computed at the rate for purchases (___%), and you will not be able to take advantage of any grace period." Indeed, the statement about the effect on grace periods might even be eliminated, as it duplicates the statement required by Proposed Comment 226.5a(b)(5) that the consumer will have a grace period "provided you have paid your previous balance in full by the due date."

K. The Credit Limit Should Be Included in the Schumer Box for Applications and Solicitations and Account-Opening Disclosures.

The Board should require the consumer's credit limit to be included in the account-opening disclosures. The Board's consumer testing showed that the credit limit was the first item consumers listed, other than comparing the terms to those that had been offered, when asked what information was important to them at account opening.[57] Credit limits are also a key part of the bait-and-switch schemes that characterize fraudulent subprime credit card marketing.[58] The Board should not rely on creditors to provide this information voluntarily, but should mandate it.

L. The Board Should Require That All Fees Be Disclosed at Account Opening.

The Board has proposed not to require creditors to disclose all fees in writing at account opening (Proposed Reg. Z § 226.5(b)(1)(ii)). Instead, the proposal would allow creditors to disclose the fee orally or in writing. Further, the fees would only have to be disclosed at some point before they were imposed, not at account opening. This is a dangerous and ill-advised proposal.

The Board's decision to require only certain fees to be disclosed in the Schumer box is understandable. Giving the specifics regarding all fees, no matter how rarely-imposed, could overwhelm the more important disclosures in the Schumer box. However, the fact that some fees are not disclosed in the Schumer box does not mean that they should not be disclosed in writing somewhere in the account-opening materials.

First, allowing creditors to impose fees without a written disclosure does creditors no favor. As the saying goes, an oral contract is not worth the paper it is printed on. Encouraging creditors to impose fees on consumers without written documentation invites litigation.

Second, dispensing with the requirement of disclosure of all fees would truly serve consumers poorly. One of consumers' biggest complaints about credit cards is the ever-increasing number and dollar amount of junk fees. The Board's proposal will encourage creditors to develop new fees that are not on the list required to be disclosed. Creditors will shift their profit structure to rely on revenue from these new fees, moving away from the ones that the proposed rule requires to be disclosed in the table. Like the children's arcade game of "whack a

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[57] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at 6 (May 16, 2007).
[58] *See* OCC Advisory Letter AL 2004-10 (Sept. 14, 2004), *available at* www.occ.treas.gov/ftp/advisory/2004-10.doc.

mole," efforts to address current abusive fees will be for naught as new fees pop up to replace the current ones.

This is especially true in the subprime context, where creditors often impose steep fees when the account is first opened or during the first few months. The consumers may eventually cancel the card due to high fees, but by then they have racked up significant debt caused by junk fees. For example, under the Board's proposal, a subprime creditor could impose a $100 "calculation fee" at the end of the first billing cycle, ostensibly a fee for the cost of making the mathematical calculations to prepare the periodic statement. It could avoid disclosing the fee in the account opening disclosures, avoid disclosing it in writing, and would only need to do so orally right before it started charging the fee.

The Board's proposal might even allow sucker pricing of fees, with the individual employee having discretion about the amount of the fee to be charged a particular consumer. In other contexts, when individual employees have discretion about the amount to charge a customer, serious credit discrimination problems have arisen.[59] Requiring a written list of fees to be included in the account-opening disclosures would prevent discriminatory imposition of fees.

Requiring creditors to include a complete list of fees in the account-opening disclosures would also mean that consumers could review those fees when evaluating how to use the account. For example, the list might include various fees for special payment methods, so a consumer could compare them and avoid the most expensive methods.

Oral disclosure of the amount of a fee at the time a consumer is about to incur it is good business practice. It would benefit consumers if the Board required oral disclosure when the consumer is dealing directly with the creditor and is taking a step that will incur a fee. But this should not be the only disclosure of the fee. The Board's proposal would open a gaping loophole, to the detriment of both consumers and, in the long term, creditors.

Finally, we note that the Board discusses how "as new services (and associated charges) are developed, the proposal minimizes risk of civil liability associated with the determination as to whether a fee is a finance charge or an other charge, or is not covered by TILA at all." 72 Fed Reg. at 32,955 Yet considerations to minimize liability risks should not play a role in the Board's decisions to interpret TILA, which is intended to protect consumers. The Act itself, 15 U.S.C. § 1637(a)(5), requires that all charges be disclosed before the first transaction. The Board's proposal flies in the face of this statutory mandate. We urge the Board to withdraw this ill-advised proposal.

M. The Board's Proposals Regarding the Scope of the Rules for Applications and Solicitations Make Some Improvements, but More Improvements are Necessary.

1. *The Board's Revision of the Definition of "Solicitation" to Include Firm Offers of Credit Is an Improvement*.

[59] *See, e.g.*, Coleman v. GMAC, 220 F.R.D. 64 (M.D. Tenn. 2004).

The Board has proposed revising the definition of "solicitation" at Reg. Z § 226.5a(a)(1) to include a "firm offer of credit" under Section 604(c) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(c). We support this proposal. If a creditor has accessed the personal financial information of consumers in the form of a prescreened list, and is offering them a credit card on that basis, the consumer should be provided with the solicitation disclosures.

The intrusion upon privacy represented by prescreening should at least entitle a consumer to receive critical information about the product being offered. Given that consumers who have not been subject to prescreening, but merely receive an application, are required to receive such disclosures, providing disclosures to consumers who are prescreened is only fair.

2. *The Board's Proposal Leaves Enormous Loopholes for Telephone Applications and Solicitations.*

The Board is proposing to leave an enormous loophole that will enable fraudulent subprime credit card marketers to continue their deceptive practices. Existing Reg. Z § 226.5a(d) requires that, when a credit card application is initiated by telephone, the card issuer need only disclose the items listed in Reg. Z § 226.5a(b)(1) through (7). The proposed regulation leaves this section unchanged.

As an initial matter, we believe the Board should require that all applications be made in writing, as discussed in Section XVI.A.1. While a telemarketer could pitch the card over the phone, the consumer would be required to sign an application to ensure that he or she actually applied for the card, and not some thief or errant household member.

When credit cards are marketed by telephone, the Board's failure to amend Reg. Z § 226.5a(d) means that the telemarketer will not be required to disclose critically important fees such as the cash advance fee, the late payment fee, the over-limit fee, and the balance transfer fee. Nor will the telemarketer have to disclose the penalty rate, or any insurance required. *The telemarketer will not even have to make the special disclosure of the reduced credit limit that is the foundation of most fraudulent subprime credit card schemes*.

These omissions create a gaping loophole. Since subprime credit cards are aggressively marketed by telephone, the Board's failure to require these disclosures in telephone solicitations means that they will be omitted precisely in the situations where they are most needed.

The Board's proposal is also flawed by its failure to require oral disclosures if the consumer rather than the creditor initiates the telephone call. *See* Proposed Reg. Z § 226.5a(d)(1). Why are these consumers less deserving of basic information about the credit card? What purpose does it serve to leave these consumers uninformed about the terms of credit?

The failure to require disclosures when consumers call creditors is particularly unfortunate in light of the continuing loopholes in "take-one" solicitations. The Board's proposal includes one improvement in "take-one" solicitations: it eliminates the option of a narrative description of the credit terms. (Proposed Reg. Z § 226.5a(e)). However, the Board's proposal continues to allow creditors to distribute "take-one" solicitations that merely invite the consumer to call. (Proposed Reg. Z § 226.5a(e)(2)). When the consumer calls, Regulation Z, even with the proposed revisions, only requires the creditor to disclose the information that the consumer specifically requests. (Proposed Reg. Z § 226.5a(e)(3)). The creditor is under no obligation to disclose *any* information other than that which the consumer is astute enough to request specifically. Disclosures of key terms are not required even if the marketer succeeds in selling the consumer the card as part of the call.

In light of these concerns, the Board should replace Proposed Reg. Z § 226.5a(d)(1) with:

> *The card issuer shall disclose orally the information in paragraphs (b)(1) through (b)(16) in a telephone application or solicitation, whether initiated by the card issuer or by the consumer*.

Another flaw in the Board's treatment of telephone transactions is that it does not propose any changes to Reg. Z § 226.5a(d)(2), which allows a credit card issuer to dispense completely with oral disclosures if it delivers the application/solicitation disclosures to the consumer along with a disclosure that the consumer need not accept the card or pay any fee unless the consumer uses the card. These disclosures are required no later than the date the card is delivered. The Board should require the creditor to disclose this information *in the mailing that delivers the card*, and should impose requirements that will ensure that the disclosures are very prominent. Otherwise, creditors may make these disclosures in separate mailings, in an obscure part of the cover letter with the card, or in other ways that are designed not to attract the consumer's attention.

VII. THE BOARD'S PROPOSAL FOR ELECTRONIC DISCLOSURES WOULD REDUCE IMPORTANT PROTECTIONS

A. The Board's Proposal Does Not Fulfill Key Requirements for Electronic Disclosures

The Board has proposed changes for electronic disclosures at

- Reg. Z § 226.5(a)(1)(iii)
- Reg. Z § 226.5a(a)(2)(v) and (vi)(B)
- Reg. Z § 226.5a(c)
- Reg. Z § 226.16(c)

As currently proposed, these changes would result in critical reductions in the essential disclosures of TILA for open-end credit. These changes are not necessary – electronic commerce and electronic communications can be easily facilitated without the loss of these critical consumer protections.

Essentially, the Board proposes to allow electronic disclosures to replace writings "subject to compliance with (E-Sign)" except for solicitations and advertisements, in which case the proposal is to allow electronic disclosures without compliance with E-Sign. We have grave concerns with these proposals – they threaten to make it even more difficult for consumers to rely on the information they receive about their open-end credit accounts.

There are four overarching principles that must be applied whenever electronic disclosures are permitted to replace paper records:

1. The electronic records must be provided in a format which can be printed and retained.

2. The electronic records 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.

3. The power of the Internet should increase the reliability and timeliness of the information contained in the disclosures as well as the delivery of this information.

4. Electronic records should only be permitted when the transaction is entirely electronic, and should be prohibited as a replacement for the required disclosures when the parties are transacting business in person. This is an essential provision to prevent a deceptive combination of an oral sales pitch and an electronic disclosure of different terms than those promised.

1. *The Electronic Records Must Be Provided in a Format Which Can Be Printed and Retained.*

The disclosures required for open-end credit are required to be provided in writing, in a form that the consumer may keep. That same requirement must be specifically articulated and applied to electronic disclosures that are permitted to replace the written disclosures. The requirement that the consumer be able to keep the disclosures is a basic requirement of the underlying regulation. The Board needs to reassert the application of this requirement in electronic transactions.

Current Reg. Z § 226.5 specifically requires of disclosures for open-end credit that –

> The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep.

Proposed Reg. Z § 226.5(a)(1)(iii) omits this longstanding principle on the delivery of consumer disclosures. The proposed rule does not require that the electronic disclosures be actually delivered to the consumer, and it also fails to require the electronic records be in a form that the consumer may keep. Instead electronic records can be provided on a website in a form that is neither downloadable nor printable.

Moreover, the Board has proposed to delete even the current minimal requirement in the Interim Regulations that electronic disclosures remain on the provider's website for 90 days. This means that under these proposed rules, a provider of critical disclosures could satisfy the requirement to deliver cost of credit and payment information, including any rights to cancel a transaction, by posting this information on the Internet for just 30, 10, or even one day! If the consumer is unable to download the information, or to print it, during the short posting window, the consumer is out of luck.

While E-Sign does include some requirements about the ability to retain information that is provided electronically in place of a writing, the protection is more of a defensive measure than an affirmative obligation:

> (e) Accuracy and ability to retain contracts and other records. Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction . . . be in writing the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.
>
> 15 U.S.C. § 7001(e).

This measure does not clearly and unequivocally require that electronic records be provided in a way that the consumer can keep them. Instead, it simply sets up a defense for the consumer relating to the terms of the record if the consumer can prove that the record was not provided in a manner which assured its "accurate reproduction." While E-Sign's requirement is important and valuable, it is not the same as a direct obligation on the part of the person required to provide the disclosure to ensure that retention is possible. The omission of such an obligation from the proposed regulations thus is a substantial diminution in protection from the current interim rules.

The Board recognizes that E-Sign is a "self effectuating statute." However, E-Sign's requirements for electronic disclosures only apply if the electronic disclosures are in place of a writing. As the Board proposes to permit disclosures to be provided electronically, E-Sign's technical requirements may be deemed to no longer be required in each instance. The Board's job is to implement the provisions of TILA. In this implementation, the Board's requirements must clearly articulate that, when the disclosures required by these laws are delivered by electronic records, the underlying requirements of the consumer protection laws are clearly applicable – which requires that the electronic records of these disclosures be retainable by the consumer.

An example of the potential issues which might arise if the Board does not clarify this requirement might be helpful here.

> <u>Example</u>. Consumer John Smith goes on line and electronically applies for open-end credit from ABC Bank. John Smith goes through E-Sign's consumer consent process (affirmatively demonstrating that he can access information in the electronic form that ABC Bank will use to provide the disclosures required by Truth in Lending and other applicable federal and state laws). The entire transaction is conducted on-line, and the disclosures required to be provided relating to the cost of credit and the repayment terms are simply displayed on the computer screen when Mr. Smith accesses them.

Mr. Smith tries to save to his hard drive the information displayed on his screen during the process, but the website does not permit this. He also tries to print out the disclosures, but this is not possible either. As a result, Mr. Smith is unable to retain the disclosures, either electronically or by printing them out.

This problem can be entirely addressed by adding a few words everywhere electronic disclosures are expressly permitted. Whenever "electronic form" appears in the regulation, the words "which can be electronically retained and printed" should be added. We recommend that the disclosures be capable of both retention and printing. A credit card loan is likely to have a longer duration than the lifespan of a home computer, and restricting consumers to downloading without an option to print only increases the likelihood that at some later time when the consumer needs to review the disclosures they will no longer be available for that purpose.

The E-Sign retention protection may not accomplish the same goal. Instead it would only be called into play if there were a subsequent dispute between Mr. Smith and ABC Bank regarding the terms of the disclosure. In that instance, once Mr. Smith shows that the disclosure had not been provided in a manner which could be retained and accurately reproduced, the court would be required to find that the disclosure was not provided. This invites litigation; it is a negative way of ensuring that essential consumer protection disclosures be provided in the proper format;[60] and it provides no value to consumers who attempt to, or need to, resolve their disputes short of a court proceeding.

The language in each of the regulations permitting written disclosures to be replaced with electronic disclosures must be amended to clarify that electronic disclosures must be delivered in a format which is both printable and downloadable.

2. *The Electronic Records Must be Delivered to the Consumer, Which Means Emailing Them to the Consumer's Designated Email Address.*

The Board properly de-links provision of electronic information by paper mail. It is definitely a step forward for the Board to prohibit delivery by snail-mail of a website address from which a consumer is to recover disclosures. However, the Board must also require that every required disclosure provided electronically must also be provided by email.

It is hard to fathom why electronic disclosures which replace written disclosures should not always be emailed to the consumer, unless there is a problem of failure of address. Emailing information, receipts, and notices of delivery to consumers is the common method of doing business in today's web-based marketplace. Airline tickets, computers, food, clothes, books, bills for cell phone usage, banking notices, and more are all routinely emailed to consumers at their designated email addresses. Once emailed, those records are accessible and retainable by

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[60] The E-Sign protection in § 7001(e) also goes to the format of the disclosure itself. E-Sign's language simply denies the validity of the electronic record if it is not originally provided in a form which can be "accurately reproduced for later reference by all parties. If the disclosure were provided in an electronic medium which allowed easy modification -- a word processing format, rather than a PDF or picture format -- the provider could not later challenge the terms in the electronic record, because it had not satisfied this original requirement to provide the record in a manner which itself required the production to be accurate.

the consumer, for a long period of time. Providing electronic records by email is the only truly reliable way to ensure that consumers actually access, receive and are able to keep those critical consumer protection disclosures required by these federal laws.

The Board indicates that a fear of "phishing" is the reason why email delivery will not be required. But phishing requires the consumer to respond to the "phishing" email by providing information by email or a website to a merchant or financial institution. We do not disagree with the implicit recommendation by the Board that information gathered from the consumer be provided on a website. We only disagree with the explicit exclusion of email as the method of providing disclosures to the consumer. Disclosures that do not contain specific sensitive information such as a PIN or password simply do not pose a phishing risk.

To ensure that electronic records actually are received by consumers, and to assist in consumers' ability to retain these important records, the Board should require that all electronic records which replace written documents be emailed to the consumer (assuming compliance with E-Sign's consumer consent provisions) at the address provided for that purpose by the consumer.

3. *The Power of the Internet Should Increase the Reliability and Timeliness of the Information Contained in the Disclosures as well as the Delivery of this Information.*

One of the primary advantages of electronic communication is that it is instantaneous and allows for completely up to date information to be shared between all parties. The availability and price of airline tickets, the cost of funds at financial institutions, the amount of money we have in our bank accounts, is information that is currently instantaneously available on the Internet. TIL disclosures should be similarly up to date when provided electronically.

The Board proposes to continue to allow a variable annual percentage rate disclosed on the card issuer's website to be considered accurate so long as it was in effect 30 days before it was viewed by the public. Proposed Reg. Z § 226.5a(c)(2)(i). This proposal is outdated, ignores the power and pace of the Web, and cannot be justified. The card issuer has the current information about the APR. The card issuer can tell its employees and contractors the real -- currently applicable -- APR at any particular time. The card issuer should also be telling consumers the APR for which they are considering applying, or else a primary reason for shopping on line -- timeliness of information -- is lost.

The Board should require electronic provision of disclosures to carry the most obvious of benefits to consumers -- timeliness of information. If there is a concern that a timeliness requirement would require every day or intra-day updating, the requirement could be structured to require update within 24, or even 72, hours of when the offered rate is changed.

4. *Electronic Records Should Only be Permitted When the Transaction is Entirely Electronic, and Should be Prohibited as a Replacement for the Required Disclosures When the Parties are Transacting Business in Person.*

The Board implicitly recognizes that electronic communications are intended to take place only when the parties are communicating electronically -- and should not be in place of paper writings. This recognition is illustrated by the Board's deletion of a mailed website address as a method of providing the consumer with information on how to obtain disclosures.

However, the Board needs to go further and explicitly state that electronic disclosures should only be permitted to be provided to consumers when they are not transacting business in person. We are concerned that unless this is made explicit, consumers who are standing in a merchant's place of business may be sent to an electronic kiosk to obtain federal disclosure information. The merchant might argue that the consumer could successfully satisfy E-Sign's consent requirements standing in a store. However, there would be no guarantee that the consumer actually has access to these disclosures at a later time, or the ability to retain the documents at that time.

To avoid these problems, the Board should clearly state in these Final Rules that electronic disclosures are only appropriate when the parties are transacting business electronically, and are not permitted when the parties are dealing in person.

B. The Board Should Withdraw its Electronic Disclosure Proposals.

While we respect the desire of the Board to consider in which instances the Board's regulations need not address specific electronic disclosure issues due to the general application of E-Sign, these proposed regulations do not simply change the source of the governing law, they also reduce the available protections. The proposed regulations also freeze into place out-of-date concepts such as 30 day old advertising of outdated rates, even on a web page that is updated as a matter of course on a daily or other frequent basis. We urge the Board to withdraw its electronic disclosure proposals and rethink how to mesh them with E-Sign so that consumers are not exposed to new risks and new burdens.

VIII. SPECIAL SUBPRIME CREDIT CARD PROTECTIONS

A. The Abuses of Subprime Cards Must Be Addressed with More Than Disclosure.

Subprime credit cards are an especially abusive form of credit cards for which the Board rightly proposes special protections. However, these protections will not be enough to protect consumers from the traps of subprime cards.

The abuses of subprime cards often mirror those of mainstream credit cards, such as exorbitant fees, sky high penalty rates, and hair trigger tactics for imposing penalty terms. The difference is that subprime cards start off abusive while mainstream cards only become so after the consumer has reached a certain level of indebtedness and is locked into the account. Thus, some of the protections needed for subprime cards are the same ones that the Board has failed to establish for credit card consumers in general, discussed in Section I.

However, some subprime cards go beyond mainstream abuses to become essentially sham products. These subprime card issuers are not really engaged in the business of credit; they are engaged in scams to fleece consumers of their money by charging them enormous fees for little or no credit. For example, subprime credit card issuer CompuCredit offers a card with a $70 credit limit which imposes $20 in issuance fees and a $19 per month maintenance fee, resulting in available credit of $31 when the consumer receives the card.[61]

These low credit limits combined with exorbitant fees also result in the consumer going over the credit limit with virtually any use of the card. Thus, over-limit fees are a key part of fraudulent subprime credit card schemes.

These types of cards simply need to be banned, and the Board has the power to do so using its authority under the Federal Trade Commission Act. The Board should declare that subprime cards are presumed to be unfair if the fees consume more than 25% of the cardholder's credit line.

B. Disclosure of Fees for Issuance or Availability.

The Board has proposed one method of addressing subprime cards by improving the disclosures for issuance and availability of a credit card. In particular, the Board proposes to amend Reg. Z § 226.5a(b)(2) to require:

1. If a fee is periodic (e.g., monthly), the creditor must disclose the amount of the fee, how often it is imposed, and the annualized amount;
2. If the fee is a one-time fee, the creditor must disclose that fact;
3. If the fee is an application fee, it must be disclosed in the table required for application or solicitation disclosures.

We support the first and third proposed changes, and have no objection to the second. These changes may help some consumers better understand the costs of a subprime card. In general, the first proposed change is a good idea to avoid consumer misunderstanding as to when a periodic fee is assessed and how much it will be. The third proposed change will help consumers for the reason stated by the Board – consumers should be aware of high application fees when shopping for credit and deciding whether to apply.

However, these changes are but a small component in any set of protections that would be necessary to help consumers avoid the abuses of subprime cards.

C. The Board's Proposed Special Subprime Credit Card Disclosure Should Be Strengthened.

The Board has proposed requiring a special disclosure for subprime and other high fee credit cards. Proposed Reg. Z § 226.5a(b)(16) would require the creditor to disclose when fees and security deposits consume more than 25% of the minimum credit limit applicable to the card. The fees that would count toward this 25% would be fees for issuance or availability of the card.

[61] https://www.purposemoney.com/imagineterms.do.

In general, we support the concept of a disclosure for cards in which the issuance or availability fees consume a significant portion of the credit limit. However, to provide meaningful protection, the proposed rules must be revised in the following ways:

- Threshold - the threshold for disclosure should be lower. A creditor should be required to reveal when fees consume more than 5% of the credit line.
- Optional fees – the Board has proposed that optional fees not be counted toward the 25% threshold. However, one of the biggest abuses with subprime credit cards has been the imposition of fees for allegedly optional services that are really not optional. For example, the first enforcement case against a subprime issuer was against Providian. One of the abusive practices that Providian was accused of was advertising a "no annual fee" card that required the purchase of a $156 per year credit protection policy.[62] All so-called optional fees must be included in the 25% threshold.
- Other fees – the Board has asked whether any other fees should be counted toward the 25% threshold. We have recently conducted an extensive review of subprime credit cards and their terms. This review has revealed that subprime creditors charge other fees, such as an "acceptance" fee. While these fees presumably would be considered fees for issuance or availability, the Board should add language to prevent creditors from avoiding inclusion in the threshold by calling the fee something else. We propose that the Board require that a fee be included in the threshold if it is charged before the first use of the card and does not involve a balance transfer, cash advance, purchase, or other discrete transaction.
- Format and language of disclosure – we found the special disclosure included in proposed Model Form G-10(C) to be difficult to understand, especially because of the length of the text, which came across as boilerplate. We recommend that the language be shortened and a percentage be disclosed, as follows:

  > "AVAILABLE CREDIT: The fees charged when you open this account will be $182 (or $197 with an additional card), which is 73% (or 79% with an additional card) of the minimum credit limit of $250. If you receive a $250 credit limit, you will have $68 in available credit (or $53 with an additional card)."

  > Also, we recommend that the disclosure be listed *after* (not before) the list of setup and maintenance fees.
- Security deposit - we believe that a security deposit should not be charged to the account at all, and thus its inclusion into the threshold should be moot. We believe the Board should prohibit the security deposit from being charged to the account as an unfair practice. The OCC has issued guidance disapproving of this practice, stating that "this type of product carries a potential for consumer abuse that raises significant compliance and reputation risks." OCC Advisory Letter AL 2004-4 (April 28, 2004).

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[62] *In re* Providian Nat'l Bank, No. 2000-53 (Dept. of the Treasury, Office of the Comptroller of the Currency June 28, 2000), available at www.occ.treas.gov/FTP/EAs/ea2000-53.pdf.

Finally, we believe that the "available credit" disclosure, while an improvement, is not enough to protect consumers. In addition to the policy recommendations discussed in Section I and at the beginning of this section, there are a number of other steps the Board could take. For example, the Board should address advertisements for subprime cards. The same "available credit" disclosure should be included in advertisements, especially in the solicitation letter for direct mail solicitations and Internet offers. Also, as discussed in Section V.A.1, we urge the Board to require creditors to prominently disclose that a consumer can reject an account if the only activity on the account is the assessment of fees.

D. Subprime Credit Card Disclosure for Account Opening Disclosures Should Reflect the Actual Terms of Credit Received by the Consumer.

The Board has proposed adding Reg. Z § 226.6(b)(4)(vii), which is essentially the disclosure as required by Proposed Reg. Z § 226.5a(b)(16) regarding when fees consume more than 25% of the available credit limit. We support this disclosure in general, but have the same suggestions and concerns as stated above. In addition, we have one further suggestion:

- Since the creditor will have established the consumer's credit limit by the time of the account opening disclosures, the special "available credit" disclosure should refer to the consumer's actual credit limit. For example, the disclosure should state:

  "AVAILABLE CREDIT: The fees charged when you open this account will be $182 (or $197 with an additional card), which is 73% (or 79% with an additional card) of your credit limit of $250. You will have $68 in available credit (or $53 with an additional card)."

IX. SPURIOUS OPEN-END CREDIT

A. The Proposed Changes are an Improvement, But They Need to be Strengthened.

We appreciate the Board's willingness to make improvements to Regulation Z aimed at curbing the market abuses relating to spurious open-end credit. We believe that the proposed amendment to the advertising rule, §226.16(b) is such an improvement, and, we support it, with only one minor change.

Limiting the changes to the advertising provisions, however, reduces the potential for effectiveness of the change in two ways. The first relates to the definition of advertising, which excludes specific transaction "negotiations."[63] These "negotiations" may be the first time payments are discussed. In fact, one consequence of limiting the proposed change to the advertising rules is that it may encourage this class of merchants to avoid mention of payments until the "negotiations" stage. The second is that by limiting the change to advertising, there is no private remedy for violations. While the offices of the state Attorneys General who have struggled for over a decade over this issue will appreciate and utilize such a change, public

[63] "Negotiating" contracts in these context is a misnomer, as terms are typically not negotiable.

enforcement as the sole enforcement tool is unlikely to be adequate due to insufficient resources.[64]

We recommend the following to address these remaining problems.

B. Eliminate the Adjective "Minimum" as a Trigger for the Disclosures in Proposed Reg. Z 226.16(b)(2).

As the Board notes in its section-by-section analysis, advertisements with misleading payment information indeed are part of the problem of spurious open-end credit. 72 Fed Reg. at 32,961. We support the requirement that the information in the ads should include the total of payments and the time necessary for paying off the purchase at the contractual minimum payment. This requirement is only triggered, however, if the ad states a "minimum monthly payment."

While it is preferable that this information be presented in any ad for credit to finance specific goods or services, we recommend at least that the additional disclosures be triggered simply when *a* payment amount is specified, not only when the "minimum" monthly payment amount is included.

Unfortunately, any loophole will, rest assured, be seized upon. Undoubtedly there will be ads specifying some payment level other than the minimum and then fail to give the additional information. CRL provided an example in their comments of a $2400 purchase price at 18% with a 2% minimum payment requirement, which started at $48.[65] Even at a flat $50 per month, it would still take 7 years to pay-off that sale -- as long as a typical car loan, and a very long time for a water conditioner.

C. Provide Comparable Disclosures at the Account-Opening Stage.

While we strongly support the early disclosure of the full purchase price at the contractual minimum, we again urge that the provision be part of the account opening disclosures, for there may well be a sales pitch without an "advertisement," as Reg. Z defines that term. Existing Comment § 226.2(a)(2)(ii) states that the term "advertisement" does not include "direct personal contacts, such as follow-up letters, cost estimates for individual consumers, or oral or written communication relation to the negotiation of a specific

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[64] We note, too, that new uncertainties about the extent to which federal regulators may assert that exclusive "visitation" authority extends to third party agents of banks, as well as to the banks themselves, may impede the states' right to enforce deceptive sales practices concerning financing in this context. (The extent to which the benefits of preemption applies to third party agents is an issue still to be resolved after the Supreme Court's decision in *Wachovia v. Watters*, and the extent to which the states may enforce non-preempted law against whatever entities can claim the protection of preemption is similarly still an open question, *cf.* Watters v. Wachovia Bank, N.A. 127 S.Ct. 1559 (2007)**.** *See generally* Christopher Peterson, *Preemption, Agency Cost Theory and Predatory Lending by Banking Agents*, American University Law Review, Vol. 56, at 515 (2007)**.** In any event, at least until the courts or Congress finally determine the parameters, the uncertainties may complicate states' public enforcement against the third party agents arranging such credit card financing for these sales, making it all the more critical that alternative route of private enforcement remain available.
[65] *See* 2005 CRL Comments at 29.

transaction." Thus, adding the proposed disclosures only to advertisements, but not to account opening, leaves a huge loophole.

At a minimum, these disclosure requirements should be added to account opening requirements of Reg. Z § 226.6 for "off-premises" sales, as the FTC Right to Cancel rule defines the term.[66] A consumer's visit with the off-premises seller who starts with the sales pitch immediately by-passes the "advertisement" requirements completely. For these consumers, minimum payment information in the subsequent periodic statement is too late –the three-day right to cancel door-to-door sales will have passed. (And, of course, undermining that legal right of consumers is part of the strategic goal for using spurious open-end credit in these transactions in the first place. The price tag for the sale doesn't show up until the three-day right to cancel has long passed.)

In CRL's comments to the ANPR, we urged that the information be provided in any account opening established to finance purchases that are equal or nearly equal to the credit limit. We continue to believe that the arguments that legitimate merchants are harmed would be disadvantaged are short-sighted and erroneous. As we noted before, it is spurious open-end credit itself which is anti-competitive, not the efforts to curb it. Merchants with competitively priced services and merchandise, offering competitively priced financing, have nothing to fear from informed consumers.[67]

Finally, and crucially, there will be more incentives for creditors and related merchants to comply with the law if a parallel provision is included in Reg. Z § 226.6. Consumers will have redress under 15 U.S.C. § 1640, which they will not have if the requirement is limited to the advertisement provisions.

X. PERIODIC STATEMENTS (REG. Z § 226.7) - THE BOARD'S PROPOSED CHANGES TO THE PERIODIC STATEMENT HAVE POSITIVE ELEMENTS, BUT DISCLOSURE OF THE EFFECTIVE APR IS OF UTMOST IMPORTANCE AND MUST BE RETAINED.

A. Many of the Board's Proposals for the Format and Content of the Periodic Will Improve Its Usefulness for Consumers, Although Certain Improvements Are Needed.

1. *The Board's More Prescriptive Approach is Greatly Needed.*

A number of aspects of the Board's proposals for the format and content of the periodic statement will improve its usefulness for consumers. First, we commend the Board for its decision to be more prescriptive regarding the format of the periodic statement. The Board's

[66] The FTC's Trade Practices rule, 16 C.F.R. § 429, gives buyers of off-premises sales the right to cancel within three business days. All 50 states have comparable state laws. *See* National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 5.8.2.2, n. 2539 (6th ed. 2004 and Supp.).
[67] 2005 CRL Comments at 27.

consumer testing has shown that certain changes in the format of periodic statements will make the information easier for consumers to understand. Testing and refining the best formats would be a waste of time if the Board did not require creditors to use those formats.

The Board is also proposing to require creditors to use a uniform term – "annual percentage rate" on the periodic statement. Proposed Reg. Z § 226.7(b)(4)(i). We commend this proposal. The Board's consumer testing showed a poor level of consumer understanding of basic consumer finance. Allowing creditors to use different terms to describe the same thing only contributes to consumer confusion.

2. *Grouping Fees Together and Providing Year-to-Date Totals Will Be a Very Positive Change.*

We applaud the Board's proposal to require that fees be grouped together on the periodic statement, identified by feature or type, and itemized, and that year-to-date totals be required. Proposed Reg. Z § 226.7(b)(6)(iv). The Board's consumer testing showed that this method of presenting the fees made the information more accessible and more usable for consumers. Abusive imposition of fees is a major problem in credit card lending. Segregating and highlighting fees in this manner is likely to make consumers more aware of them and, in turn, better able to avoid them.

3. *The Board Should Prohibit Disclosure on the Periodic Statement of Promotional Rates That Have Not Actually Been Applied.*

The Board also proposes to allow creditors not to disclose a promotional rate that has not actually been applied during the period the statement covers. Proposed Reg. Z § 226.7(b)(4)(ii). For example, a creditor might normally charge 18% interest on cash advances, but might offer a 2% rate for a limited time. If the consumer had not actually taken advantage of the 2% promotional rate, the Board's proposal would allow the creditor not to disclose the 2% rate on the periodic statement. We urge the Board to go farther, and *prohibit* creditors from disclosing a promotional rate that has not actually been applied. The Board's consumer testing has shown that disclosing multiple percentage rates confuses consumers. (For example, when the margin for an adjustable rate was disclosed on applications and solicitations, some consumers mistook it as the rate they would be charged.[68]) Allowing creditors to include temporary rates on periodic statements that have not actually been applied to the consumer's account only adds to this confusion. Of course, if the creditor wants to promote use of the temporary rate, it can include separate advertisements with the periodic statement.

4. *Eliminating the Information That Would Enable Consumers To Check Calculations is Questionable.*

The Board is proposing to delete the requirement that several terms be disclosed that help consumers check the calculations on their periodic statements. First, by adding Proposed Reg. Z § 226.7(b)(4), applicable only to non-home equity plans, it is proposing to delete the requirement that the periodic rate be disclosed. Instead, the creditor would be required only to disclose the

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[68] Macro International, Inc., Design and Testing of Effective Truth in Lending Disclosures at iv (May 16, 2007).

annual percentage rate. However, the periodic rate is useful to consumers if they want to check the calculation of their interest charges, as otherwise consumers have to translate the annual rate into a monthly rate.

Second, the Board is proposing to allow creditors not to disclose information about the balance calculation method. Instead, creditors may give consumers a toll-free number to call for this information. Proposed Reg. Z § 226.7(b)(5).

We did not oppose prohibiting disclosure of the periodic rate in application/solicitations and at account opening. (See Section VI.E of these comments). The information is not useful to consumers then, and merely duplicates – and obscures – the disclosure of the annual interest rate. When the consumer receives the periodic statement, however, the periodic rate *is* of some use, because at this point the consumer has used the card and there is likely a balance to which the periodic rate has been applied. Providing the periodic rate at this point makes it easier for consumers to do the calculations to check the calculation.

Likewise, we agree with the Board that prominent disclosure of the balance calculation method in application/solicitations and at account opening is unnecessary. (See Section VI.I of these comments). However, when the consumer receives a periodic statement this information is useful, as it is the second piece of the puzzle necessary for the consumer to check the creditor's calculations.

We urge the Board to continue to require that this information be provided on the periodic statement. Since it will be of use only to consumers who try to check the calculations, it need not be highlighted, but it should appear somewhere on the statement.

If the Board nonetheless decides to allow creditors to provide a toll-free number instead of this information, we urge the Board to expand the requirement. First, when a consumer calls the toll-free number, the creditor should be required to offer to mail the consumer a document that provides the complete set of rules for calculating the balance and applying the periodic rate. Second, all creditors should be required to include this information on their websites.

5. *Removing Percentage-Based Insurance Charges from the APR Disclosure Is Reasonable Only If the Board Continues to Require Disclosure of the Effective APR.*

The Board is proposing to eliminate Comment § 226.7(a)(4)-3, which requires percentage-based insurance charges to be included in determining the annual percentage rate figure. The Board's rationale is that consumers conceptualize fees separately from interest, and a charge for insurance is more like a fee even when it is calculated as a percentage of the balance.

Just as the question "Is orange more like red or more like yellow?" can be answered correctly either way, either way of treating percentage-based insurance charges has some merit. Excluding percentage-based insurance charges from the "nominal" annual percentage rate may be reasonable, ***but only if the disclosure of the effective APR is retained.***

If the Board adopts its alternative proposal to eliminate the requirement of disclosure of the effective APR – a proposal that we strongly oppose – then excluding percentage-based insurance charges from the nominal APR on periodic statements would deprive consumers of very important information. It would mean that creditors could significantly understate the percentage that consumers had to pay every month for the privilege of carrying a balance. Thus, we strongly oppose the removal of percentage-based insurance charges from the APR disclosure if the Board adopts its ill-advised alternative proposal to eliminate the effective APR disclosure. Removing percentage-based insurance charges from the APR would then be just one more way in which revised Regulation Z would enable creditors to conceal the true costs of credit from consumers.

B. Elimination of the Effective APR Will Dramatically Weaken TIL Disclosures for Open-End Credit, and the Board Has Not Established Adequate Reasons to Flout Congress's Direct Command.

As we discuss in detail in Section XI below, we are extremely and utterly opposed to the elimination of the effective APR from periodic statements. Without the effective APR, the entire proposed rule significantly weakens the protections of TILA for open-end credit. The effective APR is explicitly mandated for periodic statements by Sections 1606(a)(2) and 1637(b)(6) of TILA. The Board should respect this explicit statutory directive.

C. The Due Date Disclosed on the Periodic Statement Should Be the Date After Which the Creditor Imposes Any Negative Consequences.

The 2005 Bankruptcy Amendments require creditors to disclose on the periodic statement the earliest date on which a late payment fee may be charged.[69] The Board's proposal to implement this requirement (Proposed Reg. Z § 226.7(b)(11)) properly requires disclosure not just of the earliest date on which a late fee may be charged, but also the earliest date on which a penalty rate will be imposed, whichever is earlier. This is important because some creditors could use an earlier date for imposing a penalty rate. If the disclosed date related only to the late fee, it would be a trap for consumers, who would be unlikely to imagine that the creditor would treat a payment received by the disclosed date as late for purposes of penalty rates.

However, we urge the Board to broaden the rule so that it requires the disclosure of the earliest date after which the creditor has the right to impose *any* negative consequences. While late charges and penalty rates are currently the predominant negative consequences imposed for late payments, the credit card industry has shown great inventiveness in devising new fees and terms. Limiting the rule to current industry practices is likely to leave consumers unprotected. We therefore recommend that Proposed Reg. Z § 226.7(b)(11)(i)(A) be revised to read:

> *(B) The due date for a payment, if a late payment fee, penalty rate, or other negative consequence may be imposed.*

We also commend the Board for requiring the creditor to disclose not just the amount of the late fee, but also the amount of the penalty rate. (Proposed Reg. Z § 226.7(b)(11)(i)(C)).

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[69] 15 U.S.C. § 1637(b)(12).

As discussed in Section I, however, disclosure alone is an insufficient approach to the problem of late charges and penalty rates. Late charges have mushroomed so that they are now profit centers, instead of being set in an amount that recoups the creditor's actual costs. Penalty rates are a trap for consumers. Instead of merely requiring disclosure, the Board should tackle substantive regulation of these terms.

D. The Board's Approach to Cutoff Times Is Inadequate.

Proposed Reg. Z § 226.7(b)(11)(i)(B) requires creditors to disclose their cut-off time on the periodic statement if it is earlier than 5:00 PM. This requirement is an improvement over the current situation, which requires no cut-off time disclosure, but it is only a slight improvement.

In its ANPR, the Board asked for comment on whether it should require that payments be credited as of the date received. The Board should have proposed such a rule, which would clearly be within its authority under 15 U.S.C. § 1666c.

Cut-off times offer creditors the opportunity to manipulate payments in order to increase late fees and penalty rates. They also cause consumers a high level of frustration and a sense of helplessness. Consumers lose control of the timing of their payment once they deposit the check in the mail. The length of time the postal service takes to deliver the check to the creditor may vary significantly and unpredictably. Once the check reaches the creditor's mailbox, it may arrive early in the morning or late in the afternoon – again, all beyond the consumer's control. The creditor's automated processing system may reject the check, requiring more time-consuming hand processing, because the check became wrinkled in the mail or similar factors that are beyond the consumer's control. Furthermore, creditors usually charge for quicker methods of payments such as authorizing a bank debit by telephone.

The Board should adopt a rule that requires creditors to credit the payment to the consumer's account as of the postmark date on the payment. The postmark date is a reliable and fair measure of when the payment was made. Using the postmark date would mean that consumers were not penalized by circumstances beyond their control. The Internal Revenue Service accepts the postmark date as the date of payment for taxes, so it should be acceptable for credit card payments as well.[70]

In the alternative, we strongly urge the Board to adopt a rule that payments must be credited on the date received. The rule should define the date received as the date the payment was delivered to a post office box or other physical location controlled by the creditor or the creditor's payment processor. Otherwise, creditors could evade the rule by emptying their post office boxes only once a day, very early in the morning.

If the Board adopted a rule that required payments to be credited as of the date received, this would not require creditors to process all payments on the date received. It would simply mean that, regardless of the date the creditor processed a payment, it would have to be credited to the consumer's account as of the date received. For example, if a consumer's check was

[70] *See* Internal Revenue Service, Publication 17, *available at* www.irs.gov/pub/irs-pdf/p17.pdf.

rejected by the creditor's automated processing equipment because it became wrinkled in the mail, processing it manually might require an additional work day. Once it was manually processed, it would be credited to the account as of the date received, not as of the date the manual processing was completed.

Even the Board's proposed disclosure rule is flawed. Proposed Reg. Z § 226.7(b)(11)(i)(B) requires disclosure of the creditor's cut-off time if it is "before 5 p.m." The proposed regulation does not include any explanation of whether the Board is referring to 5 p.m. in the creditor's or the consumer's time zone. For example, a cut off time of 5 p.m. Eastern time is 2 p.m. Pacific time. Further, when a creditor is required to disclose a cut-off time (because it uses a time earlier than 5 p.m.), the proposed regulation does not require it to indicate the time zone that applies to the cut-off time. These omissions are likely to cause consumer confusion.

E. Disclosure of Billing Error Address –Electronic Notices of Disputes Should Preserve the Consumer's Billing Error Rights.

The Board has proposed amending the Comment regarding disclosure of the address to which consumers must sending billing error notices. Currently, a creditor may list a telephone number in this disclosure, but must warn consumers that telephoning will not preserve the consumer's billing error rights. Proposed Comment 226.7(b)(9)-2 (renumbered from Comment 226.7(k)-2) would address notification by email or website, warning consumers that notifying the creditor of a billing error by those means will not preserve the consumer's rights (unless the creditor has agreed to accept electronic delivery of billing error notices). While we support this change, we believe the Board should go further.

First, we think the Board should discourage a policy not to accept electronic delivery of dispute notices– electronic notices are "in writing" and one would think it would be easier for the creditor to accept notices via email or website than by postal mail. Second, we believe that if a creditor provides a special method for submitting disputes on-line, it must be required to accept them for purposes of preserving billing error rights. For example, some creditors have developed on-line dispute forms when consumers view their transactions over the Internet. Other creditors may use a special email address for disputes. If a creditor provides these specific channels for consumers to send disputes (as opposed to a general email address or comment form for all complaints), it should be required to accept disputes sent to them as preserving billing error rights. At a minimum, if the creditor does not consider these electronic notices adequate to preserve billing error rights, the creditor should be required to prominently disclose on the same webpage as the on-line dispute form or email address that sending a dispute using this channel does not preserve billing error rights.

XI. THE EFFECTIVE APR IS A CRITICAL YARDSTICK AND SHOULD BE STRENGTHENED, NOT ELIMINATED

A. Disclosure Of The Effective APR Is Of Utmost Importance And Must Be Retained

1. *Overview.*

We strongly urge the Board to retain the disclosure of the effective APR. To abandon that disclosure would be nothing less than declaring defeat and discarding the first principle underlying TILA: a transparent, standardized, and "fully-loaded" price tag.

The Act was a response to inconsistent, chaotic, and inherently deceptive methods of calculating the price tag, which, in turn, undermined genuine price competition and impeded informed consumer use. Non-standard ways of computing interest, along with unbundled and proliferating fees were the two primary hurdles.[71] Truth in Lending's core purpose is to assure that consumers have a transparent, standardized price tag.

The industry's shift to complex fee-based pricing makes comparison shopping difficult. However, an "all-inclusive" APR on the periodic statement that reflects both rate-based costs and fees costs helps consumers focus on the real price tag and should foster a competitive marketplace.

A fee-inclusive APR is the closest a credit card customer gets to a "fully-loaded" price tag. Eliminating it not only would *hamper* consumer appreciation of the full cost of credit, its elimination would also contribute to a shift to more fees, a fact that even an industry trade group admitted: "[a] trade association commenter concedes a policy argument for retaining the effective APR as a hedge against creditors shifting their pricing from periodic rates to transaction-triggered fees and charges."[72]

It is possible to craft a comprehensible disclosure, and it is more important now than ever.

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[71] *See, e.g., Consumer Credit Protection Act: Hearings Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency on H.R. 11601*, 90th Cong. 168-71, 142 (1967)(testimony of James L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System) (paying $300 for $150 television set "is too much."); 109 Cong. Rec. 2027 (1963)(Senator Douglas, the original proponent of TILA, noted that some creditors "compound the camouflaging of credit by loading on all sorts of extraneous fees, such as exorbitant fees for credit life insurance, excessive fees for credit investigation, and all sorts of loan processing fees which rightfully should be included in the percentage rate statement so that any percentage rate quoted is meaningless and deceptive."). *See also* National Consumer Law Center, *Truth in Lending* § 1.1.1 (5th ed. 2003).

[72] 72 Fed. Reg. 32,948, 32,998 (June 14, 2007). *See also* Ralph J. Rohner & Thomas A. Durkin, *TILA "Finance" and "Other" Charges in Open-End Credit: The Cost-of-Credit Principle Applied to Charges for Optional Products or Services,*17 LOY. CONS. L. REV. 137, 150 (2005) ("As the credit industry unbundles, and proliferates, its pricing components and charges for various products, it is attractive to the industry to keep as many components as possible off the TILA chessboard. Consumerists and other observers, in turn, worry that the fragmentation of pricing components into non-finance charge categories threatens the basic integrity of the TILA disclosure policy and its approach to 'the cost of credit.' It is the disclosure of the cost of credit, after all, that underlies TILA in the first place."). These authors, however, propose a finance charge definition not supported by the Act.

2. The "Fee-Inclusive APR" is the Best Indicator of an Account's Cost in Today's Complex Market.

As we noted in our initial comments, when TILA was passed, the price tag chaos was primarily in the closed-end market.[73] Over the past 15 to 20 years, the pricing chaos has come to pervade the open-end market. The "punitive" fees have become a much greater part of the account cost ("relatively low (around $10) and rarely assessed 15 years ago, are now significantly higher (nearly $40 at major issuers) and paid by approximately half of all cardholders during a given year**.**"[74] There has also been extraordinary fee proliferation, as issuers introduced many new fees, "and have relied more heavily on fees to supplement lower interest revenues."[75] Finally, any given account can have multiple APRs: "Today a single cardholder's balance can be subjected to cash advance APRs, balance transfer APRs, introductory APRs, promotional purchase APRs, and promotional 'life of loan' APRs."[76]

In comments submitted in response to the 2005 ANPR, the Center for Responsible Lending noted that non-interest fee income was nearly 1/3 of total revenue by 2003.[77] The consequence, of course, is that an increasingly significant share of the consumers' costs are attributable to these unbundled, non-interest fees. The goal of standardized, "unit pricing," – the goal of transparency -- is significantly undermined if fees are excluded from the price tag just when a burgeoning chunk of that price is composed of those fees.

In short, it is more important now than ever to have an accurate, fully-loaded price tag that reflects the consumers' actual use. "Today, a consumer may have five or more APRs and an extensive menu of punitive and service-based fees associated with her account. As a result of this change, the 'cost' of a credit card for any given consumer depends on multiple factors, including the types of balances the consumer revolves, the card-based services on which the consumer relies, and the care with which the consumer manages his or her account."[78] This means that increasingly, it is the effective APR, not the nominal APR, which actually explains what consumers are really paying for revolving credit.[79]

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[73] This was primarily due to the fact that the credit card industry was in its nascent stages. At the time of TILA's passage, Congress noted that revolving credit debt approximated $5.3 billion in September of 1967. H.R. Rep. No. 1040 (1967), 1967 WL 4174, *reprinted in* 1968 U.S.C.C.A.N. 1962, 1967. As of 2006, credit card debt reached approximately 86% of revolving debt (total revolving debt as the end of 2006 exceeded $1.5 trillion, according to the Federal Reserve Statistical Release G. 19) and by itself accounted for 30% of all non-mortgage consumer credit. Oct. Debt, Cardweb.com, Dec. 11, 2006, http://www.cardweb.com/cardtrak/news/2006/december/11a.html. Between 1990 and 2005 alone, credit card debt increased 238%. Gov't Accountability Office, GAO-06-929, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosure to Consumers* 57 (2006), *available at* http://www.gao.gov/new.items/d06929.pdf.
[74] Mark Furletti and Christopher Ody, *Another Look at Credit Card Pricing and Its Disclosure: Is the Semi-Annual Pricing Data Reported by Credit Card Issuers to the Fed Helpful to Consumers or Researchers?"* 5-6, Discussion Paper, Payments Card Center, Federal Reserve Bank of Philadelphia (July 2006) [hereinafter "Furletti & Ody, *Credit Card Pricing*"]
[75] *Id* at 6.
[76] *Id.*
[77] 2005 CRL Comments at 6.
[78] Furletti & Ody, *Credit Card Pricing*, at 9.
[79] Furletti and Ody, *Credit Card Pricing*, make this point in discussing the weaknesses both for consumers and researchers in using the nominal APRs derived from the Terms of Credit Card Plan semi-annual survey.

It is a business decision that the industry made to make pricing more complex. It is more than disingenuous to then use that complexity as an excuse to say that a comprehensive price tag is "too complicated" to explain to consumers. Furthermore, we note that developing the software capacity to monitor such a complex account pricing system is undoubtedly significant. With respect to the Board request for comments on the potential benefits and costs of its proposal to include the fee-inclusive APR, it seems that here, too, it would be disingenuous for the industry to create the complexity, spend the money to implement it, then claim it would be too costly to tote up all those costs for a "final sale price tag" for that month. The primary cost is in developing the complexity in the first place, not in adding the final comprehensive price tag at the end of the process.

3. Eliminating the Effective APR Will Encourage Development of Predatory Open-End Products, Like Open-End Payday Loans.

The confusion argument relied upon by the Board is the same one often used by high cost lenders, such as payday lenders, to challenge the concept of APR. And the Board's proposal provides ample incentives for payday lender to convert their predatory loan products into open end credit. These payday lenders could charge only fixed or transaction fees and thus disclose the APR on these products as 0%. Such products are already on the market. About a year ago, payday lender Advance America began offering an open end payday loan in Pennsylvania, which carried a "participation fee" of $149.95 *per month* for a credit limit of $500 and a 5.98% periodic rate APR.[80] This translates into an effective APR of over **350%**. Yet without the effective APR, Advance America would never need to disclose that 350% effective APR and would only disclose a 5.98% periodic APR.

Indeed, the Board admits in its analysis that an effective APR is the best way to provide information about an open end credit product that did not impose periodic interest charges but only transaction or flat fees. 72 Fed. Reg. at 32,997. The Board notes these products are not common; however, they will becomes more common if the effective APR is eliminated - we will see more products like the Advance America open-end payday loan. The Board also lists the very things that an effective APR provides more information to consumers about: (1) the cost of transaction fees, (2) the cost of credit insurance, (3) that minimum finance charges make carrying small balances pricey, and (4) how account activity fees might really be a substitute for periodic interest.

If consumers are confused by the effective APR, the solution is to improve the disclosure not eliminate it. The Board has taken one step by proposing to label it as a "fee inclusive APR" and providing an explanation. The Board needs to move further in that direction, not by getting rid of the most informative measure of the cost of credit in credit cards.

4. The "Fee-Inclusive APR" is Comprehensible When an Understandable Label is Attached to the Number.

It has been standard in the closed-end market since the Simplification Amendments of 1980 to have a short explanatory phrase for what were terms like "amount financed," "finance

[80] Pa. Dept. of Banking v. NCAS of Del., LLC, 2007 WL 2176116 (Pa. Commw. Ct. July 31, 2007).

charge," and "APR." [81] The Board should have provided a similar short explanation for the effective APR back at that time. Now, nearly thirty years later, bringing that same simple concept to open-end credit is long overdue.

The Board advances the alternative of eliminating the disclosure because consumers did not understand the term. But that should have been no surprise. Indeed, in CRL's comments to the Board's 2005 ANPR, it noted the confusion generated by inconsistent terminology around the rate-only APR (the "corresponding" or "nominal APR or "corresponding nominal APR") and the fee + rate APR, which also can be labeled with different adjectives, such as "effective APR" or "historic APR" or "actual APR."[82] The existing rules permit this semantic anarchy, contributing to consumer confusion. The simple solution, of course, is to improve the price tag, not tear it off. Mandating consistent terminology, with a simple descriptive phrase such as has been the standard in closed-end credit for decades, would advance understanding significantly.[83]

The Board's experience with the focus groups appears to have borne out this approach. It appears from the Board's testing that it is presentation, rather than the concept itself, that has been the bigger hurdle to comprehension. As it improved the sample disclosure of this term given the participants in the focus groups, their comprehension grew. The final form, with the descriptive term "***fee-inclusive APR"*** and a short explanatory phrase[84] noting that it represented fees as well as interest, resulted in a majority of the participants understanding the information. It is short, it is understandable, and, most of all, it is the most accurate picture of the account cost for the consumer.

5. The Fee-Inclusive APR is Extremely Meaningful.

As we noted above, given the degree to which credit card costs are off-loaded from rates onto fees today, it is the nominal interest rate that arguably has less meaning.[85] While it is true that the use of an assumed 30-day repayment period may overstate the actual price, it is equally true that nothing is perfect.[86] (The APR on a 10 year loan with 5 points understates the actual price if it is paid off early.) The point is that it represents the usage pattern for that consumer. If a revolving consumer has seven cards to choose among, an effective APR will allow him to compare apples to apples, to see which card is cheapest for him, given his own usage pattern. The important characteristics of the APR are that it be comprehensive and consistent. Whatever distortions may exist based upon a thirty-day period are consistent from one lender to the next which permits apples-to-apples and month-to-month comparisons.

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[81] Reg. Z, § 226.18(b), (d), (e).

[82] *See* 2005 CRL Comments at 11. We venture to say that it probably was as unrealistic to think that the term "effective APR" conveyed meaning to non-credit specialists as it is for economists to think that *ceteris paribus* means anything to virtually anybody.

[83] *See, e.g.,* Reg. Z, § 226.18(d), (e), which prescribe a simple descriptive phrase for the finance charge and APR.

[84] Adding an explanatory phrase was an approach we had suggested in our 2005 Comments to the Board's ANPR. *See* 2005 NCLC Comments at 44, 2005 CRL Comments at 15.

[85] See second and third paragraph of Section XI.A.2.

[86] Presumably the major issuers track usage closely enough to know how long a charge typically stays on a revolvers account. Rather than let this single point deprive consumers of the real, fully-loaded price tag, the Board could adopt a different pay-back assumption than one month. However, we do not believe that this criticism is worth either eliminating the disclosure or overhauling the computational rules.

Furthermore, as we noted in our comments to the Board's ANPR, there is value in sticker shock.[87] The Board notes that some commenters argued that "discouraging particular kinds of credit transactions is not a valid objective of Regulation Z."[88] That is simply not true. TILA indeed was intended to have a macroeconomic impact of encouraging restraint when credit costs rise.[89] Given increasing concerns about debt burdens,[90] and bankruptcies, we believe that the greater danger is that consumers are insufficiently aware of all the costs of credit. (For this reason, along with the need for standardization and certainty, we also recommend in Section III.A that the finance charge measured by the "fee-inclusive" APR include the majority of fees.)

The Board notes that some critics of the fee-inclusive APR say that consumers may be misled into using another card that is really more expensive because of other fees.[91] Unless the calculation rules permit too many fees to escape inclusion in the calculation, it is in fact that figure that will help the consumer make the determination as to which card is cheapest for his/her usage patterns. We also note that for some usages, such as cash advances, the consumer's choice may not be limited to other credit cards. A consumer may have a deposit account with a line-of-credit at 18% that would be cheaper than a credit card cash advance with a 3% transaction fee and a 17% APR.

6. The Fee-Inclusive APR is Critical Given Barriers to Consumer Understanding.[92]

Consumer credit agreements surpass the document literacy of most consumers in the U.S. Identifying and comparing disaggregated fees present special hurdles. Even when consumers locate unbundled fee, they often lack the skill to perform rudimentary calculations. Most can compare two stated APRs or finance charges, priced in identical units. However, this percentage drops when pricing is not provided in identical units, even if no computation is required. Consumers uniformly experience overconfidence, blind spots, and other cognitive difficulties that hinder their ability to compare rates and numbers to assess which credit product is less expensive than another.

The drafters of TILA understood that without uniform disclosure interest, calculations are forbiddingly complex.[93] The APR is meant to be a simplifying "heuristic" that allows borrowers

[87] 2005 NCLC Comments at 44.
[88] 72 Fed. Reg. at 32,997.
[89] National Consumer Law Center, *Truth in Lending,* § 1.1.1.
[90] Debt as a share of disposable income was below 70% until 1985, when it began to grow. By 2006, it had reached 122%. Dimitri B. Papadimitriou, Edward Chilcote, and Gennaro Zezza, *Are Housing Prices, Household Debt, and Growth Sustainable?*, at 4, (Levy Economics Institute of Bard College, January 2006), available at http://www.levy.org/modules/pubslib/files/sa_jan_06.pdf
[91] 72 Fed Reg. at 32,997.
[92] The comments in this section are based on the extensive discussion of financial literacy, cognitive psychology, and behavioral economics literature found in Elizabeth Renuart & Diane Thompson, *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth In Lending,* working paper, provided in conjunction with these comments.
[93] *See, e.g., Consumer Credit Protection Act: Hearings Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency on H.R. 11601*, 90th Cong. 168-71, 76 (1967)(statement of Joseph W. Barr, Treasury Undersecretary) ("Even a financial expert" could not be relied on to compare how much interest was being charged

to employ a rule of thumb to decide between options that are otherwise overwhelmingly complex.[94] Many consumers stumble even when confronted with basic computational problems. Pricing must be uniform, without intermediate computational steps required for comparison.[95]

B. The Board's Alternative Proposal Improves the Explanation of the APR, but Other Elements Should be Rejected.

The Board is proposing an alternative to eliminating the effective APR entirely. Instead, the Board suggests "improving" it by:

- labeling it the "Fee Inclusive" APR and requiring an explanation of what it means;
- limiting the fees included in the calculation of the effective APR to 5 categories – periodic interest, transaction charges (cash advance, balance transfer), mandatory credit insurance/debt cancellation, minimum finance charges, and account activity/account balance fees; and
- requiring disclosure of a separate effective APR for each "feature."

The first modification - to rename the effective APR as the "Fee Inclusive APR" and to explain it better – is a positive improvement, for the reasons discussed in Section XI.A.4 above. Significant problems arise with the second and third modifications. Limiting the effective APR to only the enumerated categories of fees will encourage creditors to change the name of their fees to "keep them off of the TILA chessboard."

For example, the Board's own proposal discusses the example of the Capital One "Clarity" card that has a 0% periodic interest APR but imposes a fee of $6 per $1000 per month. 72 Fed. Reg. at 33,020. Currently, this fee is disclosed as a minimum finance charge. However, under the Board's proposal, a creditor could call this fee something else (e.g., a "calculation charge") and might be able to avoid including it in the effective APR. Thus the creditor could consistently disclose a 0% APR, despite the fact that this card carries an effective APR of 14.4% for a balance of $500. In addition, it could avoid disclosing the fee in the account opening disclosures, avoid disclosing it in writing, and would only need to do so orally right before it started charging the fee. Another fee that the Board has explicitly stated is not included in the closed list is a skip payment fee, yet that is clearly a finance charge. 72 Fed. Reg. at 32,965.

The third modification proposed by the Board to the effective APR is also problematic. By requiring a separate effective APR for each feature, e.g., for cash advances, retail purchases, or balance transfers, the consumer is presented with multiple APRs. The total effect of multiple fees in any given month is diluted because they are shared among several different APRs. By

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by competing lenders.). This has not changed, unfortunately. *See* Jinkook Lee & Jeanne M. Hogarth, *Returns to Information Search: Consumer Credit Card Shopping Decisions*, 10 Fin. Counseling & Planning 23, 33 (1999) (researchers have trouble determining payoff from shopping for credit cards, given complexity of pricing structure).

[94] A heuristic is a shorthand method for making a decision without necessarily understanding or reviewing all the details and nuances. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1124 (1974).

[95] S. Rep. No. 90-392, at 2 (1967) (discussing difficulty many consumers had translating monthly rates into annual rates).

not bundling fees into one effective APR calculation, the proposal understates the true cost of credit for that billing period.

XII. MINIMUM PAYMENT DISCLOSURES

The 2005 amendments to the Bankruptcy Code require a variety of steps to disclose to consumers the consequences of making minimum payments on open-end credit debt. We strongly support the Board's approach of encouraging creditors to disclose the actual number of months that it will take to pay off the current balance with minimum payments. However, we are concerned about the overly-broad exemptions the Board is proposing, as well as some other aspects of the proposed rule.

A. The Board Has Proposed Overly Broad Exemptions to the Minimum Payment Disclosure Requirements.

1. *The Board Should Not Exempt HELOCs.*

The Board has proposed (Proposed Reg. Z § 226.7(b)(12)(iii)(A)) to exempt HELOCs altogether from the minimum payment disclosure requirements. The Board's rationale is that most HELOCs have fixed repayment periods. 72 Fed. Reg. at 33.001. As discussed in the next subsection, we disagree with this rationale. But even if we agreed with it, it would not justify exempting HELOCs that do not have fixed repayment periods.

The Board's section-by-section analysis indicates that it may revisit the question of minimum payment disclosures for HELOCs as part of its general review of HELOC disclosures. The Board should not, however, grant a blanket exemption for all HELOCs in the meantime. Even if the Board's rationale for excluding HELOCs with fixed repayment periods is correct, there is no rationale for excluding HELOCs that do not have fixed repayment periods.

2. *The Board Should Not Exempt Credit with a Fixed Repayment Period.*

The Board has proposed to exempt several types of credit with fixed repayment periods from the minimum payment disclosure requirements. (Proposed Reg. Z § 226.7(b)(12)(iii)(A), (E), (G)). We oppose this proposal. Instead of exempting these products, the Board should customize the minimum payment disclosures to reflect the special features of these products.

Even for credit with a defined fixed repayment period, it is important to have a minimum payment disclosure. Paying more than the required monthly payment will result in paying off the loan earlier than the date of final payment and will save the consumer in finance charges. Therefore, these loans should not be exempted. Instead, the Board should develop a special warning for these loans such as:

> Minimum Payment Warning: You can pay your balance down faster and save on finance charges by paying more than the minimum monthly payment required. For example, if your minimum monthly payment is $107 on a balance of $10,000 at 10% APR over 15

years - you could cut down the repayment period by 4 years and 4 months by paying an extra $20 per month.

We do not object, however, to exempting credit that has a fixed repayment term from the other minimum payment disclosure requirements, e.g. the toll-free number requirement. Not do we object to the Board's proposal to exempt credit that is payable immediately, such as charge cards. Proposed Reg. Z § 226.7(b)(12)(iii)(D).

3. *The Board Should Not Exempt Non-Revolvers.*

The Board has proposed to allow creditors not to give the minimum payment disclosures to consumers who have paid the full balance for the two previous billing cycles. Proposed Reg. Z § 226.7(b)(12)(iii)(F). We urge the Board to reconsider this exemption.

The data the Board cites does not support this exemption, but in fact supports providing these disclosures to non-revolvers. The GAO report showed that *almost 80% of non-revolvers* preferred to get a minimum payment disclosure.[96] While non-revolvers expressed less of a preference for customized minimum payment disclosures than revolvers (37% of non-revolvers found customized disclosures extremely or very useful, as opposed to 68% of revolvers), this relates to the *type* of disclosure, not to the minimum payment disclosure itself. The Board offers no explanation for its decision to exempt a category of consumers after finding that 80% prefer to get the disclosure.

It is hard to imagine what purpose would be served by not informing these consumers of the risks of ceasing their positive current behavior. If anything, the Board should want to let these consumers know about the benefits of their responsible behavior, and the disadvantage of changing it.

We do, however, commend the Board for not exempting consumers who already pay more than the minimum payment. A consumer who pays more than the minimum but less than the full balance may only exceed the minimum by a few dollars. These consumers still may be making payments that will result in long repayment periods and accumulate significant finance charges. The minimum payment warning will give them a suggestion that the more they pay down, the more they save.

4. *The Board Is Correct Not to Exempt Consumers with Low Balances.*

We commend the Board for its rejection of one commenter's suggestion that credit cards with balances less than $500 be exempted from the minimum payment disclosure requirements. Such an exemption would be manifestly against the intent of Congress, which was clearly concerned about long repayment periods for low-balance accounts. Indeed, one of the two

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[96] GAO, *Credit Cards: Customized Minimum Payment Disclosures Would Provide More Information to Consumers, but Impact Could Vary* (April 2006) at 26.

generic disclosures crafted by Congress deals with a $300 balance.[97] As the Board points out, paying a $500 balance in minimum payments can take five years.[98]

B. The Board's Revision to the Generic Disclosure Is Justified.

The 2005 amendments to the Bankruptcy Code specify two generic examples of the length of time it will take to repay open-end credit balances if the consumer makes only minimum payments. Unfortunately, the minimum payment formulas described in these generic examples are not completely accurate: the examples state that the minimum payment is a percentage of the balance, but in fact the example is based on a minimum payment that is a percentage of the balance or a fixed amount, whichever is greater.

The Board has proposed revisions to these generic examples to delete the description of the minimum payment formula. Proposed Reg. Z § 226.7(b)(12)(i). We strongly support the Board's decision to revise the language of the examples. It is important not to give inaccurate information to consumers.

It must be noted, however, that the generic disclosures remain quite unsatisfactory even with these revisions. By deleting the reference to the specific (but inaccurate) minimum payment formula, the Board's revised disclosure implies that the example is always true and that minimum payment formulas do not vary from creditor to creditor. It might be preferable to reinsert some reference to a "typical" minimum payment formula. But, more fundamentally, the generic disclosures themselves are a poor substitute for the real information consumers need – the actual effect of making only minimum payments. As discussed in Section XII.D of these comments, we commend the Board for encouraging creditors to disclose actual repayment periods.

C. The Minimum Payment Disclosures Should Be Closely Proximate to the Amount of the Minimum Payment.

The Board's proposal requires creditors to make the minimum payment disclosures "closely proximate" to the disclosure on the periodic statement of the minimum payment due. (Proposed Reg. Z § 226.7(b)(13)). We strongly support this proposal, which is essential if the minimum payment disclosures are to have any impact.

In particular, we commend the Board for not making any exception for the alternate toll-free number disclosure that is set forth in Proposed Reg. Z § 226.7(b)(12)(ii)(A). If creditors could place this disclosure on the back of the periodic statement, in a spot distant from the minimum payment due, consumers would be much less likely to notice it.

D. The Board Should Be Commended For Encouraging Creditors to Disclose the Actual Repayment Period.

[97] 15 U.S.C. § 1637(b)(11)(C).
[98] 72 Fed. Reg. at 33,006.

The Board's proposal allows creditors who disclose the actual repayment period on the consumer's periodic statement to dispense with the other minimum payment disclosure requirements. (Proposed Reg. Z § 226.7(b)(12)(ii)). We strongly support this proposal. It will aid both creditors and consumers. This option gives consumers information that is much more accurate and useful. At the same time, the option of simply printing the information on the periodic statement enables creditors to avoid having to set up and maintain toll-free numbers.

E. The Statement About the Toll-Free Number Consumers Can Call for Actual Repayment Period Information Should Be Revised.

We urge the Board to revise the statement set forth in Proposed Reg. Z § 226.7(b)(12)(ii)(A) that would inform consumers about the toll-free number to obtain actual repayment period information. Instead of concluding "For more information, call this toll-free number: __________," it should indicate more clearly that the creditor will provide an estimate of the repayment period based on the consumer's actual balance and terms. We suggest language such as "For a personalized estimate of how long it will take you to repay this balance making only minimum payments, call this toll-free number: __________."

F. The Rules for Calculating Actual Repayment Period Disclosures Should Use the Creditor's Actual Balance Calculation Method.

Proposed Appendix M2 sets forth the rules for creditors to use in providing actual repayment period disclosures. We agree with the Board's list of assumptions that creditors may use when making these calculations, with one exception. Appx. M1(a)(5)(vi) allows creditors to calculate the repayment period on the assuming that the average daily balance method is used to calculate the balance, *even if the creditor uses a less favorable method*. We object to this assumption. As discussed in Section VI.I of these comments, the use of unfavorable balance calculation methods is a hidden way that some creditors increase the cost of credit. Allowing creditors to base the calculation of the repayment period on a more benign balance calculation method than they actually use simply helps them conceal this cost of credit.

G. The Board Is Right to Require a Special Disclosure of Negative Amortization, But It Should Mandate Exact Language.

We applaud the Board for addressing negative amortization when creditors make generic or actual repayment period disclosures. When the repayment terms permit negative amortization, the Board is proposing to require the creditor to disclose "you will never repay the balance if you only make the minimum payment." Appx. M1(b)(3) (generic disclosures), Appx. M2(b)(3) (toll-free number disclosures of actual repayment period), M2(c)(3) (disclosures on periodic statement). Any other disclosure would be inaccurate and misleading. However, the Board should mandate this exact language. Negative amortization has serious consequences for consumers. Creditors should not be allowed to craft disclosure language that minimizes or obscures these consequences.

H. The Board Should Prohibit Creditors From Providing Advertisements When Consumers Call the Toll-Free Number for Generic Repayment Information.

The 2005 Bankruptcy Code amendments prohibit creditors from disclosing any information other than repayment period information when consumers call the toll-free number to get generic repayment period information.[99] The Board has, however, proposed a less strict rule, merely prohibiting creditors from making advertisements until after they provide the minimum payment period disclosures. (Proposed Comment § 226.7(b)(12)(iv)-3)).

The Board should not soften this statutory requirement. Instead of allowing advertisements after the consumer gets generic repayment period disclosure, the Board should prohibit creditors from providing this non-germane information.

However, the statutory prohibition does not apply to a toll-free number that provides *actual* repayment period information. We do not object if the Board allows post-disclosure advertisements when consumers call a toll-free number that is set up to provide actual repayment period information. Such a rule would promote the Board's goal of encouraging creditors to provide actual rather than generic repayment information.

I. The Rules for Generic Repayment Disclosures Are Overly Lax.

Appendix M1 contains the proposed rules for creditors to use when they or the FTC make generic repayment disclosures through a toll-free number. Unfortunately, the rules the Board proposes are so lax that the disclosures will likely be highly inaccurate.

The most significant omission is that the proposed rules do not require the consumer's actual minimum payment formula to be used. Instead, Appx. M1(a)(2)(i)(A) requires card issuers to use the formula that applies to most of its general-purpose credit cards. If the consumer's card is governed by a different formula, the consumer will simply get incorrect information.

Allowing the use of an incorrect minimum payment formula in a disclosure *designed to inform consumers about the effect of making minimum payments* makes a mockery of disclosure. Creditors should be required either to input the consumer's actual minimum payment formula into their toll-free number response systems, or else to disclose it on the periodic statement (a code would be sufficient) so that consumers can input it when calling the toll-free number. Giving creditors a free ride on this element of accuracy makes disclosure of generic repayment period estimates easier and more attractive for creditors, which undercuts the Board's stated goal of encouraging creditors to make actual repayment period disclosures.

[99] 15 U.S.C. § 1637(b)(11)(F)(i).

XIII. SUBSEQUENT DISCLOSURES (REG. Z § 226.9)

<u>A. Change-in-terms Notices (Proposed Reg. Z § 226.9(c)(2)).</u>

1. Requiring 45 Days Notices for a Change-in-terms or Imposition of a Penalty Rate is a Significant Improvement, but the Board Should Go Further.

The Board proposes requiring creditors to provide 45 days notice (instead of the current 15 days) before the effective date of a change in terms in connection with terms disclosed in the account-opening summary table. The Board also proposes that the advance change-in-terms notice apply in cases of a rate increase due to the consumer's default or delinquency, or due to a reduction in credit limit that results in imposition of an over limit fee or penalty rate. These are significant changes that will help consumers, and we support them. However, we believe that the Board should go further.

Currently, notice of any rate increase due to default or delinquency is required, but not in advance. In addition, some courts have held that no notice is required if the change is set forth initially by the creditor in the account opening disclosures and then the new rate appears on the periodic statement for the cycle in which the increase occurs. Accordingly, the proposal is a substantial improvement to the current rule.

Moreover, the Board proposes requiring for advance change-in-terms notices a tabular disclosure on the front of the periodic statement containing the key terms being changed when the notice accompanies a periodic statement or when it separately announces a penalty rate. This was the only priority suggestion from consumer groups that the Board accepted; we appreciate this move toward more readable, and more pertinent, disclosures.

The notice also must include information above the table, including: a statement that changes are being made to the account; notice regarding any opt out option; the date the changes to terms will become effective; notification that further information on terms in the table are contained in the notice, if applicable; and, if the creditor is changing a rate other than a penalty rate, a statement that if a penalty rate applies, the new rate does not apply until the account balances are no longer subject to the penalty rate.

The Board also asks whether 30 days would be enough. Because the rule dictates when the notice be sent, not when it must be received, a 30-day rule would inevitably provide most consumers much less than one month's notice. Thus, we oppose shortening the notice period to 30 days. Accordingly, as the Board has noted, 45 days will give the consumer about one month to address the impending change in terms.

2. *The Board Should Not Rely Exclusively on a Closed List to Identify the Fees That Must be Disclosed in a Change-in-terms Notice.*

If a creditor increases any component of a charge, or introduces a new charge that is not required to be disclosed as part of the account-opening summary table, the creditor may provide at least 45 days written advance notice before the change becomes effective, or provide notice orally or in writing of the amount of the charge "at a relevant time before the consumer agrees to or becomes obligated to pay the charge," that is, when the consumer is likely to notice it, such as in a marketing call to sell a service that includes a fee. As stated in Section VI.L, we are concerned that any oral notice provides insufficient information or time for consideration and that even written notice with no advance disclosure is too limited. More importantly, the Board's limitation of the 45-day notice to a specific, finite set of terms leaves open the all-too-real possibility that card issuers will generate new fees or terms not in the list that will not be subject to the advance notice requirement, whether or not the effect of those terms is similar.

3. *While 45 Days Notice for a Change in Terms Is An Improvement, It Will Not Solve the Problem of "Any Time for Any Reason" Changes in Terms to Credit Card Agreements.*

As the Board notes (as per commenters), some consumers are surprised by changes in terms and are not aware that they will happen because they didn't receive advance notice and because they do not remember, or never knew or understood, the information in the account-opening disclosures. The Board states that by providing advance notice, consumers will have an opportunity to consider alternate financing before the rate increase and that such notice may also help consumers decide on how much to pay to avoid certain potentially recurring charges, to make more general decisions regarding account usage, or to correct any mistakes prior to the increase to the penalty rate.

While some consumers may have the ability to make substantial changes in their credit usage in such a short timeframe, this advance notice will not help most consumers. The homogeneity in products through the market means that even if a borrower seeks a different card with substantively different terms, such a deal may be hard to find. Moreover, to the extent that the reason for the notice is a penalty rate (discussed further below), penalty rates are predominantly levied based on changes in credit scores, not specific actions by the consumer on the account. Accordingly, that same credit score will be used by any other card issuer with whom the consumer makes an inquiry about a new card. Also, consumers are rewarded in their credit scores for holding cards for longer periods of time—borrowers with longer credit histories are viewed as less risky, and therefore creating an incentive to switch cards often may not work toward the consumer's advantage more broadly.[100]

The expansive change-in-terms provisions in many credit card agreements are the mechanism that permits card issuers to impose excessive junk fees and engage in abusive practices. Many issuers place extremely expansive change-in-term provisions in their credit card agreements, which allow the issuers to change any of the terms in the agreement at any time. A typical change-in-terms agreement provides:

> We may amend or change any part of your Agreement, including the periodic rates and other charges, or add or remove requirements at any time. If we do so, we will give you notice if

[100] Federal Trade Commission, Public Forum on The Consumer and Credit Scoring, Matter No. P994810, at 43 (July 22, 1999)(statement of Peter McCorkell, General Counsel, Fair Isaac), *available at* www.ftc.gov./bcp/creditscoring.

> required by law of such amendment or change. Changes to the annual percentage rate(s) will apply to your account balance from the effective date of the change, whether or not the account balance included items billed to the account before the change date and whether or not you continue to use the account. Changes to fees and other charges will apply to your account from the effective date of the change.[101]

Some states even permit changes in the terms of a credit agreement without such a clause in the credit agreement.[102]

These expansive change-in-terms provisions deprive consumers of any "benefit of the bargain" and thus undermine the TILA's purpose in ensuring effective disclosure. They make a mockery of contract law because the terms of the "bargain" are illusory. A savvy consumer can select a credit card after reviewing TILA application and solicitation disclosures, comparing terms, reading articles about picking a credit card – in other words, be the smart shopper that the TILA envisioned – then be faced with a change-in-terms notice that totally changes the APR and other terms of the credit card. One court has described change-in-terms provisions as "an Orwellian nightmare, trapped in agreements that can be amended unilaterally in ways they never envisioned."[103]

The effect of these changes can bury a borrower and make it much harder to pay off remaining debt. The Board acknowledges that "[l]ate payment charges and over-the-credit-limit charges can have a large aggregate effect, particularly since they need not be one-time charges, and can be charged month after month if a consumer repeatedly makes late payments or exceeds his or her credit limit." 72 Fed. Reg. 33,009.

Thus, while more notice is helpful for those consumers who can find other options quickly, or for whom changed credit or payment behavior is possible and will make a difference, the ultimate issue is not whether consumers need more time for a change-in-terms notice, but that changes in terms should not be permitted at all in credit card contracts. We urge the Board to seek legislation banning changes in terms altogether for credit card agreements. For further discussion on actions the Board should take, see Section I.

Furthermore, we believe that the Board has the authority under the TILA to prohibit changes in terms for at least the term of the credit card agreement. As discussed earlier, changes in terms undermine the TILA disclosure requirements. The change-in-terms provisions of Regulation Z exacerbate the problem because they legitimize the practice of changing terms. In other words, "if you disclose it, it's okay." Rather than merely increase the time for change-of-terms notices, the Board should amend Regulation Z to provide that for open-end credit other

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[101] Stone v. Golden Wexler & Sarnese, P.C., 341 F.Supp.2d. 189, 191 (E.D.N.Y. 2004).

[102] *See, e.g.*, Del. Code Ann. tit. 5, § 952 (a).

[103] Perry v. FleetBoston Financial Corp., 2004 WL 1508518 at *4 n.5 (E.D. Pa. Jul. 6, 2004). This court went on to say that it was "reminded of George Orwell's 1946 work, Animal Farm, in which the pigs assume power and change the terms of the animals' social contract, reducing the original Seven Commandments, which included 'All animals are equal,' to one—'All animals are equal, but some animals are more equal than others.'"

than home equity plans, the creditor may not change the terms during the term of the credit card until the renewal disclosures are given. Moreover, it should require that consumers not renewing their credit card contract be permitted to pay off the existing balance at the old rate; since if there are no renewal disclosures, in order for the disclosures to be accurate, they cannot change.

B. Penalty Rate Disclosures (Proposed Reg. Z § 226.9(g)).

As described above, the Board proposes that notices regarding penalty rate increases due to default or delinquency, or due to other specified events, would be covered by the proposed 45-day advance disclosure. These notices would be in addition to the penalty rates disclosures provided at account opening. Whether or not the notice comes with the periodic statement, the notice triggers the tabular format requirement. Notice regarding the upcoming increase to a penalty rate must include: a statement that the higher rate has been triggered; the date it will apply to the account; when, if at all, the penalty rate expires; and to which balances the higher rate applies. This notice is a significant improvement to the current Reg. Z provisions.

The Board also proposes requiring the use of the term “penalty APR” because the term “default rate” is confusing to some. This is a helpful improvement, especially because it highlights the retroactive application of penalty interest rates. However, the notice would be substantially more helpful if it included the reason for the increase,[104] what, if anything, the consumer can do to reverse the increase, and the new rate that will apply.

Additionally, in order for this change to have real effect, it must apply to universal default and to adverse-action repricing. That is, in addition to application for defaults related to the account itself, it must apply to repricing due to defaults on other accounts AND to repricing due to changes in credit score (“adverse action repricing”).[105]

The Board notes that consumers may not understand that one late payment could constitute a “default” and trigger penalty pricing. The Board also observes the severity of penalty pricing practices: that it may apply to all of the balances on a consumer’s account, and often applies to balances for several months or longer, or indefinitely. Moreover, penalty rates are very high—as high as twice the usual normal rate. Rates above 30% are common.[106] The Board more generally observes “low contractual threshold” for rate increases. 72 Fed. Reg. 33,012.

When penalty rates are triggered, the new terms apply to the old balance – leaving consumers stuck paying often-high balances at interest rates far higher than was originally agreed, with devastating consequences.[107] The pressure on consumers is even more egregious

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[104] Borrowers in come circumstances may receive adverse action notices under the Fair Credit Reporting Act, but some consumers won’t be covered by that requirement.

[105] *See, e.g.*, Barrer v. Chase Bank, USA, N.A., 2007 WL 1072133 (D. Or. Jan. 23, 2007).

[106] *See also* Kathleen Day & Caroline Mayer, *Credit Card Fees Bury Debtors*, Washington Post, Mar. 7, 2005, at A1.

[107] Penalty interest rates usually are about 30 percent, with some as high as 40 percent, while late fees now often are $39 a month, and over-limit fees, about $35. According to Robert McKinley, CEO of Cardweb, "[i]f you drag that out for a year, it could be very damaging …. Late and over-limit fees alone can easily rack up $900 in fees, and a 30

because the card issuer already has collected a one-time charge for that late payment or over-limit transaction, which probably more than covers its costs. Increasing the consumer's APR is simply a way for the card issuer to reap additional profit by playing gotcha with unsuspecting consumers – trip once and they impose sky-high rates.

This practice is particularly problematic when it is applied retroactively. There is simply no legal or economic justification for assessing a penalty interest rate to an existing balance. No other industry in the country is allowed to increase the price of a product once it is purchased. Issuers have already assessed a consumer's risk of not repaying the loan and presumably offered an interest rate based on that risk. Issuers should be required to allow a consumer to pay off his or her existing balance at that interest rate.

Penalty rates also are being used when the consumer defaults on another account, or as noted above, when the consumer's credit score decreases. It is fundamentally unfair to impose a penalty rate on a consumer who has not made a late payment or defaulted on the obligation, especially when this rate increase is applied retroactively.

Another concern with using credit reports to trigger a penalty rate is the enormous problem with inaccuracies in credit scoring and credit reporting. A review of over 500,000 consumer credit files by the Consumer Federation of America and the National Credit Reporting Association found that 29 percent of consumers have credit scores that differ by at least 50 points between credit bureaus, while 4 percent have scores that differ by at least 100 points.[108] Other studies have found that between 50 to 70 percent of credit reports contain inaccurate information.[109] Recent developments in the mortgage market also make it clear that many borrowers may experience drastic declines in their credit scores simply because they were the victims of fraudulent, deceptive or unfair practices.

Thus, while advance notice will help some facing penalty rates, the severity of these practices—and their results—makes such an approach sorely inadequate. The disclosure approach condones abusive pricing practices and retains the burden fully on borrowers to maneuver around unfair practices. The Board should require that a deal be a deal; terms only should be changed at the end of the contract. While contracts would likely become shorter—for example, one year—the terms would be constant and would therefore provide a meaningful basis for a consumer to choose among credit options. It also would provide enough time for borrowers to improve their credit scores before shopping for other credit; one month is simply not enough time to do that.

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percent interest rate on a $3,000 balance can add another $1,000, so you could go from $2,000 to $5,000 in just one year if you fail to make payments." *See id*.

[108] Consumer Federation of America and National Credit Reporting Association, *Credit Score Accuracy and Implications for Consumers* at 24 (Dec. 17, 2002), *available at* http://www.consumerfed.org/121702CFA_NCRA_Credit_Score_Report_Final.pdf

[109] Alison Cassidy and Edmund Mierzwinski, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports*, U.S. PIRG (June 2004); Consumer Reports, *Credit Reports: How Do Potential Lenders See You?*, at 52-53 (July 2000)(on file with the authors).

C. Statement of Billing Error Rights (Reg. Z § 226.9(a)).

The Board has proposed revising the model forms for the statement of billing error rights to improve the readability of these notices. We support the proposed revisions to the model forms in general. However, we note that the model short form (proposed Model Form G-4(a)) states that the creditor may charge interest on the disputed amount, but does not later state (as does the long form G-3(a)) that the consumer need not pay any interest if the error resolves in the consumer's favor. This may create the impression to consumers that they must pay interest on any disputed amounts even if the error resolves in their favor. The Board should clarify this issue in Model Form G-4(a).

Also, the Board should update Model Form G-3(a) and G-4(a) as it has with Proposed Comment 226.7(b)(9)-2 to address electronic delivery of billing error rights.

D. The Proposed Disclosures for Convenience Checks Are An Improvement, and Should Disclose the Actual APR Being Offered for That Extension of Credit (Proposed Reg. Z § 226.9(b)).

The Board has proposed requiring that certain information be provided to consumers when creditors send them convenience checks. Proposed Reg. Z § 226.9(b)(3) would require the creditor to disclose: (1) the existence of a teaser rate, including its expiration; (2) the APR after the teaser; (3) any transaction fees: and (4) whether there is a grace period. These disclosures would be required whenever convenience checks are mailed 30 days or more after the account opening disclosures.

We support these proposed changes. As discussed in Sections II.C and XVI.B.2, we are disappointed that the Board chose not to cover checks that access a credit account as credit card devices for purposes of the unauthorized use protections and unsolicited issuance prohibition. The very least that the Board could do is provide meaningful disclosures to consumers before they access the often expensive credit of a convenience check.

We believe that the Board should require these disclosures whenever a convenience check is mailed. As the Board noted, its consumer testing found that consumers generally did not notice or pay attention to a cross reference in the convenience check to the periodic statement. 72 Fed. Reg. at 33,009. Consumers may similarly be disinclined to cross-reference information in their account opening disclosures. They may also find it difficult to locate, especially if the disclosures of terms applicable to convenience checks do not specifically refer to the product (e.g., if the cash advance fee applies to convenience checks but the account opening disclosures do not refer to convenience checks).

The Board has asked for comment as to whether a creditor may, instead of disclosing a firm APR actually being offered, include a reference to the "type of rate" that might apply, and refer the consumer to a toll-free number to obtain additional information. We strongly oppose this alternative. Consumers should be entitled to the actual rate that they are being offered in a convenience check, before using the check and committing themselves to potentially high cost credit. As the Board noted, its consumer testing found that consumers generally did not notice or pay attention to a cross reference in the convenience check. 72 Fed. Reg. at 33,009. They are even less likely to brave the creditor's customer service line to track down this information. There is no reason why a creditor cannot provide a firm APR with a convenience check, especially given that the creditor is individually mailing the check to an existing customer. The creditor can obtain the consumer's credit score and conduct its risk-based pricing PRIOR to sending the convenience check. The creditor will have a permissible purpose to obtain the consumer's credit score as part of an account review under the Fair Credit Reporting Act.

E. The Mandatory Table Should Apply to Renewal Disclosures (Reg. Z § 226.9(e)).

The Board has proposed only minor changes to the renewal disclosures. We believe that the Board could have done more to protect consumers. As the Board notes, there are no formatting requirements for renewal disclosures. Creditors are permitted to place the renewal disclosures on the back of a page, or at the end in small type, where consumers are unlikely to view them. One renewal disclosure we reviewed (Attachment 1) was made at the end of a three-page statement in 4 point type. This dense, unreadable disclosure included the information that the consumer could terminate the account within 30 days and avoiding paying the fee. Query how many consumers actually noticed this disclosure and were aware of their right to close the account and avoid paying the annual fee? The Board should have made the renewal disclosures more prominent, as it did with the change-in-terms disclosures.

In fact, one issue that may arise is when a creditor makes a change in terms with the renewal disclosures. Must the creditor use the tabular format in that instance, or can it "sneak it in" by using a non-tabular, small font renewal disclosure? At a minimum, the very least the Board should do is to require the tabular format if the renewal disclosure involves a change in terms.

XIV. PAYMENT POSTING (REG. Z. § 226.10) - THE BOARD SHOULD BAN PAYMENT POSTING ABUSES USING ITS AUTHORITY UNDER SECTION 1666C.

As the Board knows, card issuers have established cut-off times for posting payments and some of these hours have been set ridiculously early, established deliberately to result in the imposition of late payment fees. In reported cases, creditors have used times as early 9:00 or 10:00 AM as the cut-off time for crediting payments received that day.[110] Consequently, if a consumer's payment is received on the payment due date, it will be considered late because in all likelihood, the U.S. Postal Service will not have delivered the mail so early in the morning. Furthermore, when due dates fall on a weekend or holiday, card issuers will consider the

[110] *See, e.g.*, Lawrence v. Household Bank, 343 F.Supp.2d 1101 (M.D. Ala. 2004) (9 AM cut-off for payment posting); Landreneau v. Fleet Financial Group, 197 F. Supp.2d 551 (M.D. La. 2002) (9 AM cut-off for payment posting); Schwartz v. Citibank (S.D.), Nat'l Assn, Clearinghouse No. 53,023, Case No. 00-00078 (JWJX) (C.D. Cal. May 5, 2000) (class action settlement notice in case challenging 10 AM cut-off). At one point, MBNA supposedly set the cut-off time as early as 6:00 AM. Kevin Hoffman, *Lerner's Legacy – MBNA's Customers Wouldn't Write Such Flattering Obituaries*, Cleveland Scene, Dec. 18, 2002.

payment late if not received on the prior business day. Non-business day due dates are inherently deceptive.

The Board proposes disclosing the earliest of the cut off times for payments near the due date on the front page of the periodic statement, if the time is before 5 p.m. The Board views this as helpful because consumers apparently would make better decisions about when to send payments. As discussed in Section X.D, the Board should set a payment posting rule based on the postmark on the payment.

Furthermore, it is important to consider payment posting abuses in the broader context of a pattern of unfair behavior by card issuers. Creditors should not be allowed to rig the system to trap unwary consumers. Consumers need the protections of a general prohibition against unfair conduct by card issuers, such as the one contained in section 5 of the Federal Trade Commission Act. The ability of consumers to enforce section 5 would go a long way toward curbing abuses, of which posting cut-offs are but one example.

XV. TREATMENT OF CREDIT BALANCES (REG. Z § 226.11)

A. Option to Fulfill Refund Requirements Upon Oral or Electronic Request.

The Board has proposed revising Comment 226.11(a)-1 to clarify that a creditor may comply with the requirement to refund credit balances if the creditor chooses to make refunds upon oral request. Obviously, we have no problem with this addition. However, many consumers are unaware that a creditor is not required to refund a credit balance upon oral request, and there is no information provided to consumers regarding this issue. We believe that creditors should be required to disclose to consumers, as with the statement of billing error rights, that a creditor is not required to honor oral or telephone requests. Otherwise, consumers may forfeit their rights under this section.[111]

B. Termination of Inactive Accounts.

The Board has proposed adding new Reg. Z § 226.11(b) and associated comments to implement TILA Section 1637(h), which prohibits creditors from terminating an account prior to expiration because the consumer has not incurred finance charges on an account. This prohibition does not apply to accounts that have been inactive for three or more months. Proposed Reg. Z § 226.11(b)(1) mirrors the language of the Act. Proposed Reg. Z § 226.11(b)(2) provides that an account is inactive if there has been no extension of credit and there is no outstanding balance. Proposed Comment 226.11(b)(1)-1 adds that an account does not "expire" if the underlying agreement does not expire, even if the physical credit card has an expiration date. We believe these Proposed Comments are logical and within the spirit of the Act.

[111] *See, e.g,* Fatahi v. Fleet Bank (R.I.), N.A. 2002 WL 775118 (Mass. Super. Ct. Feb. 19, 2002).

XVI. SPECIAL CREDIT CARD PROTECTIONS

A. Unsolicited Issuance Prohibition (Reg. Z § 226.12(a)).

The Board has not proposed any substantive changes to the Reg. Z and Commentary provisions regarding the prohibition against unsolicited issuance of credit cards. We believe the Board should consider updating this prohibition in two important respects. We also agree with the Board's decision not to allow additional unsolicited cards to be issued on already existed accounts, except when there is a renewal or substitution.

1. *The Board Should Require That a Request for a Credit Card Must Be Made in Writing and the Creditor Must Authenticate the Identity of the Requestor.*

We urge the Board to revise Reg. Z to require that a request for a credit card must be made in writing, and must have certain authentication protocols to assure that the person who is making the request is actually the person whose name is on the account. We urge the Board to consider this revision given the explosion of identity theft that has occurred over the past two decades. Given the identity theft crisis, it is irresponsible to permit creditors to open credit accounts over the telephone and Internet, without some verification of identity. As the Sixth Circuit noted in the context of Internet applications:

> It may well be true that credit card applications-and in particular, on-line credit card applications-are too lightly regulated. For example, maybe it should be more difficult for an applicant to subject a co-signator to substantial debt liability (as appears to have happened here) without express authorization from the co-signator. As the system currently stands, all that is required is an internet connection and knowledge of the co-signator's name, social security number, and address.

MacDermid v. Discover Financial Services, 488 F.3d 721 (6th Cir. 2007).

Another federal court opined regarding telephone applications for a credit card:

> In an age of rampant identity theft, it is irresponsible to allow consumers to open credit cards over the telephone, without ever requiring written verification of that consumer's identity. Citibank did not even bother to save the specific intake information that it collected over the telephone when this account was opened. These sloppy business practices facilitate identity theft. Citibank's lax record keeping permits a thief to easily accumulate thousands of dollars of debt in the name of an innocent consumer once the thief has acquired the consumer's social security number. . . . [T]he Court admonishes Defendants and their clients that both good business practices and good citizenship require them to do their part to prevent identity theft.

Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006).

The Board would deserve the same admonishment if it failed to protect consumers and continued to allow telephone requests for credit cards. Given the great harm to consumers from identity theft, and its ever increasing prevalence, the responsible course is to require that all credit card applications either be made in writing or verified in writing by the consumer.

2. *The Board Should Clarify That a "Substitute" Or "Renewal" Card Must Be Sent Within a Reasonable Time After Expiration Or Suspension, and Must Have Substantially The Same Credit Features.*

We urge the Board to revise the Comments to 226.12(a) to prevent the issuance of an unsolicited card under the pretext that the card is a renewal or substitute card, despite the fact that the card has been inactive for an extended period of time. Furthermore, we urge the Board to clarify Comment 226.12(a)(1)-2.iii to provide that a substitute card must have substantially the same credit features as the card it is replacing.

Recently, media reports indicated that Citibank has sent millions of unsolicited general-purpose use credit cards to consumers who had Macy's store cards that had been inactive for several years.[112] Furthermore, Citibank's actions were not isolated; a similar "flip" may have occurred with J.C. Penney store cards. These incidents are problematic for several reasons.

First, the conversion of store cards into general purpose cards implicates the very reasons for the prohibition against unsolicited issuance of credit cards. This prohibition was enacted because unsolicited cards had encouraged consumers to incur unmanageable debt, spurred bankruptcy filings, intruded into consumers' lives and family affairs, and encouraged theft.[113] A creditor that unilaterally "flips" a store card creates exactly these problems. The creditor significantly increases the ability of consumers to incur unmanageable debt by expanding the card's use from one retailer to the universe of merchants that accept cards -- and to incur cash advances. The creditor also intrudes upon the consumer's privacy and financial affairs by sending an actual credit card without the consumer's request. Sending an unexpected credit card in the mail also increases the chances of theft.

The issue of theft is especially problematic when the card has been dormant for several years, as appears to be the case with the Macy's/Citibank flip.[114] Consumers were not expecting a new credit card after years of dormancy, and they were certainly surprised to receive a card from a creditor that they did not think they had a prior relationship with. Because these consumers were not expecting a new card after years of inactivity, such cards are easy targets for theft, including theft by other members of the same household. Furthermore, the issuance of cards after an extended period of time greatly increases the chance that the card will be sent to an address at which the consumer no longer resides. In fact, several consumers expressed concern

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[112] Kathy Chu, *Citi Sends Unrequested Credit Cards*, USA Today, Sept. 28, 2007; Suzanna Kapner, Macy's Card Sharks, New York Post, Aug. 22, 2007.

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

[114] Another creditor that has been issuing cards after a long dormancy is Sears. See, e.g., Spengler v. Sears, Roebuck & Co., 878 A.2d 628 (Md. Ct. App. July 11, 2005) (Sears issued new credit card after account had been dormant for 5 years and cardholder thought account terminated)

in response to the USA Today article that Citibank cards had been sent to old, invalid, prior addresses.

To prevent these problems, the Board should clarify in Comment 226.12(a)(2)-1 that a “substitute” or “renewal” card must be sent within a reasonable amount of time after the expiration or suspension of the original card, such as 90 days. Furthermore, the Board should clarify in Comment 226.12(a)(2)-1.iii that a substitute card must have substantially the same credit features as the original card. For example, we have no problem with the current example of a card whose features are expanded from the ability to obtain cash from a teller window to obtaining cash at an ATM – these features are substantially similar. But we urge the Board to add another example prohibiting the substitution of a card that can only be used at one store to a general purpose card, or the substitution of a card that can only be used for cash advances to a card that can be used for purchases.

3. *The Board Should Not Permit Additional Cards to Be Issued for an Existing Account Unless There is a Renewal or Substitution of An Existing Card.*

In its Section by Section analysis, the Board noted that it has not amended Reg. Z to permit the unsolicited issuance of additional credit cards for existing accounts when a previously accepted card is not being replaced. We support this position. In addition, we reiterate our position regarding the Board’s 2003 change permitting additional cards to be issued when there is a renewal or substitution of a card. We had suggested that the Board add a requirement that either all replacement cards be mailed in the same envelope or that the consumer be notified in writing that a second renewal or substitute card is being mailed. National Consumer Law Center, et al, *Proposed Revisions to Official Staff Commentary to Regulation Z Truth In Lending re: Open End Credit and HOEPA Triggers and Solicitation for Comments on Bounce Protection Products,* Docket No. R-1136, Jan. 27, 2003. Such a requirement will ensure that the consumer is aware that an additional card is being sent at renewal or substitution time, lessening the risk of an undetected theft should be card be stolen.

B. Unauthorized Use Protections (Reg. Z § 226.12(b)).

1. The Board Should Narrow its Proposed Exception Allowing for Liability for Misuse by Authorized Users.

The Board has proposed a new comment stating that misuse by authorized users is not covered by the protections of Reg. Z § 226.12(b). Proposed Comment 226.12(b)(1)(ii)-3 would state:

> If a cardholder furnishes a credit card and grants authority to make credit transactions to a person (such as a family member or co-worker) who exceeds the authority given, the cardholder is liable for the transaction(s) unless the cardholder has notified the creditor that use of the credit card by that person is no longer authorized.

We have significant concerns about the Proposed Comment. First, the Proposed Comment goes beyond the scope of what rightfully should be exempted from the authorized use protections, *i.e.*, misuse by authorized users. If a cardholder has requested that the creditor add another person as an authorized user to an account, we agree that the creditor cannot know which individual transactions are authorized or not.

However, the Proposed Comment goes beyond authorized users. It would cover instances where a person has not been added as an authorized user, but has been granted permission by the cardholder to engage in a single transaction. The Proposed Comment would impose liability if that person subsequently engages in unauthorized transactions, despite the fact that the person is not a named user on the account. Yet the card issuer's fraud detection measures should alert the issuer that someone who is not a cardholder or authorized user is repeatedly using the account. The exemption in the Proposed Comment should be limited to authorized users who have been explicitly added to the account, i.e., the cardholder has *informed the issuer* that the person has authority to conduct transactions on the account. We suggest that Proposed Comment be written to state: *"If a cardholder furnishes a credit card to a person and has informed the issuer that the cardholder grants authority to make credit transactions to that person…."*

Second, the Board has proposed a new comment that makes clear that unauthorized use includes situations when the card is obtained by robbery or fraud. Proposed Comment 226.12(b)(1)(ii)-4 states that transactions on a card obtained by robbery or fraud constitute unauthorized use. While we support this concept, the provisions of this Comment are too narrow and would leave consumers vulnerable to liability for unauthorized use in other instances of criminal activity, such as theft, burglary, and identity theft. The Proposed Comment only refers to robbery or fraud. Robbery is larceny from the victim's person by violence or theft. It does not cover burglary (*e.g.*, a thief steals a credit card from a consumer's home) or theft (*e.g.*, a thief steals a credit card from a desk at a workplace). The definition of fraud may not include some instances of identity theft, such as when a thief uses his own name and address but the consumer's Social Security Number. Also, it is unclear whether fraud would include fraud on a creditor, but not a consumer. For example, when an identity thief obtains a credit card in the consumer's name, the thief does not make any representations to the consumer, and the consumer never relies upon such statements – only the creditor does. In order to be absolutely clear, we believe that this Proposed Comment should be modified to state that unauthorized use includes circumstances where a person has obtained a card by theft, false pretences, identity theft, or other criminal or fraudulent means.

2. The Board Should Not Exclude Transactions Initiated by Convenience Check from the Unauthorized Use Protection.

The Board has proposed excluding checks that access a credit card account from the unauthorized use protections. As stated above in Section II.C, we oppose the Board's decisions not to cover these checks as credit cards. Furthermore, this failure to cover checks that access an account is especially illogical for the unauthorized use protections. The treatment of the check as "not a credit card" for other purposes should not mean that the entire transaction is exempt from the unauthorized use protection. The convenience check is a mechanism for initiating a credit card transaction, like a telephone or computer. Even though neither a telephone nor a computer is a credit card, purchases made by telephone or Internet are both covered by the unauthorized use protections. It seems anomalous that if a thief uses only the credit card number, without more, the unauthorized use protection applies, but the simple fact that the number is on a check takes the transaction outside this protection.[115]

The Board notes that under state law (usually the Uniform Commercial Code), there are unauthorized use protections for checks. However, the UCC permits banks to hold consumers partially liable for unauthorized use under a comparative negligence standard. U.C.C. § 3-406. Thus, for example, a creditor could argue that a consumer's negligence contributed to the use of a convenience check stolen from a mailbox, and therefore the consumer should be held liable for unauthorized use, because the consumer did not have a lock on his mailbox. TILA's unauthorized use protections provide far stronger protections for consumers than does the U.C.C. The Board's proposal to remove transactions initiated by convenience check from these protections leaves consumers unjustifiably vulnerable.

3. Conditions for Imposing Liability.

The Board has proposed several changes regarding methods of identifying a cardholder for purposes of when issuers can impose liability for unauthorized use. First, the Board has proposed revising Comment 226.12(b)(2)(iii)-1 to add other biometric measures as an additional method to identify cardholders. We are not opposed to the use of biometric measures. However, as we discuss in Section II.C above, if biometric measures are the sole method to identify cardholders and there is no physical card involved, such a system should still meet the definition of credit card.

Second, the Board has proposed revising Comment 226.12(b)(2)(iii)-3 to clarify that an issuer may not impose liability in Internet as well as telephone transactions because those transactions do not involve presentment of the card. Third, the Board has revised the same comment to prohibit the imposition of liability in telephone and Internet transactions, even if the issuer provides a CVV or other number on the card that suggests the person is in possession of the physical card. We support both of these proposals as ensuring that consumers are fully protected from unauthorized use.

Finally, we support the Board's position declining to establish a time frame in which the consumer is required to make a claim for unauthorized use. The Board's position is entirely consistent with Congressional intent, given that there is no mention in Section 1643 of any time limits for unauthorized use protections, unlike Section 1666. The Board's position is particularly important in cases where the consumer is unaware that a credit card has been stolen (perhaps it is a backup card she does not use often) or that an unauthorized account exists in her name (such as the case in identity theft or fraud by employees).

[115]The fact that the convenience check acts like a cash advance, or that a merchant who accepts the check may not be subject to a chargeback, should not change this analysis. If a thief uses a credit card to receive a cash advance and bought goods with the cash, the consumer is still protected from the unauthorized use, even though the creditor cannot take a chargeback from the merchant.

C. Cardholder's Right to Assert Claims and Defenses Against Issuer (Reg. Z § 226.12(c)).

The Board has proposed deleting the reference to "paper-based" debit cards from the list of transactions exempted from protection under Reg. Z § 226.12(c). Alternatively, the Board has asked whether this reference should be expanded to include "virtual cards" that consist of simply an account number.

As discussed in Section II.C above, we believe that "virtual cards" consisting of just an account number should be included in the definition of "credit card." Furthermore, these virtual cards should be covered by all of TILA's protections, including Reg. Z § 226.12(c).

Also, we disagree with the exemption from Reg. Z § 226.12(c) for debit cards that access overdraft credit. We believe that any debit card transactions that access overdraft credit should covered by Reg. Z § 226.12(c), whether it be a traditional overdraft line of credit or abusive, high cost overdraft loans ("bounce protection"). There is no reason given why debit cards that access overdraft credit should be exempted from Reg. Z § 226.12(c). It leaves consumers without a critical protection that Congress believed important. Regulation E does not provide any protections comparable to Reg. Z § 226.12(c). Consumers should not have less protection just because the funds source for a credit card is overdraft credit versus a conventional credit card account.

Finally, we support the Board's proposal to include Internet transactions charged to a credit card to the list of situations covered by Reg. Z § 226.12(c). However, we reiterate our request that the Board amend Reg. Z § 226.12(c) to provide that telephone and Internet transactions be deemed to have been made in the consumer's home state. Very few of these transactions are made by merchants in the same state as the consumer. With the rapid growth in Internet transactions, this has the potential to significantly dilute the claims and defenses protections under Reg. Z § 226.12(c) unless the Board acts.

D. The Board Should Require that a Consumer's Consent to an Offset be Manifested Using a Strict Measures.

The Board has not proposed any changes to Reg. Z or the Commentary with respect to the prohibition against offsets by a card-issuing bank against a deposit account held at the same bank. We support this decision. If the Board is contemplating any changes, it should issue a new proposed rule or comment before any final changes are made to Reg. Z § 226.12(d) or its related comment.

The Board has asked for comments on whether additional guidance is necessary regarding Comment 226.12(d)(2)-1, specifically regarding manifestation of the consumer's intent to grant a security interest and whether a security interest is generally available to creditors. We believe that if additional guidance is provided, it should require strong measures to manifest a consumer's consent – specifically a separate written document that must be independently signed by the consumer and that references a specific account.

We also believe that an issuer must show in other ways that it is not routinely taking security interests in deposit accounts as a functional equivalent of an offset by either falling under a numerical threshold (e.g., only a small percentage of accounts have a security interest) or by establishing a special program for accounts with a security interest (e.g., a secured credit card program advertised and prominently disclosed as such).

XVII. BILLING ERROR PROVISIONS (REG. Z § 226.13)

The Board has proposed a number of changes to Reg. Z § 226.13, governing the billing error provisions of the Fair Credit Billing Act (FCBA). We support most of these proposals, with two significant exceptions.

A. The Board's Proposal To Clarify That Billing Error Procedures Should Apply When a Consumer Uses a Credit Card to Purchase a Good or Service Through a Third-Party Payment Intermediary is an Improvement, but Should Also Prohibit Retaliation by the Third Party.

Under Reg. Z § 226.13(a)(13), a billing error includes an extension of credit for property or services not accepted by the consumer, or not delivered to the consumer as agreed. The Board has proposed a new Comment 226.13(a)(3)-2 to clarify that this definition applies to goods or services that are purchased using a third party intermediary, such as a person-to-person payment service (e.g. PayPal or Obopay). The Comment also provides that the property or service for which the extension of credit is made is not the payment service, but the goods or service purchase using the payment service.

We strongly support this new Comment. There have been a number of problems with transactions processed by third party intermediary payment services, including disputes when goods are not received. This issue was the subject of an enforcement action by the New York Attorney General against PayPal. Assurance of Discontinuance, *In the Matter of PayPal, Inc.*, New York Attorney General's Office, March 2004, *available at* http://www.oag.state.ny.us/internet/litigation/paypal.pdf.

However, the New York Attorney General's action against PayPal pointed to another problem with third party payment intermediaries that needs to be addressed. The New York Attorney General had alleged that when consumers exercised their credit card rights under Reg. Z § 226.13, PayPal denied consumers the ability to invoke PayPal's Buyer Complaint policy. *Id.* Such retaliation against consumers who exercise their rights under FCBA (or any other part of TILA) should be a violation of both the TILA and the Equal Credit Opportunity Act's prohibition against retaliation for exercise of federal consumer rights. The Board should so state in Reg. Z or the Commentary.

B. The Commentary Should State that Prior Notice to a Merchant is Not Required to Invoke Billing Error Rights.

The Board has proposed a new comment clarifying that prior notice to the merchant is not required to submit a billing error dispute defined under Reg. Z § 226.13(a)(3). The Board rightly notes that the billing error procedures are independent of and different from the right to assert claims and defenses under Section 1666i, which does require prior notice to the merchant and a good faith effort to resolve the dispute. 72 Fed. Reg. 33,108.

We support this Proposed Comment. Indeed, we believe even more clarity is needed to highlight the differences between the billing error rights and other rights under TILA and other laws, a topic we discuss below in Section XVII.D.

C. Electronic Billing Error Notices.

The Board proposes to add a provision to Comment 226.13(b)-2 that if the creditor stipulates in the billing rights statement that it accepts billing error notices electronically, a notice sent in such manner will be deemed to satisfy the notice requirements. Such a provision is logical and fair – if the creditor says it will accept electronic notices, it would be unreasonable to deem them not to satisfy the notice requirement.

More important is the issue of when the creditor does not accept billing error notices electronically. As we discussed in Section X.E above, such a policy should be discouraged. Furthermore, if the creditor accepts billing errors electronically by use of a special dispute form or email address, it must be required to treat them as sufficient for the purposes of preserving billing error rights.

D. The Board Should Make Absolutely Clear that Failure to Send a Billing Error Notice Only Affects Rights Under Reg. Z § 226.13.

The Board proposes to add a comment stating that the consumer's rights under the billing error provisions are independent of the protections against unauthorized use liability and the assertion of claims and defenses. Proposed Comment 226.13(c)-3 is a completely true and accurate statement of the Act, as well as current Reg. Z and the Commentary. We strongly support the Proposed Comment in order to reinforce this point, given that creditors have deliberately blurred the distinction.

Indeed, we continue to believe, as we stated in prior comments, that the Board must also make clear that the billing error procedures are independent from other provisions of TILA, as well as rights that consumers have under other laws.[116] Creditors have been raising failure to send a billing error notice as a defense against claims for failure to post payment under TILA Section 1666c, as well as common law defenses such as payment in a collection action.[117]

[116] 2005 NCLC Comments at 76-77.
[117] Asset Acceptance Corp. v. Proctor, 804 N.E.2d 975 (Ohio App. Ct. 2004).

Indeed, one creditor has even used the failure to send a billing error notice as an affirmative element in its collection lawsuits. In a cluster of cases brought in Connecticut trial courts, Citibank has argued that the lack of a billing error notice barred the cardholder from disputing the amount due. Unfortunately, these Connecticut courts have accepted this argument.[118] The Board must put a stop to this perverse use of TILA, a consumer protection statute, as an affirmative "sword" against consumers. The Board must clarify that a consumer's failure to send a billing error notice does not affect the consumer's rights under any other section of TILA, or any other federal or state law, but only precludes the consumer from invoking the procedures of Reg. Z § 226.13. We suggest the Board to add new Reg. Z § 226.13(j) to state:

> (j) Affect on other sections and laws. The failure of a consumer to timely send a billing error notice does not affect the consumer's rights under any other section of this regulation, the Truth in Lending Act, or any other federal or state law. A consumer's failure to send a billing error notice only precludes the consumer from invoking the procedures and protections of this Section.

<u>E. The Board's Proposal Should Ensure the Finality of Billing Error Resolutions.</u>

The Board has proposed a Comment that would require finality of error resolution within the time period statutorily required. Proposed Comment 226.13(c)(2)-2 would require the creditor to complete its investigation and conclude whether an error occurred in that time period. It would also prohibit the creditor from reversing any amounts previously credited to an account in relation to the billing error after the time period has expired.

We strongly support this Proposed Comment. It is unfair for a creditor to resolve a dispute in favor of the consumer (and claim that the creditor has met the time limits of Reg. Z § 226.13), only to reverse itself months later to the consumer's surprise and chagrin. We have received complaints about this very practice.

Finally, the Board has determined not to extend the time periods for investigation beyond the two billing cycles provided for by the Act. We support this position, since creditors have not proposed any more extensive investigation requirements that would justify additional time.

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[118] Citibank (South Dakota) N.A. v. Currea, 2006 WL 1229919 (Conn. Super. Ct. Apr. 13, 2006); Citibank (South Dakota) N.A. v. Lovell, 2006 WL 1229922 (Conn. Super. Ct. Apr. 13, 2006); Citibank (South Dakota) N.A. v. Babuscio, 2005 WL 3667343 (Conn. Super. Ct. Dec. 21, 2005); Citibank (South Dakota) N.A. v. Forcinelli, 2005 WL 3665635 (Conn. Super. Ct. Dec. 21, 2005); Citibank (South Dakota) N.A. v. Kilberg, 2005 WL 3665805 (Conn. Super. Ct. Dec. 21, 2005); Citibank (South Dakota) N.A. v. Todd, 2005 WL 3666353 (Conn. Super. Ct. Dec. 21, 2005); Citibank (South Dakota) N.A. v. Gemske, 2005 WL 3665083 (Conn. Super. Ct. Dec. 21, 2005). In one of these cases the court granted summary judgment only as to liability and held that the consumer was entitled to a hearing on the issue of damages. Citibank v. Morgan, 2006 WL 574211 (Conn. Super. Ct. Feb. 27, 2006). In another case, however, the court barred a consumer from raising a dispute about the amount owed, on the basis that her dispute was not within the time limits of FCBA. Citibank (South Dakota), N.A. v. Griffing, 2006 WL 2130414 (Conn. Super. July 17, 2006).

F. The Board Should Extend the Prohibition on Automatic Deduction during a Dispute to All Accounts.

The Board has proposed extending the prohibition on creditors using automatic deductions to pay for amounts that are under dispute. This prohibition would be extended to all automatic payment plans, not just payment plans where the debit is from a deposit account held by the credit card issuer. We support this change. It will ensure that all consumers who use automatic deductions to pay their credit card bills have a meaningful ability to invoke their billing error rights.

G. The Board Should Not Delete Footnote 31, Because It May Encourage Creditors to Conduct Perfunctory Investigations.

The Board has proposed deleting note 31, which states that:

> 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.

The Board's rationale for deleting note 31 is that it is unnecessary in light of the general obligation under Reg. Z. § 226.13(f) to conduct a reasonable investigation. However, we believe that footnote 31 is necessary, and that its deletion will have an adverse impact on consumers. Deletion of footnote 31 will encourage issuers to lessen the scope of their efforts in billing error investigations.

Under the Fair Credit Reporting Act, credit card issuers are similarly required to conduct investigations of disputed information when a consumer files a dispute with a consumer reporting agency. Unfortunately, the investigations conducted for FCRA investigations are often perfunctory, and involve little more than verification of the issuer's computer records. *See, e.g.,* Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004). Despite caselaw holding that FCRA investigations must be "reasonable", *see id.*, issuers continue to do little more than check their own records. Issuers do not contact third parties, call the consumer, or examine original documents (*e.g.*, the credit card application, canceled checks, etc.)

We are concerned that deletion of footnote 31 will result in the lowering of standards for FCBA investigations to the level of FCRA investigations. Footnote 31 explicitly requires issuers to determine whether the goods or services at issue were actually delivered mailed, or sent as agreed. This requires the issuer to take concrete steps to make such a determination, such as obtaining delivery records or interviewing the merchant. Deletion of footnote 31 will signal to issuers that these types of steps need not be taken anymore.

While it is true that Reg. Z § 226.13(f) requires a "reasonable investigation," the exact same standard applies to FCRA investigations, yet issuers conduct those investigations in a perfunctory manner. The "reasonable investigation" standard alone will not suffice to protect consumers. We believe that the more explicit and detailed requirements of footnote 31 are necessary to prevent creditors from reducing their efforts in FCBA investigations to the perfunctory level of FCRA investigations. Without Footnote 31, creditors will no longer seek additional documentation or engage in real examination of the facts, but will merely rely on the merchant's verification (much like credit bureaus rely on the issuer's perfunctory verifications in the FCRA context).

H. The Board Clarification to Preserve Grace Periods after a Billing Error Dispute Will Ensure Consumers are Not Discouraged From Invoking Their Rights.

The Board proposes to clarify that after the resolution of a billing error dispute against the consumer, the consumer retains any grace period she had prior to the dispute. Proposed Comment 226.13(g)(2)-1 would provide that if the consumer was entitled to a grace period at the time she asserted a billing error, she must be given an equivalent period of time to pay the disputed amount as well as related finance charges. We support this comment for the reasons stated by the Board, *i.e.*, this provision ensures consumers are not discouraged from asserting their billing error rights by risk of losing their grace period.

I. There Should Not Be An Exemption for Overdraft Loans and the Board Should Not Consider Any Other Potential Exemptions.

The Board proposes to exempt overdraft loan ("bounce protection") products from the billing error protections, instead requiring only the error resolution procedures of Regulation E. The Board has proposed revising Comment 226.13(i)-2, which exempts certain transactions involved electronic funds transfers, to explicitly refer to overdraft loan products.

We strongly oppose this change. As we have repeatedly pointed out to the Board, overdraft loan products are extremely abusive, high cost credit products for which consumers should be entitled to all of the protections of TILA, not just the billing error protections. See Comments of National Consumer Law Center, et al., *Comments to the Federal Reserve Board's Proposed Amendments to Regulation DD,* Docket No. R-1197, Aug. 6, 2004.

Furthermore, we oppose the creation of additional exemptions to the billing error procedures in favor of Regulation E coverage. Regulation E simply does not provide the same extent of protections for consumers as FCBA. For example, Regulation E does not provide error resolution protections if the merchant fails to deliver goods. 12 C.F.R. § 205.11(a)(2). This is especially unfair in signature debit card transactions that operate along the same networks as the credit cards. It would be no more difficult to provide FCBA rights with signature debit card transactions as it would be for credit card transaction.

Also, the banks' duty to investigate billing errors is much lower than for FCBA investigations. Regulation E's "four walls" rule allows the institution to merely check its own records, and requires contact with third parties only if the institution has a contract with the third party. 12 C.F.R. § 205.11(c)(4). Thus, Regulation E protections are far less than the protections of Reg. Z § 226.13.

J. The Board Should Update the Penalties for FCBA Violations and Permit Consumers to Seek Injunctive Relief.

We reiterate our request that the Board either update the $50 penalty under Section 1666(e) for failure to comply with FCBA or ask Congress to address this issue. A mere $50 penalty, even with the statutory damages available under the TILA, will not deter a creditor from violating the billing error provisions, especially if the disputed amount is significant, such as transactions for several thousand dollars. Indeed, we have seen cases in which issuers blatantly violated FCBA, yet incurred little penalty. Furthermore, according to the Department of Labor's cost of living calculator, the value of $50 in 2007 dollars is the equivalent of $11.86 in 1974 dollars, when FCBA was passed. Because of the importance of ensuring that creditors abide by FCBA so that consumers may meaningfully access its self-help remedies, we ask the Board to recommend that the cap be eliminated instead of an increase.

We also request the Board to amend Regulation Z or seek legislative change to state that consumers have the right to obtain injunctive relief to force a creditor to comply with the billing error procedures. Consumers should be able to ask a court to require creditors to comply with the law. Otherwise, a creditor can ignore a consumer's FCBA dispute, report the disputed amount as delinquent to a credit bureau, and initiate debt collection efforts. If the consumer sues, the most she can seek is $1,050 in statutory penalties, but the court may be powerless to order the creditor to fix the consumer's credit record or stop collection efforts. Thus, we urge the Board to amend Regulation Z to state that consumers have the right to obtain injunctive relief to force a creditor to comply with these provisions of the FCBA, by adding new Reg. Z § 226.13(k) stating:

> (k) A consumer may seek equitable relief for a creditor's failure to comply with the requirements of this section.

XVIII. ADVERTISING DISCLOSURE REQUIREMENTS (REG. Z § 226.16)

A. We Support the Board's Proposal To Require Advertising Disclosures When Creditors Advertise Negative Terms.

The Board has proposed amending current Reg. Z § 226.16(b) and Comment 226.16(b)-1 and –2 to require that the advertising disclosures must be made when a creditor promotes negative as well as positive terms, *e.g.*, "no annual fee". We support this approach. It will prevent creditors from heavily promoting one term that is favorable (e.g., "no annual fee") - but then failing to disclose that another term (e.g. a $149 monthly participation fee) is extremely expensive.

B. The Board Should Establish Font Requirements for All Advertising Disclosures.

Section 1663 of TILA requires that, if certain trigger terms are advertised, other disclosures must be made in a "clear and conspicuous" manner. Proposed Reg. Z § 226.16(b) and Proposed Comment 226.16-1 and 226.16-2 implement these requirements, along with the 2005 Bankruptcy Act Amendments governing the advertisement of introductory rates.

Issuers often prominently advertise selected terms of their products while obscuring the disclosures required by TILA § 143 and Reg. Z § 226.26. This undercuts the purpose of requiring these advertising disclosures, which are intended to give consumers complete information about the product being offered.

Proposed Comment 226.16-1 states that, aside from certain disclosures required for introductory rates, other disclosures need not be printed in any particular font size or any particular place. The introductory rate disclosure terms, by contrast, must be equally prominent to the teaser rate. Proposed Comment 226.16-2 states that information that is in the same type size as the teaser rate is deemed to be equally prominent. We believe that the disclosures should not only be the same type size, but should also have the same highlighting; otherwise, they are not "equally prominent." Furthermore, these should be requirements, not simply a safe harbor.

Moreover, the other required advertising disclosures that must be "clear and conspicuous" should also be equally prominent, in the same font size and with the same highlighting. Without specific guidance, the "clear and conspicuous" standard is subject to debate, and its intent can be frustrated.

The Board should also adopt a general definition of "clear". This definition should state that a disclosure is not clear if it is capable of more than one plausible interpretation.

C. Introductory Rates (Reg. Z § 226.16(e).

Section 226.16(e) deals with disclosure of introductory rates and implements TILA Section 127(c)(6), as added by Section 1303(a) of the Bankruptcy Act of 2005.

1. *Scope (Proposed Reg. Z § 226.16(e)(1)) – Extending the Introductory Rate Requirements to Promotional Materials Ensures Consumers Have Critical Information When Reviewing These Materials.*

The Board proposes extending the disclosure rules concerning introductory rates beyond direct mail applications and solicitations and also to publicly available promotional materials ("take ones"). We support this extension. As the Board notes, consumers are in the same position and need the same information regardless of the manner in which they receive the materials.

The Board also proposes extending the rules governing introductory rate disclosures for internet solicitations to apply to internet applications as well. We support this extension. This proposal will make the rule consistent with the rule governing paper applications, and will provide another opportunity to prevent deceptive marketing.

Finally, the Board proposes extending some of the requirements governing applications and solicitations to other written advertisements for open-end credit plans that may not accompany an application or solicitation. Again, we support this extension for similar reasons.

2. *Definition of "Introductory Rate" (Proposed Reg. Z § 226.16(e)(2)).*

The statute defines the temporary APR as "any rate of interest applicable to a credit card account for an introductory period of less than 1 year, if that rate is less than an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation."[119] The Board proposes to rework this definition to be "any rate of interest applicable to a credit card account for an introductory period if that rate is less than the advertised annual percentage rate that will be in effect at the end of the introductory period."

This proposal is problematic. Limiting the comparison rate to one that is "advertised" invites evasion by lenders who never advertise the base rates, or who do not do so for a comparable product (especially subprime cards). Determining what rate "will be in effect at the end of the introductory period" may also be difficult to discern from advertisements. The definition could make the disclosure requirements circular: the permanent rate must be disclosed if the permanent rate is disclosed in advertisements. That would create a disincentive for creditors to disclose permanent rates.

These problems could be avoided simply by deleting the word "advertised" from the Board's proposal. With that single word omitted, the Board's definition would capture the complete essence of a temporary rate: one that will expire and will be replaced by a higher rate.

We support the Board's proposal to extend the definition of "introductory rate" to include offers where the introductory rate lasts beyond one year. This extension makes these rules consistent with the treatment of "discounted variable-rate plans," and provides information that will be useful to all consumers considering credit on terms that will change.

Finally, we urge the Board to state explicitly in the Commentary that the definition of temporary APR encompasses any APR that will increase, not just purchase APRs. While we believe that both the statute and Proposed Reg. Z are clear on this point, we are not confident that issuers will agree. Addressing the issue in the Commentary would avoid any dispute.

3. *Stating the Term "Introductory" (Proposed Reg. Z § 226.16(e)(3)).*

The Bankruptcy Act revisions require the term "introductory" to be used in "immediate proximity" to each listing of the temporary APR. The Board's proposal uses the statutory language in Reg. Z, but states in the proposed Commentary that use of the term "intro" or "introductory" in the "same phrase" as the listing of the rate is deemed to be in immediate proximity. The discussion of this section describes the Commentary as creating a "safe harbor,"

[119] 15 U.S.C. § 1637(c)(6)(D)(i).

which would also permit other formulations – such as a graphic – that would not be in the same phrase but would be in immediate proximity.

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 use the term "introductory" in immediate proximity to the rate. The only appropriate safe harbor is a strict one such as "adjacent" or "immediately before or immediately after." The Board gives an example of "introductory balance transfer rate X percent," but there is no reason this could not be rephrased as "balance transfers: X% introductory rate" if the creditor wishes to enjoy the safe harbor. Having a restrictive safe harbor still allows other formulations, such as graphics, that clearly are in "immediate proximity."

We do not object to use of the term "intro" in place of "introductory."

4. *Stating the Introductory Period and Post-Introductory Rate (Proposed Reg. Z § 226.16(e)(4)).*

The Bankruptcy Act amendments require that the term of the introductory rate and the subsequent rate be disclosed in a "prominent location closely proximate to the first listing" of the introductory APR.[120]

"***Prominent location closely proximate***." The Board has rejected our comments proposing that "closely proximate" be interpreted as either side-by-side with or immediately under or above. Instead, the Board uses the statutory language in Reg. Z, but states in the proposed Commentary that information "in the same paragraph," but not in a footnote, is deemed to be in a prominent location. The discussion describes this as a safe harbor.

We disagree strongly with this proposal. A paragraph can be very long, and need not even begin and end on the same page. The Board indicates the need for flexible guidance, but flexible guidance is too often abused to obscure information that Congress intended to highlight.

If the Board is to take the "safe harbor" approach, the only appropriate safe harbor is one that clearly meets Congressional intent. Our prior proposal – that the rate's term be placed either side-by-side with or immediately under or above the rate – clearly is "closely proximate"; the Commentary's standard may well not be.

"***First listing.***" The Board proposes that, in a single page mailing or document, the most prominent listing of the introductory rate on the front side of the document, or the first listing if none is more prominent than the others, be deemed the "first listing" requiring mention of the rate term and the subsequent rate. We agree with this proposal, and with the Board's rationale that consumers are drawn to the most prominent listing, not necessarily the first one on the page.

We disagree with the Board's proposal that, in a multi-page document, the term of the introductory APR and the subsequent rate need only be disclosed on the "principal promotional

[120] 15 U.S.C. § 1637(c)(6)(A).

document." The purpose of giving consumers this information is to enable them to avoid being misled by a low introductory APR. They need this information on every document in a solicitation that mentions the introductory rate. The requirements of the 2005 Amendments apply to "*all* promotional materials accompanying such application or solicitation." Allowing creditors to choose only one document on which to give complete information and to give undue emphasis to the transient and deceptively low introductory rate on other documents is contrary to the statutory language and congressional intent.

Subsequent rate. The Board proposes that creditors be permitted to disclose a range of rates that may apply after the teaser rate expires if the subsequent rate depends on a later determination of creditworthiness. The Board also asks whether creditors should be permitted to choose between disclosing a range of rates or only the highest possible rate.

As discussed in Section VI.F, we strongly object to the Board's proposal to allow creditors to disclose a range of rates, such as 8.99% to 19.99% APR, so that they can engage in later risk-based pricing. Such a disclosure is meaningless and provides no information to consumers. Instead, the Board should require disclosure of a single rate, which is the actual rate that will apply after the teaser expires.

5. *Electronic Banner and Pop-Up Advertisements (Proposed Reg. Z § 226.16(e)(5)).*

The Board proposes to treat electronic banner and pop-up advertisements in the same manner as envelopes. Under the 2005 Bankruptcy Act Amendments, envelopes that advertise an introductory rate need not disclose the term of that rate and the subsequent rate.

We disagree with this proposal. Consumers should be given full information about a transient introductory rate at every opportunity.

D. Creditors Should Be Required to Make Full Advertising Disclosures in Radio and TV Advertisements (Proposed Comment 226.16(f)).

The Board has proposed adding an alternative disclosure for television and radio ads. Proposed Comment 226.16(f) would permit to creditors to only state the periodic rate (expressed as an APR) and provide a toll-free number at which the consumer can obtain fee and payment information. We oppose this proposed change. As we have repeatedly noted, interest is but one of the components of the charges assessed to consumers. The actual price that consumers pay for credit may include significant fees required to be disclosed under Reg. Z § 226.16, such as annual fees, monthly fees, or membership fees, especially for subprime credit cards and other predatory products. Under the Board's proposal, for example, Advance America could advertise on TV or radio that its open-end payday loan had a "low 5.9% APR" despite its $149 monthly fee.

The requirement to provide a toll-free number at which fee information can be found does not cure the proposed change of its deficiency. First, the Board's own testing found that consumers did not notice cross-referenced information. 72 Fed. Reg. at 33,009. Second, creditors will simply use the toll-free number, not to make disclosures, but engage in "hard sell" marketing to consumers who simply wish to inquire about the terms of credit.

E. The Board's Prohibition Against the Misleading Use of "Fixed" Will Make Credit Card Ads Less Deceptive (Proposed Reg. Z § 226.16(g)).

The Board has proposed limiting the use of the term "fixed" by creditors. Proposed Reg. Z § 226.16(g) would prohibit the use of the term "fixed" unless the interest rate will not change for a certain period of time, which must be disclosed, or is fixed forever. We support this change. It addresses a significant abuse by creditors who advertise low "fixed" rates, but then change the rates later using penalty rates or changes in terms,

We believe that this prohibition should be instituted for other TILA open-end disclosures. The Board has proposed a similar provision for use of the term "fixed" in any disclosures in tabular format, which we also support. Proposed Reg. Z § 226.5(a)(2)(iii). In addition, we believe that the term "fixed" should be limited whether or not used in the tabular format, if used in the application disclosures, account opening disclosures, periodic statements, and any other TILA disclosures.

Finally, it is unclear whether consumers who are harmed by violation of this new provision can seek redress. As the Board knows, the advertising disclosure requirements of Subpart C of TILA are not subject to the remedies of Section 1640. However, certain other advertising disclosures, such as the teaser rate disclosures of 1637(c)(6), are subject to Section 1640. Thus, the Board should make clear that the prohibition against the misleading use of the term "fixed," at least with respect to credit card advertisements, is promulgated pursuant to its authority under Section 1637(c)(5), which gives the Board broad authority to require disclosures in the credit card context.

XIX. CONCLUSION

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

However, there is still more work to be done. We urge the Board to undertake a new rulemaking to declare credit card abuses to be unfair or deceptive practices under the FTC Act. For those practices that may require Congressional action, we urge the Board to use its substantial influence to recommend such legislation to Congress.