Comments of the

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

and

Consumer Federation of America
Consumers Union
Dēmos: A Network for Ideas & Action
National Association of Consumer Advocates
Sargent Shriver National Center on Poverty Law
U.S. Public Interest Research Group

Regarding

Notice of Proposed Rulemaking
Regulation Z Provisions Implementing
the Credit Card Accountability, Responsibility and Disclosures Act of 2009

Federal Reserve System
12 CFR Part 226

Docket No. R-1370

November 20, 2009

These comments are submitted by the National Consumer Law Center (on behalf of its low-income clients),[1] the Center for Responsible Lending,[2] Consumer Action,[3]

[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 (4th ed. 2009) 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, Lauren Saunders, and Todd Blodgett of NCLC; Rebecca Borne, Josh Frank, Kathleen Keest of Center for Responsible Lending; and Linda Sherry of Consumer Action.

Consumer Federation of America,[4] Consumers Union,[5] Dēmos: A Network for Ideas & Action,[6] National Association of Consumer Advocates,[7] Sargent Shriver National Center on Poverty Law,[8] and U.S. Public Interest Research Group.[9] These comments address the Federal Reserve Board's October 21, 2009 Notice of Proposed Rulemaking which implements the Credit Card Accountability, Responsibility and Disclosures Act of 2009 (Credit CARD Act). 74 Fed Reg. 54,124 (October 21, 2009). The Credit CARD Act amended the Truth in Lending Act (TILA), adding a number of substantive credit card protections.

We appreciate the Board and staff's tremendous efforts in issuing the proposed rule, especially given the timeframe within which they were required to develop and draft the proposal. The proposed rule has many provisions that we support, and that fairly

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[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] **Consumer Action** (www.consumer-action.org) is a national non-profit education and advocacy organization that has served consumers since 1971. Consumer Action (CA) serves consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities. CA offers many free services to consumers and communities. Consumer Action develops free consumer education modules, training, and multi-lingual materials for its network of more than 9,000 community based organizations. The modules include publications in Chinese, English, Korean, Spanish and Vietnamese.

[4] **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.

[5] **Consumers Union** of United States, Inc., publisher of *Consumer Reports*, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications have a combined paid circulation of approximately 7.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and services, fees, and noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[6] **Dēmos: A Network for Ideas & Action** is a non-partisan public policy research and advocacy organization. Headquartered in New York City, Dēmos works with advocates and policymakers around the country in pursuit of four overarching goals: a more equitable economy; a vibrant and inclusive democracy; an empowered public sector that works for the common good; and responsible U.S. engagement in an interdependent world.

[7] 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.

[8] The **Sargent Shriver National Center on Poverty Law** is a national law and policy center that provides national leadership in identifying, developing and supporting innovative and collaborative approaches to achieve social and economic justice for low-income people.

[9] **U.S. PIRG** serves as the federation of state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations.

implement the Credit CARD Act. However, there are a number of issues for which the proposed rule should be improved, most importantly:

- *Anti-circumvention and anti-waiver provision.* There should be a general anti-circumvention and anti-waiver provision for Regulation Z's credit card protections. Even before the Credit CARD Act has taken effect, consumer advocates have learned of numerous tactics by credit card issuers that appear to be designed to circumvent its protections. This includes rate increases that are "rebated" if the consumer does not pay late (effectively establishing a penalty rate hike applicable to existing balances if the consumer is even one day late); increases in minimum payments designed to coerce consumers to "voluntarily" agree to higher rates, and manipulations with respect to variable rates.

- *Over-limit fee substitutes and coercive measures.* Issuers should be prohibited from imposing or increasing any fee or charge, or having any other difference in account terms, for consumers who do not opt-in to over-the-limit transaction payment. This includes late fees triggered by failure to pay in full an approved over limit transaction. This prohibition should also bar issuers from providing any inducements for opting in, since the absence of an inducement could essentially represent a penalty for not electing to opt in.

- *Using excessive minimum payment increases or requiring payment in full to evade rate increase rules.* Issuers should be prohibited from circumventing the rate increase provisions by first implementing an excessive minimum payment increase, or even requiring payment in full and then, after 60 days have passed, imposing a retroactive rate increase.

- *Deferred interest.* Deferred interest plans in which interest may retroactively assessed for the entire deferred interest balance should be banned. These plans are prohibited by the plain language of the Credit CARD Act's prohibition on double cycle billing.

- *Verification of and criteria for ability to pay.* Issuers should be required to use specific criteria or a set formula in determining a consumer's ability to pay. They should be required to verify income and asset information provided by the consumer.

Given the numerous creative evasions that we are already seeing at this early date, if the Board does not take strong, decisive action now to stop identified evasions and to make clear that new ones will not be tolerated, the tremendous effort that went into the Credit CARD Act will be wasted and the Board will have failed in its mission to ensure that consumers receive the protections that Congress intended.

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I. THE PROPOSED RULE MUST EXPLICITLY PROHIBIT ANY WAIVER OR CIRCUMVENTION BY CREDITORS.

The proposed rule includes several provisions designed to prevent evasions, and we urge the Board to adopt several more in these comments. However, we recommend the Board to go further, and include a generalized prohibition in the rule against circumvention or waiver of its protections. The need for anti-circumvention and anti-waiver provisions is absolutely critical, and its absence is potentially the most important weakness of the proposed rule.

A. Issuers Must Be Prohibited from Engaging in Tactics Designed to Circumvent the Protections of the Rule.

Even before the effective date of the Credit CARD Act, we are seeing tactics and tricks by card issuers designed to circumvent the protections of the Act, describe below. For example, Citibank is already evading the interest rate rules by imposing a rate increase that is then refunded unless the consumer pays late. Other examples include the over-the-limit fee evasions and the variable rate manipulations discussed in Sections XI and X.D.

Thus, we urge the Board to include clear language in Regulation Z itself or Commentary prohibiting creditors from circumventing the protections of the Credit CARD Act, such as:

> "A creditor may not use any device, subterfuge, or pretense designed to evade the provisions of this Regulation."[10]

Neither Congress nor the Board can keep up with all of the evasions, which are always two steps ahead of us. Though we have done our best to address the evasions we have seen and can imagine, there will be many more in the days and months ahead as issuers work hard to defeat Congress's purpose in passing the Credit CARD Act. We cannot wait several years for the Board to update Regulation Z with new provisions that will in turn become outdated.

The Board has authority under Section 105(a) of TILA to adopt regulations to carry out the purposes of TILA. Section 105(a) by its literal terms authorizes regulations that the Board believes are necessary "to prevent **circumvention or evasion** thereof." (emphasis added). The Board certainly has not hesitated to use this authority on behalf of issuers to create significant exceptions that have no statutory basis, *e.g.*, the Servicemembers Civil Relief Act exception. Certainly Section 105(a), with its focus on preventing circumvention and evasion, should be used on behalf of consumers for the specific purposes listed in the statutory language. A general anti-evasion provision is

[10] Precedent for such language can be found in state consumer protection laws. *Cf.* Virginia Small Loan Act, Va. Code § 6.1-251.

essential if Congress's purpose in enacting the Credit CARD Act is not to be eviscerated by circumventions exploiting unforeseen gaps in the statute or the regulations.

B. The Board Should Make Clear in Regulation Z or the Commentary that the Protections Of The Regulation Cannot Be Waived.

The Board must also include anti-waiver language in the proposed rule. An example of conduct that must be prohibited is the often-cited practice by JPMorgan Chase of increasing the minimum payments for certain accounts from 2% to 5%. When affected consumers called customer service regarding this increase, they were offered the option of getting the increase reversed if they agree to a higher interest rate -- a coerced "voluntary" rate hike.

We appreciate the fact that the Board did state in the Supplemental Information that the protections of the Credit CARD Act cannot be waived or forfeited. 74 Fed Reg. at 54,176. However, as the Board knows, the Supplemental Information is not accorded the same level of deference as a regulation or Staff Commentary. Wyeth v. Levine, 129 S.Ct. 1187 (2009) (FDA's regulatory preamble did not merit deference in light of lack of notice and opportunity for comment). Furthermore, this language will not be codified in the Code of Federal Regulations. Instead, we urge the Board to clearly state in Regulation Z itself or Commentary that the protections of the CARD Act cannot be waived or forfeited, using language such as:

> "The requirements and prohibition of this section apply even if the consumer consents or otherwise authorizes an increase in rates that would otherwise be in violation of this section. Any waiver of this section is null, void and of no effect."

II. NOTICES

We have a number of comments regarding the notice provisions of the proposed rule. These comments are consolidated within the following section.

A. Account Substitutions (Proposed Comment 5(b)(1)(i)-6)

Proposed Comment 5(b)(1)(i)-6 permits an issuer to provide either a change-in-terms notice or a new set of account opening disclosures if the issuer substitutes or replaces one credit card account for another. The problem, as the Board itself has recognized, is that the issuer need not provide 45 days notice for any changes created by the new set of account-opening disclosures. 74 Fed. Reg. at 54,131. Thus, issuers wishing to avoid the 45 day period for changes-in-terms, or the right to reject such changes, may attempt to circumvent these protections by "substituting" a new credit card account for an existing one.

Despite its recognition of the risk of circumvention, the Board's proposed response – a multi-part analysis of whether an account substitution is really a new account or simply a change-in-terms – is entirely inadequate. Instead, the Board should require that, for substitute or replacement accounts with the same issuer or an affiliate, if the new account is different from the old account with respect to any of the terms required to be disclosed in the account opening table under Reg. Z § 226.6(b)(2), such terms will not become effective for 45 days.

Furthermore, issuers should also be required to send a plain language summary of the differences between the accounts. Simply sending a new set of terms and conditions – which are indecipherable on their face, and which the consumer will likely not even be able to compare to the existing terms – is not meaningful disclosure.

Finally, the Board should require that the consumer has the right to reject such changes pursuant to Reg. Z § 226.9(h). These requirements would balance the need for the issuer to send the new account-opening disclosures as soon as possible for a true substitute or replacement account, with the need to delay any changes that result in higher pricing to consumers and to preserve the consumer's right to reject such changes.

We note that the proposed Comment does reference the protections of proposed Reg. Z § 226.55(d), which states that TILA's protections against rate increases apply even when an account is closed or the balance is transferred to a new card issued by the same issuer or an affiliate. We support this provision but believe similar provisions should apply to other protections of Regulation Z, including the 45 day period for account changes and the right to reject changes.

B. Periodic Statements

1. *All periodic statements for open-end credit should include the due date and late payment disclosures (Proposed Reg. Z § 226.7(b)(11)).*

The Board has proposed revising Reg. Z § 226.7(b)(11), which requires disclosure of the due date and late payment fees to limit its application to credit cards that are not home secured. Previously, this section had applied to all open-end credit.

The Board states that it limited the scope of Reg. Z § 226.7(b)(11) to non-home-secured credit card accounts because Section 127(b)(11) itself was so revised. 74 Fed. Reg. at 54,132. However, the Board has ample authority under Section 105(a) of TILA to extend the protections of Section 127(b)(11) to all open-end accounts. The Board has used its authority under Section 105(a) several times in the proposed rule to create significant exceptions on behalf and in favor of issuers that have no statutory basis, *e.g.*, an exception to the protections against rate increases for outstanding balances when the APR has been reduced under the Servicemembers Civil Relief Act. The Board should similarly use its Section 105(a) authority on behalf of consumers.

Requiring creditors to disclose the due date and late payment penalties for all forms of open-end credit is certainly not a radical extension of TILA. Instead, it is a practical, common-sense measure. The Board would simply be disclosing the fundamental terms of the legal obligation between the parties. With respect to due dates, it is almost nonsensical not to require disclosure. How is a consumer supposed to meet his or her obligations to pay the required minimum payment for the account if she is not informed of the due date? Extending Reg. Z § 226.7(b)(11) to all open-end accounts is a limited and minor extension of TILA that is eminently sensible, and a far lesser use of the Board's Section 105(a) authority in contrast to other uses in favor of issuers in the proposed rule.

2. *Comments on the minimum payment disclosures (Proposed Reg. Z § 226.7(b)(12)).*

We support many of the Board's proposals with respect to minimum payment disclosures. These include:

- Proposed Reg. Z § 226.7(b)(12)(i)(F), which requires issuers to disclose on periodic statements the estimated savings if the consumer pays off the balance in 36 months, versus only making minimum payments. This disclosure will enable consumers to clearly and easily understand the potential savings from paying off a balance in 36 months. While some consumers may be able to make this calculation themselves, the Board's own research shows that consumers often don't do so. Furthermore, some consumers may lack the quantitative skills necessary to make this calculation.

- Proposed Reg. Z § 226.7(b)(12)(ii), which requires a special warning for accounts in which the minimum payment formula results in negative amortization.

- Proposed Reg. Z § 226.7(b)(12)(iv)(B), which requires referrals, upon request by the consumer, to credit counseling services available in languages other than English.

- The fact that proposed Reg. Z § 226.7(b)(12)(v) does not include an exemption for credit cards with fixed repayment periods.

However, there are several provisions that could be improved:

- The accounts of convenience users should not be exempted, as is currently proposed Reg. Z § 226.7(b)(12)(v), from the minimum payment disclosures. As we noted in our prior comments to the Board's June 2007 Regulation Z NPRM, at least one study found that *almost 80% of non-revolvers* preferred to get a minimum payment disclosure.[11] 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

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

it. Greater understanding of the magnitude of the consequences of making only minimum payments may also induce convenience users to talk with friends and family members who are revolvers. Further, as the current recession reminds us, circumstances can change rapidly, turning convenience users into revolvers.

- The minimum payment repayment estimate disclosures should not be rounded to the nearest year, as required by proposed Reg. Z § 226.7(b)(12)(i)(B). Instead, estimates should be expressed in years and months. Six months can be a significant amount of time, especially for a consumer who struggles and scrapes in order to make the minimum payment.

C. Renewal Disclosures (Reg. Z § 226.9(e))

1. *The Board should restore the alternative procedure permitting imposition and refund of an annual fee.*

TILA currently requires card users that assess an annual or other fee based on inactivity or activity to provide a renewal notice before the fee is imposed. TILA also currently provides an alternative procedure in § 127(d)(2) that permits the issuer to impose the fee if the consumer is given 30 days to cancel the card and have the fee recredited. Current Reg. Z § 226.9(e)(2) implements that alternative procedure.

The Credit CARD Act deleted Section 127(d)(2) of TILA, and the Board therefore proposes to delete the authorization for the alternative procedure in Reg. Z § 229.9(e)(2). We oppose this deletion for the following reasons.

The deletion of Section 127(d)(2) of TILA by the Credit CARD Act was a drafting error that the Board should correct using its authority under Section 105(a) of TILA. Congress did not intend to remove the alternative procedure permitting imposition and then refund of annual fees. Instead, the deletion of Section 127(d)(2) of TILA was originally part of an earlier version of the bill that imposed a more comprehensive reform, and prohibited any change of terms until the card expired and renewal disclosures were sent. The bill would have required a complete set of account opening disclosures upon renewal, including all new terms. Thus, the alternative procedure would have been superfluous, as renewal disclosures would have been required for all cards before the card expired.

However, that portion of the bill did not survive final passage. The Credit CARD Act in its final form permits changes before renewal of the card. But the drafters neglected to restore Section 127(d)(2) of TILA to its original state.

Restoring § 226.9(e)(2) will benefit both consumers and issuers. Consumers benefit when issuers are allowed to first impose the annual fee and then to refund the fee if the card is not renewed, because consumers are more likely to notice the fee at the time that they pay their bill and to exercise their right to cancel the card if it actually appears on the statement. One of the writers of these comments, who had planned to cancel a card, had that exact experience. By contrast, a simple notice that the fee is about to be imposed if the card is not canceled in 30 days is likely to escape notice by the vast majority of consumers who do not read stuffers and other notices sent by issuers.

There is absolutely no legislative history showing any concern on Congress's part, or any other evidence of which we are aware, about misuse of the alternative impose-and-refund procedure in a way that harms consumers. Restoring Reg. Z § 226.9(e)(2) will also benefit issuers, because it provides them with a discretionary alternative procedure. It does not require them to use it. Thus, issuers are merely given an additional option that they will not have if the provision is removed.

The Board regularly invokes its authority under Section 105(a) of TILA to make exceptions to TILA's literal requirements, in order to benefit issuers. Indeed, the Board proposes to make such an exception in another aspect of this very provision, as discussed below. The Board should use that authority to help consumers in this instance by permitting a procedure that is most likely to result in consumers being aware of and exercising the right that Congress gave them to cancel a card before becoming liable for a new annual fee.

2. *The Board should require renewal disclosures if there have been any changes to the account*

Section 127(d) of TILA, as amended by the Credit CARD Act, requires renewal disclosures if a card issuer "has changed or amended *any* term of the account since the last renewal that has not been previously disclosed" (emphasis added). The Board proposes to use its authority under Section 105(a) of TILA to create an exception to this requirement for changes that are not required to be disclosed in the table provided at account opening.

We oppose this exception. The Congressional language is categorical; it does not create any exceptions. The Board explains that it believes that any changes in terms that are not required to be disclosed in the table will be relatively minor, such as increasing the amount of a fee for expedited delivery of a credit card. However, as we have repeatedly pointed out, limiting TILA protections to the terms in the account opening table is a recipe for evasion.

The Board should know from experience that issuers often find ways to bury important new terms in fees or policies that are not disclosed in the account-opening table. These comments describe many new evasions, such as new refund and rebate policies, and minimum payment requirements, that are not described in the table. Other tactics involving payment allocation are undoubtedly coming. While some of these changes might require advance notice and thus will have been previously disclosed, the creativity of the issuers knows no bounds and the Board is not requiring advance disclosure of all changes-in-terms. Thus, the Board should ensure that consumers know of *all* changes to their accounts, as Congress mandated, before renewing the card.

3. *The renewal disclosures should be in a tabular format, in a prominent location, in a form the cardholder can retain.*

Proposed Comment 9(e)-2 states that renewal disclosures must be clear and conspicuous. We support that requirement. However, the Comment goes on to say that the disclosures need not appear in a tabular format, in a prominent location, or in a form the cardholder can retain. We oppose the proposed Comment.

Disclosures provided upon renewal are the best opportunity for the consumer to take stock of changes that have slipped in to the account after the consumer last shopped for a card and to consider whether other cards offer better terms. Thus, it is important that renewal disclosures be provided in a way that is conducive to comparison shopping. The disclosures should be in the same format that similar terms are disclosed so that comparable terms can be identified and compared easily. They should be in a prominent location so that consumers will notice them.

There appears to be no rationale to failing to provide them in a form the consumer can keep. For example, one of the writers of these comments recently received a telephone call about account changes. Consumers cannot possibly understand or compare terms that are not in a form that they can review, show to others, and compare to other cards.

4. *Requirements we support.*

We support the Board's proposal to require disclosure of previously undisclosed changes that benefit the consumer, such as interest rate reductions. However, the Board's reasoning applies to all changes, including those described in the previous section. Requiring notice prior to renewal promotes informed use of credit by consumers and will remind them of the terms of their account.

We support the proposal to require at least 30 days notice of previously undisclosed changes even if the issuer does not impose an annual or other periodic fee for renewal.

D. Change-in-Terms Notices and Penalty Rate Notices

1. *All significant change-in-terms should require a notice (Proposed Reg. Z § 226.9(c) and (h)).*

Proposed Reg. Z § 226.9(c) and (h) limit the requirement to provide a change-in-terms notice and the consumer's right to reject changes to only those terms disclosed in the account-opening table under Reg. Z § 226.6(b)(2). This is an entirely too restrictive interpretation of Section 127(i)(2) of TILA as added by the Credit CARD Act. We have previously commented on this issue in our comments to the Board's July 2009 Interim Final Rule, and our comments are attached as Appendix A.

2. *Issuers should be required to provide notice of a reduction in an account's credit limit or an account termination.*

As it did with its July 2009 Interim Final Rule, the Board is proposing not requiring creditors to disclose a reduction in credit limit or an account termination, unless the reduction triggers the imposition of an over-the-limit fee or penalty rate. However, both credit limit reduction and account termination can have dire consequences for consumers eventually resulting in added fees and penalty rates, even if the result is not immediate. As discussed below, issuers appear to be evading the rule on over-the-limit fees by approving transactions but requiring payment in full and increasing the likelihood of a late fee. Issuers may also be planning to use a default to demand payment in full, and then to impose a retroactive rate increase once the consumer is 60 days late.

We continue to believe that consumers should be provided with a notice of a credit limit reduction or account termination contemporaneously with or subsequent to such actions, even if the reduction or termination does not result in an immediate over-the-limit fee, penalty rate or other consequence. An over-the-limit fee or penalty rate may not be the only negative consequence of a credit limit reduction. We have previously commented on this issue in our comments to the Board's July 2009 Interim Final Rule, and our comments are attached as Appendix A.

3. *Notices of rate increases and penalty rate notices should disclose both the current rate and the increased rate (Proposed Reg. Z §§ 226.9(c)(2)(iv)(7) and 226.9(g)(3)(i)).*

Proposed Reg. Z §§ 226.9(c)(2)(iv)(7) and 226.9(g)(3)(i)(A)(5) both require, in the case of a rate increase, that the applicable notice describe the balances to which the current rate will continue to apply. Furthermore, proposed Reg. Z § 226.9(g)(3)(i)(A)(5) requires that, if the issuer is increasing the rate for a protected balanced because the consumer has failed to make the required minimum payment within 60 days of the due date, the issuer must send a second penalty rate notice informing the consumer of the reason for the increase and the consumer's right to reinstatement of the prior rate if the consumer makes the required minimum payment for six months. We strongly support both provisions.

However, we believe that both notices are missing an important piece of information, *i.e.*, disclosure of the current rate or rates from which the rate is being increased. Disclosure of the current rate is important because it provides consumers with critical information about of the magnitude of the change in rates, which may help them understand the corresponding impact that a rate change will have on their finances. For consumers who have been over 60 days late, it informs them exactly how important paying on time for the next six months will be.

Without information about their current rate or rates, consumers will have to go hunting for this information, which they may not readily find. In addition, if multiple rates apply to their accounts, the notice will remind consumers about the other APRs, because many consumers will not readily remember that the purchase APR is not the only one that applies.

III. DEFERRED INTEREST PLANS

A. The Credit CARD Act of 2009 Bans Deferred Interest Plans, and the Board is Acting Directly Contrary to the Statute in Permitting Them.

We have previously stated our opposition to the Board's continued authorization of deferred interest plans. In particular, we believe that Section 127(j) of TILA's prohibition against double cycle billing, as added by the Credit CARD Act, also prohibits deferred interest plans that permit the retroactive assessment of interest for the entire deferred interest amount for the entire period. Not only does Section 127(j)(2) contain very specific and limited exceptions to its prohibitions, an exception for deferred interest plans was removed from a prior version of the bill. These arguments are stated in our most recent comments to the July 2009 Interim Final Rule, which are attached as Appendix A. Given the clear legislative history that the Credit CARD Act banned such plans, we believe the Board is taking an action directly contradicting the statute in authorizing them under proposed Comments 54(a)(1)-2 and 55(b)(1)-3.

B. Provisions That Should be Strengthened

As stated above, we believe that the Credit CARD Act banned deferred interest plans, and the Regulation Z should reflect express Congressional intent. However, at a minimum, the deferred interest provisions of the proposed rule must be greatly strengthened, including:

- The Board should prohibit any statement or advertisement of a deferred interest plan from including the term "no interest," "no interest until X date" or "interest free." While the Board does rightfully ban disclosure of the APR for a deferred interest plan as "0%" under proposed Reg. Z § 226.5a(b)(1), this is not sufficient to ensure that consumers are not misled about the nature of deferred interest plans. The Board should ban any suggestion or implication that a deferred interest plan carries no interest rate.

- The Board should in proposed Reg. Z § 226.7(b)(14) require a disclosure in ALL periodic statements during the deferred interest period, not just the last two billing cycles, that the consumer must repay the entire balance in full or will be obligated for the entire amount of accrued interest.

- The disclosure required by proposed Reg. Z § 226.7(b)(14) could be improved. As we have repeatedly pointed out, one of the problems with deferred interest plans is that the entire concept behind them is confusing, and even the best disclosures may not adequately convey the necessary information. Nonetheless, the Board's model disclosure could better explain the retroactive nature of the interest charges that will be imposed, and that, if true, the minimum payment will not pay off the balance by the deferred interest date:

"You will be charged interest on your purchase starting back to the original purchase date if you don't pay off the entire balance by [deferred interest date]. [Making only the minimum payment on your account will not pay off the purchase in time to avoid interest]."

- Customer service representatives should be trained to accurately answer questions regarding deferred interest and payment allocation so that consumers can plan their payments to have their intended effect. That is, customer service representatives must be able to answer questions from cardholders such as: "If I want to pay off my deferred interest balance, when do I need to make a payment?" or "If I make a payment today, what balance will it go to?"

IV. PAYMENT PROTECTIONS (REG. Z § 226.10)

A. <u>For Electronic and Telephone Payments, the 5 p.m. Payment Cut-off Time Should Refer to the Time Zone of the Consumer, not the Creditor.</u>

Proposed Reg. Z § 226.10(b)(2)(ii) prohibits creditors from setting a payment cut-off time earlier than 5 p.m.; however, the 5 p.m. cut-off refers to the time zone of the location that receives such payments. The Board asks whether creditors should be required to use the consumer's time zone for electronic and telephone payments. We believe that the creditor should be required to do so. Otherwise, using the creditor's time zone could effectively convert a 5 p.m. Eastern cut-off time into a 2 p.m. cut-off time for consumers in the Pacific time zone (or Noon for consumers in Hawaii). Note that the Credit CARD Act of 2009 simply requires that the consumer's payment be received by 5 p.m., without reference to the time zone.

In using the creditor's time zone for cut-off time for mailed payments, the Board cites creditors' need for certainty and the significant operational burdens of requiring a creditor to process payments differently based upon the consumer's time zone. However, any operational burdens would be minimal, and there should be no uncertainty, for electronic and telephone payments, because the creditor will know the exact time of receipt for such payments. There are only seven major time zones in the U.S. (nine if you count American Samoa and Chamorro) and the creditor will have the consumer's billing address in its computerized database. It should not be difficult for the creditor to determine the consumer's time zone and whether an electronic or telephone payment is made before or after 5 p.m. in that time zone.

The 5 p.m. cutoff time is reasonable for mail, because the mail is actually delivered in the issuer's local time zone and physical mail may not be accepted or processed after the traditional work day ends. But telephone and electronic payments are accepted at all hours, and as more likely to be processed in India as in South Dakota. It is unfair and deceptive for consumers to be penalized for making what they believe to be a timely payment based on their own time zone.

B. Electronic and Telephone Payments should not be Exempted from the Weekend and Holiday Due Date Provision

Proposed Reg. Z § 226.10(d) implements Section 1637(o)(2) of TILA, which requires that if the due date for a payment falls on a day that the creditor does not receive payments by mail, the creditor may not treat a payment received on the next business day as late for any purpose. The proposed rule, however, exempts electronic or telephone payments if the creditor accepts or receives payments made by those methods on the due date.

Creating two different deadlines for mailed payments and electronic and telephone payments will be unfair and confusing to consumers. Consumers naturally expect that deadlines of all sorts – tax returns, mortgage payments and many others – are extended by a day when the deadline falls on a weekend or holiday. There has been wide publicity about the new credit card law extending the due date in those circumstances, and consumers will be tricked and caught if there is fine print that the extension does not apply to electronic or telephone payments.

If there must be such an exemption, this exemption should exempt electronic or telephone payments only if the creditor receives and *credits* payments made by those methods as of the due date which falls on a weekend or holiday. Otherwise, a creditor could circumvent the protections of Reg. Z § 226.10(d) by "receiving" a payment electronically but not crediting the payment until the next business day. A frequent complaint of consumers is that they will make a payment by Internet, but the payment will not be posted under a few days later.

C. The In-Person Payment Rule Should Apply to Retailer Locations that Accept Credit Card Payments For Co-Branded Credit Cards for That Retailer

Proposed Reg. Z § 226.10(b)(3) implements Section 127(b)(12)(C) of TILA, which requires that creditors that are financial institutions with branches or offices at which credit card payments are accepted must credit any in-person payments on the date that the payments are received. The proposed rule limits the term "financial institutions" to depository institutions as defined in the Federal Deposit Insurance Act. Thus, as proposed Comment 10(b)-5 makes clear, "financial institutions" do not include retail locations that accept payments on store credit cards for that retailer.

This proposed definition of "financial institution" is far too narrow, and the proposed Comment is unfair and contrary to consumer expectation. Simply put, if a retail location accepts credit card payments for that retailer's store credit card, the payment should be credited as of the date that the consumer made the payment. If a bank branch must credit payments as of the date of in-person payment, consumers will come to expect and assume that retail locations that accept credit card payments should do the same.

They will be unpleasantly and unfairly surprised to find that retail locations are exempt from this requirement.

The proposed rule's definition of "financial institution" should be broadened. There is ample precedent for a broader definition of "financial institution," including the definition in Regulation E (definition includes "any other person that directly or indirectly holds an account belonging to a consumer," or that "issues an access device and agrees with a consumer to provide electronic fund transfer services") and the FTC's definition for purposes of Gramm-Leach-Bliley (*see* 16 C.F.R. § 313.3(k)).

D. <u>Pay-to-Pay Prohibition</u>

Proposed Reg. Z § 226.10(e) implements Section 127(l) of TILA, which prohibits issuers from imposing a separate fee to allow a consumer to make a payment, unless the payment involves expedited service by a customer service representative. Proposed Comment 10(e)-1 defines a "separate fee" as a fee for making a single payment on a consumer's account.

However, this definition of "separate fee" is too narrow. It could create significant loopholes to the ban on fees for payment, because it would not cover a monthly or other periodic fee that an issuer could impose for the access or ability to make Internet or telephone payments. For example, a "separate fee" as defined by Proposed Comment 10(e)-1 would not cover a monthly "Web access" fee charged by an issuer for online access if that was the sole method a consumer could make payments via the Internet. Thus, Board should prohibit all fees for making a payment to an account, whether for a single payment or the ability to make payments via a certain method, unless it involves expedited service by a customer service representative.

We note that proposed Comment 10(e)-3 clarifies that "service by a customer service representative" means payment made with the assistance of a live representative or agent of the issuer, and does not include an automated payment systems, such as an interactive voice response system. We strongly support this proposed Comment. Creditors should only be permitted to charge a fee when a live person is involved in assisting a consumer; such was the intent of Congress when it enacted Section 127(l) of TILA.

V. TIMELY SETTLEMENT OF ESTATE DEBTS (REG. Z § 226.11(C))

A. <u>The Board Should Prohibit Issuers from Imposing Interest and Fees on a Deceased Person's Account after Being Contacted by an Administrator or Executor</u>

Proposed Reg. Z § 226.11(c) implements Section 140A of TILA, requiring creditors to establish procedures to ensure that an estate administrator can resolve the outstanding credit card balance of a deceased in a timely manner. The Board has proposed in Reg. Z § 226.11(c)(2)(i) to prohibit creditors from imposing any fees or charges, including finance charges and penalty fees, after the issuer has received a request from the administrator or executor of any estate for the amount of the balance on a deceased consumer's account. We strongly support this provision, but urge the Board to go further. The Board should prohibit creditors from imposing any fees or charges whenever an administrator or executor or other representative of the estate contacts an issuer and informs the creditor that the consumer is deceased.

The Board should go further to ensure that creditors act in good faith whenever informed of a consumer's death and the presence of an estate administrator. For example, an administrator or executor might contact the creditor seeking to settle the estate, but neglect to make a formal request for the amount of the estate (perhaps because the administrator erroneously assumes that the balance on the last periodic statement is the amount owed by the deceased). The creditor in that instance should not be permitted to add additional fees and charges to the deceased consumer's account, because it creates the same problem sought to be addressed by the proposed rule – trailing interest and fees makes the amount of the debt a "moving target," depriving the administrator of a sum certain that s/he knows must be paid. In the meantime, while the amount of finance charges and fees accrue, the creditor has every incentive to stall the estate administrator by not responding to communications or other requests. Once a creditor knows that a consumer is deceased and an administrator is attempted to settle the estate, the creditor must be prohibited from assessing any finance charges and fees.

The Board asks whether a creditor should be permitted to resume imposing fees and charges if the administrator has not paid a balance within a certain time period. We oppose any such provision. Estates can be time consuming to settle for a variety of reasons. The executor may not have authority to pay the bill for some time, and heirs should not have to watch their inheritance wither away to late fees and penalty interest rates.

B. Creditors Should Not Be Permitted to Impose Fees and Charges on a Deceased Consumer's Account Unless They Have Proof that a Party is a Joint Accountholder and Not Merely an Authorized User.

Proposed Reg. § 226.11(c)(2)(ii) permits the creditor to continue imposing fees and charges if a joint accountholder remains on the account. Proposed Comment 11(c)-3 clarifies that a creditor may not continue to impose fees and charges if only an authorized user remains on the account. However, the Board should require that the creditor may only continuing imposing fees and charges if the creditor has documentary proof that another party to the account is a joint accountholder. In other words, the creditor must be able to prove that another party to the account is not merely an authorized user.

As the Board may be aware, some credit card issuers have failed to properly distinguish between authorized users and joint accountholders. These card issuers often attempt to pin liability for an account on the authorized user, especially if the primary accountholder dies or files for bankruptcy. For example, in one infamous Fourth Circuit case,[12] a card issuer attempted to hold the plaintiff liable for an account after the primary card holder filed for bankruptcy. The plaintiff claimed she was an authorized user. The card issuer was unable to show whether the plaintiff was an authorized user or joint account holder, because it did not have the original account agreement, having destroyed it pursuant to its document retention policy.

Thus, card issuers must be required to have proof on file, such as the signature of the other party on a joint credit application, before they are permitted to treat the party as a joint accountholder and continue imposing fees and charges. Otherwise, proposed Reg. Z § 226.11(c)(2)(ii) and Comment 11(c)-3 will have the unintended and anti-consumer effect of providing card issuers with additional incentives to improperly treat authorized users as joint accountholders.

C. Creditors Must be Required to Have and to *Follow* Reasonable Procedures to Ensure that Administrators and Executors can Pay Off the Deceased's Balance in a Timely Manner.

Proposed Reg. Z § 226.11(c) requires creditors to "have reasonable procedures designed to ensure that an administrator or executor" can pay off the deceased's balance in a timely manner. We recommend that the rule state that the creditor must "have and *follow*" reasonable *written* procedures. It is not sufficient for creditors to simply have procedures; creditors must be required to actually follow them. Such policies and procedures must be documented by being set forth in writing.

Furthermore, we urge that additional examples of reasonable procedures be added to proposed Comment 11(c)-1. Most of the examples in that proposed comment relate to establishing the *amount* of the deceased's balance. None of the examples relate to the other problems that led to the enactment of Section 140A of TILA, such as the failure of a creditor to respond to the administrator's communications. Thus, we recommend adding examples of reasonable procedures such as:

- A creditor may have a policy of acknowledging receipt of inquiries and communications by estate administrators and executors within 14 days.
- A creditor may have a policy of requiring that information on how to make a final payment, such as the address to send the payment and acceptable forms of payment, be provided to estate administrators and executors within 14 days of learning of the administrator or executor's identity.
- A creditor may have a policy of providing a payoff receipt to executors and administrators within 30 days of receiving final payment for the deceased's balance.

Finally, the Board asks whether the "safe harbor" in proposed Reg. Z § 226.11(c)(3)(ii) of 30 days to provide an administrator with the amount of the deceased's

[12] Johnson v. MBNA, 357 F.3d 426 (4th Cir. 2004).

balance is adequate time. We believe that a 30-day safe harbor is more than adequate time to provide such information.

VI. ABILITY TO PAY (REG. Z. § 226.51)

A. Requirement for All Accounts

1. *The Board must set forth criteria for a meaningful evaluation of ability to pay.*

Proposed Reg. Z § 226.51(a) implements new Section 150 of TILA, which requires card issuers to consider the consumer's ability to make the required minimum payment under the terms of the account. Proposed Reg. Z § 226.51(a) provides that the issuer's consideration of ability-to-pay must be based on the income, assets and current obligations of the consumer. While unobjectionable, this formulation is missing a critical element.

Te Board's proposal provides criteria safe harbor for estimating the minimum payment due on the card, but it fails to provide guidance for evaluating whether the consumer has the ability to make that minimum payment. While it requires consideration of income, assets and current obligations, it does not prescribe *how* issuers must consider this information. Furthermore, the proposed rule does not define "obligations." The proposed rule provides that issuers must "have reasonable policies and procedures in place to consider" income, asset and obligation information, but provides no further guidance on translating that consideration into a meaningful assessment of affordability.

Without any guidelines for when a consumer has the ability to pay, the rules are meaningless. An issuer could require the consumer to submit information on income, assets and current obligations and could claim that the information was "considered" while continuing to conduct business as usual. Congress included this provision for a reason and intended it to impose some limits on the extension of improvident credit.

While we do not recommend that the rule provide any specific safe-harbor debt-to-income ratio, or similar measurement, the rule or Commentary should specify that issuers should have empirically valid standards for determining that there is a reasonable probability that the card holder can repay. To get from "consideration" of income and obligations to an "ability to pay" determination, the policies should also include an empirically-defensible affordable debt-to-income ratio, coupled with consideration of disposable income for family size. For example, one of the signators, affiliated with a card-issuing credit union, reports that its practice is to underwrite its credit card loans, and that it has written policies in place for making the affordability assessment as it "considers" income, assets and obligations. This includes a maximum DTI for all loans, along with consideration of residual income. Including consideration of residual income assures that basic recurring living expenses are "obligations" which must be part of the affordability equation, as well as installment debt.

2. *Issuers must be required to verify income and assets before opening an account.*

A significant deficiency of the proposed rule is that it does not require issuer to verify income or asset information before opening a credit card account. The Board declined to impose such a requirement, citing potential burdens particularly for accounts opened at point-of-sale. The Board stated its concern that a verification requirement would restrict consumers' ability to open a new account. It also distinguishes its rule requiring verification in mortgage loans on the basis of evidence of inflated incomes in the mortgage market. 74 Fed. Reg. at 54,161.

However, promoting point-of-sale credit card account openings should not override the Congressional concern that there be a meaningful underwriting process for credit cards. Indeed, it was Congress's concern over the ease with which consumers can open credit card accounts, including in retail stores at point-of-sale, that gave rise to Section 150 of TILA. Too many consumers, tempted by offers of discounts or "no interest" at retail stores, have found it all-too-easy to open an account and incur credit card debt for which they struggle to repay. It was the desire to slow down the accelerated pace at which credit card accounts can be opened that gave rise in part to the ability-to-pay requirement.

Further, while there is not evidence of widespread inflation of borrower income in the credit card market as there was in the mortgage market, it is not unheard of in the credit card market. For example, one state attorney general office received complaints concerning credit cards with relatively high limits issued to recipients of SSI (a needs-based income program). One SSI recipient, with an annual income of $7700, was marketed a credit card by a telemarketer who wrote down the recipient's income as $70,000.[13]

Here, too, the practice as reported by the credit union affiliated with one of the signators to this comment may provide assurance that responsible credit card underwriting practices are viable practices. It verifies income and employment through documentation that is generally readily available to consumers. However, verification need not require full documentation of the type that would be required for a mortgage. For example, there could be a sliding scale, where limited documentation is allowable for credit lines below a certain amount. Such a sliding scale could balance the desire for streamlined availability with the need to assure meaningful underwriting.

3. *Issuers must be required to have and to* ***follow*** *reasonable policies and procedures in considering ability to pay.*

The proposed rule at Reg. Z § 226.51(a) requires issuers to "have reasonable policies and procedures to consider" information on ability to pay. We recommend that the rule state that the issuer must "have and *follow*" reasonable *written* policies and

[13] Joseph B. Cahill, *Credit Cards Invade a New Market Niche: The Mentally Disabled*, Wall St. J. p. 1 (November 10, 1998).

procedures. It is not sufficient for issuers to simply have policies and procedures; issuers must be required to actually follow them. Furthermore, such policies and procedures must be documented in writing.

4. *The consumer's ability to pay must be one of the primary considerations in an issuer's underwriting decision*

Proposed Comment 51(a)-1 provides that an issuer may consider other factors, such as credit reports and credit scores, in deciding whether to approve a credit card application, so long as these factors are consistent with Regulation B. Consistent with our suggestions that the underwriting for ability to pay be meaningful, and not just for show, the Board should require that ability to pay should be one of the primary considerations of the underwriting assessment. For example, an issuer should not be permitted to base its decision on whether to approve a credit application by placing a 90% emphasis on the consumer's credit score and only 10% on ability-to-pay.

Most importantly, if the issuer determines that an applicant does NOT have the ability to make the minimum payments for an account, this factor should override any other factor, such as a high credit score, in deciding whether to grant credit. It is the practice of extending credit based solely or primarily on credit scores, and not based on income or other debts, that was the primary evil sought to be addressed by the ability-to-pay provision of the Credit CARD Act.

5. *The safe harbor properly assumes full utilization of the credit line, but should include any mandatory fees*.

The Board has set forth a safe harbor for issuers considering ability-to-pay at Reg. Z § 226.51(a)(2)(ii). We have concerns that this safe harbor does not include either a formula or debt-to-income ratio for assessing ability-to-pay, nor does it require verification, both points discussed above.

This safe harbor assumes utilization of the entire line of credit, and uses the minimum payment formula of the account being offered. We support these two aspects of the safe harbor.

However, the proposal at Reg. Z § 226.51(a)(2)(ii)(B)(*2*) also provides that if fees are included in the minimum payment formula, the issuer may assume that no fees have been charged to the account. We urge the Board to require fees that the issuer knows will be charged, such as an annual fee or monthly participation fee, to be included in the minimum payment. In such cases, the existence or amount of the fee is not speculative, but is instead certain, and should be accounted for in the minimum payment. This is especially important for subprime "fee-harvester" credit cards. Though the new rule will restrict the percentage of fees for these cards to 25% of the credit limit, that is still a significant amount of fees that may be charged against the card and should be included in the ability-to-pay analysis.

6. *Credit limit increases should only be granted when requested.*

Proposed Comment 51(a)-3 provides that the requirement to consider ability-to-pay applies to credit line increases, whether the increases are initiated by the card issuer or requested by the consumer. This Comment is certainly preferable to one that applies the ability-to-pay requirement only to consumer-requested or issuer-initiated credit line increases. However, the Board should go further and require that all credit line increases be initiated by the consumer's request.

The Board should ban unsolicited credit line increases for some of the same reasons that unsolicited issuance of credit cards was banned by TILA in 1970. Unsolicited credit line increases present the risk of unmanageable debt for consumers who have not asked for the ability to take additional extensions of credit from a credit card account. As a general principle, consumers should only be granted credit when they have asked for it. It should be the consumer's choice whether to take on additional credit, not the issuer's decision. Consumers should not be tempted into incurring more debt than they can manage by silently increasing their ability to incur such debt. The Board should use its Section 105(a) rulemaking authority under TILA to require that credit line increases must be made only upon the consumer's request.

B. Requirements for Younger Consumers

1. *There should be a higher ability-to-pay threshold for younger consumers.*

Proposed Reg. Z § 226.51(b) prohibits issuers from opening a credit card account for a consumer under 21 years of age unless the consumer provides either: (1) the signed agreement of a co-signor over 21 years old who has the ability to pay the minimum payments on the account; or (2) financial information indicating the younger consumer him/herself has the ability to pay. However, in considering the younger consumer's ability to pay under the second alternative, the proposal simply cross-references the general ability-to-pay requirement in Reg. Z §226.51(a).

Given the Credit CARD Act's specific focus on younger consumers, there should be a higher ability-to-pay threshold for this population. Congress singled out younger consumers for particular attention, not only creating a separate provision in the Credit CARD Act, but requiring a different standard altogether. Section 127(c)(8)(B) of TILA *requires information* indicating an "*independent means*" to repay, as opposed to just a *consideration* of ability-to-pay. To use the same standard for younger consumers as for the general population violates the intent of the Act to establish special requirements for this group.

Thus, the Board should establish a higher standard and special requirements with respect to a younger consumer's ability-to-pay. For example, the Board should require that issuers can only consider the younger consumer's income earned from wages, and not other sources, such as student loan proceeds or educational grants intended to pay tuition expenses. The Board should set forth a more stringent formula or guidelines as to when a younger consumer should be considered to have the ability-to-pay, such as a higher amount of discretionary income after expenses, or a lower debt-to-income ratio.

2. *The ability-to-pay requirements for younger consumers should be applied to all forms of open-end credit.*

The Board has proposed limiting the ability-to-pay requirement for younger consumers to only credit card accounts, despite the clear language of the Credit CARD Act applying this requirement to all open-end accounts. Furthermore, this coverage of all open-end accounts is not unintentional, as evidenced by the fact that the statutory language of Section 127(c)(8) of TILA refers specifically to both credit cards AND generally to open-end consumer credit plans.

The Board should apply the ability-to-pay standard to all forms of open-end credit offered to younger consumers. While abuses involving the issuance of credit cards were certainly the main concern of Congress, there are other forms of open-end credit than can cause great harm to younger consumers. Open-end payday loans and auto title loans are chief among the predatory open-end products that could cause harm to this population. Requiring younger consumers to establish an independent means to repay might help prevent them from taking on these forms of abusive, high cost credit.

3. *Co-signors provisions*.

Proposed Reg. Z § 226.51(b)(2) provides that, if a co-signor has assumed liability for a younger consumer's account, the permission of that co-signor is necessary before the issuer can increase the credit limit for that account. We support the Board's decision to eliminate any reference that limits this provision to only parents or guardians.

Proposed Comment 51(b)-2 provides that the co-signor provisions do not prohibit a card issuer from requiring the co-signor to assume liability for debts incurred by the younger consumer after s/he attains the age of 21. However, the Board should require any issuer that wishes to require continued liability after age 21 must obtain the separate consent of the co-signor for such liability. Most co-signors will be agreeing to assume liability for the younger consumer's credit card debt based upon the requirements of Section 127(c)(8). That is, when parents or other adults are asked to co-sign, they will do so because they understand that the under-21 consumer cannot obtain a credit card without a co-signor. The natural expectation of co-signors is that they are only agreeing to assume liability until the consumer turns 21 years old. Without a separate notice that liability continues even after the consumer turns 21 years old, and a separate consent to indicate assent to such liability, co-signors will be unpleasantly and unfairly surprised when they learn they are still on the hook, contrary to their expectations.

The co-signor may not discover for decades that she remains liable for thousands of dollars of debt for her now middle-aged son. Consumers tend to be loyal and hold onto the first credit card they receive. For example, one of the writers of these comments still has the first credit card she opened as a college student in 1978 or 1979. Had her parents co-signed for this card, they would have long forgotten that they are still liable for it thirty years later.

4. *Electronic applications must comply with the retention and reproducibility requirements of the E-Sign Act.*

Proposed Comment 51(b)-4 permits the application of a younger consumer to be submitted electronically without the need for compliance with the consumer consent provisions of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. The Board states that the E-Sign Act's consumer consent provisions do not apply since the submission of an application by a consumer is not a disclosure provided to a consumer.

However, for consumer signatures to a contract (which a credit card application would qualify as) to be valid, there are additional requirements under the E-Sign Act. The E-Sign Act clearly provides:

> Notwithstanding subsection (a) of this section, if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce 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) (emphasis added).

Since Section 127(c)(8)(A) of TILA requires applications from younger consumers to be written, the E-Sign Act clearly requires compliance with its retention and reproducibility provisions. Thus Comment 51(b)-4 should clearly require that any application from a younger consumer submitted in writing must be not only retained (which is a requirement under Reg. Z § 226.25 as well) but must be capable of being accurately reproduced for later reference, especially by any co-signors.

There is good reason to require compliance with the retention and reproducibility requires of the E-Sign Act when an application from a younger consumer involves a co-signor. It would be far too easy for the "agreement" of a co-signor to be fraudulently provided in an electronic submission. All it takes is the click of a mouse. The E-Sign Act's requirement that the co-signor be able to obtain a reproduction of the electronic application provides the co-signor with information and a defense in case of such fraudulent submission of his or her "signature."

VII. FEE-HARVESTER CARD PROVISIONS (Reg. Z § 226.52)

A. Provisions We Support

We commend the Board for its proposed rule implementing the fee-harvester protections of the Credit CARD Act, which provide that, if a creditor charging fees (other than certain penalty fees) exceeding 25% of the credit limit, those fees cannot be charged to that credit card account. We support numerous provisions of proposed Reg. Z § 226.52 implementing Section 127(n) of TILA .

Most importantly, we strongly support the Board's proposed Comment 52(a)(2)-3, which clarifies that for the purposes of Section 127(n) of TILA and proposed Reg. Z § 226.52, a security deposit that is charged to the account is a "fee" for purposes of this section. This provision is absolutely critical given the history, discussed in our June 2009 memo to FRB staff, of abuses by subprime card issuers involving bogus security deposits charged to the account. (A copy of the June 2009 memo attached as Appendix B)

We also strongly support proposed Comment 52(a)(1)(ii)-1, which clarifies that the issuer is prohibited from requiring the consumer to pay any fees that exceed the 25% limitation by requiring the consumer to pay fees through other means, such as a direct payment by the consumer to the card issuer or payment from another credit account provided by issuer. This provision is important to prevent circumvention of the 25% limitation on fees.

Finally, we strongly support the provisions of Proposed Reg. Z § 226.52(a)(2) restricting the fees that are exempt from the 25% limitation to only late fees, over-the-limit fees, returned-payment fees, and fees that the consumer is not required to pay. It is especially important to strictly limit the number of exemptions, so that issuers are not encouraged to devise clever fees to circumvent the 25% limitation. In particularly, we support the inclusion of penalty fees other than three specified by § 226.52(a)(2)(i), and the inclusion of fees for voluntary credit insurance or debt cancellation/suspension products.

B. <u>The Board Must Prohibit Circumvention in the Form of Lowered Credit Limits</u>

Proposed Reg. Z § 226.52(a)(1)(i) provides that the 25% limitation on fees applies to the credit limit in effect when the account is opened. In proposed Comment 52(a)(1)(i)-3, the Board rightfully provides that a subsequent increase in the credit limit does not permit the issuer to charge additional fees to the account. However, the Board has not taken any measures to prevent circumvention by use of subsequent decreases to the credit limit.

For example, a credit card issuer could conceivably offer accounts with a $400 credit limit and $100 in fees charged to the account. After the consumer has opened the account and the $100 in fees are charged, the issuer could then decrease the consumer's limit to $200, effectively charging fees that now constitute 50% of the credit line. Such a decrease could be immediate and even unbeknownst to the consumer, since the 45 day requirement for changes-in-terms (or even the requirement for a notice) does not apply to reductions in the credit limit.

The Board should prohibit this type of circumvention by requiring issuers that subsequently decrease a credit limit within the first year must waive or refund any fees that exceed 25% of the new, lower credit limit.

VIII. ALLOCATION OF PAYMENTS (REG. Z § 226.53)

A. The Proposed Allowance Of A 21-Day Window Permits Too Much "Gaming" And Should Be Narrowed (Comment 53-2)

Proposed Comment 53-2 permits issuers to use the date that the billing cycle ends, the date payment is credited, or any date in between as the point at which interest rates are used to determine the allocation of payments. This gives up to twenty-one days of flexibility to issuers in how they implement a rule which is intended to tightly define where payments go. Specifically it would allow issuers to systematically reverse the payment allocation from its intended order for most cardholders in the month when a teaser expires, a new promotional rate is added, or a penalty rate is imposed. Section 164(b) of TILA clearly is intended to require that payments above the minimum are allocated in the manner most favorable to consumers. In virtually all cases, that would imply that the payment order should be based on the most current interest rates at the time when payment is applied (i.e. the date payment is credited). We cannot see why in an automated system allocating payments based on current interest rates would present an undue administrative burden on issuers. Therefore, we do not see the need for allowing this significant window of flexibility in payment allocation rather than simply requiring allocation be based on the most current rates available.

Unfortunately, operational flexibility is often used in a way that systematically disadvantages the customer. Therefore, at the very least, if issuers are allowed this timing flexibility in what date to use for determining interest rate when allocating payments, it should be required that they utilize the same date between cycle date and payment date consistently in all situations to all cardholders rather than choosing a date most favorable to themselves depending on the situation.

B. The Payment Allocation Rules On Deferred Interest Balances Should Allow Consumer Choice. (Reg. Z § 225.53(b))

While the Credit CARD Act clearly intends to allocate payments above the minimum in the best interests of consumers, we agree that the optimal allocation of payments is less clear if an account includes a deferred interest balance. This is an inherent quandary about the nature of deferred interest programs, which is another reason why these plans should be prohibited. While the rules proposed by the Board to implement Section 164(b)(2) of TILA essentially track the statute and thus are a reasonable default, consumers should be allowed to choose whether to allocate payments to a deferred interest balance in a different manner that they find more beneficial. If no consumer preference is indicated, the Board's proposal should be used as a default, but it should be required that any request by the consumer for a different allocation specifically regarding a deferred interest balance should be honored. While changing payment allocation by request may be operationally challenging for some issuers, it should be kept in mind that multiple balances that include a deferred interest balance are not standard practice with credit cards, and that therefore issuers have the option not to offer this type of pricing if they cannot honor such requests. If the Board chooses not to adopt this change, at the very least, issuers who voluntarily allow people choose to direct a payment to (or away from) a deferred interest balance should be allowed to honor these requests.

IX. DOUBLE-CYCLE BILLING PROHIBITIONS (REG. Z. § 226.54)

A. <u>The Board Should Include an Anti-Circumvention Provision in Proposed Reg. Z § 226.54 or the Commentary.</u>

Section 127(j)(1) of TILA, added by the Credit CARD Act, governs two separate situations that occur when a consumer who was previously a convenience user becomes a revolver and thus loses the grace period. First, Section 127(j)(1)(A) prohibits any charges based on days in the previous billing cycle. Second, Section 127(j)(1)(B) prohibits any charges based on days in the current cycle that are imposed on any balances or portions thereof that were paid on time. Though the Act does not require issuers to offer a grace period, if they do, the provisions impose limitations on how the grace period can be denied.

We are already aware of new evasions designed to circumvent these provisions. Included in Appendix C is a new card agreement for a Bloomingdales card from the Department Store National Bank. The terms purport to eliminate any grace period and to charge interest from the date of a transaction. But the terms then go on to say that the interest charges will be reversed on the next billing statement, or might not be imposed at all, under a complicated set of circumstances.

First, in order to be eligible for the refund, the consumer must have had no balance the previous month or paid the prior balance in full. Second, the issuer will not apply the interest charges in the first instance if (a) the consumer's purchase balance has been greater than $5.00 in at least two of the past twelve billing periods and all interest charges during that period were refunded, or (b) the purchase balance was greater than $5 in more than four of the last twelve billing periods and not more than one interest charge was not refunded. The issuer also reserves the right to waive all or part of any interest charge without losing its right to impose interest charges from the day of the transaction in future billing periods.

To say that this policy is complicated and incomprehensible to most consumers is an understatement. Moreover, it is clearly designed to evade the two protections that Congress enacted to prevent unfair loss of a grace period. An issuer who imposes interest that is then refunded clearly has a grace period. The fact that the interest was imposed and then refunded should not enable the issuer to ignore the grace period rules.

The issuer rules described above permit the issuer to charge interest based on a prior billing cycle, in violation of Section 127(j)(1)(A) of TILA. The interest is not truly imposed until the issuer fails to refund it, because a consumer who has been in the habit of paying in full and having the interest refunded has a grace period that is not lost until the refunds cease. Thus, it is only in the second billing cycle that the consumer is irrevocably charged interest, and that interest is based on an earlier billing cycle in violation of Section 127(j)(1)(A). The issuer also violates Section 127(j)(1)(B) of TILA by charging interest in the current billing cycle based on amounts that have been paid on time.

A consumer upon whom interest is imposed but later refunded because the balance was paid on time has a grace period within the meaning of Reg. Z § 226.5(b)(ii), because there is a "period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate." The Board should not permit an issuer to evade grace period requirements by theoretically imposing finance charges and then automatically refunding them. In either situation, in the end, the consumer is able to obtain credit without incurring charges.

Congress eliminated vanishing grace periods both due to the unfairness of having interest imposed on an amount paid on time, and due to the unfairness of interest being charged in full on a balance when a consumer makes a minimal mistake, such as paying $371.58 instead of $371.85. The terms and conditions described above would permit an issuer to impose interest on the entire amount in such circumstances, in violation of Section 127(j)(1)(B).

These evasions are examples of why the Board should adopt a general anti-evasion rule, discussed in Section I of these comments. Furthermore, with respect to the particular evasions discussed above, we propose two specific provisions. First, the Board should make clear that the definition of a grace period includes interest that is imposed but then refunded if payment is received within the grace period. This clarification can be made in Reg. Z § 226.5(b)(ii) or in Reg. Z § 226.54(a)(2). For example, § 226.5(b)(ii) could be amended to say: "For purposes of this paragraph, ''grace period'' means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate<u>, including any period within which repayment will cause the finance charge to be refunded or waived</u>."

Second, we propose a new illustration in Comment 226.54(a)(1)-6 as follow to make clear both (1) that the grace period rule applies to a charge-and-refund situation and thus prevents any interest on the portion of a balance paid, and (2) the interest is considered imposed in the cycle in which the right to a refund is lost, so that the issuer may not impose any interest based on days in preceding billing cycle:

> iv. Same facts as paragraph 6 above [Comment 226.54(a)(1)-6] but the under the terms of the account, the creditor charges interest from the day of the purchase, but refunds it in the subsequent billing cycle if the consumer pays the balance in full by the due date. The consumer paid the

> February balance in full on March 25. The billing period ends March 31, and the statement generated April 1 includes a refund of interest charged in February, and charges new interest on the March purchases. The consumer pays $550 of the $600 balance by the April 25 due date. The statement generated on May 1 must include a full refund of the interest charged in March (two billing cycles ago). The statement generated on June 1 must include a refund of any interest charged in April for the $550 that was paid. The creditor need not refund the April interest on the remaining $50 that was not paid.

B. <u>Proposed Reg. Z § 226.54 or its Comments Should Clarify that Certain Limitations and Practices with Respect to a Grace Period Are Not Permissible.</u>

Proposed Comment 54(a)(1)-1 provides that the prohibition against double-cycle billing does not require issuers to have a grace period. Proposed Comment 54(a)-1 also states that issuers are not prohibited from placing limitations and conditions on a grace period consistent with Reg. Z § 226.54.

We are concerned about this proposed Comment, because "limitations" on the grace period represent a potential avenue for issuers to circumvent the double-cycle billing prohibition. The example discussed in the above section illustrates how one clever issuer is already attempting to evade the protections of the double-cycle billing prohibition by essentially creating a type of grace period that imposes interest on purchases immediately, but then refunds the interest only under certain conditions that essentially circumvent Reg. Z § 226.54.

Another potential circumvention is a condition on grace periods requiring that the balance be paid off by the due date for <u>two</u> billing cycles in a row. Such a requirement would eliminate the protections of the double-cycle billing prohibition.

Thus, proposed Comment 54(a)-1 must be strengthened to: (1) prohibit certain limitations on the grace period and certain issuer practices, including the ones discussed above, as contrary to the double cycle billing prohibition; and (2) prohibit in general any limitation on the grace period or practice designed to circumvent the protections of Reg. Z § 226.54.

C. <u>The Board Should Create An Exception for Payment Allocation When it Results in the Loss of the Grace Period.</u>

Proposed Comment 54(a)-3 states that card issuers must comply with the payment allocation methods in Reg. Z § 226.53, even if so doing will result in the loss of a grace period. The Board states that it did not create an exception for situations in which the payment allocation rules would result in higher interest charges for the consumer, because Congress did not create such an exception in the Credit CARD Act.

The Board has ample authority under Section 105(a) of TILA to create an exception to the payment allocation rules when application of the rules would cause loss of a grace period resulting in higher interest charges. The Board has used its authority under Section 105(a) several times in the proposed rule to create significant exceptions on behalf of issuers, *e.g.*, the Servicemembers Civil Relief Act exception. The Board should similarly use its Section 105(a) authority on behalf of consumers.

X. LIMITATIONS ON INCREASES IN APRS AND CERTAIN FEES (REG. Z § 226.55)

Proposed Reg. Z § 226.55 implements what is perhaps the most critical protection of the Credit CARD Act, the prohibition in Section 171 of TILA against increases in any annual percentage rate (APR), fee, or finance charge applicable to any outstanding balance, except under certain exceptions. The proposed rule is similar to the rule issued by the Board under its Federal Trade Commission Act authority at Regulation AA, 12 C.F.R. § 227.24.

Because the Credit CARD Act's protections go further, however, the proposed rule correctly differs from Regulation AA in several key respects. For example, it only permits a creditor to raise an APR or certain fees on an outstanding or "protected" balance if the consumer fails to make the minimum payment within 60 days of the due date, as opposed to the 30 days in Regulation AA, § 227.24. As discussed below, the proposed rule applies to increases, not just with respect to the APR, but also certain fees. We support this provision, but believe it should be extended to all fees that in reality constitute a substitute for interest charges.

While we support most of the proposed rule, it could be improved in several respects. Most importantly, we are concerned that it lacks an extremely critical provision – a ban against circumvention or waiver of the rule's protections. We are already seeing many evasions. We address the specific evasions we are aware of below, but the game of whack-a-mole will continue unless the Board adopts a general anti-evasion rule as discussed below.

A. <u>The Proposed Rule Properly Applies to Increases in Certain Fees, But the List of Fees Should Be Expanded</u>.

Proposed Reg. Z § 226.55 applies its protections to both increases in the APRs for an account, as well as certain fees. The fees covered by these protections are: (1) fees for the issuance or availability of credit, (2) fixed or minimum finance charges, and (3) fees for mandatory credit insurance or debt cancellation/suspension products.

We support the Board's coverage of fees in the proposed rule, and indeed, believe that the Board was required to cover them under the terms of Section 171 of TILA. Section 171 specifically applies its protections to any increase in "***any*** annual percentage rate, ***fee***, or finance charge applicable to an outstanding balance" (emphasis added). By its clear and unambiguous terms, the protections of Section 171 extend to more than just APRs.

However, we believe the list of fees covered by proposed Reg. Z § 226.55 is too limited, because the list does not cover new fees that could be used as a substitute for periodic interest. The Board has limited this list to fees that are disclosed in the account-opening table, and that are not transaction-based or penalty fees. As the Board knows, we have repeatedly and consistently urged the Board not to limit many requirements of Regulation Z (change-in-terms notices, right to reject changes) to only those fees listed in the account-opening table. Our reason for this recommendation has been consistent – the strong risk that creditors will invent new fees to circumvent protections that only apply to this "closed" list of fees.

Increasingly, creditors are using fees as a substitute for periodic interest. Even before the Credit CARD Act has gone into effect, we are seeing issuers impose all sorts of new fees. For example, issuers have imposed fees for "inactivity" or low usage.[14] One can imagine an inactivity fee that defines "inactivity" as a failure to make new purchases, yet "inactivity" would be desirable conduct for the debt-laden consumers who Congress most wanted to protect from interest rate hikes (and conduct that might be required if the consumer's credit limit has been lowered).

When the Credit CARD Act becomes effective, issuers will have an even greater incentive to both increase old fees and create new ones, in order to make up for income lost because of the Act's limitations on increasing APRs for an outstanding balance. Thus, the Board should ensure that the protections of Reg. Z § 226.55 apply to both the listed fees, and any new fees, unless the fees qualify for a specific exception, *e.g.*, the fee is transaction based (cash advance, foreign transaction fee) or for a specific, concrete service (i.e., expedited card delivery or statement reproduction fee). This will prevent issuers from imposing new fees as a form of interest substitute.

The Board can always amend its rules to exempt additional fees from the limitations of Reg. Z § 226.55 if issuers identify a specific fee that is clearly justifiable. However, the burden should be on issuers to justify a new fee. It should not be on consumers to avoid the latest creative evasion scheme.

B. <u>The Proposed Rule Must Explicitly Prohibit Any Waiver or Circumvention By Creditors</u>.

Proposed Reg. Z § 226.55(d) provides that the limitations on rate increases continue to apply after an account is closed, acquired by another card issuer, or the balance is transferred to another credit account issued by the same issuer or its affiliate. We support this provision, and agree that without it, card issuers could use account closures or transfers to circumvent the protections of Section 171 of TILA.

[14] Sandra Block, *Latest Bank Fee is For Paying Off Credit Card on Time Every Month*, USA Today, October 19, 2009.

However, as discussed above in Section I, we urge the Board to go further and include a generalized prohibition in the rule against circumvention or waiver of its protections. The need for anti-circumvention and anti-waiver provisions is absolutely critical, and its absence is potentially the most important weakness of the proposed rule.

C. The Board Should Add Further Examples to the § 226.55 Commentary to Prohibit Evasions Based on Interest or Fees That Are Waived or Refunded

We appreciate the examples of evasions involving contingent or discretionary rate or fee increases that are prohibited by proposed Comment 55(b)(1)-4. However, the Board needs to go further to provide examples of prohibited evasions involving refunds or waivers of interest or fees. We are already seeing evasions in this area.

Attached in Appendix C is a notice of change that one of the writers of these comments recently received on a Citi card. The notice increases the APR to 29.9% (though the amount of the increase cannot be determined from the notice, a problem that is discussed in Section II.D above). A "letter" accompanying the formal Notice of Change in Terms and Right to Opt Out says that the consumer can earn back a credit equal to 10% of your total interest charge on purchase balances. (It is not clear whether this is 10 percentage points, reducing the net rate to 19.9%, or it is 10% of the 29.9%, which is to say 2.99%). The letter further says that "If in any month you do not pay on time, you may not be eligible to continue to participate in this program." The right to this refund and the terms under which it can be revoked are not described in the actual new terms.

Clearly, this is a contingent rate increase of the type forbidden under Comment 55(b)(1)-4(i). Paying only one day late will result in an immediate, retroactive rate increase, circumventing Congress's clear intention that retroactive rate increases be imposed only if the consumer is 60 days late. The only difference is that true, current interest rate is achieved over the course of two billing cycles rather than one, by a rate increase that is refunded rather than waived at the outset.

One can imagine a similar scheme that would involve a higher rate that is charged in theory on the statement, but is waived if payment is received on time. This would operate in practice in an identical fashion to the contingent fee increase that the Board has forbidden, the only difference would be that the theoretical higher interest is shown on the statement.

If evasions of this type are allowed, they will spread like wildfire and Congress's intention to prevent retroactive rate increases will be defeated. As discussed above, this is why a general anti-circumvention provision is needed. In addition, in order to address this specific, known evasion, the Board should adopt a new comment as follows:

> New Comment 55(b)-4. *Waived or Refunded Fees or Charges.* The prohibition against contingent or discretionary rate increases in paragraph 4 applies to the practice of waiving, deferring, or refunding, in whole or in

part, a fee or finance charge except for deferred interest programs as described in paragraph 3.

i. Assume that a card issuer discloses an APR of 29.9%, but that it will refund 10% of the interest charges if the issuer receives the consumer's required minimum payment by the due date, which is the fifteenth of the month. The payment due on March 15 is not received until March 20. Section 226.55 requires the card issuer to refund the 10% interest, and prohibits the issuer from disqualifying the consumer from future 10% refunds based on the current balance. However, pursuant to § 226.55(b)(3), the card issuer could provide a § 226.9(c) or (g) notice informing the consumer that the 29.9% rate will apply to new transactions.

ii. Assume that a card issuer discloses that it will impose a $10 per month participation fee, but that it will refund the fee if the issuer receives the consumer's required minimum payment by the due date, which is the fifteenth of the month. The payment due on March 15 is not received until March 20. Section 226.55 requires the card issuer to refund the $10 fee, and prohibits it from disqualifying the consumer from future refunds.

iii. Assume that the issuer sends a notice pursuant to Section 226.9(c) increasing the APR on new transactions from 19.9% to 29.9% APR but discloses that the increase will be waived if the issuer receives the consumer's required minimum payment by the due date, which is the fifteenth of the month. The payment due on March 15 is not received until March 20. Section 226.55 requires the card issuer to waive the 10% interest and prohibits the issuer from disqualifying the consumer from future waivers of interest on the existing balance.

D. <u>The Commentary Should Be Clear That Manipulation Of External Indices Constitute "Control" Under the Variable Rate Exception (Reg. Z § 226.55(b)(2)(i)).</u>

Under Section 171(b)(2) of the CARD Act, issuers may apply increased interest rates to outstanding balances if the rate hike results from changes in an index "that is not under the control of the creditor." Two practices adopted recently by issuers demonstrate how easily external rate indices can be controlled by issuers. The topic of issuer control needs further refinement in the Commentary, and should be defined narrowly to minimize creative evasions.

1. "Up-escalator only" variable-rates must be prohibited.

As discussed in a recent report by Pew Charitable Trusts, variable rates are subject to issuer manipulation.[15] It is therefore important that only variable rates that truly are out of the issuer's control be excepted from limitations on increasing rates and

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[15] Nick Bourke and Ardie Hollifield, *Still Waiting: 'Unfair or Deceptive' Credit Card Practices Continue as Americans Wait for New Reforms to Take Effec*t, The Pew Charitable Trusts (October 2009).

fees. The Pew report emphasizes the use of "partially variable rates," or rates that have floors causing them to only vary upward from their original level.

Pew analyzed application disclosures for all consumer credit cards offered online by the largest 12 bank issuers and the largest 12 credit union issuers and found that while nearly one-third of advertised purchase rates on bank cards were "fixed" in December, 2008, fewer than one percent were "fixed" in July, 2009. In addition since December of last year, use of a minimum rate requirement (where the variable rate has a floor that keeps it from falling) has increased among credit cards issued by the largest banks, from one percent to nine percent of cards (for purchase rates) and from ten percent to 38 percent of cards (for cash advance rates). Center for Responsible Lending analysis shows that while 2 of the top 8 issuers currently commonly use a floor equal to the current purchase APR, none of the top 8 issuers used this practice on most of their cards five years ago.

These floor rates create a situation where the interest rate is called "variable", but it can only vary upward relative to its starting value. The interest rates can never decline from where they start. This practice had been a growing trend in the mortgage industry, and credit card issuers likely borrowed this practice from them. The primary users of this practice were the same subprime ARMs that trip-started the mortgage meltdown. Whether in mortgages or credit cards, "up-escalator only" adjustable rates are a way to avoid giving borrowers one of the supposed benefits of variable rates: at least a chance that a declining rate environment will lower their rates. These up-escalator only rates mean that issuers effectively control any downward movement of the index, while benefiting from upward movement. That is too much control to qualify for this exception. The Commentary should specify that such manipulation over external indices is an impermissible evasion of this limitation.

2. Pick-a-rate" variable rates.

The Center for Responsible Lending also examined in detail an additional practice that leads variable rates to be partially under issuer control. Through this obscure and seemingly minor change in the fine print of the agreement credit card issuers have increasingly begun to charge customers a higher variable interest rate. CRL found that an increasing number of issuers have adopted a practice identified as "pick-a-rate", with 117 million accounts currently affected. They do this by allowing a long time window from which it can select the highest value for the designated index. This hidden pricing charges consumers APRs 0.3 percentage points higher on average than traditional pricing. Pick-a-rate results in a total cost to consumers of $720 million per year and could reach $2.5 billion per year if the practice were allowed to become an industry standard.

Traditionally, issuers have specified the prime rate on a certain date (e.g. the end of a billing cycle) as the index rate used for calculating that billing cycle's interest rate. Proposed Comment 55(b)(2)-1 appears to have this model in mind, as it provides that issuers may "change the day of the month on which index values are measured to determine changes to the rate." While arguably this implicitly would disallow "pick-a-rate," we recommend that the Commentary specify it be strengthened and clarified to assure that issuers cannot use long time windows from which they can cherry-pick the highest rate are exercising impermissible control over the index.

The "pick-a-rate" practice adopted a minor language twist with a potentially major impact. Rather than stating that the index prime rate "will be the maximum prime rate reported on the last day of the billing cycle," many issuers now say the prime rate "will be the maximum prime rate reported in the *90 days preceding* the last day of the billing cycle." This seemingly innocuous change generates significantly more revenue for issuers, while being almost invisible to card holders.

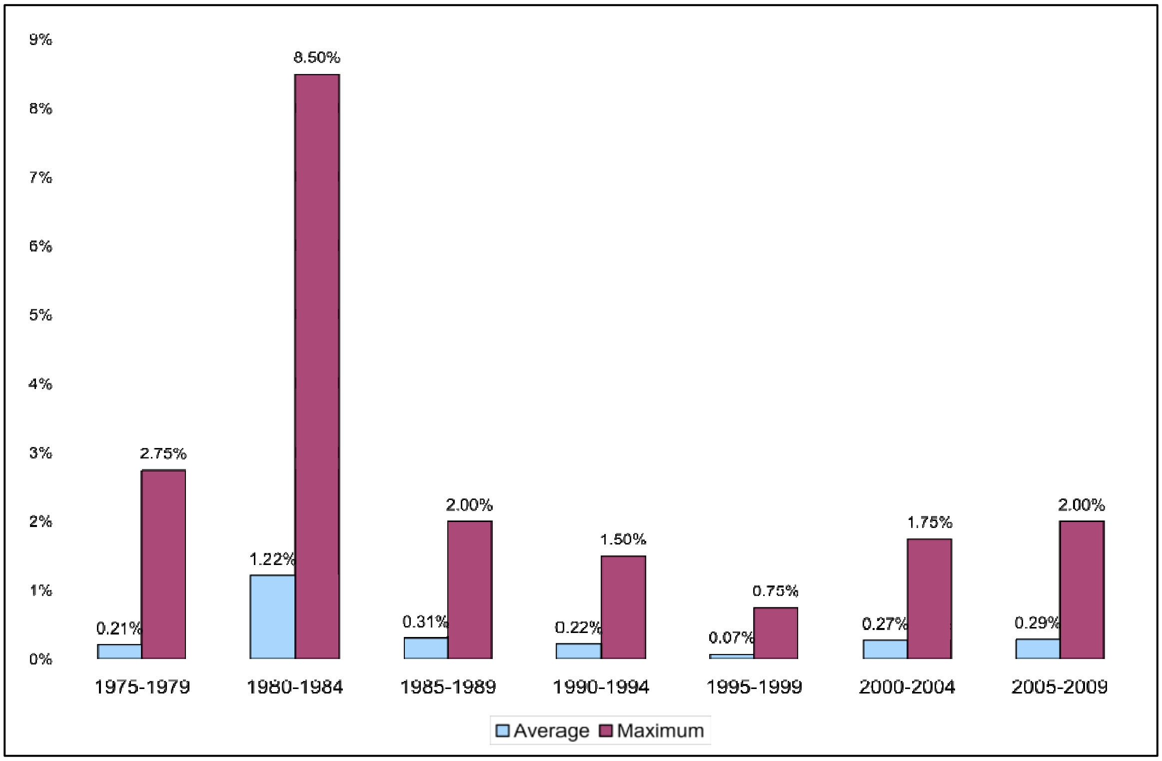
A sample of actual credit card terms and conditions featuring pick-a-rate pricing is included in Appendix C. As the contract states, the relevant prime rate they would apply using the pick-a-rate technique was 4.00%. Yet prime for the date specified in the offer was actually 3.25%, meaning the consumer would pay an additional 0.75 percentage points in interest under pick-a-rate pricing.

Even if borrowers were to notice this scheme, it might be easily dismissed as only having a minor impact since the prime rate does not change much. Indeed, since 2000, prime has changed about once every 2.5 months. However, the impact can be surprisingly significant.

Just how much the pick-a-rate practice raises interest rates varies. The difference between the index rate on a particular day and the maximum rate for that same index over the preceding 90-day period defines pick-a-rate's impact.[16] When rates are falling or when they are volatile in general, pick-a-rate will have the largest impact.
Using the full historical data available, which starts at 1975, the pick-a-rate practice leads to an average gain in interest rate of 0.4 percentage points. Using data since 2000 only, the impact is 0.3 percentage points. On one particular day in history, the pick-a-rate practice would have raised a consumer's APR by as much as 8.5 percentage points.

Figure 1: Average and Maximum Interest Rate Increase from Pick-a-Rate Pricing (using 5-year increments)

[16] Three months or 90 days is currently the most commonly used period. Although longer periods are not currently used, it is possible that just as issuers compete in a spiral of increasing fee levels, as more issuers adopt the 3-month window for calculating prime, some more aggressive issuers may push the window out to 4 months, 6 months, or even longer. However, whether they would actually do this is currently unknown and may depend on the scrutiny the practice receives from the public and regulators.



Since 2000, pick-a-rate pricing would have raised the rate charged by as much as 2.0 percentage points. However, as shown in Figure 2, the impact of the practice varied greatly depending on the date considered.

Figure 2: Historic Interest Rate Increase from Pick-a-rate Pricing

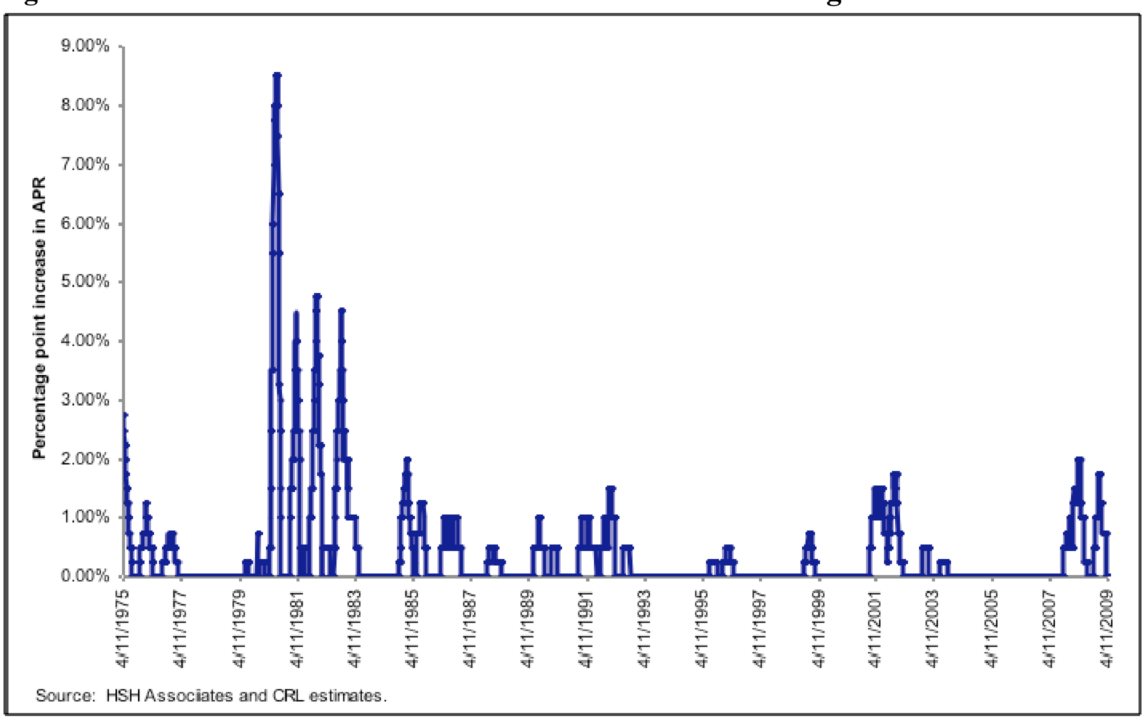
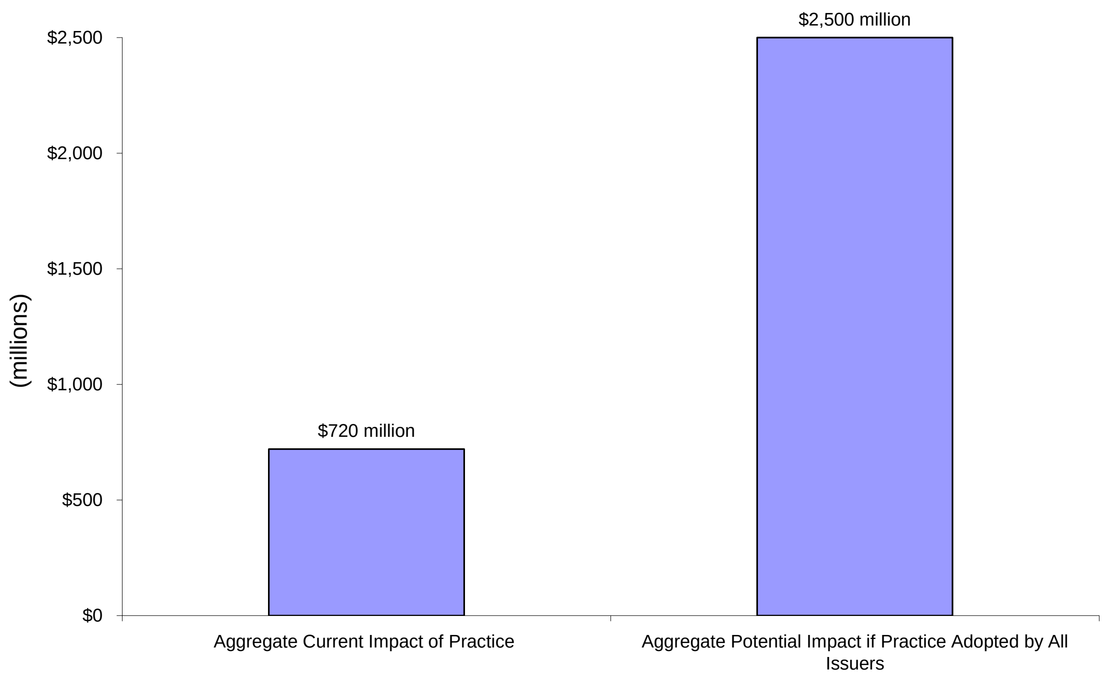


Figure 3: The Aggregate Impact of Pick-a-Rate



Source: HSH Associates and CRL estimates.

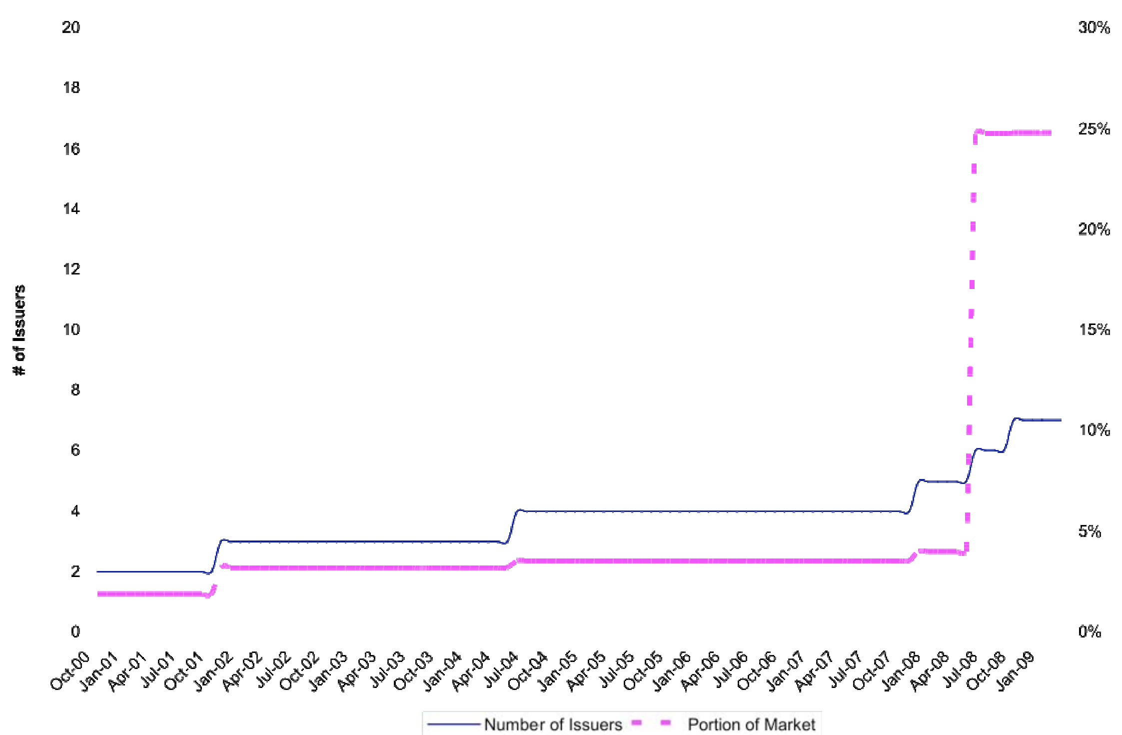
On a dollar basis, a quarter of balances currently use a 90-day window for picking prime. Also, an additional 11.4% of the market employs pick-a-rate with about a one month window, rather than choosing prime from a particular date. The impact of the one-month window raises the rate charged by 0.1 percentage points. These two practices combined currently cost customers $720 million annually.[17] The impact will be even higher if the current trend holds and more issuers move to a 90-day window. If all issuers adopted this practice, the potential cost to consumers is $2.5 billion per year due to this deceptive practice. The impact would be even larger if issuers opt to choose a window longer than 90 days.

A small number of medium-sized issuers have used pick-a-rate for years. The growth in the number of issuers using the practice has accelerated recently, however, with top issuers now starting to adopt the practice. As Figure 3 shows, not only has the number of issuers using pick-a-rate been increasing over time, but the rate of increase has been accelerating.[18] In addition, the balances represented by issuers using pick-a-rate

[17] Number is based on the average impact on interest rates for the most recent period (2000-2009). The average impact since 1990 has been somewhat lower. However, the average impact using data since 1975 or 1980 would be higher.
[18] Data used to determine issuer practices was obtained using a database of solicitations from Mintel Comperemedia.

have been growing even more quickly. It is estimated that 117 million active accounts are now affected by the practice and that number is growing.[19]

Figure 4: Growth in Adoption of the Pick-a-rate Practice



Source: Mintel Comperemedia and CRL estimates.

Clearly both partially variable rates and the use of pick-a-rate are deceptive tactics that put the variable rate index effectively under substantial control of the issuer. In fact, if the pick-a-rate definition or the floor rate is expanded enough, the rate can become "variable" in name only and actually be under the complete control of the issuer

The Board has the authority and obligation to restrict these practices since they cause the index rate to be substantially controllable by the issuer. The Board has many options in limiting these tactics including simply eliminating their use (i.e. the use of index floors, specifying that index rates must be selected from a single day, such as a specific date, or a consistent day, such as the last day of the billing cycle, and generally stating that other tools that makes index rates controllable are prohibited). Alternatively, the Board could set statistical limits on when a rate is significantly controlled by the issuer based on either the variance in the index, or the average amount of change from the unfettered index value.

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[19] This includes only active accounts affected by the practice using a 90-day period. The number affected by the 30-day period practice is larger.

3. *Substituted indices should be more strictly evaluated (Comment 55(b)(2)-6).*

Substitution of an index also presents opportunities for abuse. Proposed Commentary §226.55(b)(2)-6, 74 Fed. Reg. at 54321, specifies that "if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable." We believe that the fact that a new index creates a similar rate at a single point in time is not sufficient protection from manipulation. Even if issuers are prohibited from creating their own index individually, this does not prevent issuers from finding an organization that creates a favorable index. While the Board cannot specify every potential manipulation in a new index, the Board can add requirements that the rate based on the new index be similar to the prior rate in terms of not just current value, but also expected rate variability and in terms of what is reasonably expected to happen to the rate on average over the life of an average account.

4. Conversion of variable–to-fixed rate exception should limit the opportunity for locking in high fixed rates (Comment 55(b)(2)-5)

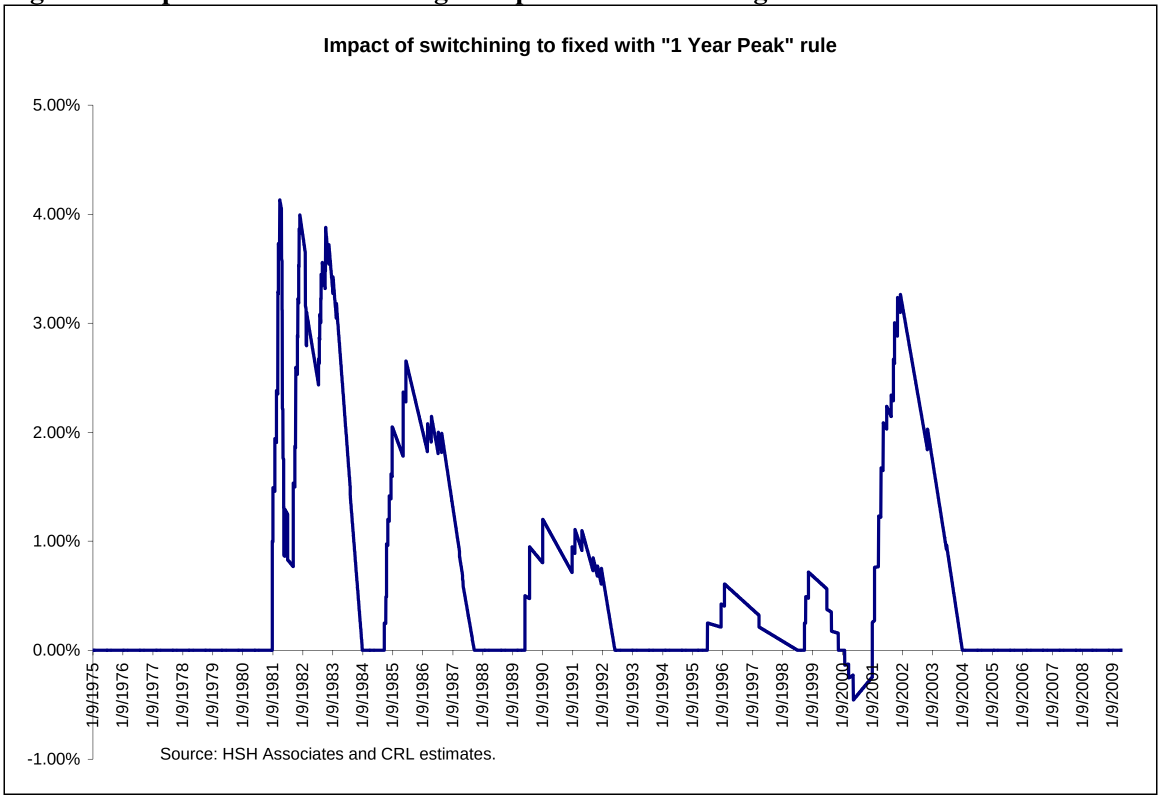
Proposed Comment 55(b)(2)-5 specifies that nothing prevents a variable rate from being converted to a fixed rate. As a general rule, we believe that fixed rates are preferable for their predictability and transparency. We do have a concern that this could be manipulated to lock-in a higher rate. The Board recognizes this possibility in providing that the permitted conversion would be "*to an equal or lower rate… determined at the time the card issuer provides the notice required by §226.9(c).*"

While this provides a bright line rule, it nonetheless allows room for manipulation. As the Board is aware, future interest rates index values are regularly forecasted by economists with some accuracy. This gives the "option value" of issuers being able to "lock in" the current rate level great value. An issuer could let rates remain variable in most conditions, then lock a rate at its current value when the index level is known to be unusually high and likely to move downward. The Center for Responsible Lending simulated the impact of an issuer utilizing this option value and found that it can result in substantially higher rates. Specifically, CRL assumed issuers locked in rates when they were at a local peak in the prime rate (using a one year window) and that the average account life was 3 years.[20] Using data since 1975, this results in a 60 basis point increase in the average APR. Using data since 2000, it results in a 54 basis point increase

[20] While the simulation assumes that issuer forecasts were perfect within the 1-year window, it does not assume perfect information. Issuers are assumed to have no knowledge of rate changes beyond one year, and therefore may fix rates at a value lower than what the rate would be had it stayed variable beyond one year. In fact, as shown in Figure 5, there is a short period of time between 2000 and 2001 when consumers modestly benefit from the formula used. Furthermore, the rule used in the simulation is also conservative in that issuers do not lock in any rate during a period of a declining index. They only do so at a peak in prime (more specifically, they lock in the rate when prime was never higher in the prior 12 months, nor expected to be higher in the subsequent 12 months). Therefore, there is the potential for the practice to have an even higher impact if issuers locked in prime any time rates were high and declining. This could occur even without perfect issuer knowledge.

in average APR. Figure 5 graphically displays the potential impact of this practice on consumers.

Figure 5: Impact of an Issuer Using its Option to Lock in High Fixed Rates



We recognize the difficulty of trying to prevent every kind of manipulation. But some, like this one, are at least foreseeable, and warrant some type of red flag. It is inevitable that interest rates will rise, given our current low rate environment, inviting this kind of gamesmanship. Among the options the Board might consider is to limit conversions to some pre-defined statistical parameter, such as measuring the converted rate against the highest quartile of values over a historical period, or measuring it against a respected forecaster for expected future movements. If the matter is not addressed in the Commentary now, it would nonetheless be appropriate for the Board to monitor any conversion trends. At a minimum, it may be suitable for regulatory guidance under either CARD or UDAP authority. Like the "up-escalator only" variable rates, this flexibility could lead to "lose-lose" situations for the cardholders, and regulators should be alert for them.

E. <u>The Board Should Prohibit Evasion of the Interest Rate and Minimum Payment Protections by Minimum Payment Changes That Precede a Rate Increase</u>

Among the Credit CARD Act's most central provisions are the restrictions on retroactive interest rate increases and limitations on changes to the minimum payments, including for a closed account. Both of these provisions were designed to protect struggling consumers, and to give them a chance to pay back their obligations without being pushed under by penalty rates or unattainable minimum payments.

Congress mandated, first, that if a creditor believes that a consumer has become more risky but the consumer has not been 60 days late on a payment, the creditor may impose a rate increase prospectively on new transactions but not retroactively on the existing balance. Even for consumers who are 60 days late on a payment, for whom retroactive rate increases are permissible, Congress mandated in Section 171(b)(4)(B) of TILA that the creditor "terminate such increase not later than 6 months after the date on which it is imposed, if the creditor receives the required minimum payments on time during that period."

Congress anticipated that creditors could circumvent these rules by imposing exorbitant minimum payment increases, which could trigger late fees, push a consumer who is not 60 days late into becoming so, and deny a consumer who was 60 days late the benefit of the 6 month rehabilitation period. Therefore, new Section 171(c)(1) of TILA provides: "The creditor shall not change the terms governing the repayment of any outstanding balance" except for the two methods specified (5 year amortization or doubling the amount of principal). Section 127(i)(3) of TILA also gives the consumer the right to reject any significant changes to the account and to close the account and to pay it off over time with only the narrowly circumscribed changes to the minimum payment.

These provisions together impose a *categorical rule* against applying any changes to the minimum payment for current balances. The protection is *not limited* to situations when there is a rate increase.

However, creditors appear to believe that, at least in some circumstances, they can change the minimum payment however they want, or even demand payment of the current balance in full. For example, the Department Stores National Bank agreement attached in Appendix C state that the bank may declare the entire amount due and payable if the bank fails to receive even a single minimum payment. The agreement also allows the bank to make changes at any time to the minimum payment schedule at any time to apply the new terms to any unpaid balances, "unless prohibited by law."

Creditors may believe that the limits on changes to minimum payments apply only when there is a rate, fee or finance charge increase. They could claim that the minimum payment rule is limited by the definition of "outstanding balance" in Section 171(d) of TILA, which is "the amount owed on a credit card account under an open-end consumer credit plan as of the end of the 14th day after the date on which the creditor provides notice of an increase in the annual percentage rate, fee, or finance charge in accordance with section 127(i)."

However, this definition of "outstanding balance" was not intended as a limitation on the situations in which the minimum payment rules apply. It was merely intended to identify the date that is the dividing point between the existing balance that is protected against minimum payment changes and the new transactions to which changes can apply. That is, the definition determines *to what balances* the rule applies, but not *when* the rule applies. The rule limiting changes to the minimum payment itself has no restriction as to when it applies.

The proposed regulations compound this problem and even go further to narrow the protection of the "outstanding balance." The rules are set out in proposed Reg. Z § 226.55(c), which uses the term "protected balance." Whereas Section 171(d) of TILA refers to the entire amount owed under a consumer credit "plan" as of a certain date, proposed Reg. Z § 226.55(c) limits the protections to a particular type of balance for which a prospective rate increase has been imposed. For example, if the consumer has a cash advance balance at 29% and a purchase balance at 18%, and the latter is being increased prospectively to 29%, the Board's definition would protect only the purchase balance, not the cash advance balance.

If unlimited minimum payment increases can be applied to the current balance as long as there has been no interest, fee or finance charge increase, creditors could evade both the rate increase rules and the minimum payment rules merely by re-ordering the changes. For example, the creditor could first quadruple the minimum payment, and a short while later impose the rate increase. Or, the creditor could first demand payment in full, and when the consumer cannot pay that balance in 60 days, impose a retroactive rate increase. Even for consumers who have already been 60 days late and are subject to a retroactive rate increase, the issuer could first demand payment in full, circumventing both the minimum payment rules and the requirement that the consumer be given a chance at rehabilitation by paying the *minimum payment* on time for 6 months.

This problem is compounded by the decision the Board made in its July 2009 Interim Final Rule when it decided that consumers are entitled to 45 days notice of minimum payment changes but not the right to opt out of those changes, close the account, and pay the account off over time. As we commented earlier in our comments, attached as Appendix A, consumers should have the right to opt out if the minimum payment changes that exceed the increases permitted under Section 171(c)(2) of TILA.

Congress could not have intended evasions to the protections against excessive minimum payment increases. Congress had no reason to expect an interpretation of the Credit CATRD Act that would deny protections against minimum payment changes for consumers who have not had rate increases because that distinction makes no sense as a policy matter. Indeed, the very purpose of the rules is to restrict issuers to making only limited changes to the minimum payment when they have been *forbidden* from imposing a rate increase retroactively. Congress's overriding concern was with the adverse impact of excessive increases to the minimum payment on an existing balance, and creditors should not be able to defeat Congress's intent by simply changing the minimum payment before any rate increase.

In order to prevent evasions of the protections for current balances based on the sequencing of changes to the minimum payment, the Board should apply the minimum payment increase protections across the board to the current balance. Such a rule would not prevent issuers from making prospective changes to the minimum payment rules for new transactions.

If the Board feels necessary, it could invoke its authority under Section 105(a) of TILA to apply the minimum payment increase protections to all current balances. After all, Section 105(a) by its express terms permits the Board to make "other provisions" and "adjustments" to TILA's literal requirements that the Board believes are necessary "to prevent **circumvention or evasion** thereof." (emphasis added). The Board certainly has not hesitated to use this authority on behalf of issuers to create significant exceptions that have no statutory basis, *e.g.*, the Servicemembers Civil Relief Act exception. Certainly Section 105(a), with its focus on preventing circumvention and evasion, should be used on behalf of consumers for the specific purposes listed in the statutory language.

XI. OVER-THE-LIMIT TRANSACTIONS (REG. Z. § 226.56)

Proposed Reg. Z § 226.56 implements new Section 127(k) of TILA, which prohibits creditors from charging an over-the-limit fee, unless the consumer has expressly elected to permit the creditor, to pay transactions that will exceed the credit limit on the consumer's credit card account. In general, we support many provisions of the Board's proposed rule, but urge the Board to strengthen it in a number of critical aspects. Most importantly, the Board must prohibit any additional or increased fee or charge, or any other difference in account terms, for consumers who choose not to opt-in to over-the-limit transaction payment.

A. Protections Against Unfair Over-the-Limit Practices

1. *The Board must protect consumers against any coercive tactics by issuers with respect to over-the-limit fee opt-in.*

a. Differences in accounts

Proposed Reg. Z § 226.56(j) prohibits creditors from denying credit or conditioning the amount of credit based on whether the consumer elects to opt in to over-the-limit transaction payment. We strongly support this proposal as necessary to protect the ability of consumers to freely decide whether to elect or to decline to opt in. However, the Board must institute greater protections to prevent issuers from coercing consumers into opting in.

The Board must prohibit any differences in credit card accounts based upon whether the consumer elects to opt in to over-the-limit transaction payment. Issuers must be prohibited from offering any less favorable terms to consumers who decline to opt in. They must also be prohibited from offering "inducements" for opting in, such as waiver of a fee or lowering of an APR.

Allowing issuers to impose or increase a fee or APR for not electing to opt in is, for all intents and purposes, permitting issuers to charge a price for the exercise of a federal right. An issuer that charges a $60 annual fee if the consumer declines to opt in, but does not charge an annual fee if the consumer elects to opt in, is essentially charging $60 to consumers for their exercise of the protections under Section 127(k) of TILA. Furthermore, any inducement for opting in to over-the-limit transactions would simply be a penalty in disguise. For example, an issuer that "waives" a $60 fee if a consumer elects to opt is in effect charging $60 to consumers who decline to opt in. Similarly, an issuer that lowers the consumer's APR by 5% if the consumer elects to opt is in effect charging a 5% higher APR to consumers who decline to opt in.

As the Board rightfully notes, an issuer that conditions the amount of credit granted based upon whether the consumer elects to opt in to over-the-limit transaction payment would appear to violate Section 1691(a)(3) of the Equal Credit Opportunity Act (ECOA), which prohibits creditors from discriminating against a consumer based upon the good faith exercise of any rights under the federal Consumer Credit Protection Act. Charging consumers a fee or higher APR for refusing to opt in to over-the-limit transaction payment also appears to violate this same ECOA provision.

We note that just this past week, on November 12, the Board issued a final rule in the overdraft services context requiring opt in and prohibiting any difference in account terms for consumers who did not elect to opt in. Regulation E, 12 C.F.R. § 205 (17)(b)(3). As the Board knows, there are many similarities between overdraft services for bank accounts and over-the-limit transaction payment for credit cards. What the Board cited as its reasons for adopting this rule is equally applicable in the over-the-limit context. The Board stated that without a prohibition against different terms or conditions for accounts for which the consumer has not opted in to overdraft services:

> [t]he Board believes some institutions could otherwise effectively compel the consumer to provide affirmative consent to the institution's payment of overdrafts for ATM and one-time debit card transactions by providing consumers who do not opt in with less favorable terms, conditions, or features than consumers who do opt in. For example, an institution could provide an opt-in account with no monthly fee to consumers who opt in, but an account that assesses a monthly maintenance fee to consumers who do not opt in. Behavioral research suggests that consumers may choose the "free" opt-in account, even though the costs for overdrawing the account could end up being substantially higher than the monthly maintenance fee, because they may optimistically assume they will not overdraw the account and as a result, incur overdraft fees.[35]
>
> [35] This behavior is commonly referred to as ''hyperbolic discounting.'' See, e.g. Shane Frederick, et al., Time Discounting and Time Preference: A Critical Review, 40 J. Econ. Literature 351, 366–67 (2002) (reviewing the literature on hyperbolic discounting).

This reasoning is equally applicable in the context of opt-ins for over-the-limit transaction payment as it is for overdraft coverage. The Board should institute a similar rule to protect credit card consumers from coerced opt-in.

b. Denied transaction or other coercive fees

The Board should also prohibit issuers from imposing fees, such as denied transaction fees, that are designed to coerce borrowers into opting in to over-the-limit coverage. Though we are unaware of any credit card issuers who presently charge a denied transaction fee, many prepaid card providers do, and banks are also starting to charge denied transaction fees on bank debit cards in order to make up for anticipated lost overdraft fee income and to induce customers into signing up for overdraft coverage.

There is no justification for charging a denied transaction fee, as it costs the issuer nothing. Such a fee merely serves as a means of coercing consumers into opting in to over-the-limit transaction payment and of charging over-the-limit fees in another guise. In the overdraft context, the Board noted in its just-issued final rule under Regulation E that denied transaction fees "could raise significant fairness issues under the FTC Act, because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction." Similarly, card issuers bear little, if any, risk or cost to decline a credit card transaction.

Indeed, denied transaction fees should be independently prohibited under Section 149 of TILA because they are a penalty fee that is not reasonable or proportional to any violation. They should also be independently prohibited under Reg. Z § 226.56(j) because permitting such fees would permit issuers to circumvent Congress's clear intent that consumers be permitted to have hard credit limit caps on their accounts without penalty.

2. *Absent a consumer's opt-in, the Board must prohibit any fees for conduct resulting from over-the-limit transaction payments, including unfairly imposed late fees.*

Proposed Comment 56(b)(2)-2 states that, even without the consumer's opt-in, a creditor is not prohibited from assessing fees other than an over-the-limit fee when an over-the-limit transaction is paid. We oppose this proposed comment, because it could enable creditors to circumvent the protections of Section 127(k) of TILA by charging a fee for over-the-limit transactions, but calling the fee some other name. Creditors could also attempt to circumvent the protections of § 226.56 by using tactics to trigger other fees as a result of over-the-limit transactions.

Instead of the currently proposed Comment 56(b)(2)-2, we urge the Board to prohibit any fee directly or indirectly caused by or resulting from payment of an over-the-limit transaction, unless the consumer opts in to over-the-limit transaction payment. That is, the issuer should be forbidden from paying an over-the-limit transaction if it might result in any type of fee, including a late fee, not just an over-the-limit fee. If the consumer wished to have such transactions covered, understanding that they will have to be paid in full in order to avoid a late fee or any other adverse consequences, the consumer could opt in.

Indeed, we are already seeing tactics by credit card issuers that are designed to trigger late fees for over-the-limit transactions as a way to compensate for the loss in over-the-limit fee income. At least one issuer has a credit card product for which it states there is no credit limit. Some issuers label these limits "no preset spending limit" or similar names.

In reality, there is a credit limit, but the issuer allows transactions over that limit.[21] The catch is that the issuer requires that any balance above this credit limit must be paid off in the minimum payment. Other issuers, such as the Department Store Bank Card agreement attached as Appendix C, make clear that, though there is a credit limit, they may approve over limit transactions and demand payment in full.

When consumers who carry a balance make a purchase, they have an expectation that they will be able to pay it off over time just like every other purchase on their credit card. This is especially important for debt-laden consumers who are close to their credit limits. Consumers may get into trouble because they may charge too much under the assumption they can pay off what they are charging over time, since their prior charges could revolve. These consumers may be unable to pay the entire over-the-limit balance in full when the bill comes due, and thus will be charged late fees.

This tactic is especially important to stop because, in addition to triggering late fees, it could also increase the chance that the consumer cannot pay the minimum payment within 60 days of the due date, and enable issuers to impose interest rate increases on protected balances. Indeed, this is likely one reason that issuers are moving to this model.

The Board should prohibit imposition of late fees in these circumstances, because the fees are triggered by over-the-limit transactions and the issuer's tactics of requiring full payment of the over-the-limit amounts. The Board should also prohibit disguised over-the-limit fees, such as a fee for increasing the consumer's credit limit or a "high balance" fee for having a balance too close to the credit limit.

3. *Prohibition of fees for "unavoidable" over-the-limit transactions.*

Proposed Reg. Z § 226.56(b) permits creditors to pay an over-the-limit transaction even if the consumer has not elected to opt in to payment of such transactions, so long as the creditor does not impose any fee or charge for paying that transaction. Proposed Comment 56(b)(2)-1 provides that an over-the-limit fee cannot be charged unless the consumer has opted in even when the creditor is unable to avoid paying an over-the-limit

[21] For instances, U.S. Bank states:

"Terms & Conditions: Absence of a preset spending limit on the WorldPerks Visa Platinum Card, does not mean unlimited spending. Each charge causing your balance to exceed Revolve Limit is evaluated based on account history, credit information and payment resources. ***Monthly minimum payments are 1% of balance within your Revolve Limit, plus the amount above your Revolve Limit***. At any time, we may decline transaction authorization requests for any reason and/or request additional information from you about a transaction request or account use." See Appendix C for a copy (emphasis added).

transaction. We strongly support these provisions, and agree with the examples set forth in the proposed Comment. However, two clarifications are needed.

First, as discussed above, this ban on imposition of fees must include late fees triggered by a requirement that over-the-limit transactions be paid in full.

Second, the Board must make clear that this Comment applies even to creditors that have a policy of declining to pay over-the-limit transactions. Such a clarification is necessary because proposed Comment 56(b)-1 provides that "Section 226.56 does not apply to any creditor that has a policy and practice of declining to pay any over-the-limit transactions…" Thus, proposed Comment 56(b)-1 appears to exempt creditors with such policies from ALL of the protection of Reg. Z § 226.56, including §226.56(b)(2) and Comment 56(b)(2)-1. Conceivably, Comment 56(b)-1 could permit a creditor that has a policy of declining to pay over-the-limit transactions to actually charge an over-the-limit fee when it is unable to avoid paying an over-the-limit transaction.

In the Supplementary Information, the Board does state that the prohibition against imposing over-the-limit fees for unavoidable transactions still would apply to creditors that have a policy of declining over-the-limit transactions. 74 Fed. Reg. at 54,178. However, this statement is only made in the Supplementary Information, and is not reflected in Reg. Z or the Commentary. The Board should make clear in the Commentary itself that a creditor that is exempt because it has a policy of declining to pay over-the-limit transactions is still subject to the prohibition on assessing an over-the-limit fee for unavoidable transactions for consumers who have not opted in.

4. *Other provisions we support.*

In addition to the provisions discussed above, the Board has proposed a number of provisions with respect to unfair over-the-limit practices that we support:

- We support the prohibition against assessing an over-the-limit fee caused by creditor's failure to promptly replenish available credit.
- We support the prohibition against assessing an over-the-limit fee when a credit limit is exceeded solely because of the assessment of fees or interest.

B. Opt-in and Revocation Notices

1. *All joint accountholders should be required to consent to over-the-limit transaction payment.*

Proposed Reg. Z. §226.56(f) permits creditors to treat the consent of any joint accountholder to an account as consent for all accountholders. We oppose this provision, as one joint accountholder should not be permitted to bind the other accountholder(s) to a decision in which the latter did not acquiesce.

The Board cites as its reason for this provision the operational difficulties for creditors to determine which accountholder was responsible for a particular transaction, which would be necessary to decide whether to authorize or decline an over-the-limit transaction based on an accountholder's individual opt-in choice. However, the Board could also require that creditors obtain the consent of ALL accountholders in order to pay over-the-limit transactions. A rule requiring the consent of all accountholders is as operationally as simple as a rule requiring the consent of only one accountholder. Such a rule also better protects the interest of consumers, and Section 127(k) of TILA is a consumer protection provision that should be interpreted in favor of consumers.

At a minimum, consumers under the age of 21 should not be permitted to consent to over-the-limit transaction payment without the authorization of any co-signor, as per Section 127(p) of TILA. Section 127(p) prohibits increasing the credit line of a younger consumer's account without the authorization of any co-signor. Since consent to pay over-the-limit transactions effectively represents an increase in the credit limit of an account, Section 127(p) requires co-signor authorization. Even after the consumer turns 21, the joint accountholder's consent should still be required, as the parent or other guarantor has the same interest in knowing and being able to control the limits of his or her liability.

2. *The opt-in notice should be segregated and should require a separate signature or initials to indicate consent to over-the-limit transactions.*

The Board has asked whether creditors should be required to segregate the opt-in notice from other account disclosures. We agree that the opt-in notice should be segregated. As the Board rightfully notes, a failure to segregate the notice may permit creditors to obscure it within the account application, leading the consumer to inadvertently consent to the payment of over-the-limit transactions.

The Board should also not permit a simple check box to indicate that the consumer has consented to over-the-limit transaction payment. Proposed Comment 56(b)-5 provides that a consumer's consent to over-the-limit transaction payment must be separate from other consents, a provision that we support. However, the proposed Comment then provides that the consumer's consent can be indicated using a separate signature line OR a check box. The use of a check box alone to indicate consent is insufficient. It is far too easy for a creditor to print forms with the box already pre-checked or to later add the check mark. Moreover, check boxes can be used to divert the consumer from separately reading and considering the implications of opting in.

Instead, the Board should require that the creditor must always obtain the consumer's signature or initials separately consenting to over-the-limit transaction payment. A check box could be used, but only if accompanied by the consumer's signature or initials.

3. *The Board's model opt in and revocation notices should provide the same methods to be made available to consumers for both actions.*

Proposed Comment 56(c)-1 provides that if a creditor obtains consent from consumers using a certain method, *e.g.*, by telephone or via Website, the creditor is required to accept revocations of consents made by the same methods. We agree with this provision. However, the Board's Model Forms at Appendix G-25(A) and G-25(B) do not reflect this provision.

Appendix G-25(A) permits consumers to consent by telephone, via Website, or by checking a box and returning a form. Beyond the fact that this check box should also require the consumer's initial or signature, the proposal is deficient in that Appendix G-25(B) does not provide the "returning a form" option as an available method to revoke a consent. Instead, it requires the consumer to compose his or her own written correspondence and mail it to an address, which is more difficult than sending back a pre-printed form. Thus, the two Model Forms do not provide parallel methods for consent and revocation, and do not reflect the principles of proposed Comment 56(c)-1. The Model Forms should include a model sign-and-return revocation form available both online and also with any periodic statement that assesses an over-the-limit fee.

4. *The revocation notice should only be provided when an over-the-limit fee is assessed, and should be on the first page of the periodic statement or the page reflecting the fee. A standalone revocation notice should also be sent immediately following incurrence of an over-the-limit fee.*

Proposed Comment 56(d)-1 permits creditors to place the notice of revocation on each periodic statement, even if no over-the-limit fee has been incurred for that billing cycle. We are concerned that this provision will result in the revocation notice being treated as "boilerplate" and thus ignored by consumers. The better rule is to require the revocation notice only when an over-the-limit fee has actually been assessed.

Furthermore, the revocation notice should be placed in a location where consumers will be most likely to notice it – either on the front of the first page of a periodic statement or on the front of the page in which the over-the-limit fee itself is reflected. Placing the revocation notice on page four of a periodic statement when the over-the-limit fee is reflected on page two will create the risk that consumers will overlook the notice. However, a prominent reference to the revocation right on the front of the first page could refer to details described later in the statement.

A form for revoking the opt in should be included with the statement, as discussed above. Moreover, creditors should also be required to send the consumer a stand-alone revocation notice, along with notification that a fee has been incurred, immediately following incurrence of the over-the-limit fee. Receipt of this notice will further decrease the likelihood that consumers will overlook their right to revoke consent.

5. *Contents of the opt-in notice.*

Proposed Reg. Z § 226.56(e)(1)(ii) requires creditors to disclose any rate increase that would be triggered by an over-the-limit transaction. We support the inclusion of such information in the opt-in notice.

Proposed Comment 56(e)-2 permits creditors to briefly describe benefits of opting in. We oppose this provision, as we are concerned that creditors in general should not be permitted to promote or advertise over-the-limit transaction payment as a form of "protection" or beneficial product.

Proposed Comment 56(e)-2 also permits, but does not require, creditors to disclose that over-the-limit transactions are paid at the creditor's discretion and are not guaranteed. This disclosure should be mandatory, if true for that creditor.

The Board has asked whether any other information beyond the over-the-limit fee, penalty APR for over-the-limit transactions, and disclosure of the opt-in right should be included in the opt-in notice. We believe that additional information is necessary, and that the notice should also include:

- A statement that the consumer is not required to sign up for over-the-limit transaction payment and that it will not affect the consumer's chances of being approved for a credit card;
- A clarification that the over-the-limit fee will only be assessed if the consumer consents to over-the-limit transaction payment;
- The minimum amount that a transaction can exceed the credit limit for which the issuer may charge the over-the-limit fee;
- The fact that an issuer can charge an over-the-limit fee once each month for three months if the consumer remains over-the-limit; and
- The fact that a consumer will not be charged an over-the-limit fee or declined transaction fee if a transaction is declined.

The Board has asked whether creditors should be permitted to include any information in the opt-in notice beyond that prescribed by Regulation Z. We believe creditors should not be permitted to include additional information, as it creates the risk that the important information conveyed by the opt-in notice will be overshadowed or that consumers will be distracted by the additional information.

6. *Timing of the opt-in notice and of revocations.*

The Board states in the Supplementary Information that all consumers, including existing accountholders, must receive a notice regarding the opt-in right and must consent before a creditor can impose an over-the-limit fee. 74 Fed. Reg. at 54,180. We strongly agree with this statement. However, we urge the Board to include an explicit statement of this principle in either Proposed Reg. Z § 226.56(d)(1)(i) or the related Commentary provision.

Proposed Reg. Z § 226.56(d)(1)(ii) requires the creditor, if the consumer decides to consent to over-the-limit transaction payment orally or electronically, to provide the opt-in notice immediately before and contemporaneously with the consumer's election. We support this provision. The Board also asks whether creditors should be required to provide the consumer with a written confirmation once the consumer has opted in, to verify that the consumer intended to make the election. We support the requirement for a written confirmation, and believe that it is critical for consumers who opt-in by telephone, in person, or using other non-written methods.

Proposed Reg. Z §226.56(i) requires issuers to implement the consumer's revocation as soon as reasonably practicable, but does not set forth a specific time period. The Board asks whether it should establish a safe harbor, such as five days from the consumer's request. We believe that the Board should establish a safe harbor, and that the safe harbor should be three days from when the creditor receives the request.

The Board also asks whether it should require creditors to implement a consumer's revocation request within the same time period that a creditor generally takes to implement opt-in requests. We would support such an approach, but prefer a firm number of days as a deadline. Consumers need certainty about when their revocation requests will be implemented.

The Board also requests comment on whether a creditor should be permitted to obtain consumer consent for the payment of over-the-limit transactions prior to the effective date of the final rule. We believe they should not be allowed to do so. As discussed throughout this section, critical improvements to the proposal are needed in order for it to provide adequate consumer protections—including, among others, a requirement that consumers be offered identical account terms regardless of whether or not they opt-in. These protections should be firmly in place before the creditors obtain consumers' consent to over-the-limit transaction payment.

XII. STUDENT CREDIT CARD MARKETING PROVISIONS (REG. Z § 226.57)

Proposed Reg. Z § 226.57 implements several provisions of the Credit CARD Act that deal with the marketing of credit cards to college students. We generally support the proposed section and its accompanying Commentary. We offer the following comments.

A. <u>All Parts of a Contract Between an Institution of Higher Education and a Card issuer Must be Publicly Disclosed, Including Any Memorandum of Understanding and Amendments.</u>

We urge the Board to clarify in proposed Comment 57(b)-1 that the term "any agreement or contract" as required to be disclosed by proposed Reg. Z § 226.57(b), encompasses a memorandum of understanding or other amendment, interpretation or understanding between the parties that directly or indirectly relates to a college credit card agreement. In other words, institutions of higher education must be required to disclose not only the original contract but also any memorandum between the parties that amends, extends, or constitutes a further agreement, or contains an interpretation or administration of the contract.

Proposed comment 57(b)-1 as currently drafted is underinclusive and does not ensure that the entire scope of the contractual relationship between the institution of higher education and creditor is disclosed. If the parties sign a contract but subsequently supplement that contract with a memorandum of understanding, it is not clear under proposed comment 57(b)-1 that disclosure of the memorandum is required.

Disclosure of these memoranda would not be unduly burdensome for the institution of higher education. Institutions of higher education have no legitimate interest in withholding such information. Congress has already mandated that they disclose financial information that is ordinarily closely held. Disclosure of amendments to the original contract will not put them at a further competitive disadvantage, reveal confidential information or open them up to liability. Under this disclosure scheme, institutions of higher education would not be required to disclose sensitive financial data or business processes. The benefits of requiring that the contract be disclosed in its entirety, including memoranda of understanding, are clear: it would shed light on the complete scope of the transaction and foreclose the possibility of secretly amending or supplementing the contract.

B. Issuers Should Be Prohibited From Offering Any Inducements to College Students, Whether or Not Conditioned Upon Opening An Account.

Proposed Comment 57(c)-2 provides that if a tangible item is offered to a person whether or not the person applies for a credit card account, the item has not been offered as an inducement. We believe this approach to defining an inducement is too narrow and allows companies to lure college students to the marketing table by offering cheap, yet appealing items, such as food or electronic gadgets. We urge the Board to change proposed comment 57(c)-2 to prohibit issuers from offering any tangible item to any person within the geographic restrictions of the rule, under any circumstances.

The classic credit card marketing situation is one in which the card issuer buys a large amount of pizza and offers it to students walking by the application table. While the pizza is not conditioned upon completing a credit application, it certainly constitutes an inducement. The card issuer is playing upon college students' well-known love for pizza to attract them to the table, where they are more susceptible to advertising pitches or solicitations and thus more inclined to apply for or open a credit account. Card issuers should not be permitted use gimmicks like free food, flash drives or gift cards to draw in college students to listen to their pitches.

Furthermore, proposed Comment 57(c)-1 definition of "tangible item" is far too constricted. The definition includes only physical items (such as a gift card or t-shirt) but does not include non-physical items that can be highly desirable, such as frequent flier miles or "reward" points that can be exchanged for goods. Note that while some definitions of "tangible" refer to a physical form, other definitions include "real or actual, rather than imaginary or visionary" or "definite; not vague or elusive".[22] Certainly an inducement of 25,000 frequent flier miles – enough for a round trip ticket within the continental U.S. – is "real" versus "imaginary" and "definite" versus "vague".

Thus, the Board should expand the definition of "tangible items" in Comment 57(c)-1 to include any item, whether physical or non-physical, having a monetary value that is separate and apart from the credit card account itself. The Board has ample authority to issue such a definition, both as an interpretation of Section 140(f)(2) and under its Section 105(a) authority.

C. Annual Report to the Board

Proposed Reg. Z § 226.57(c) implements the reporting requirements to the Board by card issuers regarding their marketing arrangements with institutions of higher learning. We urge the Board to adopt a robust and comprehensive disclosure scheme that requires card issuers to submit detailed reports regarding these arrangements. Creditors should be required under § 226.57(d) to submit the following information:

- terms that differ between student and non-student accounts opened under the agreement (e.g. varying payments to the educational institution based on account type);

- statistical data on the number of student and non-student accounts opened, closed, or outstanding during the relevant period;

- the terms and conditions of open-end credit accounts opened pursuant to the agreement, and whether and how the types of accounts offered to students differ from those offered to non-students (e.g. do student accounts have higher interest rates or lower credit limits than staff or faculty accounts);

- the rate of default on student accounts;

- an accounting of fees, penalties and other charges collected in connection with open-end student and non-student accounts opened under the agreement (in the aggregate and categorized);

- provisions related to marketing, advertising, distribution or other restrictions that control how a card issuer may contact students (such as mailing lists, access to student mailboxes or facilities, internet marketing and direct email messages to students, flyers or posters on campus, etc.); and

[22] These are alternate definitions of "tangible" listed in www.dictionary.com.

- any benefits provided to the institution, affiliated organization or employee of such organization that is not a monetary payment, such as discounts, rewards, payment of travel expenses, or other non-monetary benefits.

The Board has the authority to seek this information as it constitutes part of the "terms and conditions" of marketing agreements under Section 127(r)(2)(A) of TILA. Furthermore, the list of items to be included in the annual report pursuant to Section 127(r)(2)(A) appears to be non-exclusive. The Board should require card issuers to report on the full nature of their contractual relationship with institution, including whether they are exploiting college students by offering them sub-standard credit terms in exchange for paying off their universities with cash or other benefits.

XIII. INTERNET POSTING OF CREDIT CARD AGREEMENTS (Reg. Z § 226.58)

A. Definitions – Reg. Z § 226.58(b)

The Board has solicited comments on the definitions of "agreement" and "pricing information" and on whether more or less information should be included. 74 Fed. Reg. at 54188. While too much information can at times hinder information search, the general guiding rule when in doubt should be to err on the side of more information rather than less. Though more information than needed can make information search more costly, less information than needed makes information search impossible. We recognize that the Board has turned to consumer focus groups to guide them in designing disclosures that convey meaningful information, and that providing additional, detailed information may seem at odds with that trend. However, the statutory directive in Section 122(d) of TILA is to post the "written agreement between the creditor and the consumer." It serves a different purpose than does the basic shopping disclosures that summarize key terms, such as those required by Reg. Z § 226.5a. Posting the agreement itself permits consumers who wish to know more before obligating themselves to a contract an opportunity to study the details, and to consult with legal or financial advisors about the terms in that contract if they wish. Further, Internet access is particularly useful, as the transparency of the "fine print" terms may help bridge the gap between many consumers and access to such disinterested, informed advice. A new, hidden trap in the fine print would not remain hidden for long, and warnings about them would assuredly find their way onto the Web.

Consequently, we believe that the definitions of "agreement" and "pricing information" should include all information that at least some consumers are likely to find useful and relevant when comparing products. The Board's proposal to incorporate by reference the required pricing information from Reg. Z § 226.6(b) is an appropriate touchstone, as a comparison of that list to some of the recently-adopted costly changes in card practices shows.

For example, a recent report Pew Charitable Trusts discussed problems related to the use of floors on variable rates that freeze at the start rate (referred to as "partially variable rates" in the report).[23] Certainly this is important pricing information, as it deprives consumers of one of the reasonably expected benefits of adjustable rates -- a lower rate in a declining rate environment. This information would—and should be considered pricing information under the proposal, though its disclosure may not be as conspicuous as it should be, given this recent, more aggressive use of "up-escalator only" rate floors.[24]

A forthcoming Center for Responsible Lending report on recent changes finds other subtle, but costly recent trends in credit card pricing terms.[25] For example, CRL research has found more issuers are adopting an index formulation that permits them to "cherry-pick" the value from a three-month window in order to maximize the contractual index rate.[26] Even without scouring the net for three months of rate data for a particular index, simply seeing that kind of gamesmanship would send a signal to consumers about that issuer's practices. This and other key rate information, such as how prospective rates may be changed because of credit score or report information appropriately should be part of the posted agreement. (Reg. Z § 226.58(b)(4)(i), incorporating §§226.6(b)(2)(i); 226.6(b)(4)). Similarly, fees such as "account management" fees and expedited payment fees that use a representative are making inroads. Various transaction fees, such as foreign transaction fees, balance transfer and cash advance fees, have been going up, with new or higher floors, and raised or open ceilings. This is all key information that would and should be captured in the definition of pricing information, Reg. Z §§ 226.6(b)(2), (3).

We also welcome the inclusion of information concerning credit limits and the method of calculating minimum payments. Reg. Z §§ 226.58(b)(4)(ii), (iii). The corresponding Official Staff Commentary, however, might be clarified to assure that the information regarding the credit limit includes not only how it is set, but under what circumstances it might be reduced.

There is other relevant information which may not be captured by the proposed definitions, but have an impact on the consumer's obligation. For example, although the new law restricts the more egregious abuse of payment allocation, issuers still have discretion as to allocating the minimum payment (Reg. Z § 226.53), which can significantly change the price of credit.[27] Arbitration, though not a pricing term, has a

[23] Nick Bourke and Ardie Hollifield, *Still Waiting: 'Unfair or Deceptive' Credit Card Practices Continue as Americans Wait for New Reforms to Take Effect*, The Pew Charitable Trusts (October 2009).
[24] One of the incorporated "pricing terms" is Reg. Z § 226.6(b)(4)(ii)(E), which requires disclosure of limitations on variable rate changes. However, that disclosure is prohibited in the more readily accessible account-opening table. Reg. Z § 226.6(b)(2)(ii)("A disclosure of any applicable limitations on rate increases or decreases shall not be included in the table.").
[25] The report is currently scheduled for release in mid-December. Some of these trends are also reflected in the Pew study, *supra*.
[26] The "pick-a-rate" practice and its impact on consumers is described more fully in Section IX.D2.
[27] *See* Joshua M. Frank, *What's Draining Your Wallet? The Real Cost of Credit Card Cash Advances*, Center for Responsible Lending (December 16, 2008).

clear impact on the legal rights of a consumer under the contract. While it should be captured by the existing definition of "agreement," the industry's past use of "stuffers" to add an arbitration clause to the agreement suggests that it might be useful to clarify in the Comment 58(b)(1) -1, -2 that legally binding terms are part of the "agreement" irrespective of how they are delivered to the consumer.

Finally, while issuers may wish to minimize the number of agreements they provide by adding ambiguity and ranges to terms, this defeats the purpose of the policy. Consumers need to be able to obtain precise terms of credit offered wherever possible, rather than vague ranges that provide little useful information. The definition of an account agreement needs to take this into consideration.

B. The Posted Agreements Should Be Readily Available To All and Up-To-Date

In any posting of cardholder agreements online—both for potential customers (the public) and existing cardholders, the information must be up-to-date. Consumer Action (www.consumer-action.org), which conducts annual surveys of credit card terms, finds that disclosures are often out of date.[28] The 2009 survey is only the most recent to find that many of the terms and conditions online may be outdated—in some cases, by as much as two years. Adding more confusion to this situation, Consumer Action finds that the outdated information typically is accompanied by an invitation to call a phone number to find out what has changed. However, when Consumer Action's researchers called, they reached customer service representatives who had no idea of what is being referred to or the answer to the question: "What has changed? While the requirement for quarterly submissions**,** including updates, at Reg. Z § 226.58(c) and (d) should help potential cardholders find up-to-date information, we suggest that consumers be advised of exactly how to find or obtain any updates.

Additionally, the Board must not permit issuers to require that interested persons and potential applicants "pay" for credit card pricing terms and cardholder agreements with sensitive personal information. In its 2009 Credit Card Survey, Consumer Action found that HSBC, one of the largest issuers of credit cards, would not provide any card information, even basics like APR, grace period and penalty rates, until the caller provides highly personal information—including a Social Security number, date of birth and mother's maiden name, among other sensitive details.[29] Once Consumer Action's researcher provided these personal details, she was given a disclosure statement detailing her "custom offer." But this "custom fit" offer turned out to be only a typical credit card disclosure, the kind required under Reg. Z § 226.5a. No firm offer of credit was provided—only a meaningless range of rates. The Board should ensure that the credit card agreements posted and maintained on the issuers' Web sites can be accessed without any registration or requirement that personal information be supplied in order to view it.

[28] *Beware Of Outdated Credit Card Information Online*, Consumer Action, August 12, 2009, *available at* www.consumer-action.org/news/articles/2009_credit_card_survey/#Topic_09
[29] Linda Sherry, *First Person: HSBC's 'Custom Fit' Needs Ample Alterations*, Consumer Action 2009 Credit Card Survey, August 12, 2009, *available at* www.consumer-action.org/news/articles/2009_credit_card_survey/#Topic_08

We fear that issuers may try to circumvent the requirement that cardholder agreements must be provided online by trying to establish different criterion for "applicants" and "existing cardholders." While some distinction may be necessary, it would be a great disservice to consumers, card applicants, cardholders and researchers to prohibit access to existing cardholder agreements to only the cardholders themselves. In the Credit CARD Act, Congress obviously intended for cardholder agreements to be an open book in the future, so that all interested parties can obtain and compare information. Because the Board is allowing different procedures for "agreements offered to the public" and "open accounts," (Reg. Z § 226.58(f)) we ask that the final rules clarify that one does not need to be a cardholder in order to see the full cardholder agreement for any account.

C. <u>The Board Should Ensure that Consumers Without Access to the Internet can Obtain the Agreements and Pricing Information, and that Online Consumers Find It in a User-Friendly Manner.</u>

While the Credit CARD Act invoked the Internet to facilitate consumer information, not all consumers have access to it. The Board should therefore ensure that there is a means for consumers on the other side of the digital divide to access this same information, and are informed of the means to acquire it.

Consumers with Internet access should have the ability to easily find information. Some consumers may which to shop for cards by the brand name they know. However, issuers sometimes change names, use multiple names, are purchased by other banks, or issue products in partnership with other organizations. Therefore, the agreements provided to the Board should include information that allows consumers to locate a product offering if they know the issuing firm by another name.

The Board correctly recognizes on that a button or box that allows cardholders to request an agreement must be clearly identified. 74 Fed. Reg. at 54,192. However, it needs to be clarified that issuers who choose to instead post agreements on their Website must also make these agreements readily available to cardholders. These agreements should not only exist on the Website, but cardholders need to know of their existence and location. The Web address of these agreements needs to be clearly identified (for example through links on commonly used areas of the site) so that they can be reached with a reasonable amount of effort.

D <u>The Board Should Maintain a Publically Accessible Archive of Agreements to Facilitate Research, and to Provide Consumers With a Means of Assessing the Track Record of a Particular Issuer.</u>

The Board indicated its intention to only include account agreements currently offered to reduce the administrative burden and because the volume of information provided would reduce the ability of consumers to comparison shop. 74 Fed. Reg. at 541,89. While consumer shopping may be a primary purpose of the Internet posting requirement, it does provide other sources of value, both for researchers and for consumers who wish to understand how their issuer's product offering has changed over time. Collecting all prior account agreements would undoubtedly create a large administrative burden, it should not cause a large burden for the Board to simply retain account agreements that it has previously acquired and posted which are no longer current, and to move access to them to a publicly available archive Website. Doing so would allow most consumers to only focus on current agreements, preventing confusion, but allow those who wish to look at clearly designated prior account agreements to do so.

XIV. LIST OF APPENDICES

Appendix A – Consumer Groups' Comments to July 2009 Interim Final Rule Amending Regulation Z to Implement Selected Provisions of the Credit CARD Act (September 21, 2009)

Appendix B – Memo from Consumer Groups to Board staff, June 2009.

Appendix C – Examples of Disclosures and Notices from Issuers

APPENDIX A

Comments of the

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

and

Center for Responsible Lending
Consumer Action
Consumer Federation of America
Consumers Union
Dēmos: A Network for Ideas & Action
National Association of Consumer Advocates
U.S. Public Interest Research Group

Regarding

Board of the Governors of the Federal Reserve System
Truth in Lending
Federal Reserve System
12 CFR Part 226
Docket No. R–1364

Interim Final Rule and
Request for Comments

September 21, 2009

These comments are submitted by the National Consumer Law Center (on behalf of its low income clients),[1] and the Center for Responsible Lending,[2] Consumer Action,[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 (4th ed. 2009) 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 of NCLC, with the assistance of Carolyn Carter of NCLC, Ruth Susswein of Consumer Action, and Josh Frank 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

Consumer Federation of America,[4] Consumers Union,[5] Demos: A Network for Ideas & Action,[6] National Association of Consumer Advocates,[7] and U.S. Public Interest Research Group.[8] These comments are in response to the July 22, 2009 Interim Final Rule issued by the Federal Reserve Board. The Board's Interim Final Rule implements two provisions of the Credit Card Accountability, Responsibility and Disclosures (CARD) Act of 2009:[9] (1) Section 101(a), which adds Section 127(i) of TILA (15 U.S.C. § 1637(i)) requiring creditors to provide 45 days advance notice for rate increases and significant changes in term and (2) Section 101(a), which adds Section 163 of TILA (15 U.S.C. § 1666b), requiring that creditors provide periodic statements to consumers twenty-one days prior to any payment due date or end of a grace period.

The Board has requested comment on the interim final rule, which amended Sections 226.5(b)(2)(ii), 226.9(c) and 226.9(g) of Regulation Z, as well as adding new Section 226.9(h). In short, we urge the Board to:

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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] **Consumer Action** (www.consumer-action.org) is a national non-profit education and advocacy organization that has served consumers since 1971. Consumer Action (CA) serves consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities. CA offers many free services to consumers and communities. Consumer Action develops free consumer education modules, training, and multi-lingual materials for its network of more than 9,000 community based organizations. The modules include publications in Chinese, English, Korean, Spanish and Vietnamese.

[4] **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.

[5] **Consumers Union** of United States, Inc., publisher of *Consumer Reports*, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications have a combined paid circulation of approximately 7.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and services, and noncommercial contributions, grants, and fees. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[6] **Dēmos: A Network for Ideas & Action** is a non-partisan public policy research and advocacy organization. Headquartered in New York City, Dēmos works with advocates and policymakers around the country in pursuit of four overarching goals: a more equitable economy; a vibrant and inclusive democracy; an empowered public sector that works for the common good; and responsible U.S. engagement in an interdependent world.

[7] 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.

[8] **U.S. PIRG** serves as the federation of state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations.

[9] Pub. L. No. 111-24, 123 Stat. 1735 (May 22, 2009).

- require creditors to give 45 days written notice for ALL significant changes in terms, including all fees (unless for expedited or one-time services), security interests, and mandatory arbitration provisions.
- require that all reductions in a credit limit be disclosed in writing.
- require that a notice of rate increase (whether due to a penalty or not) should indicate to what balances the increased rate applies.
- properly acknowledge that deferred "retroactive" interest plans are not permitted under the Credit CARD Act.
- permit consumers to reject any increases in the minimum payment that exceed the limits of TILA Section 171(c)(2)/Reg. Z Section 226.9(h)(2)(iii).
- provide that treatment as "late for any purpose" includes the loss of credit card rewards.

I. Change-in-terms and Penalty Rate Notices

a. Creditors should be required to give 45 days written notice for ALL significant changes in terms.

The Credit CARD Act amends Section 127(i) of TILA to require that creditors provide a change-in-terms notice 45 days in advance for "any significant change, as determined by rule of the Board, in terms (including an increase in any fee or finance charge,…)" While the Act provides great latitude for the Board to establish what is a "significant" change, it also shows Congress's concern that consumers receive 45 days notice for important changes to their accounts. This concern is especially acute with respect to any increase in a "fee or finance charge" since the Act specifically mentions changes in those terms.

Yet the Board has chosen to take a very restrictive view of what constitutes a "significant term" other than the APR, including only those terms required to be disclosed in the account opening table required under Section 226.6(b)(2) of the January 2009 Final Rule revising Regulation Z. This is an extremely limited list in that it only includes certain important non-interest terms of an account, such as only specific fees, the grace period, balance computation method, and fixed/minimum finance charges.

This list is entirely too limited. It does not even include other important terms for which the current (pre-January 2009) Regulation Z requires a change-in-terms notice, such as addition of a fee required to be disclosed in the current version of Section 226.6 or the addition of a security interest. It does not include extremely critical terms such as a binding mandatory arbitration provision, which has a profound impact on a consumer's fundamental access to the judicial system for violations of TILA, as discussed below in subsection I.d. By reducing the number of terms for which a change requires advance notice to consumers, the Interim Final Rule does not reflect Congress's intent to provide greater protection to consumers.

b. Fees permitted to be disclosed orally and immediately prior to their imposition should be limited to only fees involving expedited or one-time services.

Throughout the course of the Regulation Z rulemaking, we have consistently and vehemently opposed limiting the scope of fees that would require a change-in-terms notice.[10] We were (and still are) concerned that a creditor could establish a completely new fee not covered under the categories set forth in Section 226.6(b)(2) of revised Regulation Z, *e.g.*, a monthly "calculation" fee, and not be required to provide 45 days written notice before imposing such a fee. Yet the Board has chosen again to ignore our very serious concerns.

Furthermore, we note that there is a difference between requiring a fee to be disclosed at account opening and requiring that the consumer receive a change-in-terms notice for that fee. In its June 2007 proposal, the Board specifically cited concerns that creditors not be subject to liability for failing to disclose every single fee that could possibly or potentially be imposed in the future.[11] In addition to the fact that such concerns are not legitimate in promulgating a consumer protection rule, the same logic does not exist when a creditor adds a new fee. In the latter case, the creditor knows that the fee will imposed and thus can take measures to minimize litigation risk – the only issue is whether the creditor gets to impose it right away, or will be required to wait 45 days.

In this rulemaking, the Board has provided another reason for its restrictive approach, stating that waiting 45 days to impose a fee would be problematic, given that it contemplates that these fees would primarily involve a single service, for which disclosure 45 days in advance would not be useful.[12] These services would probably be purchased by telephone, would not be central to the account, and some of these fees would be for an expedited service.[13] If these are the Board's main concerns, then the ability to disclose a fee orally immediately prior to imposition should be limited to those circumstances. It makes sense not to require 45 days notice for a fee involving an expedited service or a single service that is time sensitive (*e.g.*, providing a replacement card). However, no such logic apples to fees that do not involve a time sensitive or one-time service, particularly for those fees imposed on a monthly or periodic basis.

Thus, the dividing line as to whether imposition of a new fee requires 45 days prior written notice should be whether the fee is for a service that is one-time or time sensitive. This distinction will prevent creditors from imposing new, creative fees, such as a monthly "calculation" fee, without 45 days written notice, while permitting fees such as a replacement card fee to be imposed orally immediately prior to imposition.

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[10] *See e.g.,* National Consumer Law Center, et al., Comments to the Federal Reserve Board's Notice of Proposed Rulemaking--Review of the Open-End (Revolving) Credit Rules of Regulation Z, Docket No. R-1286 (Oct. 15, 2007).
[11] 72 Fed. Reg. 32,948, 32,955 (June 14, 2007).
[12] 74 Fed. Reg. 36,077, 36,084 (July 22, 2009).
[13] *Id; see also* 74 Fed. Reg. 5244, 5269 (Jan. 29, 2009).

At a minimum, a change-in-terms notice should be required for all new penalty fees. Creditors have probably already begun the process of imagining new fees to make up for potential decreases in late payment or over-the-limit fees. Such new penalty fees, such as an "inactivity" fee or "excessive transactions" fees, should at least require 45 days written notice before they are imposed.

c. Reductions in a credit limit should be disclosed in writing.

Section 226.9(c)(2)(vi) of the Interim Final Rule requires a reduction in credit limit to be disclosed 45 days prior to imposing a penalty rate or fee for exceeding that limit. However, this notice may be provided either in writing *or orally*. Permitting oral disclosure of a reduced credit limit creates a great risk of harm to consumers.

Oral notice is unreliable. The creditor may think it has reached the cardholder, but may in fact have reached some other household member. The cardholder may lack proficiency in English, or have a hearing impairment, or be unable for one reason or another to take written notes. The difficulties of proving what was disclosed orally could create huge problems for both consumers and creditors. Furthermore, this provision conflicts with Section 226.9(g)(4)(ii)(A) of the Interim Final Rule, which does require a written notice.

Creditors should always be required to disclose a reduction of credit limit in writing, for no other reason than consumers should have a piece of paper to refer to when trying to recall what their credit limit is. If consumers are informed only orally of their credit limit, there is a chance they may forget that limit. As the Board notes, Regulation Z generally does not require disclosure of an account's credit limit.[14]

Without a written documentation of a credit limit reduction, how will these consumers be able to determine what their credit limit is to avoid going over it? While new protections against penalty rate increases and the over-the-limit fee opt-in requirement may prevent some of the worst consequences of exceeding a credit limit, consumers will suffer harm if they accidentally exceed a credit limit because they can't remember what it is and don't have it in writing. Knowledge of the credit limit is also important for calculation of a credit score. Consumers need to know what their credit limits are if they want to ensure that they only uses a portion of the available credit to keep a credit score from decreasing.

Our concern about consumers not knowing their credit limits is further heightened by the recent practice of creditors to inform consumers that their credit cards have "no preset spending limit." In fact, these cards do have a limit, but the consumer is permitted to make transaction above this limit. Any balance above this limit must be paid by the due date as part of the minimum payment, like a charge card. One potential problem with this practice is that, if consumers make transactions that go above the limit without realizing how much they have exceeded it, they may be unable to pay the minimum payment and will be charged late payment fees. If the limit is not disclosed, or if the

[14] See 74 Fed. Reg. 36,077, 36,086 (July 22, 2009).

limit is lowered without a written notice, this increases the chances that the consumer will go over that limit and be faced with an unexpected high minimum payment that they cannot pay.

Finally, consumers should also be given written notice of an account closure, even if sent at the time of account closure and received after the fact. While we understand the Board's safety and soundness concerns about advance notice, consumers should be sent a written notice at the time their account is closed so that they have formal confirmation of the fact. This is especially true for credit card accounts that a consumer might not use frequently, such as a "backup" card. At a minimum, the Board should note in section 226.9(c)(2)(V)(a) exempting account closures that the Equal Credit Opportunity Act and Fair Credit Reporting Act may require written notice of an account closure.

d. *A binding mandatory arbitration clause must be considered a "significant" term.*

The proposed regulation does not include waiver of the right to sue as a "significant" term. Nevertheless, one of the most significant changes possible for a consumer credit agreement is a requirement that the consumer give up the right to utilize the court system and the constitutional right to a jury trial. Another highly significant change is a requirement, when the consumer is forced to utilize arbitration, that the consumer give up the right to bring that arbitration action in conjunction with other consumers so as to obtain class-wide relief.

Furthermore, a central purpose of the Credit CARD Act's notice requirements for significant changes is to allow the consumer to cancel the account if the consumer does not accept the change. Clearly, consumers need the right to cancel an account (or reject a change) when being asked to give up Constitutional rights or where an arbitration requirement is being stacked against the consumer so as to make it impractical as a means of remedying the card issuer's illegal conduct. Over 50 appellate and federal district court cases have found unconscionable creditor limitations on the consumer's right to bring class-wide arbitrations. *See* National Consumer Law Center, Consumer Arbitration Agreements § 6.5.5 (5th ed. and 2008 Supp.). Certainly the consumer should have a right to cancel an account/reject a change where the creditor unilaterally is limiting the arbitration remedy in a way that many courts have found to be unconscionable.

As the law stands, creditors must provide notice of any change in an arbitration requirement, or it will not be effective. The Board should provide clarity as to the nature of that notice, giving consumers both 45 days written, clear and conspicuous notice and a clear course of action if they do not accept the change in terms.

e. A notice of rate increase (whether due to a penalty rate or not) should indicate to what balances the increased rate applies.

Because the protections against rate increases for an outstanding balance are not yet effective, the Interim Final Rule's requirements for a change-in-terms notice and penalty rate notice do not require disclosure of whether an increased rate applies to outstanding balances or only to new transactions. The Board has stated that it anticipates reviewing this issue for potential additional content requirements for conformity with the CARD Act protections.

We strongly support a disclosure to make clear to consumers when an increased rate applies only to new transactions, or when differing rates apply to different balances. Consumers need to know exactly what the consequences of a rate increase are, so that they understand how a rate increase will affect their account, can adjust their behavior accordingly, and determine if the creditor is applying the correct APR to any protected outstanding balance.

Indeed, in our comments to the Board's May 19, 2008 NPRM, we had urged the Board to revise its model language in Sample Form G-20 to make clearer how a rate increase would apply to an outstanding balance, by using language similar to the following:

> The current purchase APR of 12.99% will apply to all purchases made before 1/15/11. The new purchase APR of 16.99% will apply to purchases made after that date.

We believe that it is particularly important to disclose the prior rate in the change-in-terms notice so that consumers will have an indication of the magnitude of the change and its impact on their finances. Otherwise, consumers will have to go hunting for their prior rate, which they may not readily find. In addition, this disclosure makes clear that purchases made after 14 days (not 45 days) will have the higher rate applied to them. Any notice of a rate increase must make clear what transactions will be subject to the rate increase, so that consumers can adjust their behavior accordingly. Finally, for rate increases that apply to an outstanding balance, the consumer's right to have the original rate reinstated after six months of timely payment must be disclosed. Requiring that the original rate also be disclosed helps consumers understand the benefits of having their rate reinstated.

II. Deferred "Retroactive" Interest Plans Are Not Permitted Under the CARD Act

The Supplementary Information to the Interim Final Rule states the Board's determination that the Credit CARD Act permits deferred interest plans in which interested may be retroactively imposed based on the entire balance if not paid off by the end of a certain date.[15] In addition, the rule contains a number of exceptions reflecting that determination. Since these plans involve the retroactive imposition of interest for the entire balance back to the original transaction date, we will refer to them in this discussion as "deferred retroactive interest plans."

[15] 74 Fed. Reg. 36,077, 36,085 (July 22, 2009).

We recognize that the main rulemaking regarding deferred retroactive interest plans will take place when the remainder of the CARD Act is implemented. We are addressing such plans in this rulemaking, however, because we believe that discussion about this issue in the Supplementary Information is simply wrong. This discussion assumes that since the Credit CARD Act's addition of Section 164 of TILA creates a special payment allocation rule for "deferred interest arrangements" that Congress meant to permit them.[16] However, Section 164 does not expressly authorize such plans. *More importantly, even if an implicit authorization can be assumed, Section 164 does not expressly state what* ***kind*** *of deferred interest plan is permissible*. It does not specify that deferred interest plans that permit retroactive imposition of interest all the way back to the transaction date for the *entire* balance are permissible. Section 164's reference could be to plans in which interest is not imposed during the deferred interest period, then only retroactively imposed on the remaining unpaid balance if not fully repaid. For example, a deferred interest plan could provide that if a consumer makes a $1,000 purchase and pays off $800, that the accrued deferred interest only for *the remaining $200* can be imposed.

This distinction is critical, because the Credit CARD Act also contains an *explicit prohibition* of deferred retroactive interest plans in the prohibition against double cycle billing. Section 127(j) of TILA provides, with great particularity, that a finance charge cannot be assessed as a result of the loss of any time period within which the consumer may repay a balance without incurring a finance charge based on any balances from prior billing cycles. This language specifically prohibits deferred retroactive interest plans, which impose a finance charge based on balances from prior billing cycles if the consumer does not repay the entire balance within the specified time period (which would qualify as "the loss of any time period within which the consumer may repay a balance without incurring a finance charge").

Thus, Section 127(j) bans deferred retroactive interest plans where interest for the entire balance can be retroactively imposed, but does not ban plans in which the deferred interest only on the remaining unpaid balance is imposed at the end of the deferred interest period. Furthermore, Section 127(j) does not contain an exception for deferred interest plans. In fact, such an exception was included in a prior version of the bill. *See* Attachment 1 - copy of H.R. 627 as introduced in the House of Representatives. Its removal from the final version enacted into law reflects Congress's determination that deferred retroactive interest plans are prohibited by Section 127(j).

III. Right to Reject Changes

a. Consumers should be permitted to reject any increases in the minimum payment that exceed the limits of TILA Section 171(c)(2)/Reg. Z Section 226.9(h)(2)(iii).

The Board's Interim Final Rule essentially provides that a consumer is not permitted to reject a change if the change is an increase in the minimum payment. The

[16] *Id.*

Board believed that permitting a consumer to reject a minimum payment increase would potentially subject a consumer to increased interest charges and an extended amortization period.[17] However, the Board's rule leaves consumers vulnerable to dramatic minimum payment increases that far exceed the limits of TILA Section 171(c)(2)/Reg. Z Section 226.9(h)(2)(iii) This is because, since the consumer cannot reject the minimum payment increase, the protections of those provisions do not apply at all. Thus, creditors are free to increase the minimum payment, even potentially to the entire amount of the balance, essentially accelerating a debt.

Creditors certainly have an incentive to make dramatic increases in the minimum payment, because such increases can be used to coerce consumers to accept other changes in an account. One major credit card lender has already engaged in such conduct, increasing the minimum payment but advising consumers that they could switch to an account with a higher interest rate (a change that would otherwise be rejectable, or in February 2010, prohibited). (See Attachment 2 which documents this conduct.)

The Board's concern that rejecting minimum payment increases would potentially subject a consumer to increased interest charges should be balanced by Congress's explicit concern that permitting minimum payment increases above the limits in TILA Section 171(c)(2) could undermine a consumer's right to cancel an account or protections against rate increases. The appropriate method to strike that balance is to provide a right to reject any minimum payment increases above the formula set forth in Reg. Z Section 226.9(h)(2)(iii).

Furthermore, such a rule should apply for the life of the account. In other words, if a creditor increases the minimum payment in month one by doubling the percentage of the balance included in the payment from 2% to 4%, the creditor must be prohibited from increasing the minimum payment from 4% to 8% in month six.

IV. Periodic Statement Timing Requirements

a. Treatment as "late for any purpose" should include loss of rewards.

Section 163(a) of TILA, as amended by the Credit CARD Act, prohibits a creditor from treating a payment as late for any purpose if a statement is not mailed 21 days before the due date. In Comment 5(b)(2)(ii)-2, the Board has rightfully defined "late for any purpose" to include imposing a late fee or penalty rate, or reporting the consumer as delinquent to a consumer reporting agency. We propose that an additional action be added to this list – that treating a payment as "late for any purpose" includes revoking rewards from a credit card reward program.

As the Board knows, one of the highly promoted aspects of credit cards are rewards programs, such as cash back, airline mileage, or points redeemable for merchandise. Some creditors will revoke the rewards accrued by consumers if they make a late payment. Thus, if a creditor has violated the periodic statement timing

[17] *Id.*

requirements of Section 163(a), the creditor should not be permitted to treat a payment as late by revoking the consumer's accrued rewards.

b. Consumers should be able to submit proof of timely payment.

Creditors should be required to reverse a decision to treat a payment mailed before the due date as late if the consumer provides certain evidence to the creditor. The deadline should be three days before the due date – the normal delivery time that consumers expect for first class mail. The Board should also adopt a parallel rule for electronic payments, pegged to the time when the consumer's bank or the credit card issuer promised to credit the payment.

Evidence that a creditor should be required to accept includes a receipt from the United States Postal Service or from a delivery service such as, or comparable to, United Parcel Service, Federal Express, DHL or Airborne Express, or a printout of the computer screen or email confirmation showing the date on which an online payment was scheduled to be made.

IV. Provisions That We Support

The Board has promulgated a number of provisions that we support, the most important of which is to clarify that there is a substantive right to reject changes to an account.

- We strongly support Section 226.9(h) of the Interim Final Rule clarifying that there is a substantive right to reject changes to an account. We agree that TILA Section 127(i)(3)'s requirement for a notice of the right to cancel the account is illogical and deceptive without a corresponding substantive right to reject changes. Clarifying that this substantive right exists is important for all the reasons that the Board cites in the Supplementary Information.

- We strongly support the timing requirements for penalty rate notices in Section 226.9(g)(2) of the Interim Final Rule, *i.e.*, that penalty rate notices can only be sent *after* the occurrence of the event that triggers the penalty rate. Creditors should not be permitted to send general, boilerplate notices to all consumers about the mere possibility of a penalty rate imposition. Boilerplate notices would be meaningless, have no use to consumers, and be ignored.

- We support Comment 226.5(b)(2)(ii)-3's treatment of the official payment due date as excluding any courtesy period or state-required waiting period that is provided before a late fee is imposed.

ATTACHMENT 1

H.R.627

Credit Cardholders' Bill of Rights Act of 2009 (Introduced in House)

SEC. 3. ADDITIONAL PROVISIONS REGARDING ACCOUNT FEATURES, TERMS, AND PRICING.

(a) Double Cycle Billing Prohibited- Section 127B of the Truth in Lending Act is amended by inserting after subsection (c) (as added by section 2(c)) the following new subsection:

`(d) Double Cycle Billing-

`(1) IN GENERAL- No finance charge may be imposed by a creditor with respect to any balance on a credit card account under an open end consumer credit plan that is based on balances for days in billing cycles preceding the most recent billing cycle.

`(2) EXCEPTIONS- Paragraph (1) shall not apply so as to prohibit a creditor from--

`(A) charging a consumer for deferred interest even though that interest may have accrued over multiple billing cycles; or

`(B) adjusting finance charges following resolution of a billing error dispute.'.

(b) Limitations Relating to Account Balances Attributable Only to Accrued Interest- Section 127B is amended by inserting after subsection (d) (as added by subsection (a)) the following new subsection:

`(e) Limitations Relating to Account Balances Attributable Only to Accrued Interest-

`(1) IN GENERAL- If the outstanding balance on a credit card account under an open end consumer credit plan at the end of a billing period represents an amount attributable only to interest accrued during the preceding billing

ATTACHMENT 2

Cardmember Service
P.O. Box 15298
Wilmington, DE 19850-5298

CHASE

March 31, 2009

[redacted]

Important information is provided below regarding your account.

RE: Your account ending [redacted]

Dear [redacted]

In November 2008, you received a notice advising you of changes to your credit card account effective with your January 2009 statement. In that notice, we communicated a $10 monthly service charge would be applied to your account.

Beginning April 1, 2009, we will no longer assess a $10 monthly account service charge. We will credit your account for any $10 monthly service charge(s) billed since January 1, 2009 along with any finance charges related to the $10 monthly account service charge. You will see the adjustment on your April billing statement. Your minimum payment due each month will remain at 5% of your New Balance as communicated in the November 2008 notice.

There is an optional alternate offer available. Those terms include moving your current balances subject to an APR with no defined expiration date to **(a)** a new Annual Percentage Rate (APR) of 7.99% until January 1, 2011, and **(b)** a minimum payment calculation that consists of the greater of $10, 2% of your New Balance or 1% of your New Balance plus billed interest and any billed late fees. After January 1, 2011, the APR for any remaining portion of the balance(s) would be the applicable APR associated with this type of balance as outlined in your Cardmember Agreement and any subsequent disclosures. As always, your account remains subject to all terms and conditions, including default APR actions, as outlined in your Cardmember Agreement.

If you have any questions or wish to take advantage of the optional alternate offer described above, please call us at the toll-free number on the back of your card. For your convenience, we are available 24 hours a day to assist you.

Sincerely,

Deb Walden

Deb Walden
Executive Vice President
Cardmember Experience

CIT015

APPENDIX B

Consumer Groups' Comments Regarding Rulemaking for Selected Provisions of Pub. L. 111-24, the Credit Card Accountability Responsibility and Disclosure (CARD) Act

The consumer groups listed below are submitting comments in anticipation of the upcoming rulemaking by the Federal Reserve Board for the Credit CARD Act of 2009. These comments were prepared by Chi Chi Wu and Lauren Saunders of the National Consumer Law Center, Kathleen Keest and Josh Frank of the Center for Responsible Lending, Travis Plunkett of Consumer Federation of America, Linda Sherry and Ruth Susswein of Consumer Action, Lauren Bowne of Consumers Union, and Ed Mierzwinski of USPIRG.

I. Preventing Manipulation of Variable Rates

Section 101(b)(2) of the Credit CARD Act, establishing new Section 171(b)(2) of the Truth in Lending Act (TILA), permits an issuer to change or increase an APR on an account (including on an outstanding balance) based on a variable rate. Apparently, some issuers have been contemplating using this exception to get around the ban on other forms of rate increases being applied to outstanding or existing balances. We have been informed that, on conference call sponsored by Mastercard on the CARD Act, one issuer asked if it would be legal to use a variable rate that was not just tied to the prime rate, but also tied to some sort of index that utilized a credit score factor along with the prime rate. In other words, this issuer was exploring the idea of circumventing the retroactive re-pricing limitations by creating a risk-based "index."

Now, such an "index" would not be permissible under new Section 171(b)(2) of TILA, because that section specifically requires the index be publicly available and not under the creditor's control – a provision added to prevent such circumvention. However, another potential avenue for manipulation could be the margin of the variable rate. An issuer could try to use a similar risk-based margin.

The Board should ensure that such circumvention is not possible. We note that the credit card FTC Act rule issued in January 2009 did state at the Comment 24(b)(2)-1 that a creditor is not permitted to "increase the annual percentage rate by changing the method used to determine a rate that varies with an index (*such as by increasing the margin*),…" (emphasis added). We strongly urge the Board to include this same language in the regulations or comments implementing new Section 171(b)(2) of TILA regarding variable rates.

II. Reasonable Fees

Section 102(b) of the Credit CARD Act, establishing new Section 149 of TILA, requires that penalty fees or charges, including late fees and over-the-limit fees, or other penalty fees, be reasonable and proportional to the omission or violation. The Board is to promulgate rules, in consultation with the federal financial supervisory agencies, to establish standards for making that determination. In promulgating rules, the Board is to consider: (1) the cost to the creditor of the violation, (2) deterrence, (3) the conduct of the cardholder, and (4) other factors as the Board deems appropriate. The Board may set a "safe harbor" amount presumed reasonable for any fee.

a. Purposes of penalty fees and the statutory factors

Historically, a principle of common law regarding contract breaches, such as delayed payment, was that the purpose of damages was to compensate for the costs to the other party for that breach. Pre-fixed amounts were only permitted when it was too difficult to calculate the compensation value. If the "liquidated damages" pre-fixed amount was excessive, then it was "legally unenforceable on grounds of public policy as a penalty."[1]

In evaluating the type and amount of penalty fees, care must be taken to assure that both the components of the evaluation and the pricing are attributable to the breach itself, a connection that the statute retains by tying the reasonableness and proportionality to "the omission or violation."[2] It therefore is not appropriate, for example, to use penalty fees as a means to replace revenue lost generally as American households de-leverage or to cross-subsidize less profitable segments of the customer base.[3]

This discussion will focus on discrete penalty fees, particularly the ones primarily imposed currently, late and over-the-limit (OTL) fees. However, the increased interest rates triggered by certain breaches, including late payment and over-limit charges, are also "other penalty charges." To the extent that those rates are penalties, they, too, should be evaluated for reasonableness and proportionality. To the extent that the rationale for them has shifted to "risk-pricing", then, as we discuss in Section III, the Board must ensure that there are empirically supported, and more finely tuned, relationships between risk and penalty rates.

(1). <u>Compensation for costs incurred by the creditor from such breach</u> When interest accrues on a daily basis, as it does on credit card accounts, compensation is already built into the pricing. Delay in payment is compensated by the extra days interest accruing before payment.[4] For the other common penalty fee currently imposed, over-the-limit fees, it is difficult to articulate a legitimate cost-based justification at all, *cf. Beasley, supra* at 457-58. Additionally, late charges and over-limit charges have been triggers for

[1] Restatement of Contract (Second) § 356: Liquidated Damages And Penalties (1981). *See also* Beasley v. Wells Fargo Bank, N.A. 1 Cal. Rptr. 2d 446 (Cal. Ct. App. 1991).
[2]*Cf.*, Beasley v. Wells Fargo Bank, N.A. 1 Cal. Rptr. 2d 446 (Cal. Ct. App. 1991)(upholding jury verdict against bank for unjustified late and OTL fees for failure to connect some components considered to the breach and pricing components.)
[3] *Cf.* Beasley, *supra* at 448 (internal document describing increased late and OTL fees as part of strategy to "maximize fee income" and "good source of revenue,"); Comments of the Center for Responsible Lending on the Proposed Rule Regarding Unfair and Deceptive Acts and Practices, FRB Docket R-1314 (Aug. 4, 2008), *at* pp. 8-12 (discussing both uses of penalty fees.)[hereinafter "CRL UDAP Comments"]
[4] For that reason, some laws initially prohibited late fees on interest-bearing accounts, as it would represent double compensation. The original version of the Iowa Consumer Credit Code did so, for example, but due to the downward competition pressures resulting from preemption and exportation developments, the law was changed.

penalty rates, and may continue to be under the new Act.[5] Thus the consumer may pay for the same conduct in two or three ways: regular interest accrual, a set fee and, at times, punitive interest rate accrual. It should be a basic principle that compensation means to cover costs, not "cost-plus."

(2) Deterrence and (3) conduct of the cardholder: These two factors will be discussed together, because it is unclear what the "conduct of the cardholder" is intended to cover that has practical import differing from "deterrence." It is difficult to quantify such "soft" values, and there are no immediately obvious limiting principles.

There have only been a few studies on credit card penalty fees. Combining the findings of those studies, it is possible to extract some principles relevant to this factor. One study found some deterrent effect to credit card penalty fees, but that learning depreciates rapidly: there is a "recency" effect."[6] A second study, by Massoud, Saunders and Scholnick, found some correlation between late fees and risk, but also found evidence of "rent extraction," especially by banks with larger market shares, after holding that risk constant. In other words, the evidence was consistent with a "market concentration tax."[7]

Possibly both the value of deterrence and the relationship to risk may be better appreciated by distinguishing between late payments likely resulting from "inattention" and those that might represent either financial distress or financial illiteracy.[8] Combining the evidence of a "recency" effect with a differentiation between infrequent "mistakes" and evidence of financial distress suggests that there may be reason for the Board to consider a limit on the number of consecutive penalty fees, including late fees.[9] If the breaches are driven by incapacity, then punitive fees and rates in fact do not serve a deterrent function, but rather worsen financial distress, to no one's benefit.

In weighing deterrence, the Board should also take into account whether the conduct to be deterred is such that the industry actually perversely makes it more difficult to avoid. Fees which originally existed as a means to discourage certain behaviors and were closely tied to those behaviors have since become an important revenue stream. Issuers use hairline triggers as an excuse to charge additional fees even if there is little to no cost to issuers. According to CardTrak.com, "in the 1980s cardholders were generally permitted to submit payments up to 15 days after the due date without bumping into a late fee. The late fee usually reflected the cost of making a reminder phone call or sending a reminder letter. Today, late payment fees are generally charged if the cardholder fails to

[5] The Act limits retroactive rate increases, but does not limit triggers for prospective rate increases.
[6] Sumit Agarwal, John C. Driscoll, Xavier Gabaix, and David Laibson, *Learning in the Credit Card Market* (Feb. 8, 2008),, *available at* http://ssrn.com/abstractk=1091623
[7] Nadia Massoud, Anthony Saunders, Barry Scholnick, *The Cost of Being Late: The Case of Credit Card Penalty Fees*, January 2006, New York Federal Reserve Conference Paper. There are some shortcomings in the study that raise questions about the correlation between penalty fees and risk. For example, their methodology is not able to differentiate between correlation that is due to some issuers aggressively pursuing revenue growth (and therefore having both higher risk and higher fees) and correlation that is truly due to issuers seeking to price for risk through higher fees.
[8] *Cf* Nadia Massoud, Anthony Saunders, Barry Scholnick, *Who Makes Credit Card Mistakes?* (August, 2007).
[9] Note that the CARD Act places limits on pyramiding of OTL fees.

submit a payment by mid-afternoon on the due date."[10] Over-limit fees also were generally not assessed until somebody exceeded their credit line by 5% to 20%.[11] Furthermore, in addition to not assessing late fees immediately after the due date, the time before the due date was much larger in the 1980's. Between 1990 and 2007 the average credit card grace period has declined from 30 days to 20 days.[12]

b. Pricing the fees

Prior to the functional deregulation of credit card rates and fees resulting from the OCC's promulgation of a broad definition of "interest" allowing exportation of deregulated fees, and the Supreme Court's 1996 decision in *Smiley v. Citibank of S.D., N.A.*, there were occasional efforts to objectively evaluate the price of fees. *See, .g..g. Beasley, supra.* However, commonly fees were set by law.

Since *Smiley*, the amount of late and OTL fees marched steadily upward with no apparent effort to justify the price. The amount of the typical penalty fee charged has more than doubled between 1995 and 2005 from $12.53 to $27.46 for late fees and from $14.07 to $30.18 for over-limit fees, according to annual surveys conducted by Consumer Action. Currently, it is common to see such fees at $35-$39.

As a percentage of receivables, penalty fee revenue has increased from 0.70% in 1990 to 1.21% in 2008.[13] In the year *Smiley* was decided, they were 4.4% percent of revenue, but jumped to nearly 10% by 1999. In 2008, penalty fees were 6.6% of revenue.[14] This steady – and "lock-step"[15] -- upward trend once the fees were no longer subject to scrutiny under legally limiting principles suggests that current levels should not be viewed as a starting point to determine "reasonableness." (Previous comments to the Board have discussed other factors driving penalty fees, *see generally* CRL UDAP Comments, notes 48-49.)

Options that are available for defining a reasonable fee include: 1) a flat, universal threshold, 2) a tiered threshold, or 3) a threshold that is a percentage of the payment. The Act permits the Board to set a "safe harbor" amount that is presumed to be reasonable or proportional.

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[10] Thomas Redman, *Fees & Recession*, CardTrak.com, Dec. 17, 2008, *available at* http://www.cardtrak.com/news/2008/12/17/fees___recession

[11] *Id.*

[12] Cardweb.com

[13] Center for Responsible Lending estimates based on Card & Payments Magazine and Mark Furletti & 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?* July 2006, Federal Reserve Bank of Philadelphia Payment Cards Center Discussion Paper.

[14] 2008 figure from Kate Fitzgerald, *2009 Bankcard Profitability Study*, Cards&Payments, p. 23 (May, 2009). Earlier figures calculated by Josh Frank, CRL, from data in Mark Furletti, *Credit Card Pricing Developments and Their Disclosure*, to exclude fee income that is not classified as penalty fees.

[15] *See, e.g.* Mark Furletti & 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?*, at 19, 25 (documenting "herding" among large issuers on late fees).

The United Kingdom recently set a flat fee maximum. The UK's Office of Fair Trading in 2006 determined a reasonable maximum for a default charge (such as late or over-limit fees) would be £12.[16] The Office argued convincingly that it is not appropriate to include extraneous costs such as elevated risk of charge-off or fraud in setting the default charge threshold. Such risks, to the extent that they exist, are not a cost of being late or over-limit. (As we discussed earlier, the universe of people who incur a late charge are not monolithic, nor is their likely relationship to risk.)

While the reasoning of the Office of Fair Trading in setting their threshold is reasonable, the £12 figure they come up with appears excessive. Most consumers who are late only a few days or go slightly over-limit do not receive any extra communication whatsoever. For those that do become late or far enough over-limit that it initiates further communication, a single letter, phone call, or email is the most common outcome, which even with a generous allotment for overhead, has a cost far below this figure. The overhead-inclusive costs of a single collection call are far less than £12 per violation. Card users whose payment is received only a few days late or who go temporarily only slightly over-limit result in little to no expense to issuers since they do not result in any additional customer contact. In fact, given how hard many issuers work to maximize balances borrowed, the additional finance charges received are already a net benefit to issuers. Overall, it appears that even cardholders who are late 15 days should have a threshold fee lower than the United Kingdom's determination, with minor violations (such as being a few days late or slightly over-limit) having a far lower threshold.

This suggests that a tiered threshold may be superior to a single dollar figure. A single threshold that is a percentage of the payment also has advantages since collections calls are much more likely to be initiated for somebody carrying a large balance and therefore having a large payment. Minimum payments make a better base for calculating the percentage than the balance for late fees because the violation is directly linked to the payment and this is therefore the relevant amount. This also has the benefit of encouraging responsible minimum payment levels.

Prior to *Smiley*, a fairly common standard for late fees was the lesser of a fixed amount, e.g. $10-$15 or a specified percentage (commonly 5%) of the minimum payment. According to Consumer Action's 1995 Credit Card Survey, when California law had a $10 maximum late fee, Citizen's Bank charged a late fee of the lesser of $10 or 10% of the payment due, First Interstate Bank (later acquired by Wells Fargo) charged 5% of payment due for a late fee, and Mellon Bank charged the greater of 5% of the payment due or $15. As they represent prices before it became more common to price penalty fees for other purposes unrelated to the breach, these price points may represent more realistic pegs for determining reasonableness and proportionality.[17]

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[16] *Calculating Fair Default Charges in Credit Card Contracts*, United Kingdom Office of Fair Trading, April 2006, *available at* www.oft.gov.uk/shared_oft/reports/financial_products/oft842.pdf.

[17] The Self-Help Credit Union does not charge OTL fees, and its late fee is 5% of the past due amount, to a maximum of $20. CRL is an affiliate of Self-Help, which consists of a credit union and a non-profit loan fund.

It is important to set penalties that encourage responsible card-user behavior. However, it is important to keep in mind that cardholders already have a strong incentive to not pay late or go over-limit since their future charges will likely go to a higher penalty APR. Equally critically, card-user incentives must be balanced with issuer incentives. Higher penalty rates create a powerful incentive for issuers to manipulate consumers to encourage penalty fees. While even a small penalty fee will encourage consumers to pay on time if they can, large penalty fees create a harmful incentive for issuers, and ultimately exacerbate problems.

Finally, we also recommend that the Board's rules assure that new penalty fees are not created to create a multiplier effect to replace lower individual fees on fewer penalties. For example, since many borrowers may opt out of over-limit fees, issuers may start to charge a decline-transaction fee. Since this is done electronically at no cost to the issuer, there is no "reasonable" amount for such a fee. Any other penalty fee that is not based on a real, direct operating cost to the issuer should also be considered unreasonable.

c. Summary of principles for reasonable and proportional late fees

- The amount must be tied to the cost of the behavior, not unrelated factors, such as reduced income from a de-leveraging customer base.
- Compensating for costs means simply that; the compensation factor should not allow for multipliers, and the fact that balances accrue interest during the delay must be considered in assessing this component. There must be a real, direct, operating cost to be compensated.
- Deterrence is a soft value, with no inherently limiting principles. It should not be used as a "catch-all" merely to justify continued extraordinarily high fees. Evidence suggests that there may be a limit to the deterrent value of sequential late fees, and both price and frequency of penalty fees should be calibrated so as not to exacerbate breaches traceable to financial distress, such as unemployment.
- The amount of the fees should not be so high as to create perverse incentives for the issuers to functionally encourage the breach in order to collect the fees, or to encourage issuers to create imaginative triggers for such fees.
- The Board should assure that issues do not impose fees for conduct that is ordinary, predictable, and contractually permissible in order to enhance penalty fee income.
- A safe harbor set by the Board for fees rather than individualized issuer-set fees, is likely to be the simplest method. A percentage fee based on the minimum payment, to a maximum dollar amount may be better than a single dollar amount.

III. Ability to Pay

Section 109 of the Card Act adds new Section 150 if TILA, stating:

> ‘‘A card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.’’

Mortgage and other consumer loan applications use guidelines for income, outstanding debt to income and net disposable income in addition to credit history. Underwriters verify source of income and predictability of income, tax returns, and other documentation in order to determine whether to grant loans.

Extensions of unsecured credit via a credit card are often granted on an instantaneous basis that does not provide time for a full validation of ability to repay. Issuers even argue that people demand instant decisions. However, consumers who need credit instantly may by their very nature warrant heightened validation of ability to repay.

To meet the mandate set by the Credit CARD Act, issuers must establish non-discriminatory, universally predictable requirements for approving new credit card accounts and further extensions of credit based on:

- Credit report/credit score
    - Consider notifying applicants in advance of eligibility requirements, such as a minimum credit score for a particular card, so they can self-select
- Income (individual, not household, unless the application is a joint application, in which case incomes of both parties can be assessed)
    - Consider alternatives to or validation of self reported income on applications
    - If any third-party income evaluation system is used, applicants will be entitled to access and dispute rights under the Fair Credit Reporting Act.
- Other payment obligations
- Predictability of employment
- Amortization period
- Stop automatic extensions of credit. Issuers should not be permitted to increase credit limits unless the cardholder applies for an increase.

For applicants who can’t meet the criteria, banks might want to consider establishing low-risk secured credit card programs to grow new customers for the long term with a “training wheels” type account.

a. Current credit card underwriting

Currently, creditors obtain much, if not all, of this information from credit scores. The underlying credit report from which the credit score is derived does not contain salary or income information.

Two main capacity factors (credit score and gross annual income) are considered on most applications. For this purpose, it is our understanding that banks rely on self-reported income. “Know your customer” validations are also conducted.

Companies develop matrices that correlate score with income in determining whether to issue a card and if a card is issued, what the interest rate and credit limit will be. Sometimes the applicant’s relationship with the financial institution is also a factor. At this time, credit card issuers have no way (that we know of) to gauge an applicant’s regular expenses, such as rent, utilities, or food, so even when issuers know income and outstanding credit, they can’t really evaluate how much disposable income people have to pay for additional finance charges.

This is an interesting section from the FDIC examiners’ guidelines about current practices:

Compared to other types of lending, the underwriting and loan approval process for credit card lending is generally more streamlined. Increasingly, much of the analytical tasks of underwriting are performed by technology, such as databases and scoring systems. Whether the underwriting and loan approval process for credit cards is automated, judgmental, or a combination thereof, consistent inclusion of sufficient information to support the credit granting decision is necessary.

Underwriting standards for credit cards generally include:

> *- Identification and assessment of the applicant’s repayment willingness and capacity, including consideration of credit history and performance on past and existing obligations. While underwriting is based on payment history in most instances, there are cases, such as some application strategies, in which guidelines also consider income verification procedures. For example, assessments of income like self-employment income, investment income, and bonuses might be used.*
>
> - *Scorecard data.*
> - *Collateral identification and valuation, in the case of secured credit cards.*
> - *Consideration of the borrower’s aggregate credit relationship with the bank.*
> - *Card structure and pricing information.*
> - *Verification procedures.*

(Source: March 2007, FDIC - Division of Supervision and Consumer Protection, page 40: found online at: http://www.fdic.gov/regulations/examinations/credit_card/pdf_version/ch7.pdf)

IV. Fair and Regular Re-Pricing Requirement

Section 101 of the CARD Act adds new Section 148 of TILA, which requires creditors to maintain reasonable methodologies to assess the factors for re-pricing a credit account based on risk, market conditions or other factors and determine whether to reduce an APR based on such factors. New Section 148 specifically requires creditors to review accounts for which an APR has increased to assess whether the APR should be decreased.

Note that there are essentially two different kinds of re-pricing contemplated by this Section. The Board must treat these types of re-pricing differently when determining the factors that an issuer can legitimately consider in re-pricing. Some factors are legitimate for one kind of re-pricing, but not the other, while some are equally relevant to both. These kinds of re-pricing are:

- Market-condition re-pricing, which presumably applies to issuers' generally applicable baseline rate structures – including where issuer peg purchase rates, cash advance rates, penalty rates, and any other general rate category they come up with.
- Individualized "risk-assessed" re-pricing.

a. Legitimate factors in re-pricing

In order to ensure that issuers use "reasonable methodologies" in re-pricing an account, the Board must consider what factors and data issuers can legitimately use to develop their systems. First and foremost, factors used by an issuer should be documented in writing and available to the public. Legitimate factors should be limited to:

For market-condition re-pricing
- Cost of funds but only to the extent not reflected by a variable rate;
- The issuer's loss rates for that particular card product.

For individualized risk-based re-pricing
-Specific, empirically tested risk factors indicative of the cardholder's ability to repay;

Factors that should not be included are:

For market condition re-pricing
-The issuer's loss rates for other card products or product lines, such as mortgages or auto loans.
- The issuer's rent-seeking profits
- The issuer's inability (due to CARD Act restrictions) to charge higher fees or higher rates on existing balances

The reasons why the latter two factors are not legitimate are discussed below in subpart IV.d.

For individualized risk-based re-pricing
-Any factor that measures price sensitivity as much as risk (or more than risk) should not be used even if it is correlated with risk.
-Any individual purchase information that is correlated with protected class status.

b. Systems must have logical and empirically based relationships

The factors used by an issuer's re-pricing systems should relate to the pricing based upon a logical and empirically based relationship. This relationship should be specific (such as an assignment of points or values), documented, and available to the public.

Data used to develop the system should be based on a large sample – at least the issuer's entire cardholder population for a particular card product, or a reasonable sample thereof.

An example of a legal standard for an empirically based model comes from the requirements for a credit scoring system in Regulation B. While credit scoring serves a somewhat different function than re-pricing systems, Regulation B provides some potential ideas for other requirements, such as:

- The system must be "empirically derived, demonstrably and statistically sound."
- The system must be "developed and validated using accepted statistical principles and methodology"; and
- The system should be periodically reviewed and re-validated as to its ability to serve its function and adjusted accordingly.

c. Individualized risk re-pricing issues

An issue that arises for individualized re-pricing based on supposed "risk" assessment is that, in the credit card context, it really isn't based on true risk. Unlike mortgages or auto loans, there are no tiers of pricing based on credit scores or other risk factors (except for some late fees linked to balance amount). Instead, issuers have basically two buckets of pricing (apart from promotion rates) – regular APRs and penalty APRs.

Thus, the Board's task must include requiring issuers to develop logical relationships between risk and the pricing of accounts. The Board must ensure that there are more than two buckets of pricing in order to permit downward as well as upward pricing upon review.

d. Market condition re-pricing

One issue with market-condition re-pricing is the "stickiness" of upward pricing.

The classic example was when credit card rates took years to come down after the double-digit prime rates of the late 1970s and early 1980s. Credit card rates by major card issuers stayed high until into the early 1990s. It was the last market segment to come down. The conventional wisdom says "competition" drove rates down, but that doesn't explain why competition worked so much more slowly in the card space than other spaces.[18]

Indeed, it was when members of Congress became vocal about these high rates that they came down. In 1991, credit card rates were similar to 1982 rates. In November 1991, the U.S. Senate voted 74-19 to cap card rates at 14 % (compared to 19.8% rate of major issuers. The threat of regulation eased by spring of 1992; however, one Federal Reserve researcher posited a "regulatory threat" hypothesis to "unsticking" credit card rates.[19] In other words, in a market where competition doesn't work well, something else has to make rates come unstuck. Congress has determined that "something else" is new Section 148 of TILA and the Board's regulations.

The Board must be able to set the requirements for a "reasonable methodologies" that can capture the dynamic of "stickiness". Such requirements should considering factors such as the spread between prime rates and issuers' rates, and whether issuers' returns indicative of rent-seeking.[20]

Furthermore, the requirements that issuers decrease rates using the same methodologies that they use to increase them also ties into the requirement that fees be "reasonable." Indeed, after issuers were forced to keep upfront rates visible, and thus re-pricing was limited, they began to get imaginative in order to keep the same level of revenue. They began charging more back-end fees, aided in great part by the *Smiley* decision.

This substitution of fee income for interest income, for reasons unrelated to the cost of either, is responsible for the significant run-up in fees. Conversely, the requirement that fees be "reasonable and proportional" as required by new Section 149 of TILA may put downward pressure on revenues, and issuers may raise rates to compensate to keep up a "rent-seeking" level of profits. However, the desire to keep revenues just as high in the face of the "reasonable fee" restriction is not a legitimate factor for raising rates or lowering them when market stabilizes. If the issuers' cost of funds go down, they must not be permitted to keep rates just as high in order to make up for the fact they can no longer charge unreasonable fees.

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[18] Mitchell Berlia, Loretta J. Mester, *Credit Card Rates and Consumer Search*, Review of Financial Economics 13, 179–198, (2004) ("Since there are numerous issuers of credit cards, one might expect pricing to be competitive. Yet the slow response of credit card rates to changes in money market rates is consistent with imperfect competition").
[19] Victor Stango, *Strategic Responses to Regulatory Threat in the Credit Card Market*, Federal Reserve Bank of Chicago, WP 2002-02, February 2002.
[20] On the general idea that the market is not competitive, and there are economic "rents," see Lawrence M. Ausubel , *The Failure of Competition in the Credit Card Market*, The American Economic Review, Vol. 81, No. 1, at 50-81, (Mar. 1991).

e. Other issues

We also recommend that the Board require the issuers to report aggregate numbers to the Board regarding the number of accounts that are repriced with an increased APR versus a lower APR. In reporting such data, market condition re-pricing must be reported separately from individualized risk re-pricing. In addition, issuers should be required to separately report downward re-pricing that is a promotional rate or that has other strings attached.

Finally, we note that new Section 148(b)(4) of TILA will be require a “statement of the reasons” in the notice of rate increase. Such a statement of reasons could be combined with the risk-based pricing notice required by the Fair Credit Reporting Act, 15 U.S.C. § 1681m(h).

V. 60 Day Late Exception, Map to a Lower Rate

Section 101(b)(2) of the Credit CARD Act, establishing new Section 171(b)(4) of TILA, permits issuers to impose a rate increase on an outstanding balance. New Section 171(b)(4)(A) of TILA requires that, when issuers invoke the 60-days late exception, they must give the consumer a clear and conspicuous notice of the rate increase, the reason for the increase, and the consumer's ability to reinstate the old rate if payments are received on time for 6 months.

a. Notice

For this provision to work as Congress intended, it is essential that the notice is given when the rate increase is imposed. The recent January 2009 amendments to Regulation Z provide that when a penalty APR is triggered, the issuer is required to send a notice *before* the consumer is 30 days late (now 60 days) so that the consumer would have the opportunity to "cure". *See* 12 C.F.R. § 226.9(g)(1). However, if the consumer subsequently does become 60 days late, the issuer is not required to send a second notice. 12 C.F.R. § 226.9g(4)(iii).

The language of new Section 171(b)(4)(A) clearly requires that the notice of a rate increase due to the 60 day late exception must be given at the time that exception is triggered. Thus, a second notice should be sent. Indeed, it makes no sense for information about the right to return to the lower rate to be disclosed in the first notice under § 226.9(g)(1), because many of those consumers will never trigger the 60 day late exception and the right to return will never apply to them.

What is necessary is a second notice notifying the consumer that the penalty APR will now apply to prior transactions and clearly explaining the consequences of not paying on time for the next 6 months. The notice should include both the old rate and the new rate. A model form should be provided.

" NOTICE OF INTEREST RATE INCREASE AND RIGHT TO RESTORE LOWER RATE

You previously triggered a penalty APR of 28.99%, which applies to transactions after X date. Currently, you have a protected $___ balance of transactions prior to X date that carries an APR of 12%. Because you are more than 60 days late in making your required minimum payment, the APR on your entire balance is being increased to 28.99%."

Your rate will be lowered back to 12% for transactions before X date if you pay the requirement minimum payment on time every month for the next 6 months, starting with this statement. Your right to have the lower rate reinstated applies only to the next 6 months. You will forfeit this right if any of the next 6 payments are late."

This notice of course should be required to be in the same segregated format required by 12 C.F.R. § 226.9 (g)(3)(ii). In fact, we believe that it is so critical, it should ONLY be included in a periodic statement as provided for in 12 C.F.R. § 226.9(g)(3)(ii)(A).

b. Reinstatement of old rate.

New Section 171(b)(4)(A) of TILA requires that the rate increase must terminate "not later than 6 months after the date on which it is imposed, if the creditor receives the required minimum payments on time from the obligor during that period."

One issue is what the first "required minimum payment" should be for purposes of this subsection. Currently, if cardholders are 60 days past due, their minimum payment will be the past due amounts plus accrued penalty fees. Thus, the first "minimum payment" will actually be three or more times the regular minimum payment. It could be very hard for cardholders who become 60 days past due to pay a minimum payment that is triple the amount of their regular payment. The Board should define "required minimum payment" to be the regular minimum payment, or at least no more than the minimum payment using the restrictions in new Section 171(c), *i.e.*, double the percentage of principal or five year amortization.

Another issue is what happens when the cardholder is able to make the requisite six months of minimum payments. The Board should require that the rate should automatically revert to the original rate six months after the effective date of the increase, without the need for any action on the consumer's part other than paying on time.

VI. Over-the-Limit Transaction Opt-In.

Section 102(a) of the CARD Act adds new 127(k) of TILA, requiring creditors to obtain the express election of the consumers to permit completion of over-the-limit transactions before any over-the-limit fee can be imposed. This new section requires the Board to prescribe:

- the form of notice for over-the-limit fees

- the form of the notice of the election or revocation, either in writing, electronically or orally.
- the form of the disclosure of the right to revoke an election in any periodic statement that includes notice of the imposition of an over-the-limit fee
- regulations that prevent unfair or deceptive acts or practices in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees.

a. Form of the notice of over-the-limit fees and election/revocation

Section 127(k)(2) requires the Board to prescribe a notice of over-the-limit fees that creditors must provide before a consumer can make an election as to permitting such fees. This notice should include more than just the amount of the over-the-limit fee. It should include a disclosure such as:

"You may choose to permit over-the-limit transactions to your account. If you choose this option, we will approve a transaction even if it exceeds the credit limit to your account. **You are not required to sign up for this option. (**For applications: **Signing up will not affect your chances on being approved or denied for the credit card**.)

Overlimit Fees

- We will charge you an over limit fee of $___ each time you go over your credit limit. **You will incur this fee only if you sign up to permit over-the-limit transactions to your account.**
- We will charge you this fee even if you spend only $__ more than your credit limit.
- Once you are over-the-limit, we can charge you this $__ fee once each month for at least three months if you remain over-the-limit.

If you do not sign up for this option we will deny transactions if they will put you over credit limit. You will not be charged an over-the-limit fee if your transaction is denied.

How to Choose the Over-the-limit Option or Get More Information :

Contact us at 1-8xx-xxx-xxxx.
Contact us at [insert Internet address].
Complete the form below and mail it to [insert address].

___ Please approve my transactions which will put me over my credit limit. I understand that I will be charged $___ each time I go over my credit limit.
Signature or initial ______________________
Printed Name: _________________________
Date: _________________________
Account Number: _________________________"

Furthermore, the Board should require that any written or electronic form for election of over-the-limit fee imposition should include the above disclosure. The form should also require the consumer to affirmatively sign or initial the document in order to indicate that s/he has opted in into over-the-limit fee imposition. Printed or internet forms in which the opt-in box or line is already checked should be prohibited. No signature or initials should be necessary if the consumer is not opting in to over-the-limit fees.

Section 127(k)(2) requires that both existing customers and new customers must elect over-the-limit transaction authorization before a fee can be imposed. Existing customers should be sent the notice and form for election in the mail, in a separate document, but with their periodic statement. For new customers, the notice and form for election should be placed in a separate document, but included along with the account opening disclosures. While the account opening table required by Regulation Z, 12 C.F.R. § 226.6 will include the amount of the over-the-limit fee, it will not include information about the nature of over-the-limit transaction authorization and the information necessary to inform consumers about the consequences of opting in. If creditors are permitted to put this information in a document with other content, such as an account agreement, there is too great a risk that the notice will be buried.

There is ample precedent for requiring critical notices to be placed on a separate document. The Board acknowledged in the recent Regulation E proposal regarding overdrafts, that notice of the right to opt-in to overdraft coverage for checking accounts must be segregated from all other account documents and must not contain any information not specified by the Board.[21] In addition, the disclosure of the right to rescind under § 1635 of TILA is but one example of a notice that requires a separate document.

b. Form of the notice of over-the-limit fees and election/revocation

Section 127(k)(2) requires the Board to prescribe the form of the disclosure of the right to revoke an election in any periodic statement that includes notice of the imposition of an over-the-limit fee. The Board should of course require that this notice be provided in a clear and conspicuous manner. Indeed, the Board should require that this notice be segregated from the rest of the periodic statement. In addition, the notice should be placed in close proximity to where the over-the-limit fee itself is listed on the periodic statement.

The disclosure should include both notice of the right to revoke the election and instructions on how to do so. Furthermore, the creditors should be required to include with the periodic statement a form the consumer can use to revoke the election in writing, which can be returned with the consumer's payment.

c. Preventing unfair or deceptive acts or practices

[21] *See* 74 Fed. Reg., 5212, 5225-5226 (Jan. 29, 2009).

New Section 127(k)(5) requires the Board to prescribe regulations that prevent unfair or deceptive acts or practices in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees. The intent of this provision was to prevent certain types of manipulation that would encourage consumers to elect to opt-in to over-the-limit fee imposition, such as:

- Setting credit limits lower for consumers who decline to opt in versus higher limits for consumers who did opt in
- Otherwise offering less favorable terms to consumers who decline to opt in.
- Setting credit limits so low that consumers feel compelled to opt in
- Creating the impression that a consumer could be penalized for not opting in or that it could reduce the chances of being approved for a credit card.

Indeed, the Board should require creditors to offer accounts with the same terms regardless of whether the consumer has opted in or not to over-the-limit fee imposition. Otherwise, any significant difference between accounts with versus without over-the-limit fees could result in a chilling effect on consumers' exercising their right to decline opt-in. Higher fees (such as annual or monthly fees) or annual percentage rates for credit cards without over-the-limit fees would certainly discourage the reasonable consumer from choosing decline them.

Creditors should not be allowed to require consumers to have more expensive credit cards because they don't want to be able to spend more than their credit limit. Moreover, as the Board has recognized, consumers tend to underestimate at account opening how likely they may trigger a transgression that results in a penalty fee, such as an over-the-limit fee. As a result, when presented with two potential credit card accounts, they are likely to pick the one that has over-the-limit fees but even marginally cheaper annual fees or lower APRs. Allowing credit card accounts to differ on other terms based on over-the-limit fees could undermine the entire purpose of Section 127(k).

Finally, another concern that prompted this provision was deceptive promotion of over-the-limit coverage that would encourage consumers to opt in. One example would be notices of election that touted "Free Overlimit Protection" where the opt in was free, but of course, there was a fee for the over-the-limit transaction itself. In fact, issuers should not be permitted to use the term "protection" at all for over-the-limit transaction authorization.

VII. Fee Harvester Provisions

Section 105 of the CARD Act adds new Section 127(n) to TILA, which place restrictions of the fees charged to subprime or "fee-harvester cards. In general, it provides that, if a creditor charges any fees (other than penalty fees) exceeding 25% of the credit limit, those fees cannot be charged to that credit card account.

New Section 127(n) of TILA is similar to the Credit Card FTC Act Rule, section __.26, with two important exceptions. First, of course, the limit on fees charged to the credit line is 25%, as opposed to 50% in the FTC Act Rule. Second, unlike the FTC Act Rule, Section 127(n) does not mention security deposits charged to the line of credit.

We urge the Board to address the issue of security deposits in its rulemaking to implement new Section 127(n) of TILA. As we have stated before in our comments to the Credit Card FTC Act Rule, the Board should simply ban security deposits charged to a credit card account as inherently deceptive.

There is no reason to charge a security deposit to an account except to deceive the consumer into thinking that she is receiving more credit than the creditor actually grants. The so-called security deposit provides no real collateral and thus no "security" for the creditor. Thus, the only reason to create a bogus security deposit is to create the misleading impression of a higher credit limit. Furthermore, the consumer is required to pay finance charges on this bogus security deposit, incurring expenses for an imaginary item.

In the early 2000s, the Office of Comptroller of Currency (OCC) brought at least two enforcement cases against subprime card issuers involving bogus security deposits charged to an account.[22] Subsequently, the OCC issued an advisory letter stating:

> In addition to presenting increased risks of default, customer confusion, and other adverse consequences, this structure [secured credit card programs in which security deposits (and fees) are charged to the credit card account] may constitute an unfair practice under the applicable standards of the Federal Trade Commission Act (FTC Act). Accordingly, the OCC has determined that this type of secured credit card product is not appropriate for national banks, and should not be offered by them.[23]

If the OCC has advised national banks not to offer credit cards with security deposits charged to the account because such cards may constitute an unfair practice under the FTC Act, the Board should adopt a similar rule using its authority under new Section 127(n).

If the Board is not willing to ban security deposits charged to an account, such deposits should at be included as a "fee" for purposes of the 25% threshold for when fees can be charged to an account. Obviously, the Board has already set a precedent for including bogus security deposits in fee-harvester restrictions in promulgating Section __.26 of its Credit Card FTC Act rule. There is no reason not to include them again in the Board's CARD Act rulemaking.

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[22] *In re* First Nat'l Bank in Brookings, No. 2003-1 (Dept. of the Treasury, Office of the Comptroller of the Currency January 17, 2003), *available at* www.occ.treas.gov/ftp/eas/ea2003-1.pdf. *In re* First Nat'l Bank of Marin, No. 2001-97 (Dept. of the Treasury, Office of the Comptroller of the Currency December 3, 2001), *available at* www.occ.treas.gov/ftp/eas/ea2001-97.pdf.

[23] OCC Advisory Letter AL 2004-4 (April 28, 2004), *available at* http://www.occ.treas.gov/ftp/advisory/2004-4.doc.

Conversely, failure to include security deposits in the restrictions set by Section 127(n) will create a huge loophole in its protections. Subprime card issuers will easily evade the restrictions by charging huge security deposits that exceed 25% of the credit limit of the account. Such a loophole would be contrary to Congress's intent in protecting consumers from the abuses of the high fees charged by fee-harvester card issuers.

VIII. Six Month Minimum Time Period for Promotional Rates

Section 101(d) of the CARD Act adds new Section 172(b) to TILA, which requires that all promotional rates have a minimum term of six months. One of the most comment promotional rates is an introductory rate.

According to data from Mintel Comperemedia, the majority of credit card offers currently include an introductory rate on balance transfers. In fact, balance transfers are the most common category of introductory rate offers. If an issuer seeks to minimize the period over which a consumer is receiving a low introductory rate on a balance transfer, they can delay implementation of the transfer of funds. This would conflict with the clear intention of new Section 172(b) of TILA, which is to insure that consumers enjoy the benefit of the low introductory rate for a minimum of six months. Therefore, in situations when an introductory offer includes a balance transfer, the six month minimum period should start no sooner than when processing of all balance transfers made at the time of account opening is complete. Since credit card issuers can process these transactions rapidly if they wish to do so, it should not pose a significant cost. At the same time, it prevents issuers from voluntarily slowing the transfer process to circumvent the new law.

IX. Ability of Estate Administrators to Timely Settle Estates

Section 504 adds new Section 140A of TILA dealing with the subject of the ability of estate administrators to settle a deceased cardholder's estate. This section states:

> The Board, in consultation with the Federal Trade Commission and each other agency referred to in section 108(a), shall prescribe regulations to require any creditor, with respect to any credit card account under an open end consumer credit plan, to establish procedures to ensure that any administrator of an estate of any deceased obligor with respect to such account can resolve outstanding credit balances in a timely manner.

We understand that this section was added to the Credit CARD Act because of reported problems by consumers, acting as estate administrators, in getting timely information from issuers when trying settle a deceased cardholder's credit card debts. Apparently, it was alleged that at least one issuer was unresponsive, failing to provide information and not responding to communications by administrators. In the meantime, the decedents' credit card debts continued to accrue interest and fees, adding to the amount owed.

In order to address this particular alleged problem, we suggest the following language:

> No fees or interest can accrue or be imposed after the date of death of the cardholder, and the claim on the cardholder's estate is barred, if not filed within the earlier of 60 days or the date required by the state in which the cardholder's estate is administered.

Another issue is a concern that the language requiring creditors "to ensure that any administrator … can resolve outstanding credit balances in a timely manner" could be construed as permitting creditors to impose personal liability on the estate administrator. While that might seem to be an unlikely interpretation, we note that several recent media articles have documented instances in which issuers have attempted to pin liability for decedents' credit card debts on surviving family members.[24] To prevent any implication that an estate administrator could be held personally liable to "resolve" the debt, we suggest adding the following caveat.

> Nothing in this provision shall be construed to impose personal liability or responsibility for a decedent's debt on the administrator of the estate.

X. Prevention of Deceptive Marketing of Credit Reports

[Note – we realize the FTC has rulemaking authority for this section, but we were advised to send a courtesy copy to the Federal Reserve Board.]

Section 205 of the CARD Act adds new Section 612(g) of the Fair Credit Reporting Act. This Section requires that any advertisement for a "free" credit report disclose that free credit reports are available under Federal law at "AnnualCreditReport.com." For TV and radio advertisements, the disclaimer will only state "This is not the free credit report provided by Federal law."

Section 205(b) of the CARD Act requires the Federal Trade Commission to mandate the specific wording of the disclaimer for all other advertisements. The Commission should use a modified version of the TV and radio ad disclosure – "This is not the free credit report provided by Federal law. Free credit reports under Federal law are available from AnnualCreditReport.com."

New section 612(g) of the FCRA requires that this disclaimer be made "prominently," which is a higher standard than "clear and conspicuous." In order to be "prominent," the Commission should require:

- For print and electronic advertisements, the disclaimer be printed in type size one-half as large as the largest type size in the advertisement.

[24] David Streitfeld, *You're Dead? That Won't Stop the Debt Collector*, New York Times, March 4, 2009, A1; Don McKay, *MBNA Claims to Have Talked to My Dead Mother about Credit Card*, Huffington Post, March 4, 2009, *available at* http://www.huffingtonpost.com/don-mcnay/mbna-claims-to-have-talke_b_171889.html.

- For radio and television advertisements, this disclaimer must receive at least 3 seconds of airtime.

Furthermore, the disclaimer must be placed in a prominent position in print and electronic advertisements. A prominent position would be:

- Segregated and in different color print
- At the top or bottom of a promotional letter.
- In multi-page documents, it should be placed on every page.
- Placed near the URL or contact information for the website at which the advertised free credit report is made available.

Section 205(b) of the CARD Act requires the Commission to determine, for Internet advertisements, whether the disclaimer should appear on the advertisement itself or on the website on which the free credit report is made available. The Commission should require the disclaimer to be placed on both, so that consumers have the greatest chance of seeing it and being informed that the free credit report they are receiving is not the one provided to them by Federal law.

APPENDIX C

H

bloomingdale's INSIDER **VISA**

Premier Insider Visa account statement

For the period ending Sep 9, 2009
Days in billing cycle: 31

[redacted]
Account number [redacted]
Questions or lost/stolen card?
Call 1-877-859-0259

Visa account summary

Balance of last statement	0.00
Payments	− 0.00
New transactions this statement	+ 1,164.57
FINANCE CHARGES	+ 11.08
New Balance	**1,175.65**
Minimum payment due on Oct 9, 2009	**$39.00**
Credit limit	8,000.00
Credit used	− 1,176.00
Credit still available	6,824.00

Financial terms

Purchases

Average daily balance	$681.67
Daily periodic rate	0.04150%
CORRESPONDING ANNUAL PERCENTAGE RATE	15.15%
Actual Annual Percentage Rate	19.44%
International transaction fees	$11.08

IMPORTANT NOTICE OF CHANGES IN ACCOUNT TERMS AND RIGHT TO OPT OUT

We are changing account terms, including interest terms and increasing APRs. Read the enclosed Change in Terms, Right to Opt Out and Information Update. (Online customers please reference "Change in Terms" page.) You can opt out of some of these Changes, unless you become 60 days late, by calling toll-free 800-354-9676 by the Effective Date, which is November 10, 2009. If you opt out, your account will be closed and you will not be able to use it anymore. This message and the enclosed notice are our notice to you about these changes.

FOR YOUR INFORMATION, ENCLOSED PLEASE FIND OUR CURRENT "PRIVACY POLICY" (ONLINE CUSTOMERS, PLEASE REFERENCE "PRIVACY POLICY" PAGE).

Visa transaction details

Transaction Date	*Posting Date*	*Description*	*Location*	*Amount*
Aug 10	Aug 12	Total Alajuela 11,020.00 188	Alajuela .00171597	18.91
				0.19
Aug 10	Aug 12	Intern'l Fee-Fin.Charge		
Aug 10	Aug 12	Centro Cientifico Tropica	Poas	9.61

(continued on next page)

Please tear off and return the slip with your payment. Be sure to write your account number on the front of your check and make your check payable to Bloomingdale's. You can pay at any Bloomingdale's store, on-line at **www.bloomingdales.com/paybill**, or by mail.
Payments received by 5:00pm local time will be credited as of the date received.

bloomingdale's

Payment slip

The creditor is Department Stores National Bank.

☐ New address or phone number?
Please provide the information on the reverse side.

Account number [redacted]
New Balance: 1,175.65
Minimum payment: $39.00
Payment due date: Oct 9, 2009

Amount enclosed: $

5,L193
05-20 3494 1/2

[redacted]

000367

PO BOX 689194
DES MOINES, IA 50368-9194

EBV8-79801254003670001 NYNY-NNNN-YNNN-NNNN
0003900 0117565 0000000 9819

1. Within 30 days of receiving your letter, we must tell you that we received your letter. We will also tell you if we have already corrected the error.
2. Within 90 days of receiving your letter, we must either correct the error or explain to you why we believe the bill is correct.

While we investigate whether or not there has been an error:

- We cannot try to collect the amount in question, or report you as delinquent on that amount.
- The charge in question may remain on your statement, and we may continue to charge you interest on that amount.
- While you do not have to pay the amount in question, you are responsible for the remainder of your balance.
- We can apply any unpaid amount against your credit limit.

After we finish our investigation, one of two things will happen:

- If we made a mistake: You will not have to pay the amount in question or any interest or other fees related to that amount.
- If we do not believe there was a mistake: You will have to pay the amount in question, along with applicable interest and fees. We will send you a statement of the amount you owe and the date payment is due. We may then report you as delinquent if you do not pay the amount we think you owe.

If you receive our explanation but still believe your bill is wrong, you must write to us within 10 days telling us that you still refuse to pay. If you do so, we cannot report you as delinquent without also reporting that you are questioning your bill. We must tell you the name of anyone to whom we reported you as delinquent, and we must let those organizations know when the matter has been settled between us.

If we do not follow all of the rules above, you do not have to pay the first $50 of the amount you question even if your bill is correct.

Your Rights If You Are Dissatisfied With Your Credit Card Purchases

If you are dissatisfied with the goods or services that you have purchased with your credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase.

To use this right, all of the following must be true:

1. The purchase must have been made in your home state or within 100 miles of your current mailing address, and the purchase price must have been more than $50. (Note: Neither of these are necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)
2. You must have used your credit card for the purchase. Purchases made with Cash Advances from an ATM or with a check that accesses your credit card account do not qualify.
3. You must not yet have fully paid for the purchase.

If all of the criteria above are met and you are still dissatisfied with the purchase, contact us in writing at:

Department Stores National Bank
P.O. Box 8097
Mason, OH 45040

While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay, we may report you as delinquent.

VISACIT0809MIX

Department Stores National Bank
Notice of Change in Terms, Right to Opt Out and Information Update

Dear Visa® Cardholder,

Thank you for continuing to use your Bloomingdale's and/or Macy's Visa Card to fulfill your credit card needs. The terms of your Credit Card Agreement are changing. We want to be clear with these changes and trust the information provided below will allow you to make informed decisions regarding your Visa credit card. We appreciate your continued use of the Visa Card.

The Changes. We are changing your Visa Credit Card Agreement and replacing it with a new one. The Effective Date of these changes is shown on your Statement in the message titled "IMPORTANT NOTICE OF CHANGES IN ACCOUNT TERMS AND RIGHT TO OPT OUT". Please call Customer Service at the number on the back of your card if you need additional clarification on this date.

We have identified some of the changes to your Credit Card Agreement, listing the titles of the new sections. For complete details regarding those and other changes, please review your new Card Agreement, which is attached.

- **Paying Interest on Purchases:** This section describes that your Purchases earn interest from the date of the transaction. It also details the limited circumstances under which this interest could be refunded to your Account and those limited circumstances where we will not charge interest on the Purchases.
- **Interest Charge – Balance Computation Method:** This section describes how we calculate the Average Daily Balance for Purchases and Cash Advances and the Interest Charged to your Account.
- **Cost of Credit:** This section and its subsections describe the Annual Percentage Rate ("APR") applicable to your Account and how it is calculated. The APR for your Account is a variable rate calculated quarterly by adding 21.25% to the Prime Rate. Using this calculation, the **ANNUAL PERCENTAGE RATE** for purchases and cash advances on your Account would be 24.50% as of August 2009. We no longer charge a Late Payment APR if you are delinquent on your Account. We are increasing the Minimum **INTEREST CHARGE** to $2.00.
- **Late Payment Fee:** We are increasing the Late Payment Fee. This fee will be $15.00 on balances less than $50.00, $29.00 on balances of $50.00 but less than $300.00, and $39.00 on balances of $300.00 and above.

Right to Opt Out. You can opt out of these changes, unless you become 60 days late. To opt out of these changes, you must write or call us by the Effective Date, which is shown on your Statement in the message titled "IMPORTANT NOTICE OF CHANGES IN ACCOUNT TERMS AND RIGHT TO OPT OUT". Write us at Credit Customer Service, P.O. Box 8110, Mason, OH

45040-8131 or call us toll-free:

Bloomingdale's Visa	1-800-354-9676
Macy's Visa	1-800-354-3469

Include your name, address, account number and a statement that you are opting out of these changes. If you notify us by the Effective Date that you do not accept these changes, your Account will be closed and you may pay off the balance of your Account under the current terms. However, you will no longer be able to use your Account for purchases or other advances.

Information Update

- **Application of Payments:** This section describes how we will apply your payments. Until February 22, 2010 payments will be applied at our discretion. On and after February 22, 2010, payments in excess of the Minimum Payment Due will be applied in accordance with law and payments less than the Minimum Payment Due and credits will be applied at our discretion. For payments received on or after February 8, 2010 you may not direct us how to apply your payment to your Account.
- **Credit Limit:** This section describes that a credit limit exists for your Account and details your agreement not to make purchases or cash advances in excess of that limit. It also describes our ability to increase or decrease your credit limit. We will no longer charge an overlimit fee if the balance on your Account exceeds your credit limit.
- **If your Account is at the Late Payment APR of 24.9% or 26.99%,** this rate will apply until you have had six consecutive billing periods with no amount past due. At that time, your APR will change to the variable APR as described in Section 11 of the Visa Credit Card Agreement.
- **Document Production Fee:** This section describes that we may charge you a Document Production Fee if you request copies of previously provided records.

We hope you choose to take full advantage of your credit card account and all the benefits and services we offer you. This notice and the statement message titled "IMPORTANT NOTICE OF CHANGES IN ACCOUNT TERMS AND RIGHT TO OPT OUT" are our notice to you about the changes to your Account. Keep both of them for your records.

CARD AGREEMENT

1. Definitions: This Department Stores National Bank ("DSNB") Visa Credit Card Agreement ("Agreement") is between Department Stores National Bank, 701 E 60th St. N, Sioux Falls, SD 57117, ("we," "us," or "our") and each person who signs the application or otherwise requests a DSNB Visa Card Account ("you" or "your"). This Agreement contains the terms which govern the use of your DSNB Visa Card ("Card") and your DSNB Visa Card Account ("Account"). Please read this Agreement and keep it for future reference.

2. Promise to Pay: In return for extending credit to you on this Account from time to time, you promise to pay us in U.S. Dollars with an instrument drawn on a financial institution located in the United States ("payment") for all purchases of goods and services and all cash advances, incurred by you or anyone you authorize to use this Account or Card, according to the terms of this Agreement.

3. Acceptance of This Agreement: The use of this Account or Card by you or anyone you authorize means that you accept this Agreement and agree to be bound by its terms.

4. Billing Statement: We will send you a monthly billing statement ("Statement") after each monthly billing period at the end of which you have a debit or credit balance of more than $1.00. Your payment is due at the address shown on your Statement on or before the Payment Due Date shown on that Statement.

5. Use of Your Account and the Card: Your Account and the Card may be used for the following transactions:

A. To purchase or rent goods and services for personal, family or household use (collectively referred to in this Agreement as "Purchases") from participating establishments that accept the Card.

B. To obtain cash advances from financial institutions, automatic teller machines or others that accept the Card as a substitute for cash, or by writing a convenience check/cash advance check that we may provide to you (collectively referred to in this Agreement as "Cash Advances").

Your Account and Card may not be used for any illegal transactions, which may include gambling in certain states.

6. Minimum Payment Due: Each month, you agree to pay at least the Minimum Payment Due, which is the sum of a Monthly Minimum plus any amounts which exceed your credit limit, all unpaid Late Payment Fees, any credit protection charges (if enrolled) applied that month and any delinquent Monthly Minimums by the Payment Due Date. The Monthly Minimum is calculated as follows:

- The greater of $5.00 or 3.25% of the New Balance, rounded up to the next whole dollar amount, or the entire New Balance if it is under $5.00.

7. Additional Payment Information: You may at any time pay more than the Minimum Payment Due with no penalty. If you pay more than the Minimum Payment Due and there is still a balance due, you must continue to make your Minimum Payment Due in future months. Until February 22, 2010 payments will be applied at our discretion. On and after February 22, 2010, payments in excess of the Minimum Payment Due will be applied in accordance with law, and payments less than the Minimum Payment Due and credits will be applied at our discretion. If we accept any late payment or partial payment, whether or not marked as payment in full, it will not affect the due date of any payment due under this Agreement, it will not act as an extension of time or a waiver of any amount then remaining unpaid, and it will not affect any of our rights under this Agreement including our right to declare the entire balance in your Account to be due. Returns and credits are not applied toward your Minimum Payment Due.

8. Paying Interest on Purchases: We will begin charging interest on Purchases on the transaction date. However, during a billing period in which your purchase balance either (a) has no Previous Balance shown on your Statement or (b) the sum of payments and credits (excluding credits for returns of Purchases made during the current billing period), as reflected on your Statement, is at least equal to the Previous Balance, then if you pay your New Purchase Balance in full, we will refund the Initial Interest Charge on your next Statement.

Notwithstanding the above, we will not apply an Interest Charge on your Purchases in accordance with the preceding paragraph in those billing periods where: (a) your purchase balance has been greater than $5.00 in at least two of the past twelve billing periods and all Interest Charges during that time period have been refunded in accordance with the preceding paragraph, or (b) your purchase

[redacted]

balance has been greater than $5.00 in more than four of the last twelve billing periods and not more than one Interest Charge during that time period has not been refunded in accordance with the preceding paragraph. We reserve the right to waive all or part of any Interest Charge in certain cases without losing our right to impose such Interest Charge in future billing periods.

9. Paying Interest on Cash Advances: We will begin charging interest on Cash Advances on the transaction date. We reserve the right to waive all or part of any Interest Charge in certain cases without losing our right to impose such Interest Charge in future billing periods.

10. Interest Charge - Balance Computation Method: An Interest Charge will be imposed on your Account by applying a Daily Periodic Rate or Rates, multiplied by the number of days in the billing period, to the Average Daily Balance for Purchases and the Average Daily Balance for Cash Advances and by assessing certain fees which are explained below. The Average Daily Balance for Purchases and the Average Daily Balance for Cash Advances are calculated separately.

The Interest Charge for Purchases is computed by applying the Daily Periodic Rate for Purchases shown on the front of your Statement, multiplied by the number of days in the billing period, to the Average Daily Balance for Purchases (including new transactions), which is also shown on the front of your Statement. To get the Average Daily Balance for Purchases, we take the beginning balance of your Purchases each day, add any new Purchases, any Interest Charges applied to the previous day's balance, and new fees, and subtract any new payments and credits. This gives us the daily balance. Then, we add up all of the daily balances for the billing period and divide the total by the number of days in the billing period. This gives us the Average Daily Balance for Purchases. (This results in daily compounding of Interest Charges.)

The Interest Charge for Cash Advances is computed by applying the Daily Periodic Rate for Cash Advances shown on the front of your Statement, multiplied by the number of days in the billing period, to the Average Daily Balance for Cash Advances (including new transactions), which is also shown on the front of your Statement. To get the Average Daily Balance for Cash Advances, we take the beginning balance of your Cash Advances each day, add any new Cash Advances, any Interest Charges applied to the previous day's balance, and new fees, and subtract any new payments and credits This gives us the daily balance. Then, we add up all the daily balances for the billing period and divide the total by the number of days in the billing period. This gives us the Average Daily Balance for Cash Advances. (This results in daily compounding of Interest Charges.)

11. Cost of Credit - Cost of credit is determined as follows:

A. The Daily Periodic Rates applicable to Purchases and Cash Advances for the billing period is 1/365th of the Annual Percentage Rate (regardless of leap years) in effect for the billing period as disclosed below, rounded down to five decimal places. The Annual Percentage Rate may be changed quarterly. It will be calculated by taking the rate disclosed as the "Prime Rate" in the "Money Rates" section of The Wall Street Journal on the 15th day of March, June, September and December of each year (or the next business day if the 15th day falls on a weekend or holiday) and adding 21.25% to that rate. As of August 1, 2009, the **ANNUAL PERCENTAGE RATE** so calculated is **24.50%**, which corresponds to a Daily Periodic Rate of .06712%. Any change in the Annual Percentage Rate will go into effect on the first day of the billing period that begins after the first day of the next calendar quarter and may result in an increase or decrease in the Interest Charge imposed on your Account and in the Minimum Payment Due.

B. There will be a Minimum **INTEREST CHARGE** of $2.00 in any billing period in which the **INTEREST CHARGE** resulting from application of the Daily Periodic Rate would be less than $2.00.

C. We charge a Cash Advance Fee for each Cash Advance posted to your Account. This Fee will be the greater of $5.00 or 4% of the amount of your Cash Advance.

D. We will charge an International Transaction Fee for each transaction (including, but not limited to, a Purchase or Cash Advance) processed to your Visa Account by a merchant outside the United States and its territories. This Fee will be equal to 1% of the transaction amount in U.S. Dollars.

12. Credit Limit: The amount of your credit available will be shown on your Statement. You agree not to go over this "credit limit". We may refuse to authorize any transaction on your Account which would exceed your credit limit. If you owe more than your credit limit, we can require you to immediately pay the excess. We can increase or decrease your credit limit at any time without giving you notice in advance unless required by law. We may also, from time to time, establish limits on the amount of Cash Advances that may be charged to your Account.

13. Late Payment Fee: A late payment fee of $15.00 for balances less than $50.00; $29.00 for balances of $50.00 but less than $300.00; and $39.00 for balances $300.00 and above will be charged to your Account if we do not receive your Minimum Payment Due by the Payment Due Date shown on your Statement.

14. Returned Check Fee: We add a $29.00 fee to your Account if any payment check or similar instrument is not honored or is returned because it cannot be processed, or if an automatic debit is returned unpaid. We assess this fee the first time a check or payment is not honored, even if it is honored upon resubmission. We also charge a fee if we return a cash advance check you write because paying the check would cause the balance on your account to exceed your credit limit.

15. Pay-by-Phone Fee: We may allow you to make payments by authorizing us over the telephone to transfer funds from a deposit account to your Account. We will charge a Pay-by-Phone Fee for each such transfer, if permitted by law. The amount of the Fee will be disclosed at the time you request this optional payment service.

16. Document Production Fee: We may charge you a fee of $3.00 per item if you request copies of previously provided records, such as Statements and sales checks. We will not charge you for documents produced in connection with a Billing Error investigation.

17. Foreign Currency Conversion: When your Visa Account is used to initiate any transaction (including, but not limited to a Purchase, return or Cash Advance) in a currency other than U.S. Dollars, Visa USA will convert the foreign currency to U.S. Dollars. The exchange rate will be a rate selected by Visa from the range of rates available in wholesale currency markets for the applicable central processing date, which rate may vary from the rate Visa itself receives; or, the government-mandated rate in effect for the applicable central processing date. The exchange rate in effect on the central processing date may differ from the rate in effect on either the transaction date or the posting date.

18. Default/Collection Costs: If we fail to receive any Minimum Payment Due, if you declare bankruptcy, or if you die, it will be a default, and, subject to any right you may have under state law to receive notice of and to cure such default, we may declare the entire unpaid balance in your Account due and payable. If your Account is referred to an attorney who is not our salaried employee, and we prevail in a suit against you to collect the amount you owe, in addition to the full amount owed and any court costs, you agree to pay our reasonable attorney's fees, to the extent permitted by law. No attorney's fees will be imposed in any state, or in any amount, unless permitted by law. To the extent permitted by law, after we declare the entire unpaid balance due, we may continue to impose Interest Charges under the terms set forth in this Agreement each month until we obtain a court judgment for the amount you owe.

19. Canceling or Limiting Your Credit: We have the right at any time to limit or terminate the use of your Account without giving you notice in advance, unless we are required to give you notice by law. If requested, you agree to return any Card issued to you. You agree to notify us promptly if any Card we issue to you is lost or stolen.

20. No Waiver by Us: We reserve the right, at any time and in our sole discretion, not to impose part or all of any fee or other amount imposed pursuant to this Agreement or not to exercise any right as set forth in this Agreement and in doing we will not waive our right to impose any such fee or exercise any such right in the future. Without limiting the foregoing, we may, at our option: (a) accept late or partial payments or checks or money orders whether or not marked as payment in full or tendered with other conditions or limitations, (b) agree to extend the due date of any payment due under this Agreement for any length of time, and/or (c) release any other person responsible under this Agreement, without notifying you and without releasing you from your obligation to pay all amounts owing under this Agreement in full, or to otherwise perform the terms and conditions of this Agreement.

21. Change In Terms/Change In Address: We may change any term of this Agreement or add a new term at any time, including changes to the minimum payment schedule(s) or the Interest Charge rates, and may apply the new terms to any unpaid balances, as well as to any future balances, unless prohibited by law. When required by law, we will mail you prior notice of the change(s). You agree to notify us promptly in writing if you move. Until we receive written notice of your new address, we will continue to send Statements and other notices to the address in our records.

22. Credit Investigation: You give us permission to investigate your credit history by obtaining consumer reports and by making direct inquiries of businesses where you have accounts and where you work. We may request a consumer report from consumer reporting agencies in considering your application for this Account and later in connection with an update, renewal, extension of credit, or in connection with the collection of this Account. Upon your request we will tell you whether or not a consumer report was requested and the name and address of any consumer reporting agency that furnished the report.

23. Disputed Accuracy of Credit Report: We may report information about your Account to credit reporting agencies. Late payments, missed payments, or other defaults on your Account may appear on your credit report. If you request cards on your Account for others, we may report account information in the names of those other people as well. If you think we reported erroneous information to a credit reporting agency, write to: Credit Bureau Dispute Verification, P.O. Box 8222, Mason, OH 45040-8222. In doing so, please identify the inaccurate information and tell us why you believe it is incorrect. If you have a

[redacted]

copy of the credit report that includes the inaccurate information, please send a copy of that report to us as well. We will promptly investigate the matter and notify you in writing of the results. If we agree with you, we will also contact each credit reporting agency to which we reported and request a correction.

24. Assignment: We may assign your Account and any of our rights under this Agreement to an affiliate or some other entity without your consent or advance notice to you. Following such assignment, that entity will take our place in this Agreement.

25. Disputed Amounts: All communications concerning disputed amounts, including any check or other payment instrument in an amount less than the full amount due that you send to us marked "paid in full", or which you otherwise tender as full satisfaction of a disputed amount, must be sent to us at the address for billing inquiries shown below in the notice regarding your right to dispute billing errors under federal law. This address will also appear on each Statement.

26. Telephone Monitoring: We treat every customer call confidentially. To ensure that you receive accurate and courteous customer service, on occasion, your call may be monitored by a second employee.

27. Governing Law: You understand and agree that this Agreement is entered into between you and us in South Dakota and any credit we extend to you is extended from South Dakota. You further understand and agree that this Agreement is governed only by applicable federal law and the law of the State of South Dakota, whether or not you live in South Dakota and whether or not you use your credit card in South Dakota.

28. Identifying Information: The identifying information you provided in your credit application (including name, address, telephone number, email address and social security number) as well as any updates to that information is provided to DSNB, Macy's, Inc. and their affiliates.

Your Billing Rights: Keep this Document for Future Use

This notice tells you about your rights and responsibilities under the Fair Credit Billing Act.

What To Do If You Find A Mistake On Your Statement

If you think there is an error on your statement, write to us at:

Department Stores National Bank
P.O. Box 8097
Mason, OH 45040

In your letter, give us the following information:

- Account information: Your name and account number.
- Dollar amount: The dollar amount of the suspected error.
- Description of problem: If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us:

- Within 60 days after the error appeared on your statement.
- At least 3 business days before an automated payment is scheduled, if you want to stop payment on the amount you think is wrong.

You must notify us of any potential errors in writing. You may call us, but if you do we are not required to investigate any potential errors and you may have to pay the amount in question.

What Will Happen After We Receive Your Letter

When we receive your letter, we must do two things:

[redacted]

0001597

Citibank (South Dakota), N.A.
c/o Customer Service Center
P.O. Box 6148
Sioux Falls, SD 57117-6148

citi

[redacted]

For your Citi card ending in: 0088

October 12, 2009

Dear [redacted]

We are making changes to your account terms.

To continue to provide our customers with access to credit, we have had to adjust our pricing. The terms of your account will be changing. These changes include an increase in the variable APR for purchases to 29.99% and will take effect November 30, 2009. As always, you have the right to opt out and pay down your balance under your current terms. If you opt out, you may use your account under the current terms until the end of your current membership year or the expiration date on your card, whichever is later. At that time, we will close your account.

If you accept these changes, we have designed a program where you can earn interest back each month that can help offset the increase in your purchase APR.

Earn interest back every month.

Here's how -- make your payment on time every month.

Each month you do, you will receive a credit on your billing statement equal to 10% of your total interest charge on purchase balances. This can help offset the increase in your purchase APR. Start earning interest back in December and January, and you will see the full credit on your statement no later than February 2010 and monthly after that.

If in any month you do not pay on time, you may not be eligible to continue to participate in this program.

We reserve the right to change or end this program with 30 days' prior written notice. Please see the back of this letter for further details.

Please read the Notice of Change in Terms and Right to Opt Out beginning on the back of this letter so you are fully aware of all your account changes. Please **call toll free 1-866-915-9424** should you have any questions.

We are committed to providing you with the information, tools, and support you need to best manage your credit.

Sincerely,

Ken Stork

Ken Stork
Citibank (South Dakota), N.A.

Further Details of the Interest Back Program: You will not be able to earn the statement credit if your account is closed, you default under your Card Agreement, you are currently participating in a payment arrangement program, or your account is converted to another Citi product that is not eligible for this program. Once you default, you may not be eligible to continue earning the statement credit based upon your record with us. Statement credit earned through this program will be calculated by multiplying the percentage stated in this program by the sum of the monthly billed interest charges on purchases. Payments that result in a credit balance will not be included in the calculation.

Notice of Change in Terms and Right to Opt Out

Please save this notice for future reference.

The Changes. Your Card Agreement is changing. The changes will be effective November 30, 2009. The changes will be effective whether or not you receive a billing statement.

- The variable APR for purchases is being increased. This purchase APR will equal the U.S. Prime Rate plus 26.74%. As of September 15, 2009, this purchase **APR** is 29.99%. This APR equals a daily periodic rate of 0.0822%.
- The variable APR for cash advances is being increased. This cash advance APR will equal the U.S. Prime Rate plus 26.74%. As of September 15, 2009 this cash advance **APR** is 29.99%, which equals a daily periodic rate of 0.0822%.
- The variable APR for default is being increased. This default APR will equal the U.S. Prime Rate plus up to 26.74%. As of September 15, 2009, this default **APR** is 29.99%. This APR equals a daily periodic rate of 0.0822%.
- The Transaction Fee for Balance Transfers is being increased. This fee will be 5% of the amount of the balance transfer, but not less than $10. This fee is a **FINANCE CHARGE**. This fee is in addition to any periodic fee that may be imposed with a promotional offer.

In addition, the following changes to your Card Agreement are also being made:

I. The calculation of the fee for foreign purchases is changing. This fee will be called the Transaction Fee for Foreign Purchases. The description in your Card Agreement of this fee will be as follows:

Transaction Fee for Foreign Purchases. We add a fee of 3% of the U.S. dollar amount of each purchase made outside the U.S., whether made in U.S. dollars or in a foreign currency. This fee is a **FINANCE CHARGE.**

II. The following sections regarding transaction fees are changing:

Transaction Fee for Cash Advances. You take a cash advance if you use a cash convenience check; get money through an automated teller machine (ATM); or get money through home banking or a financial institution. You also take a cash advance if you make a wire transfer; buy a money order, traveler's check, lottery ticket, casino chip, or similar item; or engage in a similar transaction. For each cash advance we add a fee of 5% of the amount of the cash advance, but not less than $10. This fee is a **FINANCE CHARGE.**

You Have the Right to Opt Out.

You may opt out by calling or writing us by November 29, 2009, unless you become 60 days late.

If you opt out of these changes, you may use your account under the current terms until the end of your current membership year or the expiration date on your card, whichever is later.

At that time, we will close your account, which means you will no longer have access to credit on this account. You can continue to repay the balance under the current terms.

Call us toll-free at **1-866-915-9424.** (Please have your account number available.)
or
Write us at **Customer Service Center, P.O. Box 6218, Sioux Falls, South Dakota, 57117-6218.** Include your name, address and account number on your letter.

--------------- **Information Update** ---------------

We are replacing the "Changes to this Agreement" section of your Card Agreement with the following:

"We may change the rates, fees, and terms of this Agreement from time to time as permitted by law. The changes may add, replace, or remove provisions of this Agreement. We will give you advance written notice of the changes and a right to opt out to the extent required by law."

We are also replacing the following paragraph in your Card Agreement:

"When can we change the rates, fees, and terms of this Agreement? We may change the rates, fees and terms of your card agreement at any time for any reason. These reasons may be based on information in your credit report or general market conditions. If the change will cause a rate or fee to increase, you will receive advance notice and a right to opt out."

DETAILS OF RATE, FEE, AND OTHER COST INFORMATION

As required by law, rates, fees, and other costs of this credit card offer are disclosed here. All account terms are governed by the Credit Card Agreement. Account and Agreement terms are not guaranteed for any period of time; all terms, including the APRs and fees, may change in accordance with the Agreement and applicable law. We may change them based on information in your credit report, market conditions, business strategies, or for any reason.

†Annual Percentage Rate (APR) for Purchases	**0%** Introductory APR until the last day of your billing cycle that ends in April 2010. After that, the Standard Variable APR is between **12.74%** and **22.74%**. The APR you receive is determined based on your creditworthiness. The Introductory APR will end sooner if your payment is late or the account balance is over the credit limit. *See*[1] *below for explanation.*
Other APRs	Balance Transfers: **0%** or **2.99%** Introductory APR until the last day of your billing cycle that ends in April 2010 for all Balance Transfers and Direct Deposits. After that, the APR for any balances that were subject to the Introductory APR is between **12.74%** and **22.74%**. The Standard Variable APR for Balance Transfers is between **12.74%** and **22.74%**. The Introductory APR and the Standard Variable APR you receive are determined based on your creditworthiness. The Introductory APR will end sooner if your payment is late or the account balance is over the credit limit. *See*[1] *and*[6] *below for explanation.* Cash Advances: Standard Variable APR is **24.99%** for all Direct Deposits, Check Cash Advances, ATM Cash Advances, Bank Cash Advances, Overdraft Protection and Cash Equivalent transactions. *See*[7] *below for explanation.* Default APR: Variable APR is **27.99%** for all Purchase, Balance Transfer, and Cash Advance Balances if late or overlimit. *See*[2] *below for explanation.*
Variable-Rate Information	Your APRs may vary. For each billing cycle, we determine each APR by adding a margin to the prevailing U.S. Prime Rate. The margin for the Standard Variable APR for Purchases and Balance Transfers is between 8.74% and 18.74%. The margin for the Standard Variable APR for Cash Advances is 20.99%. The margin for the Default APR is up to 23.99%. *See*[3] *below for explanation.*
Grace Period for repayment of balance for Purchases	At least 20 days from the statement Closing Date (provided you fully paid your New Balance Total from the previous statement by its Payment Due Date). *See*[4] *below for explanation.*
Method of computing the balance for Purchases	Average Daily Balance (including new purchases).
Minimum Finance Charge	$1.50.
Annual Fee	None.
Transaction fee for Purchases	Transaction Fee for the purchase of wire transfers from a non-financial institution: 5% of each such transaction (minimum $15). *See*[5] *below for explanation.*
Foreign Transactions	Transaction Fee for any transaction made in a foreign currency and, as of June 1, 2009, any transaction made in U.S. Dollars that is processed outside the United States: 3% of the U.S. Dollar amount of each such transaction. This fee will be in addition to any other applicable fee.

Fee for Balance Transfers and Direct Deposits that are subject to the Introductory APR: 3% of each such transaction (minimum $10). *See*[5] *and*[6] *below for explanation.*
Standard Balance Transfer Fee: 4% of each such transaction (minimum $10).
Standard Cash Advance Fees:
Direct Deposits and Check Cash Advances: 4% of each such transaction (minimum $10).
ATM Cash Advances, Bank Cash Advances, and Cash Equivalent transactions: 5% of each such trans[illegible] (minimum $15).
[illegible]
[illegible] balance as of the day the fee is assessed [illegible]
Overlimit Fee: [illegible]

If your account has balances with different APRs, payments are applied to the balance with the lowest APR before any [illegible]nts are applied to balances with higher APRs. This means that balances with higher APRs are not reduced until balances with lower APRs have been paid off.

[1] The Introductory APR does not apply to Cash Advances, other than Direct Deposits. When an Introductory APR ends, the Standard (non-introductory) Variable APR is calculated using the Variable-Rate Information and is applied to new and outstanding balances (consisting of Purchases and/or Balance Transfers, as applicable). If your payment is late or the account balance is over the credit limit, the Standard Variable APR will be applied to those balances as of the first day of the billing cycle in which the payment was late or the balance exceeded the credit limit. We reserve the right to change the APRs in our discretion including, for example, the margins.

[2] When your minimum payment is either late (i.e., not received by 5 p.m., E.T., on its Payment Due Date) or the account balance is over the credit limit, on any two occasions within 12 consecutive months, we may increase each of your account's Standard Variable APRs up to the Variable Default APR. The Variable Default APR will be applied to all new and outstanding balances. APRs will be reduced a maximum of two percentage points, possibly as low as the previously applicable Standard Variable APR(s), after six consecutive months of making payments on time and not exceeding your credit limit.

[3] The U.S. Prime Rate used to determine your APRs for each billing cycle is the highest rate appearing in *The Wall Street Journal* at any time within the immediately preceding three months. On February 27, 2009, the U.S. Prime Rate applicable using this formula was 4.00%.

[4] The number of days between your statement Closing Date and your Payment Due Date (the grace period) may vary from one billing cycle to another.

[5] We include Transaction Fees when computing finance charges. Incurring Transaction Fees results in an APR exceeding 0% for the billing statement on which those fees appear. The Daily Periodic Rate (DPR) will remain 0% for Purchases and for the accounts approved at the 0% Introductory APR for Balance Transfers and Direct Deposits as disclosed.

[6] For purposes of the Balance Transfer promotion, the three checks accompanying the Guide to Benefits materials we send to you will also be treated as Balance Transfers if they post to your account before the end of this Balance Transfer promotional offer. Any of these checks and Direct Deposits that post to your account after this promotional offer ends will be Cash Advances with a 24.99% Standard Variable APR.

[7] Cash Equivalent transactions are defined as money orders, foreign currency, and travelers checks from a non-financial institution, person to person money transfers, bets, lottery tickets, casino gaming chips and bail bonds.

FEATURES

[redacted]. Earn 1 point per dollar of new net retail purchase transactions (qualifying purchases less credits, returns, and adjustments) charged to the card each billing cycle. Point earnings are rounded to the nearest whole point. Earn unlimited points. Balance transfers, cash advances, including purchases of money orders or other cash equivalents, out-of-network payments made through the [redacted] service, purchases made by or for a business or for a business purpose, fees, finance charges, unauthorized/fraudulent transactions and certain other charges do not earn points. Points valid for 5 years. Rewards begin at 2,500 points for cash/merchandise and 25,000 points for air. Air rewards subject to maximum dollar value and special air arrangements require payment of additional points and a processing fee. Air rewards from AK, HI, or PR limited to mainland U.S. unless fare paid to U.S. gateway. Points and/or rewards may not be combined with other discount or reward programs, unless specifically authorized by FIA Card Services, N.A. Cash reward check expires 90 days after date of issue. Cash rewards not transferable. Other significant terms apply. Program subject to change. For more information, visit [redacted] Details accompany new account materials. All cardholders receive [redacted] program benefits.

***BALANCE TRANSFERS.** If the total amount you request exceeds your credit line, we may either send full or partial payment to your creditors in the order you provide them to us or we may send you Access Checks. Allow at least 2 weeks from account opening for processing. Continue paying each creditor until the transfer appears as a credit. Balance Transfers incur finance charges from the transaction date. The Standard Balance Transfer fee is 4% of the amount of the transaction (min. $10). For Balance Transfers subject to the Introductory APR, the fee is 3% of the transaction (min. $10). If you have a dispute with a creditor and pay that balance by transferring it to your new account, you may lose certain dispute rights. Balance Transfers may not be used to pay off or pay down any account issued by [redacted].

**Certain restrictions apply to each benefit. The [redacted] service is available for personal use of the cardholder, his or her spouse, and dependents under 22. Available by phone or online, 24 hours a day, 7 days a week. Significant terms and conditions apply. You are responsible for the cost of any items or services arranged on your behalf. The [redacted] service is provided by [redacted]. Details accompany new account materials.

CONDITIONS

You have read the accompanying application, and everything you have stated is true. You are at least 18 years of age or you are at least 21 years of age if a permanent resident of Puerto Rico. You authorize [redacted] (hereinafter "us" or "our") to review your credit and employment histories and any other information in order to approve or decline this application, service your account, and manage our relationship with you. You consent to our sharing of information about you and your account with the organization, if any, endorsing this credit card program. You authorize us to share with others, to the extent permitted by law, such information and our credit experience with you. In addition, you may as a customer later indicate a preference to exempt your account from some of the information-sharing with other companies ("opt-out"). If you accept or use an account, you do so subject to the terms of this application, the "Details of Rate, Fee, and Other Cost Information" and the Credit Card Agreement (which includes an arbitration provision) as it may be amended; you also agree to pay all charges incurred under such terms. Any changes you make to the terms of this application will have no effect. You understand that the Annual Percentage Rate you receive will be determined based on your creditworthiness. You accept that on a periodic basis your account may be considered for automatic upgrade at our discretion. You consent to and authorize us, any of our affiliates, or our marketing associates to monitor and/or record any of your phone conversations with any of our representatives.

The [redacted] Privacy Policy is available at [redacted] and accompanies the credit card. If the enclosed postage-paid envelope has been misplaced, send application to: [redacted] PO Box [redacted]

This credit card program is issued and administered by [redacted] N.A. Any account opened in response to this application shall be governed by the laws of the State of Delaware. The WorldPoints program is managed in part by independent third parties, including a travel agency registered to do business in [redacted] Ohio ([redacted] Washington ([redacted] and other states, as required. MasterCard is a registered trademark of MasterCard International Incorporated, and is used by the issuer pursuant to license. [redacted] is a service mark of [redacted], and is used by the issuer pursuant to license. [redacted] WorldPoints, [redacted] are registered trademarks [redacted] Bank of Opportunity, [redacted] and the [redacted] logo are registered trademarks of [redacted] Corporation. All other company product names and logos are the property of others and their use does not imply endorsement of, or an association with, the [redacted] program.

[redacted]

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WorldPerks® Visa® Platinum Card

Benefits and Terms & Conditions.

Redeem up to two award tickets a year for as little as 21,000 miles each (a 4,000-mile per ticket discount).

WorldPerks Visa stopped issuing Annual Award E-certs℠ on April 30, 2009. You'll still be able to redeem existing E-certs until one year from the date of issue.

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No preset spending limit.

Enjoy unrivaled purchasing power for maximum spending flexibility. With your excellent financial standing coupled with the WorldPerks Platinum Card, you get the flexibility to make purchases without worrying about remaining under a fixed credit limit. With the WorldPerks Platinum Card, you're in control.

Terms & Conditions: Absence of a preset spending limit on the WorldPerks Visa Platinum Card, does not mean unlimited spending. Each charge causing your balance to exceed Revolve Limit is evaluated based on account history, credit information and payment resources. Monthly minimum payments are 1% of balance within your Revolve Limit, plus the amount above your Revolve Limit. At any time, we may decline transaction authorization requests for any reason and/or request additional information from you about a transaction request or account use.

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No cap on miles you earn.

The sky is the limit on miles with the WorldPerks Visa Platinum Card. With other cards there is a maximum on the number of miles you can earn per year.

Terms & Conditions: Platinum: Monthly Statement Period Award Level: For Net Purchases less than or equal to $10,000, earn 1 mile for every $1 spent. For Net Purchases over $10,000, earn 1 mile for every $2 spent. Yearly Award Level: If, during the calendar year, Net Purchases exceed $50,000 (WorldPerks Visa Card) or $60,000 (Platinum Card), all miles the rest of the year are earned at a rate of 1 mile for every $2 spent. Exemptions: Northwest WorldPerks Platinum Elite/Gold Elite/Silver Elite members, and WorldPerks Visa AutoPay Cardmembers who select the full payment option on the first available payment date after their Statement Date. Miles will be awarded as long as your Account is open and not five days or more past due or overlimit at the close of your Visa billing period. "Net Purchases" for a billing period are determined by adding all new Purchases recorded to your Account during the billing period and then subtracting any credits or other adjustments recorded to your Account during the billing period for returned Purchases. If credit for returned Purchases exceeds new Purchases in any billing period, the excess credits will be carried forward into successive billing periods and subtracted from future new Purchases to determine the Net Purchases for those successive periods. We will not request miles for Advances, Convenience Checks, Visa Buxx, Balance Transfers, Finance Charges and Fees, credit insurance charges or transactions to fund certain prepaid card products. We reserve the right to adjust the number of miles we request from Northwest for Net Purchases or to stop requesting miles for Net Purchases on the Account, upon notice to you.

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Savings of up to 15% from National Car Rental at locations in the U.S. and Canada.

To reserve, book online at **nationalcar.com** or call 1-800-CAR-RENT. Contract ID required at time of reservation. Call the Cardmember Service number on the back of your Card for your Contract ID.

Terms & Conditions: To reserve, book online at **nationalcar.com** or call 1-800-CAR-RENT. Contract ID required at time of reservation. Discount applies to base rate only. Taxes (including GST/VAT), other governmentally authorized or imposed surcharges, license recoupment fees, airport and airport facility fees, fuel, additional driver fee, one-way rental charge and optional items (such as LDW up to US$29.99 per day) are extra. Concession recoupment fees up to 15.5% may be added to the rental rate at some airport locations. Up to 10% may be added to the rental rate if you rent at an off-airport location and exit on our shuttle bus. Renter must meet standard age and driver requirements. Subject to change without notice.

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Complimentary Emerald Club membership from National Car Rental.

Bypass the lines at the counter and go straight to the Emerald Club Aisle℠ where you can choose your own car. Plus, as an Emerald Club member, when you choose to receive an E-receipt, there's no need to wait on an agent for a receipt. We'll email it to you.

Terms & Conditions: The Emerald Club and its services require a signed Master Rental Agreement on file. Emerald Aisle® is available at select locations only. Expedited counter service available at all other locations. © 2006 Vanguard Car Rental USA Inc. All rights reserved. To join the Emerald Club for free, go to **nationalcar.com/offer/WPVISAEC** .

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Enjoy VIP perks and preferred rates at the world's best hotels, resorts, villas and cruises. Members enjoy benefits like free room upgrades, late check out, and