COMMENTS
to the
Consumer Financial Protection Bureau
regarding
Streamlining Inherited Regulations
Docket No. CFPB -2011-0039
76 Fed. Reg. 233 (December 5, 2011)
by the
National Consumer Law Center

June 4, 2012

Thank you for the opportunity to comment on the suggestions that have been submitted for streamlining the CFPB's inherited regulations. We will not repeat our earlier comments. The National Consumer Law Center is filing these comments on behalf of its low-income clients.[1]

These comments begin with a suggestions regarding streamlining the comment process itself, to make it easier for nonprofits and consumers, with their limited resources, to weigh in on these important issues. The CFPB should not treat silence as consent. It should also continue to seek out innovative ways to engage nonprofits and consumers beyond formal comments, and should not discount efficient means such as sign on letters and form letters used by organizations with scarce resources.

The comments then address the following areas:

- *Risk-based pricing notices.* The best way to reduce complexity in risk-based pricing requirements is to remove the exception for creditors to send a credit score to all applicants and and to streamline the home mortgage scoring disclosure. The CFPB should not water down the risk-based pricing notice by allowing creditors to send the same exact boilerplate notice to all consumers.

- *Credit card ability-to-pay requirement.* The CFPB should not reverse the requirement that credit card issuers only consider the independent ability-to-pay of those consumers liable on an account. Stay-at-home mothers are

[1] These comments were written by Jeremiah Battle, Jr., Carolyn Carter, Lauren Saunders, Margot Saunders and Chi Chi Wu.

demographically as much at risk from the financial stresses of unaffordable credit card debt as other vulnerable groups. As for domestic violence survivors, their major consumer financial problem is not inability to obtain credit, but rather identity theft or "coerced debt" by the abuser – which permitting consideration of household income might exacerbate. Permitting consideration of household income will undermine the overall ability-to-pay provision, because it would not be limited to spouses, since the ECOA prohibits discriminating on the basis of marital status. Thus, the CFPB might not be able to allow use of household income for spouses but not unmarried partners.

- *Other credit card issues.* The ink has barely dried on the comprehensive revamp of the Regulation Z rules for credit cards, in which all parties invested enormous resources. The CFPB should not re-open these rules so soon and should not water down the change-in-terms notices, fee-harvester rules, promotional rate disclosures, rate increase re-evaluation requirements, or other recently established credit card protections.

- *SAFE Act*. The CFPB should not water down the requirements of the SAFE Act for mortgage loan originators.

- *E-Sign.* The E-Sign Act embodies important principles that are even more relevant today. Many commenters urged exceptions to or abandonment of the requirements for when legally required written information can be provided electronically. The principles of the E-Sign Act – that consumers should consent to how they receive information, show they are actually able to receive the information, and receive it in a form they can keep – are critical if consumers are to actually see important information.

The CFPB Should Continue to Seek Streamlined Ways for Consumer Advocates, Other Small Nonprofit Advocates, and Individuals, to Provide Input; Silence Should Not Be Construed as Agreement.

We are happy to have the opportunity to comment on the streamlining suggestions that earlier commenters have filed. At the same time, our resources have not permitted us to do more than the most cursory review of and reply to those comments. This docket and the numerous other requests for comments published by the CFPB in the last few months have demanded the commitment of significant resources from our organization. Other consumer advocates do not have the resources to even attempt comments, and rely on us and a small number of other organizations with equally limited resources to file formal comments in this and other dockets.

Of course, we are extremely glad and supportive that the CFPB has been so active in issuing reform proposals. The CFPB merely needs to keep in mind, when reviewing comments, the limited resources that nonprofit organizations have. The mere fact that we did not comment on a streamlining suggestion, or devoted only a few words to it, should not be taken to imply that the suggestion is not highly controversial. We observed many suggestions that were alarming, but we chose not to devote time to ideas that have not been identified by the CFPB or a large number of commenters. Should any new suggestions catch the CFPB's attention, we urge the CFPB to reach out to seek further input.

We also encourage the CFPB to keep in mind ways to streamline the process for effective input by consumer, civil rights, community, asset-building and other nonprofits organization, as well as consumers themselves. Most nonprofit organizations do not monitor the Federal Register and are not in the habit of filing regulatory comments. Even reviewing and signing on to comments written by others is a challenge for some, especially when the issue appears technical or is one on which the organization does not already have a formal position.

Consequently, it is essential that the CFPB not discount sign-on letters, form letters, and other time-efficient ways for nonprofit organizations to express their views. Organizations only endorse a position if they support it and are willing to put their name on it. Individuals do not take the initiative to submit a form comment letter, even if it takes only a couple of minutes, unless the issue is important to them. That support should be more important than the form in which it is expressed. The CFPB must also not weigh a large number of comments on the industry side against a small number on the consumer side and conclude that the weight of the comments is against the latter. Nonprofits simply do not have the same lobbying and regulatory resources that industry groups do, even small businesses.

Moreover, written comments only go so far. They are not a substitute for face-to-face dialogue about specific issues the CFPB is considering. We appreciate that the CFPB has been accessible to national organizations and has held some events around the country. But the industry has far more resources to pursue face-to-face dialog on both specific and general issues, including meetings with senior CFPB officials, industry conferences and other nationwide outreach efforts.

The CFPB must find ways to equalize the input. The CFPB should solicit meaningful input from consumer advocates and other nonprofit organizations, in both formal and informal ways, in a manner that recognizes the resource limitations and capacities of different organizations.

The CFPB has already undertaken many innovative outreach efforts unusual for a federal regulatory effort. We welcome those efforts and urge the CFPB to continue thinking about new ways to engage the public in the CFPB's regulatory process.

1. **Fair Credit Reporting Act.**

   a. Risk-Based Pricing Notices

We note that several comments (e.g., Securian Financial Group; Indiana Credit Union League; California and Nevada Credit Union Leagues) complain about the complexity of the different options for risk-based pricing notices.[2] The proposed solution by at least one of these commenters is to permit creditors to send the same exact notice to all consumers (or just to consumers who were subject to risk-based pricing if they so choose).

We oppose this solution. This reduces the risk-based pricing notice to boilerplate, making it meaningless and gutting Congress's intent in mandating it, *i.e.*, to provide consumers with meaningful information that they are being treated less favorably in the terms of credit being offered based upon their credit report or score.

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[2] A number of commenters also appear to be simply confused by existing requirements under federal consumer laws and the inherited regulations. Perhaps additional compliance training could ameliorate some of the concerns raised by commenters. For example, one commenter requested that the CFPB clarify whether adverse action notices under the FCRA are required for non-lending products. Yet it is abundantly clear from the plain language of Sections 1681a(k) and 1681m(a) of the FCRA, as well as the Supreme Court's decision in Safeco Insurance Company v. Burr, 127 S. Ct. 2201 (2007), that adverse action notices are required for non-credit uses of consumer reports. Other commenters urged the CFPB to eliminate duplication so that a creditor need not send credit scores for both an adverse action notice and a risk-based pricing notice, or they have urged the CFPB to consolidate adverse action notices under the FCRA and ECOA. Yet the regulations already provide that a creditor need not send a risk-based pricing notice if it sends an adverse action notice, and the Regulation B Model Forms provide for a joint FCRA/ECOA notice.

Instead, in order to reduce complexity, we urge the CFPB to remove the credit scoring exception, as we discussed in our March 5, 2012 comments. We also suggest that the CFPB streamline the home mortgage scoring disclosure. Eliminating the credit score disclosure exception will simplify the number of options and thus reduce complexity and confusion.

For the home mortgage disclosure, we urge that all applicants be provided with the Section 1681g(g) notice as required, but that the CFPB require that the risk-based language be added to the disclosure when risk-based pricing has occurred, *i.e.*, adding the statement, "We used the information from your credit report(s) to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment]. The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories." Furthermore, we urge the CFPB to require that, when this language is added, the lender must disclose the actual score it used, as mandated by Section 1681m(a)(2) and (h)(5)(e) of the FCRA (the Dodd-Frank credit score disclosure requirement).

Finally, one commenter urged that the CFPB eliminate the requirement that notices utilizing the credit score exception include a bar graph or percentages indicating where the consumer's score falls within the general population. **If** the credit score exception notice is retained, we oppose the idea of eliminating this information. Providing information in a visual format such as a bar graph is helpful for consumers, and it is easy enough for the provider of the credit score to supply this information to the creditor. The idea that creditors have difficulty in complying with this requirement because their operating systems cannot physically import the graph or percentage into their notices is ludicrous. We live in an age where grade-school children know how to drop a graph or figure into a Microsoft PowerPoint or Word document; surely a creditor can figure out how to do it.

b. Adopting the FTC Staff Summary for FCRA

In our March 5, 2012 comments, we proposed that the CFPB should adopt the Federal Trade Commission's report entitled "40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations" (herein referred to as the "FTC Staff Summary"). In reviewing the comments of industry members, we note that several commenters asked for guidance on the FCRA and FDCPA (Securian Financial Group; Center for Capital Markets Competitiveness; ACA International; American Financial Services Association;

and Saltmarsh, Cleaveland and Gund). Adopting prior FTC interpretations of those statutes, including the FTC Staff Summary for the FCRA, would be an easy way to provide such guidance. Indeed, one commenter [Saltmarsh, Cleaveland and Gund] even urged adoption of the FTC Staff Summary as we did.

2. Credit Cards.

a. The Independent Ability-to-Repay Requirement Protects All Consumers

In our March 5, 2012 comments, we urged the CFPB not to reverse the FRB's decision to require credit card issuers to only consider the independent ability to pay of those consumers liable on an account. While our March 5 comments covered this issue in detail, we have since obtained a few more pieces of information that may be relevant.

As you know, the group that is allegedly most impacted by the independent ability-to-repay provision is stay-at-home parents, particularly mothers. One subtle implication in recent media articles is that stay-at-home mothers are not at risk if they incur debts that they cannot independently afford to repay. The typical stay-at-home mother featured in these articles is a well-educated former professional.

However, the CFPB should be cognizant that, demographically, this profile is not typical. According to a report from the U.S. Census Bureau, stay-at-home mothers tend to be less educated, younger, more likely to be in poverty, more likely to be Hispanic, and more likely to be foreign-born than other mothers.[3] Thus, stay-at-home mothers may be as much at risk from the financial stresses of unaffordable credit card debt as other vulnerable groups, such as low-and-moderate-income consumers, minorities, and younger consumers.[4]

Another argument repeatedly made is that the independent ability-to-pay provision presents an obstacle to a stay-at-home parent who is the survivor of domestic violence, in that it could prevent the survivor from independently obtaining a credit card. However, a new study forthcoming in the University of Pennsylvania Law Review finds that the major consumer financial problem

[3] Rose M. Kreider and Diana B. Elliott, U.S. Census Bureau, America's Families and Living Arrangements: 2007, September 2009, at 14, *available at* www.census.gov/prod/2009pubs/p20-561.pdf.

[4] Note that stay-at-home mothers tend to be younger than other mothers. *Id.*

facing domestic violence survivors is not inability to obtain credit, but rather identity theft or "coerced debt" by the abuser.[5] After surveying lawyers and other advocates for survivors, this study documented abusive financial tactics committed by abusers such as:

> applying for credit cards in their partners' names without their knowledge, using physical duress to force their partners to apply for credit cards, using threats (such as of hurting the children) for the same ends, forging victims' signatures on home mortgage documentation for purposes such as withdrawing equity from the family home, using a combination of fraud and duress to induce victims to sign quit-claim deeds for the family home over to the batterer, not allowing victims to have access to family bank accounts, and prohibiting the victim from becoming literate about the household's finances.[6]

Professor Angela Littwin, the author of this study, has noted that, at least in the Fall of 2010 when she conducted her research, **she did not come across any lawyers or other advocates who were concerned about protecting the survivor's ability to get credit based on the abuser's income.** And she noted it would seem quite risky for a survivor to be using the abuser's income to pay for debt about which the abuser is unaware.[7]

Professor Littwin also noted there are many cases in which the survivor is the primary earner.[8] Indeed, unemployment can be a major source of the stress that can lead to domestic violence and alcohol abuse. Changing the independent ability-to-repay provision would enable non-primary-earner abusers to take out credit based on the income of primary-earner survivors and to physically coerce the survivor into repaying it.

Furthermore, as discussed in our March 5 comment, one concern if a stay-at-home parent were to obtain a credit card based solely on the income of the wage-earner spouse is the issue of ability to repay credit if the couple divorces. Situations of domestic violence, in which the possibility of separation may be greater, heighten that concern. (An important point not mentioned in our prior comments is that when there is a divorce, credit cards that are solely in the name

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[5] Angela Littwin, Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence, University of Pennsylvania Law Review (forthcoming 2012).
[6] *Id.* at 11.
[7] Email from Professor Angela Littwin to Chi Chi Wu, May 22, 2012.
[8] *Id.*

of one spouse will likely be assigned to that spouse as her own individual debt. Credit card accounts that are joint accounts between the spouses will likely become part of the division of debts).

Eliminating the individual income ability-to-pay provision and permitting the listing of household income will seriously undermine the overall ability-to-pay provision, including with respect to dual earner couples and others. If issuers are permitted to use household income, they could greatly increase the amount of credit that they could grant for an applicant applying solely individually, if the applicant is part of a dual-earner couple. For example, an issuer might be able grant a credit limit of $20,000 to the husband in a dual earner couple (where each spouse earns about the same income) if the issuer relies upon household income, but only grant a $10,000 credit line based solely on the husband's income.

Issuers might also be able to approve more individual applicants, but on the basis of income to which they do not have legal access. For example, an issuer might need to decline the application of an individual applicant earning $10,000 per year, but could approve the application based on household income of $30,000 per year.

The problem with permitting use of household income, of course, is the same for dual-earner spouses. The applicant is being granted credit based upon income that he or she does not have a legal entitlement to access. If the spouses were to divorce or the household to dissolve, the applicant could be burdened with debt that he or she cannot afford to repay.

This issue would also arise for households in which the members are not married, *e.g.*, adult children living with parents, siblings living together or unmarried domestic partners. And if the CFPB did attempt to permit household income but restrict it only to married couples, problems under the Equal Credit Opportunity Act (ECOA) might arise. The ECOA prohibits discrimination on the basis of marital status. 15 U.S.C. § 1691(a)(1); 12 C.F.R. § 1002.6(b)(8) (requiring creditors to evaluate married and unmarried applicants by the same standards). Thus, it could violate the ECOA to permit creditors to use household income for married individual applicants, but not unmarried individual applicants.

If the CFPB is considering changing the independent ability-to-repay provision, we would urge the Bureau to first undertake an in-depth data study on this issue. As the CFPB knows, the provision permits issuers to simply ask for "income" or "salary" and rely on the information provided by applicants. Thus, there is a real question concerning whether the provision is actually even causing applicants to be denied credit.

The CFPB should undertake a study seeking data on:

- Are stay-at-home parents really being denied credit because of the independent ability-to-repay provisions? What percentage of stay-at-home parent applicants are being denied? How does that compare to denials of applications in the general population?
- To what extent are denials of credit concentrated in the instant credit department store context, where the primary motivation may be to obtain a discount and not credit, and to what extent do stay-at-home parents have other options for obtaining credit with later documentation, or from another source, if they are initially denied?
- What information was requested by credit card applications before and after the independent ability-to-repay provisions took effect?
- What were the underwriting standards prior to the effective date of the independent ability-to-repay provision and how have they changed since then?

Since the most prevalent situation for denial of credit would be in the retail setting, data on store-branded credit cards would be useful, including all of the above questions plus:

- What are the underwriting criteria for store-branded cards and how they differ from general-purpose cards;
- A review of credit card applications for store-branded cards;
- Default rates on store-branded cards before and after the CARD Act;
- A review of complaints regarding issuers for store-branded cards, such as World Financial Network Bank and GE Money Bank.

Also, as we discussed in our March 5, 2012 comments, one area of continued concern (and we believe one of the biggest remaining traps for consumers) is deferred interest plans. If the CFPB will be undertaking a study on store-branded credit cards, we would suggest seeking data on deferred interest plans, including:

- How many consumers end up paying deferred interest versus those who are able to pay off the entire balance by the end of the deferred interest period?
    - How much interest does the former group pay?
    - What are the demographics of consumers who end up paying deferred interest versus those who do not?
    - Did consumers understand the consequences of not paying off the balance?
    - What impact did retroactive charging of interest have on the consumers?
- What complaints have been received by the CFPB or issuers of cards accounts that were subject to a deferred interest plan?
- What are the mean and median APRs for deferred interest plans and how do they compare to general-purpose cards?
- What is the default rate for credit cards with deferred interest plans?

b. Fee-Harvester Proposals

Several commenters, including Wells Fargo, have urged the CFPB to limit the fee-harvester restrictions of the Credit CARD Act. For example, one issuer has proposed applying the fee-harvester regulations to only those credit cards that imposed fees associated with the application for credit or to cards which charge transaction fees for purchases. We strongly oppose this proposal, or any proposal to limit the scope of the fee-harvester provisions of Regulation Z, such as excluding cash advance or foreign transaction fees. As the CFPB well knows, fee-harvester issuers are very adept at exploiting loopholes. Any exception would create a gigantic opportunity for these issuers to gouge consumers. Certain subprime issuers will structure their credit cards to exploit any exception, for example, by not charging application fees but charging a high fee in the second month. The CFPB should stand as strong as possible on the fee-harvester rule.

c. Requirement to Re-Evaluate Rate Increases

A few commenters have asked for an exception to the Credit CARD Act's requirement that issuers re-evaluate increases in the Annual Percentage Rate for a credit card account. One commenter asked for an exception to the re-evaluation requirement for increases based upon a decrease in a consumer's credit score. We strongly oppose this proposal. The Credit CARD Act's re-evaluation requirement was specifically designed to apply to increases based upon both "market conditions" and "credit risk of the obligor." 15 U.S.C. § 1665c(a). The major reason for an increase based on the consumer's credit risk would be a drop in credit score. Thus, the exception proposed by these commenters would contradict the plain language of the Credit CARD Act, as well as fly in face of the reason for the re-evaluation requirement.

Another commenter has proposed limiting the timeframe for re-evaluation to one year. We oppose this proposal as well. The Federal Reserve Board gave significant consideration to the issue of whether to have a time limit for the rate re-evaluation requirement. *See* 75 Fed Reg. 37526, 37558-59 (June 29, 2010). The Board ultimately decided not to institute a time limit, a position that we supported.

This same commenter has also urged that re-evaluation not be required for a change from fixed to variable rate or vice versa, and that such changes be excluded from treatment as a rate increase. We oppose this proposal. Again, the Federal Reserve Board gave due consideration to this issue, and had good reason to treat a change from fixed rates to variable rates as a rate increase.

d. Proposals Regarding Change-in-Terms Notice

Several commenters have suggested changes to the requirements for change-in-terms notices. Two commenters have asked for an exemption from change-in-terms notices for when a consumer requests the change-in-terms, requests an upgrade, or negotiates an agreement with the creditor to change the terms. We oppose this proposed exemption. Regulation Z already has a carefully crafted, narrowly drawn exception for changes agreed to by the consumer at Regulation Z § 1026.9(c)(2)(i)B), which is limited to changes required by the creditor for additional advances of credit that are unique to the consumer. This exception was carefully crafted to avoid evasion and circumvention, and should not be expanded.

Another commenter has proposed eliminating the table required for change-in-terms notice, or permitting the table to include other changes in the summary. The first option is completely unacceptable. The Federal Reserve Board developed the table form for changes-in-terms after much thought, research and consideration. To abandon the format after having it in place for only two years makes no sense. As for the second option, we do not think there is any need to permit changes other than key terms to be in the table without further evidence indicating that it would benefit consumers.

Finally, another commenter has asked for a conforming change to the Official Staff Commentary to Regulation Z, § 1026.7(b)(7)-1 to allow change-in-term notices to appear on the front of any page of a periodic statement. While we recognize that other sections of Regulation Z permit this placement, we believe the better practice is to put the change-in-terms table on the front of the **first** page of the statement.

e. Proposals Regarding Promotional Rates

One commenter has proposed amending the definition of "introductory rate" to clarify that a promotional rate is considered an "introductory rate" only if it applies exclusively to new accounts in the context of the advertisement. We oppose this proposal. We understand the dilemma regarding issuers who offer a promotional rate for both new accounts and existing accounts. We would not be opposed to, in the case of an advertisement in this situation, retaining the existing disclosure requirements as set forth in Regulation Z § 1026.16(g), but allowing the creditor to substitute the words “promotional” or “promo” instead of “introductory” or “intro”. However, we believe the § 1026.16(g) disclosures should be made in advertisements if a promotional rate is being offered to new accountholders in addition to existing ones.

This same issuer has proposed an exception in order to permit, on private label credit cards, the post-promotional “go to” rate to appear on the invoice or sales slip associated with the sale instead of being placed in the account opening table. This commenter also proposes clarifying that disclosure of a range of rates as the “go to” rate. These proposals are unnecessary and Regulation Z needs no clarification. Regulation Z already permits issuers to disclose a range of rates in the account opening table for point-of-sale transactions. Reg. Z § 1026.6(b)(2)(i)(B) provides that a variable “go to” rate must be disclosed in accordance with the accuracy requirements of Reg. Z § 1026.6(b)(4)(ii)(G). In turn, Reg. Z § 1026.6(b)(4)(ii)(G) provides for an exception under Reg. Z § 1026.6(b)(4)(ii)(H), and that section in turn permits disclosure of a range of rates as permitted by Reg. Z § 1026.6(b)(2)(i)(E) so long as the consumer is referred to the document where the actual APR applicable to the consumer’s account is disclosed. This scheme provides plenty of leeway and flexibility for issuers, and no more exceptions should be given that further weaken the account opening disclosures for point-of-sale.

Another commenter has proposed generally permitting disclosure of an "up to" APR instead of the actual go-to APR or fee, or in the alternative, a generic reference to the cardholder's standard rate or fee applicable to the type of transaction. We oppose this proposal. In the point-of-sale context, it is unnecessary for the reasons stated in the paragraph above. For direct mail and internet solicitations, there is also flexibility because Regulation Z permits disclosure of a range of rates or multiple rates in the application/solicitations table. And as for the account-opening table, there is no reason not to provide the actual APR applicable to the account. By the time an account is opened for non-point-of-sale situations, the issuer will have reviewed the consumer's credit score and be able to price the account.

This same commenter has proposed permitting issuers to increase rates on existing promotional balances to the standard, non-promotional rate, if a cardholder is 30 days past due. Not only do we strongly oppose this proposal, we believe it would violate the Credit CARD Act's prohibition against rate increases applied to an existing balance for payments that are less than 60 days late.

f. Other Proposals by Issuers

In general, we oppose many of the other proposals the industry proposals regarding credit cards, including but not limited to:

- Permitting issuers to increase the APR or fees for an account when the account is suspended, *i.e.*, while the account cannot be used for new transactions.
- Eliminating TIL advertisement disclosures for credit cards and requiring only a simple statement indicating a phone number and website to contact for additional information.
- Creating a *de minimis* line increase exception to Regulation Z's ability to pay requirements.
- Shortening the safe harbor for how long an issuer must wait before processing a balance transfer after mailing account-opening disclosures from ten to seven days.
- Eliminating the requirement under Regulation B for issuers to report an account on the credit report of authorized users.

- Eliminating renewal notices and only requiring advance disclosure of the annual fee.
- Eliminating the disclosures required for the exception to the ban on retroactive rate increases for workout and temporary hardship arrangements.
- Eliminating the annual statement of rights regarding billing errors. However, if the CFPB did eliminate the annual statement, we would urge that all issuers be required to provide the short form statement on periodic statements. The periodic statement is probably where consumers first turn for information when there is a billing error. We also oppose the proposal to essentially eliminate the short form statement regarding billing errors and to replace it with a reference to a website, phone number or mail address to obtain the statement.
- Shortening the disclosures for convenience checks. These disclosures are already fairly short, and the tabular format is useful to highlight key terms for consumers.
- Eliminating the short form prescreening opt-out notice from the first page of solicitations.
- Eliminating year-to-date running totals of fees and interests on periodic statements.
- Adding an exception to the minimum payment warning when a cardholder pays more than the minimum payment for two or more consecutive billing cycles.
- Waiving TILA Section 1666h's prohibition against issuers offsetting a cardholder's debt against funds the cardholder has on deposit with the issuer upon the death of the cardholder.

If the CFPB decides to evaluate the possibility of acting on any of these suggestions, we would like the opportunity to provide detailed comments at the earliest possible stage.

g. Re-organizing Regulation Z's Open-End Credit Provisions

Finally, we note that several commenters urged the CFPB to re-organize Regulation Z rules for open-end credit in three separate sets of rules governing credit card accounts, home equity lines of credit, and all other open-end accounts. After the prolonged and arduous task of rulewriting after the Credit CARD Act, we do not think re-organizing Regulation Z is a good use of the limited resources of the CFPB. What may be useful is a simple chart indicating which requirements apply to what types of credit. The Board already put out such a chart for some of the Regulation Z requirements – see 75 Fed. Reg. 7658, 7663 (Feb. 22, 2010). Perhaps what is required is an extension of this chart. If the CFPB does not put out such a chart, we may consider doing so in our own publications.

3. Overdrafts.

Several commenters have proposed permitting banks that do not have a formal overdraft program to charge overdraft fees in situations where there is a "force pay" transaction, *i.e.*, the bank is required to pay a debit card transaction that overdraws the account. We strongly oppose this proposal. The Federal Reserve carefully thought out this issue, and had good reasons to prohibit the imposition of overdraft fees by banks that do not operate an overdraft program but must fund the rare overdraft in force pay situations.

4. Manufactured Housing and the SAFE Act.

We also urge the CFPB not to water down the requirements of the Secure and Fair Enforcement for Mortgage Licensing Act (the SAFE Act). During the original comment period, the Manufactured Housing Institute (MHI) asked the CFPB to encourage states to water down their requirements for persons who originate for-profit loans for buyers of manufactured homes.

Unfortunately, the manufactured home finance sector has a history of irresponsible manufactured home loan origination. Reckless lending practices including inflated appraisals of home value and lending without regard to the consumer's repayment ability led to a meltdown in the 1990s similar to the wider subprime mortgage meltdown of the late 2000s. In addition, manufactured home retailers have a great deal of control over the consumer's access to financing for the home, similar to the way an automobile dealer can control financing for a car. This gives the retailer the ability to steer the consumer into less desirable financing alternatives, such as steering the consumer into higher-cost chattel lending when conventional mortgage financing may be available.

The requirements of the SAFE Act do not impose an undue burden on lenders. They include a criminal background check sufficient only to show that the mortgage loan originator has not been convicted of a felony during the past seven years, or any felony involving fraud, dishonesty, a breach of trust, or money laundering.[9] The Act also requires 20 hours of pre-licensing education, a licensing test, a bond in an amount established by the state, and 8 hours a year of continuing education.[10] MHI's comment refers to these requirements as "unduly onerous," but does not explain how they are burdensome or why these are inappropriate for persons who originate manufactured home loans.

MHI has asked the Bureau to encourage states to narrow the scope of their mortgage originator licensing requirements so that they apply only to a person who both takes a loan application *and* offers or negotiates the terms of the loan for compensation or gain. This change would unravel existing licensing standards; create an environment of unregulated rogue originators; encourage sham arrangements to avoid licensing; and defeat the consumer protection goals of the SAFE Act. The SAFE Act's requirements are entirely appropriate for a person who obtains a consumer's highly sensitive personal financial information as part of taking a loan application . Notably, MHI's request is not confined to manufactured home loan originators, but apparently would apply to all mortgage loan originators, opening this highly sensitive activity to unlicensed individuals throughout the market.

MHI's comment also asked CFPB to give states the authority to create *de minimis* exemptions from the SAFE Act for individuals who originate only a small number of mortgage loans. It cited the need to exempt homeowners who are selling their own homes, without recognizing that such an exemption is already included in the CFPB's regulation.[11] The SAFE Act regulations also include a carefully-crafted exemption for non-profit housing organizations. Adding an exemption for persons who originate mortgage loans in a for-profit context, but only a small number per year, is an entirely different matter. Such a step would foster small-time rogue originators, who are commonly involved in the worst cases of mortgage fraud, as well as foreclosure rescue scams, and should not be exempted from the SAFE Act's requirements. We urge the CFPB not to make

[9] 12 U.S.C. § 5104.

[10] 12 U.S.C. §§ 5014, 5015, 5017(d).

[11] 12 C.F.R. Part 1008, Appx. B., § (a)(1) (exempting "[a]n individual who acts as a loan originator in providing financing for the sale of that individual's own residence, provided that the individual does not act as a loan originator or provide financing for such sales so frequently and under such circumstances that it constitutes a habitual and commercial activity" and "[a]n individual who acts as a loan originator in providing financing for the sale of a property owned by that individual, provided that such individual does not engage in such activity with habitualness").

exemptions from SAFE Act requirements for individuals who originate few mortgage loans.

5. The Importance of Retaining the Consumer Protections of E-Sign.

Several industry commenters have proposed undermining or even eradicating the requirements of the E-Sign Act governing when the important disclosures and information provisions of TILA, EFTA, and TISA may be provided in electronic instead of paper form. The E-Sign Act was adopted for the purpose of facilitating electronic transactions while preserving the essential goals of ensuring that consumers will in fact see important information and have the ability to retain that information for future reference and use. Its framework remains valid today.

As the CFPB considers amending rules to facilitate electronic commerce, we ask that the following basic facts and principles be kept in mind:

- According the U.S. Census, over 30% of all adults do not have access to the Internet at home.
- Over 70% of older Americans (defined as 55 and over) do not have access *either* at home or work.
- About 65% of low income people in the U.S. (defined as living on income of less than $50,000 a year) do not have access to the Internet either at home or work.[12]

For consumers who do not have ready access to the Internet at home or work, conducting transactions electronically becomes quite a challenge. Imagine not being able to receive mail at home, having to find a place to be able to open it, read it, and obtain special permission to print it or keep it (as one has to at a public library).

The mere fact that a consumer has opened an account on the internet or on a mobile device does not mean that the consumer either has the ability to receive electronic communications or that those communications are the best way to reach the consumer. The transaction could have taken place at a kiosk in the store of the provider, or an older consumer may have been assisted by a caregiver.

[12] See US Census Bureau, Internet Access and Usage: 2009, http://www.census.gov/compendia/statab/2011/tables/11s1156.pdf.

Even consumers who have internet access and are comfortable using computers to review accounts may prefer paper for some types of communications. The more they use the internet for commerce, the more consumers are barraged by a flood of email solicitations that cost nothing to send but bury important messages, which get lost. A home computer may be shared by husband, wife, and children doing homework, and busy families do not always have the time or remember to log on to check their accounts. For these and other reasons, many consumers prefer to receive bills, statements and notices about important changes to their accounts in the mail, where they are more likely to be seen.

Paper is also a superior form for retaining records. Computers can crash, and software changes, so that information stored on a computer may not be accessible when it is needed for a tax return, a tax audit, or other purposes.

The advent of smartphones and new forms of communications with consumers makes the E-Sign framework all the more important. If the only internet access that a consumer has or regularly uses is a mobile device, we must pay particular care to ensure that consumers do not miss important information if they are limited to tiny messages on a 3 inch screen that they cannot retain or print.

The E-Sign Act does not mandate a particular form of communication, and its principles are flexible enough to adapt to new technology. **It stands only for the important principle that, when the law requires that consumers receive important information, they must give their clear and deliberate consent to replace paper with electronic records that they are actually capable of receiving.** It is far too easy to obtain consent with a click of the mouse with the result that consumers will not see important information.

a. E-Sign's Consent Requirements are Critical Consumer Protections.

In consumer transactions, E-Sign requires a specific and electronic consent process before an electronic notice may replace a legally required written document (either a notice or contract).[13] E-Sign ensures that no party can be required to transact their business electronically.[14] Thus the first question to consider, whenever electronic means are proposed to replace paper writings or

[13] 57 15 U.S.C. § 7001(c).
[14] 15 U.S.C. § 7001(b)(2).

handwritten signatures, is whether both parties have agreed to communicate electronically.[15]

Under E-Sign, if a statute, regulation, or rule of law requires that information be provided to a consumer in writing, an electronic record can only be utilized if certain conditions are met.[16] First, the consumer must affirmatively consent to such use and must not withdraw that consent.[17] Second, prior to consenting, the consumer must be given a clear and conspicuous statement of the following:

- Any right or option to get the copy of the contract in non-electronic form;
- The right to withdraw consent and the procedures for and consequences of doing so;
- What transactions the consumer's consent applies to;
- The procedures for updating the information needed to contact the consumer electronically; and
- How, after consenting to electronic provision of the information, the consumer may get a paper copy and whether any fee will be imposed.[18]

The consumer must also be given a statement of the hardware and software requirements for access to and retention of electronic records.

Third, E-Sign requires that the consumer consent electronically ''in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information.''[19] This means that consumers must demonstrate, not just affirm, that they have access to the equipment and programs necessary to receive, open, and read the relevant electronic documents.

The legislative history states:

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[15]Prudential Ins. Co. of Am. v. Prusky, 413 F. Supp. 2d 489 (E.D. Pa. 2005) (E-Sign does not require an insurer to accept electronic signatures); DWP Pain Free Med. P.C. v. Progressive Northeastern Ins. Co., 831 N.Y.S.2d 849 (N.Y. Dist. Ct. Dec. 7, 2006) (neither New York State Electronic Signatures and Records Act nor E-Sign obligates any person, including an insurer, to accept the use of electronic records and signatures).

[16] 15 U.S.C. § 7001 (c)(1).

[17] *Id.* § 7001(c)(1)(A).

[18] *Id.* § 7001(c)(1)(B).

[19] 15 U.S.C. § 7001(c)(1)(C)(ii). *See also* 146 Cong. Rec. S5224 (June 15, 2000) (statement of Senators Hollings, Wyden, and Sarbanes) (''The Act requires that consumers consent electronically— or confirm their consent electronically—in either case, in a manner that allows the consumer to test his capacity to access and retain the electronic records that will be provided to him.'').

> It means the consumer, in response to an electronic vendor enquiry, actually opens an attached document sent electronically by the vendor and confirms that ability in an e-mail response. . . . It is not sufficient for the consumer merely to tell the vendor in an e-mail that he or she can access the information in the specified formats.[20]

E-Sign's consumer consent requirement affords the consumer three protections:

- It ensures that the consumer has reasonable access to a computer and the Internet to be able to access information provided electronically.
- It ensures that the consumer's means of access to electronically provided information includes the software to read the electronic records provided.
- It underscores to the consumer the fact that, by electronically consenting, the consumer is agreeing to receive the described information electronically in the future.[21]

The Federal Trade Commission and the Department of Commerce reported to Congress that the purpose of the requirement is to ''ensure that consumers who choose to enter the world of electronic transactions will have no less access to information and protection than those who engage in traditional paper transactions.''[22] The strict use of and compliance with the consumer consent

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[20] *See id.*

[21] Senator Leahy emphasized these differences when, regarding the passage of E-Sign, he stated on the floor of the Senate:
[This bill] avoids facilitating predatory or unlawful practices. . . . [It] will ensure informed and effective consumer consent to replacement of paper notices and disclosures with electronic notices and disclosures, so that consumers are not forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher. * * * I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent. Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for accessing the information. 146 Cong. Rec. S5219–22 (daily ed. June 15, 2000) (statement of Senator Leahy).

[22] The FTC and the Department of Commerce went on to state: Moreover, this provision reduces the risk that consumers will accept electronic disclosures or other records if they are not actually able to access those documents electronically. As a result, it diminishes the threat that electronic records will be used to circumvent state and federal laws that contain a ''writing'' requirement. The consumer consent provision in Section 101(c)(1)(C)(ii) provides substantial benefits as a preventive measure against deceptive and fraudulent practices in the electronic marketplace. Fed.

provision is also necessary to protect consumers from the ever-growing use of electronic commerce for fraud.

b. E-Sign's Record Retention Requirements Are Critical Protections

E-Sign provides that the validity of an electronic record of a document otherwise required to be in writing may be denied if it is not in a form that is capable of being retained and accurately reproduced by all parties.[23] E-Sign requires that the record be retained in a manner that ''accurately reflects the information'' in the record and ''remains accessible to *all* parties . . . in a form that is capable of being accurately reproduced for later reference.''[24]

The law traditionally has made certain assumptions about the characteristics of paper ''writings'' that are not necessarily applicable to electronic records:

- A paper writing is by its nature tangible. Once handed to a person, a paper writing will not disappear unless lost or destroyed by the recipient.
- The printed matter on the paper writing will not change each time someone views it. The writing can be used at a later time to prove its contents.
- While the information on the paper can be deliberately changed by forgery, that takes an effort and some skill.

E-Sign's record integrity provisions, while imperfect, do recognize these differences and provide some protection for the recipient of an electronic record which replaces a writing. It allows a court to deny the effect of an electronic record unless it is provided in a format which both parties are able to reproduce accurately at a later time.[25] Imagine the problems that might result if the homeowner's copy of a mortgage note was provided in an automatically-updating word processing format such that, every time the homeowner reviewed the document electronically, the record was saved with a new date on it. The mortgage company will have kept its own electronic copy in a more secure fashion and will have the technical capacity to prove in a court of law that the electronic document it has in its possession is the same one electronically

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Trade Comm'n, Electronic Signatures in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii) (June 2001), *available at* www.ftc.gov/os/2001/06/esign7.htm (last accessed on June 23, 2009).

[23] 15 U.S.C. § 7001(e).

[24] 15 U.S.C. § 7001(d).

[25] 15 U.S.C. § 7001(e).

signed by the homeowner. Yet, if the homeowner had been provided only with a version that can be inadvertently changed, the homeowner will face a much tougher battle using the homeowner's copy to prove the terms of the contract. E-Sign's provisions prohibit the mortgage company in this example from using its more secure electronic record to prove terms different from those asserted by the consumer. the CFPB should not eliminate this important protection.

c. Ignoring the E-Sign Requirements May Result in Consumers Not Seeing Important Information.

Written requirements are triggered in a variety of settings, including provisions in the Truth in Lending Act, the Electronic Funds Transfer Act, and other statutes. These statutes mandate written information that provides important consumer protections including:

- Disclosures about terms of an account;
- Account agreements and full terms and conditions;
- Transaction and statement information;
- Notice of changes in terms.

These legal requirements exist for a myriad of reasons. Consumers need to know the terms of a product before they enter into an agreement; need to know what they are agreeing to; need to monitor their accounts for unauthorized charges and unwanted fees; need access to statements for budgeting, tax returns, and proof of purchases and expenses; and need to know when the deal they entered into has changed and decide whether to continue a relationship.

In these days of increasing identity theft, and explosion of fees that can obscure and complicate pricing, providing information to consumers in a form they will actually see and understand is more important than ever. The CFPB is well aware of the problems with dense legalize and multi-page disclosures. These are problematic enough on paper, but even worse when the consumer is encouraged just to click "I agree" without even seeing the disclosure.

Electronic statements sound eco-friendly, but they require the consumer to take the initiative to go look for their statement, remember their password, and have access to a computer and time on their hands when they are thinking about it. It is much easier to be prompted when the mail arrives to simply rip open the envelope and review the document. There is a serious danger that pushing everyone into electronic communications as the default method will have the end result of ensuring that even fewer people get the information they need.

Different means of communication also may be appropriate for different types of accounts. For example, one study found that consumers were less likely to adopt paperless options for accounts where a payment is due upon receipt of the statement than for other types of accounts.[26] That reflects a conscious choice of consumers: they prefer the paper reminder to pay on time.

The CFPB will soon be considering the appropriate regulatory framework for new products like prepaid cards, which have low margins, or mobile payment systems, which by definition are electronic. New technologies provide new opportunities. New devices and new ways of interacting also change the ways that consumers behave. It may be that there are new forms of electronic information that will meet the E-Sign principles.

But the CFPB should not blithely make decisions without careful study. The CFPB should initiate a study about how and whether consumers see information when it is provided in various electronic forms. It may be, for example, that even when consumers accept invitations to elect electronic statements, they are less likely to view those statements than when they receive paper. The CFPB should know the answer to that question before encouraging electronic statements.

Reducing unnecessary costs is certainly important, but ensuring that people *actually see* information, and not just have theoretical access to it, is even more important. It is important to recognize that:

- Consumers are a diverse group, even within the subset of those who appear to have initiated a transaction online or on a mobile device;
- Consumer preferences should not be assumed, and consumers should have choices that actively encourage them to receive information in the manner that works best for them.

That is what the E-Sign Act is design to do: permit consumers to choose how to receive information, in a form they can truly access, with records they can keep. The E-Sign Act's simple principles are even more important in today's over-saturated information age.

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[26] Emmett Higdon, eBusiness & Channel Strategy Professionals, "Paperless Plight: Growing Resistance Outpaces Adoption Among US Bank Account Holders" at 2 (Nov. 1, 2010).

Thank you for the opportunity to submit reply comments on ideas for streamlining regulations. We look forward to working with the CFPB in the future.