June 19, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information ("RFI") Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities (Docket No. CFPB-2018-0011)

Dear Ms. Jackson:

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding the Bureau's Adopted Regulations and New Rulemaking Authorities. These particular comments focus on two amendments adopted by the Bureau affecting credit card lending; we urge reversal of these two changes.

- In 2013, the CFPB removed the requirement that credit card issuers consider the consumer's independent income and assets in establishing the consumer's ability-to-pay a credit card debt. Instead of independent incomes and assets, or those that the consumer has a legal entitlement to access, the CFPB allowed issuers to consider *any* income and assets that the consumer has a "reasonable expectation" of accessing. The CFPB should undo this decision. Furthermore, if payment of household expenses is considered as an income source, then Regulation Z should be amended to require issuers to consider household expenses in their analysis of a consumer's ability-to-pay.
- Previously, the "fee-harvester" rule that caps credit card fees to 25% of the credit limit had included fees charged prior to account opening in that 25% cap. In 2013, the CFPB amended this rule to exclude pre-account opening fees in response to a lawsuit by First Premier Bank. The CFPB should re-issue the rule that included pre-account opening fees in the 25% cap by using its authority under TILA, as expanded by the Dodd-Frank Act. This expanded authority should be able to withstand a legal challenge by high-fee subprime credit card issuers like First Premier Bank.

1. ***The CFPB should require the credit card ability-to-pay analysis to be based on the consumer's independent income and assets***

In May 2013, the CFPB amended the ability-to-pay (ATP) requirement of Regulation Z.[1] The original ATP requirement was promulgated by the Federal Reserve Board (FRB) pursuant to the

[1] 12 C.F.R. § 1026.51(a), *as amended by*, 78 Fed. Reg. 25,818, 25,838 (May 3, 2013).

Credit Card Accountability, Responsibility and Disclosures (CARD) Act of 2009.[2] The original ATP formulation required credit card issuers to consider the borrowers' "independent income and assets" to support their ability to repay the credit extended. The CFPB amended the ATP formulation to remove that requirement, and to permit card issuers to consider any income and assets that the consumer has a reasonable expectation of accessing.[3] We urge the CFPB to reverse this change and restore the requirement to consider independent income and assets (including household income that the consumer is entitled to access).

The impetus for this change was concern that the requirement to show an independent ability-to-pay purportedly disadvantaged stay-at-home spouses.[4] But requiring consideration of the borrower's independent income and assets does not deny stay-at-home spouses the ability to access credit or build a credit history. To the extent that a stay-at-home spouse has a legal entitlement to the other spouse's income, such as in a community property state or with a joint bank account, the pre-May 2013 Official Interpretations did provide that such income may be considered, and we have no quarrel with that. As for building a credit history, stay-at-home spouses can do so if they are listed as co-borrowers or even authorized users on an account.[5]

However, if a stay-at-home spouse incurs debt that she has no ability to repay, and she cannot access the other spouse's income or assets to repay the debt, she will be in a far worse position that if she had never incurred the debt. Allowing consideration of income and assets of other consumers not obligated on the account presents risks for both consumers and the safety and soundness of credit card accounts. It is better to get a co-signer on a card than to take on debt based on potentially unreliable income of another person who has no obligation on the card.

The overbroad rule does not merely impact spouses. The same ATP rule should prohibit adult children from relying on income from a parent without their consent, or roommates from basing their ability-to-pay on income from other roommates.

Also, in removing the requirement to consider independent income and assets, the CFPB issued three illustrations of when consideration of income of a non-obligated household member is acceptable. The first two illustrations are acceptable (joint bank account and when the non-obligated person regularly transfers funds to the consumer), but the third illustration effectively classifies contribution to household expenses as income, allowing consideration of:

> 3. When the household member regularly uses his or her salary to pay for the applicant's expenses.[6]

Thus, the Official Interpretations permit the payment of expenses by a household member to be considered as "income" for an applicant. In addition to creating the risks described above, another problem with this provision is that there is no parallel requirement that issuers consider those expenses when determining an applicant's ability-to-pay. This is fundamentally

[2] Codified at15 U.S.C. § 1665e.
[3] Reg. Z § 1026.51(a)(i), (ii); Official Interpretations § 1026.51(a)(i)(i)-1, -2.
[4] 78 Fed. Reg. 25,818, 25,820–25,821 (May 3, 2013).
[5] National Consumer Law Center, Credit Discrimination § 9.4.2 (6th ed. 2013), *updated at* www.nclc.org/library.
[6] Official Interpretations § 1026.51(a)(1)(i)-6.iii.

inconsistent. In other words, if payment of household expenses by another constitutes income, then those household expenses should be included in the ATP analysis required by Regulation Z. Currently, Regulation Z only requires a card issuer to consider one of the following:

> The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations."[7]

The phrase "debt obligations" appears to only require consideration of monetary debt obligations (e.g., mortgages, car loans), without explicit consideration of other non-debt expenses, such as food, utilities, clothing, and medical expenses. We recommend that an explicit allowance for household expenses be included in the overall ATP analysis of ability-to-pay, *i.e.*, Regulation Z should be amended to require consideration of:

> The ratio of debt obligations *and household expenses* to income; the ratio of debt obligations *and household expenses* to assets; or the income the consumer will have after paying debt obligations *and household expenses*. It would be unreasonable for a card issuer to not review any information about a consumer's income, assets, [or current] *debt* obligations, *or household expenses,* or to issue a credit card to a consumer who does not have any income or assets.
>
> (Additional text in italics; delete text in [brackets])

A simple method of determining household expenses for an applicant would be to use the Internal Revenue Service's Collection Financial Standards.[8] The Official Interpretations for Regulation Z could note that one acceptable measure of household expenses would be these standards.

2. Pre-account opening fees should be considered in the 25% cap for subprime specialty or "fee harvester" credit cards.

In March 2013, the CFPB's modified Section 1026.52(a) of Regulation Z, which limits fees on credit card accounts to 25% of the credit limit – the "fee harvester" rule. This 25% cap was set by the Credit CARD Act.[9] The CFPB amended this rule by withdrawing the provision that requires pre-account opening fees to be included in the calculation of fees for this 25% cap.[10] We recognize that the CPFB made this change because it was in a difficult position after the decision in *First Premier Bank v. CFPB*.[11] However, we believe the CFPB can re-issue the provision to include pre-account opening fees in the 25% cap by using its authority under TILA, as expanded by the Dodd-Frank Act. The CFPB should do so to protect low-income consumers from being exploited by these exorbitant and deceptive fees.

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[7] Reg. Z, 12 C.F.R. § 1026.51(a)(1)(ii).

[8] These are a set of national and local expense standards that the IRS has developed for food, clothing, housing, utilities, and transportation. *See* http://www.irs.gov/Individuals/Collection-Financial-Standards. Of course, if the applicant is a homeowner, mortgage expenses should be deducted from these amounts if they are already included in the calculation of debt payments, so that they are not double-counted.

[9] Codified at 15 U.S.C. § 1637(n).

[10] 78 Fed. Reg. 18,795 (Mar. 28, 2013).

[11] 819 F.Supp.2d 906 (D.S.D. 2011).

The fee harvester rule was enacted to prevent vulnerable consumers with impaired or no credit histories from being unfairly exploited by high fees for limited credit. These cards imposed great costs on consumers who could least afford it. NCLC first documented the many abuses posed by fee harvester credit cards in a November 2007 report.[12] The high fees imposed by creditors, combined with low credit limits, left the consumer with little real credit at a high price.

The very nature of these cards made them deceptive. Creditors deliberately structured the pricing on these cards to understate the APR – the price tag that consumers look at – and to move the cost of the credit to fees that are excluded from the APR in the application disclosure. Pre-Credit CARD Act, the typical fee harvester card advertised an APR of 9.9% -- clearly an artificially low pricetag – but the fees amounted to 50% to 80% of the credit line. Thus, the fees far exceeded the finance charges generated by the periodic interest represented by the APR.

In response to NCLC's fee harvester report, Congress included a provision specifically addressing these credit cards in the Credit CARD Act. The fee harvester provision limited these abusive fees, restricting them to 25% of the amount of the credit limit. However, the most prominent subprime issuer – First Premier – quickly figured out an evasion and circumvention of the 25% cap by charging fees that are ostensibly charged before the account is opened.

First Premier is one of the largest issuers of fee harvester cards in the country and has a sordid history of abuses against consumers. In addition to enforcement actions by the New York Attorney General[13] and the FRB,**[14]** one of the most notorious cases of credit card abuse cited in the hearings leading up to the Credit CARD Act involved a sailor who was issued a First Premier card with a credit limit of $250 with a $95 program fee, a $29 account set-up fee, a $6 monthly participation fee, and a $48 annual fee –instant debt of $178 for available credit of only $72.[15]

The First Premier credit card at issue in *First Premier v. CFPB* (which it still offers)[16] charged a $95 "processing fee" prior to account opening, as well as a $75 annual fee, for a credit limit of $300 – in other words, a price of $170 for $130 of real credit. The price structure for the current First Premier card is similar to fees charged before the Credit CARD Act, despite the fee harvester rule.

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[12] Rick Jurgens and Chi Chi Wu, *Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers*, National Consumer Law Center, Nov. 2007.

[13] Assurance of Discontinuance, *In the Matter of First Premier Bank*, New York Attorney General's Office, July 23, 2007, at 1-3, *available at* http://www.ag.ny.gov/sites/default/files/press-releases/archived/First%20Premier%20Bank%20Settlement.pdf.

[14] *Written Agreement by and among United National Corporation, Sioux Falls, South Dakota; First PREMIER Bank, Sioux Falls, South Dakota; PREMIER Bankcard, Inc., Sioux Falls, South Dakota; and the Federal Reserve Bank of Minneapolis*, Federal Reserve Board, September 25, 2003, *available at* http://www.federalreserve.gov/Boarddocs/Press/enforcement/2003/20030925/attachment.pdf.

[15] Credit Card Practices: Fees, Interest Rates, and Grace Periods: Hearing Before the Permanent Subcomm. on Investigations of the Comm. On Homeland Security And Governmental Affairs, 110th Congr. (2007) (testimony of Alys Cohen, National Consumer Law Center).

[16] See https://www.premiercardoffer.net/CardDetailsPage/BKLIUKXA2%200012OMI. (viewed May 26, 2018).

	Credit Limit	Up Front Fees	Advertised APR	Credit Actually Extended
Before the Credit CARD Act	$250	$178	9.9%	$72
Present	$300	$170	36%	$130

Not only is the First Premier card tremendously expensive, its burdensome fee structure results in the card being unaffordable for most of its cardholders. At the time of its lawsuit against CFPB, First Premier had a 40% or 50% default rate on its card.[17]

The South Dakota District Court held that a rule including pre-account opening fees was not within the CFPB's rulemaking authority because the rule did not effectuate the purpose of the fee harvester provision. The court viewed Congress's intent narrowly as only regulating fees that reduce the credit line, which would not include pre-account opening fees. It held that the FRB's rule was not within the latter's authority to issue regulations that make "adjustments and exceptions … necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof …." 15 U.S.C. §1604(a). The court viewed the "purposes" that the FRB could consider as only the fee harvester provision itself, and used a constrained interpretation of that provision.

As an initial matter, the District Court gave short shrift to the Supreme Court's decisions[18] repeatedly affirming that the Federal Reserve Board (which issued the original fee -harvester provisions) had broad authority to issue regulations under TILA, and was entitled to substantial deference in so doing. The Dodd-Frank Act transferred this same broad authority to the CFPB.

Furthermore, the FRB's (and now CFPB's) authority is to issue regulations that effectuate the purposes of "*this subchapter*" – all of TILA, not just the fee harvester provision considered

[17] Affidavit of Miles K. Beacom, CEO of Premier Bankcard, First Premier Bank v. United States Consumer Fin. Prot. Bureau, Case No. 4:11-cv-04103 (D.S.D. Aug 4, 2011). *See also* Andrew Kahr, "CFPB Replaces Fed's Illegal Regulation with Its Own Illegal Regulation," American Banker (Apr. 16, 2012), *available at* http://www.americanbanker.com/bankthink/CFPB-Card-Act-First-Premier-Fed-1048401-1.html.

[18] Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 100 S. Ct. 790 (1980)(establishing the FRB's broad authority to issue TIL regulations and the deference that such regulations must accorded; "Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive."); Mourning v. Family Publications Service, 411 U.S. 356, 93 S. Ct. 1652 (1973) (establishing that the FRB is entitled to deference when issuing TIL regulations). *See also* Chase Bank USA v. McCoy, 131 S. Ct. 871 (2011) (citing *Milhollin* and its standard with approval); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239, 124 S.Ct. 1741(2004) (re-affirming the Board's pivotal role in interpreting TILA and *Milhollin*'s holding); Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219, 101 S.Ct. 2266 (1981)("absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts,").

alone. The court failed to consider that the rule is fully consistent with the overall purpose of TILA "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him …." 15 U.S.C. §1601(a). Most importantly, the calculation and disclosure of an APR that enables consumers to compare different credit offers, including different offers that have different price structures, is one of the most central purposes of TILA.[19]

The history of the First Premier card is instructive in this regard. First Premier originally claimed a 9.9% APR, but charged $178 in fees against $250 in credit. After the CARD Act was passed, it raised its APR to 79.9% and lowered its fees to $75. The APR thus more honestly reflected the cost of credit.

However, when First Premier first reacted to the fee harvester limit by offering a 79.9% APR, it likely found few takers, with the high APR deterring consumers, including presumably even its usual customer base of consumers with low credit scores. That is presumably why the bank abandoned that approach and went instead with a deceptively low APR of 36% and the new pre-account opening fee.

	Up Front Fees	Advertised APR
Before the Credit CARD Act	$178	**9.9%**
December 2009	$75	**79.9%**
Present	$170	**36%**

Preventing this type of deception and ensuring honest disclosure of the cost of credit was a purpose of the fee harvester provision that the court did not consider.

In terms of protecting the credit line, whether a fee is charged before or after an account is open makes no difference in the impact of that fee on the amount of credit. If a consumer gives a lender $100 and then the lender immediately turns around and loans the consumer $200, the consumer has received $100 in net credit. The result is the same if the lender gives the consumer a $200 credit line with an initial $100 fee charged against it.

The purpose of the fee harvester provision is also broader than protecting the amount of credit extended. It was to protect consumers from the onerous burden that high fees impose.[20] It was intended to stop the harm of a card designed more to put the consumer into debt and incur fees and not to provide a meaningful amount of credit.

Also, the original rule that included pre-account opening fees in the 25% cap could have benefitted competition and honest competitors. It could have resulted in consumers being steered away from the high-fee First Premier Card to a more affordable secured card. Consider

[19] *See* Elizabeth Renuart and Diane Thompson, The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending, 25 Yale J. on Reg. 181 (Summer 2008).

[20] *See* 154 Cong. Rec. H8610 (daily ed. Sept. 23, 2008) (statement of Rep. Langevin that "legislation also protects vulnerable consumers from fee-heavy subprime cards "). *See also* 154 Cong. Rec. H8603 (daily ed. Sept. 23, 2008) (statement of Rep. Maloney stating that Act "prevents subprime cards from trapping the most vulnerable cardholders in a cycle of debt")

that a consumer who is solicited to pay a $95 pre-account opening fee could have used those funds to obtain a secured credit card. This would have been a much more affordable and safer option because the consumer would have been able to retain the value of the $95. As the FRB and bank regulators noted, secured cards are "a more beneficial product than a high-fee subprime credit card."[21]

The legislative history of the fee harvester provision of the Credit CARD Act also demonstrates that it is completely consistent to include pre-account opening fees within the 25% cap. Currently, the fee harvester provision includes a rule of construction that states: "No provision of this subsection may be construed as authorizing any imposition or payment of advance fees otherwise prohibited by any provision of law." 15 U.S.C. § 1637(n). But originally, the very first version of the fee harvester provision introduced in Congress *did* explicitly permit card issuers to charge fees above the 25% cap before the account was opened. This was the language in the original House version of the bill in 2008:

> (m) Standards Applicable to Initial Issuance of Subprime or `Fee Harvester' Cards- In the case of any credit card account under an open end consumer credit plan the terms of which require the payment of fees (other than late fees or over-the-limit fees) by the consumer <u>in the first year the account is opened</u> in an amount in excess of 25 percent of the total amount of credit authorized under the account, <u>the credit card may not be issued</u> to the consumer and the opening of the account may not be reported to any consumer reporting agency (as defined in section 603) <u>until the creditor receives payment in full of all such fees</u>, and such payment may not be made from the credit made available by the card.[22]

Consumer groups expressed strong opposition to the provision requiring advance payment of fees, as did several state Attorneys General. As a result, Representative Keith Ellison offered an amendment to the House bill to remove this explicit language allowing fees to be charged prior to account opening.[23] It was approved unanimously by the House in July 2008. The amendment eliminated the requirement that fees in excess of 25% "in the first year the account is opened" must be paid before the account is opened. It also included rule of construction preserving existing bans on advance fees.

Thus, the explicit provision permitting fees charged before account opening in excess of the 25% cap was removed by Congress early on in the history of the fee harvester rule. This is a clear expression of Congressional intent that the Federal Reserve Board did not violate the plain language of the Credit CARD Act by extending the 25% cap to pre-account opening fees.

Finally, we note that the CFPB has even broader authority than the FRB had under TILA. If the CFPB re-promulgates a rule including pre-account opening fees in the 25% cap, it should be more resistant to legal challenge given that the Dodd-Frank Act expanded the CFPB's authority

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[21] 74 Fed. Reg. 5498, 5539, n. 148 (January 29, 2009).
[22] From H.R. 5244 as introduced in the 110th Congress.
[23] *See* Attachment A, Comments of NCLC and USPIRG to the CFPB regarding Fee Harvester Credit Cards, Docket No. CFPB-2012-0015, 77 Fed. Reg. 21,875 (April 12, 2012)(Ellison Amendment to the Committee Print of July 24, 2008).

to issue TILA regulations. Section 1100A(4) of Dodd-Frank added the words "additional requirements" to the authority in Section 105(a) of TILA, i.e., the revised text reads:

> The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 that apply to a mortgage referred to in section 1602(aa), such regulations may contain such *additional requirements*, classifications, differentiations, or other provisions,...
>
> 15 U.S.C. § 1604(a)(emphasis added)

Thus, the CFPB could re-promulgate the provision applying the 25% cap to pre-account opening fees using this new, greater TILA authority to establish "additional requirements."

* * *

Thank you for the opportunity to submit these comments. If you have questions about them, please contact Chi Chi Wu at the National Consumer Law Center, cwu@nclc.org or 617-542-8010.

Respectfully submitted,

Allied Progress
Americans for Financial Reform
Arkansas Community Organizations
Atlanta Legal Aid Society, Inc.
Brooklyn Coop Federal Credit Union
Center for NYC Neighborhoods
Center for Responsible Lending
Consumer Action
Consumer Federation of America
East Bay Community Law Center
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center (on Behalf of Its Low-Income Clients)
National Fair Housing Alliance
The One Less Foundation
People's Action Institute
Public Good Law Center
Public Justice Center

Tennessee Citizen Action
Tzedek DC
U.S. PIRG
Virginia Poverty Law Center
West Virginia Center on Budget and Policy