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By Electronic Delivery

August 8, 2008

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
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Washington, DC 20551

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
Attention: OTS-2008-0004
1700 G Street, NW
Washington, DC 20552
http://regulations.gov (Federal eRulemaking Portal)

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Subject: Federal Reserve Board: Docket No. R-1314
Office of Thrift Supervision: OTS-2008-0004
National Credit Union Administration: RIN 3133-AD47
Unfair or Deceptive Trade Practices; Overdraft Services
Proposed Rule – Comments of Citigroup Inc.

Dear Sir or Madam:

This comment letter is submitted by Citigroup Inc. ("Citigroup"), on behalf of itself and its subsidiaries, in response to the joint proposal by the Federal Reserve Board (the "Board"), the

Office of Thrift Supervision and the National Credit Union Administration (collectively, the "Agencies"), to exercise their authority under Section 5(a) of the Federal Trade Commission Act to prohibit institutions from engaging in certain acts or practices in connection with overdraft services for deposit accounts (the "Proposal").[1]

This comment is organized in four parts. First, we briefly summarize the Proposal. Second, we explain our view that the Agencies should not address this matter through a rulemaking focused on "unfair" or "deceptive" trade practices. Third, we address the reasons that enactment of this regulation should be only prospective and have an implementation date no sooner than 18 months after final publication in the Federal Register. Finally, we comment on the specific details of the Proposal.

A. General: The Proposal.

The Proposal would require that banks[2] follow certain rules with respect to their overdraft practices, lest they be considered to be engaged in "unfair and deceptive" acts or practices. In summary, the Proposal would require a bank that charges fees for paying overdrafts:

- To provide consumers with notice and the right to opt-out of the bank's overdraft services. These must be provided before the bank's assessment of any fee, and again during any statement cycle in which a fee is assessed.

- To allow the consumer to elect a partial opt-out, where the bank may pay (and may charge for) overdrafts related to checks and ACH transfers, but not for ATM or debit card point-of-sale (POS) payments. The Agencies justify this requirement on the basis that "potential merchant fees and other adverse consequences" could flow from the nonpayment of checks and ACH transfers, and so the consumer should be allowed to avoid those consequences without having to pay overdraft fees associated with ATM and POS transactions.

Narrow exceptions to these general rules would allow a bank to pay, and charge for, an overdraft initiated by a debit card transaction, even if the consumer has opted-out, under the following circumstances:

- If there were sufficient funds in the consumer's account at the time the transaction was authorized, but the actual purchase amount exceeded the amount that had been authorized; or

[1] 73 Fed. Reg. 28904 (2008). Citigroup is filing a separate comment letter on the aspects of the Proposal that address certain acts or practices in connection with consumer credit cards accounts. In addition, on July 21, 2008, we filed a comment letter with the Board on Docket No. R-1315, the Board's related proposal to modify the Board's Regulation DD.

[2] Although the overdraft practices portion of the Proposal would cover other types of entities as well, we have confined our comments to banks under the authority of the Board.

- If the transaction were presented for payment by paper-based means, rather than electronically through a terminal, and the bank had not previously authorized the transaction.

As an example of the first exception, the Proposal describes a situation where a consumer uses his or her debit card to purchase gasoline. The merchant may seek a $1 authorization to ensure that the card is valid, and then submit the actual amount after the consumer has pumped the gas. An overdraft could result if the consumer purchased $50 in gas while only having $40 in his or her account.

The second exception is intended to address a situation where a merchant presents a debit card transaction for payment by paper-based means at end-of-day settlement, where the merchant did not obtain authorization at the time of transaction. This may occur if the merchant makes an imprint of the consumer's debit card at the time of the transaction and later submits the imprint and sales slip to its acquirer for payment.

The justification for these exceptions is that, in both examples, the bank was not given the opportunity to verify that the consumer had sufficient funds until after the transaction was completed. Finally, the Proposal states that a bank may not assess an overdraft fee if the consumer's overdraft would not have occurred but for a hold placed on funds in the consumer's account that is in excess of the actual transaction amount.

B. <u>The Proposal Should Not Be Addressed through the FTC Act</u>.

In summary, we believe that the Agencies are dealing with a *disclosure* issue, rather than an "unfair" or "deceptive" practice issue that is more appropriately addressed by enforcement of Regulation DD.[3] We agree with the requirement that a bank must inform its customers, before paying an overdraft, that there will be a charge for that overdraft, and the amount of the charge. This is a standard practice in the industry and required by Regulation DD.[4] However, the payment of an overdraft and the charging for that service should not be viewed as an intrinsically "unfair" or "deceptive" practice if the customer has been previously informed of the practice and the related charges. To the extent that the Agencies have concerns that institutions might pay and charge for overdrafts without adequately disclosing the fees to consumers, these concerns can be addressed through current enforcement mechanisms and, in the case of banks, through rulemaking, guidance and the examination process.

As a threshold matter, the Agencies have failed to meet the standards for declaring the overdraft practices addressed in the Proposal as either unfair or deceptive. The practices are not "deceptive" as they are fully and clearly disclosed to customers. As the Proposal describes, to be

[3] 12 CFR Sec. 230.1 et. seq.
[4] 12 CFR Sec. 203.4(b)(4)

"unfair," the Agencies must show: (1) substantial consumer injury; (2) injury that is not avoidable; and (3) the benefits do not outweigh the injury.

Regarding the first requirement, the practices addressed in the Proposal, namely charging overdrafts without providing a way to opt-out of overdraft charges and placing a hold on the basis of authorization by a merchant, involve the imposition of relatively modest charges on consumers. If the first test is to be meaningful, "substantial" injury should mean something more than the imposition of a relatively modest fee for the provision of a customer service when the possibility of the fee's imposition has been adequately disclosed. Regarding the second requirement, customers generally have the ability to avoid overdraft charges by monitoring the amount of available funds in their account. Finally, as discussed more fully below, the benefits of the current system where an opt-out is not required and banks can place credit holds based on merchant authorizations outweigh the modest injury that would theoretically be imposed on some customers if overdraft fees are imposed without changing these practices.

There are also important public policy reasons that favor our approach. We strongly believe that the practice of paying overdrafts results in a *favorable* outcome to the vast majority of customers, because, among other things, it enables them to complete their intended transactions in a timely fashion. Customers are responsible for managing their bank accounts. With today's technology, a customer can easily obtain information on their actual balances, whether via phone, ATM or internet. Knowing how much money is in his or her account is the customer's responsibility. Overdrafts are typically the result of a customer's failure to accurately calculate his or her balance and other outstanding items. When the bank pays the overdraft, it is presumably assisting the customer in completing the customer's intended transactions despite this mistake. In addition, excepting ATM and certain point-of-sale transactions, paying for an overdraft typically results in less expense to the consumer than having an item returned for insufficient funds, because in the latter case *both* the bank *and* the merchant usually charge NSF[5] fees to the customer.

Treating this issue as an unfair or deceptive trade practice will expose institutions to greatly enhanced litigation risk under both state and federal law. Additionally, the classification of these charges as unfair and deceptive in specific situations could be used against banks in lawsuits arising from activity that has already occurred.

C. <u>The Proposal must have prospective effect only and an implementation period of at least 18 months</u>.

Assuming arguendo that the Agencies move forward with this rulemaking, it is imperative that the Agencies give prospective effect only to any final rules resulting from the Proposal to limit (although, in our view, not eliminate) the litigation and reputational risks that are likely to flow from the re-characterization of heretofore lawful practices as unfair or deceptive. It is also

[5] "NSF" fees are fees for returned items.

imperative that the Agencies provide an implementation period of at least 18 months for such rules. Banks will require an implementation period of at least that length to make the extensive systems and operational changes likely to be required by the rules.

On the issue of prospective effect, the Agencies should take an approach similar to the one the Board followed in its recently announced final rule on advertising and disclosure practices for higher-priced mortgages. In that rule, which centered on unfair practices but used reasoning equally applicable to deceptive practices, the Board noted that a regulation is by its nature "prospective and applies to the market as a whole, drawing bright lines that distinguish broad categories of conduct." Docket No. R-1305 – Regulation Z, at 4 (July 14, 2008).[6] The Board then explained that its decision to proceed with such a regulation is based on a number of factors, including the "integral" factor of the Board's power to choreograph an orderly implementation of the regulation through a prospective enforcement rule and an appropriate implementation period.[7] The Board then provided unambiguously that "acts or practices occurring before the effective dates of these rules will be judged by the totality of the circumstances under other applicable laws or regulations."[8] We believe that such an approach is equally appropriate and necessary for the Agencies' proposed amendments, even though we remain concerned that it may not be enough to preclude vexatious and costly litigation under state UDAP statutes and otherwise based on the re-characterization of formerly lawful practices as unfair or deceptive.

On the issue of the implementation period, we believe that banks would require at least 18 months to develop and deploy the systems and operational changes necessary to implement any final rules resulting from this rulemaking including significant changes to printed materials and Internet sites, operational procedures, employee training, and a host of other business processes.

We urge the Agencies to approach the implementation period for any final rules resulting from the Proposal in much the same way the Board approached the implementation of the recently issued rule on higher-priced mortgages. There the Board recognized the difficult implementation challenges facing the industry by providing a baseline implementation period of approximately 14 months, with longer implementation periods of approximately 20 and 26 months respectively for parts of the rule presenting greater implementation challenges. We urge the Agencies to do the same here using a baseline implementation period of at least 18 months.

D. Specific Comments.

Although, as discussed above, we believe that this rulemaking is unnecessary as it concerns overdrafts, in this section we provide specific comments in case the Agencies decide to move forward with the Proposal.

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[6] 73 Fed. Reg. 44522, 44523 (2008).
[7] Id.
[8] Id.

1. Notice and opt-out. Banks cannot assess overdraft fees unless they first provide the consumer with notice and right to opt-out.

We agree that fees should be disclosed at account opening pursuant to Reg DD,[9] or pursuant to a change in terms notice if they are modified during the term of the account.[10] However, for the reasons discussed above, provided the customer has been previously informed of the practice and the related charges, we do not believe these practices should be considered as "unfair" or "deceptive."

Similarly, although we favor allowing banks that offer overdraft services the option to give their customers a right to opt-out, we do not believe that banks should be required to do so. If there is customer demand for the right to opt-out, some institutions will offer it, and customers for whom that is important can open accounts there. However, it should not be deemed an unfair or deceptive practice not to offer customers that choice.

Providing an opt-out right is also likely to be expensive for institutions to establish initially and to manage on a going forward basis. As the OCC Chief Counsel has testified before Congress:

Imposition of unnecessary regulatory burdens is not simply an issue of bank costs. When unnecessary regulatory burdens drive up the cost of doing business for banks, bank **customers** feel the impact in the form of higher prices and, in some cases, diminished product choice.[11]

If, despite our arguments, the Agencies decide to require banks to offer an opt-out right, then we recommend that the opt-out right requirement only extend to overdrafts at ATMs and debit card point-of-sale locations.

2. Bifurcated opt-out. The consumer must be given the choice to opt-out for all transactions, or *only* for payment of overdrafts at ATMs and debit card point-of-sale transactions.

If a bank gives their customers a right to opt out of overdraft services, the bank should have the option whether or not to give the customer the choice to opt-out for all transactions, or *only* for payment of overdrafts at ATMs and debit card point-of-sale transactions. Even if there is a consumer benefit in allowing the customer to choose that only certain overdrafts should be paid, the consumer benefits are not large and, because repeated overdrafts are incurred by only a small percentage of customers, affect relatively few customers. Furthermore, monitoring overdrafts in

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[9] This disclosure is already required in account-opening documentation. See 12 CFR Sec. 230.4(b)(4).
[10] 12 CFR Sec. 230.5.
[11] Statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, before the U.S. Senate Committee on Banking, Housing and Urban Affairs, on Regulatory Burden Relief, Washington, D.C., June 22, 2004 (emphasis in the original).

this manner puts an unfair onus on the bank. Finally, the practicality of bifurcating opt-outs will vary from institution to institution depending upon the construct of their systems and operations. In sum, this is another situation where the best solution is for the Agencies to leave the development of bifurcated opt outs to marketplace forces.

3. Additional appropriate circumstances for paying an overdraft where a customer opts out.

The Agencies requested comment on whether there are other circumstances in which an exception may be appropriate to allow an institution to impose a fee or charge for paying an overdraft even if the consumer has opted out of the institution's overdraft service, and if so, how to narrowly craft such an exception so as not to undermine protections provided by a consumer's opt out election. We strongly recommend an explicit exception for returned deposited checks or other items. There are instances where Reg. CC requires that funds attributable to deposited checks be made available to customers the day after the deposit although the bank has not yet received collected balances on account of those check deposits. Such deposited checks can be returned by the maker's bank for various reasons, including insufficient or unavailable funds or an unauthorized maker or endorser signature, and the available funds in the customer's account must then be reduced to account for the return. In the event that the reduction causes the account to become overdrawn, the bank should be entitled to charge the customer an overdraft fee whether or not the customer has exercised his or her right to opt-out of having overdrafts paid by the bank.

We also believe that banks should be specifically authorized to charge for overdrafts where there is express customer consent. It may be or become technologically feasible for banks to contact the customer by telephone, e-mail or text message, identifying a specific transaction that has been presented for payment, requesting and receiving instructions from the client on a case-by-case basis. We believe that banks should be expressly allowed to contact customers on such basis and charge them for such overdrafts, irrespective of whether they have opted out.

4. Periodic statement. Bank must provide another notice and opt-out "at least once" for any periodic statement cycle in which fee is charged.

We believe that the current industry practice that customers are notified of overdraft fees at account opening is sufficient and that it would be unduly burdensome on banks and confusing to customers to put additional disclosure on the periodic statements. This burden and confusion would be especially acute were the disclosure required to include an explanation about the customer's right, if any, to opt-out of overdraft service.

However, if the Agencies see a need to require banks to provide additional disclosure on any periodic statements, then we recommend that banks be permitted to provide an abbreviated form of notice on the periodic statements. Such a notice might read, for example, "You have been charged an overdraft fee, for information concerning the imposition of overdraft fees on this account, see your account manual or call customer service at 800-555-1234." During this call the representative could also provide the total of the amount of overdraft fees charged to the customer's account to date. Not only would this information be more current, but it would alleviate the additional programming costs that banks would be required to incur in placing that information on each periodic statement. Further discussion about disclosures is in our July 21, 2008 comment letter to the Proposal to modify Regulation DD.

5. Debit holds. A bank may not assess an overdraft fee if an overdraft would not have occurred but for a hold placed on funds that is in excess of actual transaction amounts.

The Proposal's recommended treatment of debit holds is not feasible because there is no practical way that a bank can know if a particular hold is excessive or not. Indeed, as the Agencies' second proposed exemption implicitly recognizes, there are many circumstances in which a hold does not match the settlement. Moreover, the bank could not know with any certainty when a merchant has completed the transaction or transactions related to a particular hold. This issue is particularly acute with respect to bank account overdrafts which are settled on a daily basis. Management of holds is more appropriately conducted, as is the current industry practice, between the consumer and the merchant in connection with the merchant transaction.

6. Regulation AA. The Agencies should not extend the Credit Practice rule allowance for state exemption to the Proposal.

We agree with the Agencies' position as expressed in the Proposal that the Credit Practice rule allowance for state exemption should not be extended to the Proposal because it would undermine uniform application of federal standards, would not provide meaningful relief from regulatory burden and would not help consumers.

We appreciate this opportunity to comment on the Proposal. If you have any questions relating to these comments or would like to discuss them in greater detail, please call me at (212) 559-2938 or Joyce Elkhateeb at (212) 559-9342 or Jeffrey Watiker at (212) 559-1864.

Sincerely,

Carl V Howard

Carl V. Howard
General Counsel – Bank Regulatory

cc: Joyce Elkhateeb
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August 8, 2008

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Regulation Comments
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Mary Rupp
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Attention: RIN 3133-AD 47
http://regulations.gov (Federal eRulemaking Portal)

Re: Federal Reserve Board: Docket No. R-1314
Office of Thrift Supervision: OTS-2008-0004
National Credit Union Administration: RIN 3133-AD47

Unfair or Deceptive Acts or Practices in Connection with Consumer Credit Card Accounts

Ladies and Gentlemen:

Citigroup, one of the largest U.S. financial services holding companies, respectfully submits these comments in response to the credit card provisions of the proposed rulemaking (the "Proposal") of the Federal Reserve Board (the "Board"), Office of Thrift Supervision, and National Credit Union Administration (collectively, the "Agencies") regarding unfair or deceptive acts or practices ("UDAP") in connection with consumer credit card accounts and overdraft services for deposit accounts published in the *Federal Register* on May 19, 2008. Citigroup ("Citi") will comment separately on the provisions of the Proposal regarding overdraft services for deposit accounts.

A. Introduction

The Proposal would cause considerable harm to consumers and the credit card industry.

Citi appreciates the opportunity to comment on the Proposal. We also appreciate the Agencies' efforts to craft a comprehensive set of rules to reform the regulatory framework for the credit card industry, and we are pleased that the Agencies have acted. We strongly support general reform of the regulations governing the credit card industry and we believe that portions of the Proposal, if modified as suggested in this comment, would be beneficial. However, if promulgated as is, the Proposal would cause considerable harm to consumers, the credit card industry, and the overall economy.

The best way to bring about the needed reform is through improvements to Regulation Z and the creation of a fully functioning market. The goal is to give consumers the opportunity to make informed choices about the products and services they need and credit card issuers the opportunity to compete equally on providing the most favorable experience to the consumer. Because of the lack of transparency in this industry, where disclosures are written to avoid litigation rather than inform consumers and where there is a lack of uniformity in how, what, and when information is provided to consumers, the market in this industry is not effectively functioning. By creating a transparent marketplace, where card issuers compete on a level playing field, we believe that consumers "will vote with their feet" and choose the issuer who provides the best value, services, innovative products, and consumer friendly practices. In short, transparency will drive best practices in this industry and will punish through a loss of market share card issuers who fail to address customer needs. Maintaining a disclosure based regulatory framework will drive efficiency into the market, enhance best practices, and create the change needed in the credit card industry.

The Proposal comes at a time of significant stress in the credit card industry and general economy. Returns in the industry are at a 25 year low. The stress in the credit environment and funding markets has resulted in a material deterioration in the quality of returns in credit card portfolios. Losses in the consumer credit card industry are high and it is possible that they have not yet peaked. This is in sharp contrast to the very favorable credit conditions of just one year ago, even though our credit underwriting criteria during this period has remained consistent if not more conservative as we have witnessed this general deterioration. Although such harsh economic conditions will not always prevail and we currently have the appropriate risk management tools to manage through them, these conditions are instructive of the pressures that the credit card industry and its customers face on a cyclical basis. They help show why credit card issuers must retain their ability to respond to changes in market conditions and credit risk.

They also show that in order for issuers to compete vigorously and to maintain low prices and other benefits for most customers, the ability to manage market and credit risk through repricing is a critical component to the business model.

The Proposal, particularly its provisions concerning interest rate increases on existing balances and payment allocation methods, would adversely affect credit card issuers and the overwhelming majority of consumers by interfering with risk management, low rate promotional pricing, and competition in the credit card industry. The Proposal, along with associated changes to Regulation Z, would significantly reduce interest yields for credit card issuers.[1] As a result, it would put at risk the lower prices, better and more available product offerings, and other benefits that have accrued to consumers in the credit card marketplace during the past two decades in large part due to better risk management and fierce competition among issuers through the use of low rate promotional offers.[2] In addition, the Proposal would result in these adverse consequences unnecessarily, because the underlying goals of the Proposal can be achieved through more targeted and appropriate modifications to Regulation Z. In particular:

- Section 24 of the Proposal restricts an issuer's ability to reprice existing balances except in very limited circumstances. This would limit a card issuer's ability to effectively manage, in real time, systemic changes in credit and funding markets. Without that ability, card issuers would be required to price for that risk at the time of account acquisition, resulting in much higher costs. This approach is problematic because of the open-end nature of a credit card loan, which has no term and therefore could extend for many years without a card issuer's ability to adjust for these systemic changes. Limiting the ability to reprice for risk will result in higher prices and less credit availability for all consumers. We believe the Agencies can better achieve their goal of enhanced interest rate stability for consumers without these adverse consequences through the changes we recommend to Regulation Z, 12 C.F.R. § 226 (2008), which we discuss in detail below.

- A provision in Section 24 of the Proposal restricts a card issuer's ability to reprice existing balances following a late payment until that late payment is 30 days past due. This is simply too long a time for card issuers to wait before managing the rapidly changing credit risk profile of an individual customer. Without the ability to reprice sooner to manage such changes, the cost of credit would increase for all and foreclose the availability of credit for many. We believe the Agencies can better achieve their goal of safeguarding against the use of "hair trigger" late payment deadlines for the imposition of penalty APRs by shortening the exception for a late payment. We believe the exception should apply to any late payment that is past due for 5 days or as of the close of the billing cycle following the missed payment due date, whichever is earlier. Such a change

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[1] Letter from Oliver I. Ireland to each of the Agencies, at Exhibit 1, Table 1 (August __, 2008) (Public Comment, Federal Reserve Board Docket No. R-1314, Office of Thrift Supervision OTS-2008-0004, and National Credit Union Administration RIN 313-AD47, Proposed Rulemaking on Unfair or Deceptive Acts or Practices) ("Industry Data Letter"), available at http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc_id=R%2D1314&doc_ver=1.

[2] Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures*, GAO 06-929, September 12, 2006, pp. 13-17.

would rationalize the timing and significantly improve the economics of the late payment exception, while continuing to safeguard against the use of "hair trigger" late payment deadlines.

- Section 23 of the Proposal, due to its restrictions on payment allocation methods, would change the economics of low rate balance transfer and other promotional offers and significantly reduce their number and vitality. Fewer and less attractive low rate offers would harm consumers, who can and do use such offers to reduce the effective interest rates on their credit card accounts by significant amounts. Fewer low rate offers also would harm competition in the credit card industry, which is fiercely competitive today in large part as a result of such offers and the opportunities they provide to consumers to shop for credit and walk away from card issuers who do not offer rates, terms, and services to their liking. We believe payment allocation is a quintessential disclosure issue that can be addressed without these adverse consequences through improvements to the disclosures required under Regulation Z, including a new amortization chart discussed in more detail below.

- Most of the issues encompassed by the Proposal should be addressed through changes to Regulation Z, and not through a UDAP rulemaking. As discussed in more detail immediately below, Regulation Z is the proper vehicle for addressing those issues because they concern the informed use of credit and other goals of that regulation and its enabling statute, the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.* (2006). Conversely, a UDAP rulemaking is not the vehicle for addressing those issues because it exposes credit card issuers to unfounded reputational and litigation risks for engaging in lawful practices.

The Proposal's reliance on the Agencies' FTCA Authority represents bad public policy.

Our objections to Sections 23, 24 and the other provisions of the Proposal discussed below are amplified by the Agencies' proposed use of their authority under Section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 57a(f), to promulgate those provisions. Despite the broad scope of authority granted to the Agencies under the FTCA, we believe that, for the most part, the Agencies' use of it here is troubling. The various provisions of the Proposal rest on questionable findings of the elements of unfairness, particularly the findings that Regulation Z disclosures, opt out rights under state law, and other protections do not empower consumers to avoid the alleged injuries. The findings also downplay the substantial countervailing benefits that accrue to the overwhelming majority of consumers from the right of credit card issuers to reprice existing balances for market and credit risk, engage in payment allocation practices that support the vigorous use of low rate promotional offers, and other practices addressed by the Proposal. Moreover, the Proposal represents bad public policy. It needlessly uses FTCA authority to taint mainstream practices of the credit card industry, when the Agencies can fully achieve such regulatory changes as they deem necessary through modifications to Regulation Z.

In essence, the Proposal represents the Agencies' use of their FTCA authority to re-characterize as unfair or deceptive several longstanding industry practices that comply with the letter and the spirit of both federal and state law. Ironically, this use of FTCA authority is itself unfair, as it would expose credit card issuers to unfounded litigation and reputational risks for practices undertaken in good faith reliance on well-established statutes, regulations, and regulatory guidance on the federal and state level by the Agencies, state regulators, and other authorities. It also represents an unwarranted override of major areas of credit card law traditionally reserved for the states. This includes, for example, the law governing interest rate increases on existing balances. The Board's Regulation Z recognizes that this is a matter reserved for state law. 12 C.F.R. § 226, comment 9(c)-2. Moreover, it is a matter robustly regulated at that level. Del. Code Ann. Tit. 5, § 952 (establishing consumer opt-out right for change in terms increasing interest rate on new or existing balances); S.D. Codified Laws § 54-11-10 (same with respect to interest rate increases and other changes "effective as to existing balances").

In general, we believe the Agencies should reserve their FTCA authority to prohibit "fringe" lending practices that have no plausible consumer benefit or compelling business rationale. We also believe it is fair to say that, in the area of financial services, the Federal Trade Commission (the "FTC") has exercised its FTCA authority in just such a way. For example, the FTC has concentrated its enforcement authority in the area of financial services on matters involving egregious abuse of consumers, such as unauthorized charges and bank account debits, the assessment of late fees caused by a service provider's own delay in posting payments, the breach of a "lifetime" guarantee, misleading "no fee" promises, and false promises regarding loan terms.[3] The FTC has also crafted its financial services rules to target abusive security interests, contractual remedies, and credit repair services or, in the case of the telemarketing rule, to regulate practices pursuant to an express legislative mandate. None of the rules opine broadly on loan pricing, loan terms, general payment procedures, or other basic lending practices.[4]

The "fringe" lending practices addressed by the FTC's work in the financial services area contrast fairly vividly with most of the practices addressed by the Agencies in this Proposal. These practices are foundational to the credit card industry and are anything but fringe. They include:

- time to make payment practices governed by a rule established by the Congress more than 30 years ago in TILA, which are the subject of proposed Section 22;

- payment allocation practices on the multiple rate accounts that have remade the industry in the past 20 years for the benefit of consumers, which are the subject of proposed Section 23;

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[3] *See* Letter from Lydia B. Parnes, Director, Bureau of Consumer Protection, Federal Trade Commission, to John E. Bowman, Chief Counsel, Regulation Comments, Office of Thrift Supervision, at 14-25 (Dec. 12, 2007) (Public Comment, OTS-2007-0015, Advance Notice of Proposed Rulemaking on Unfair or Deceptive Practices ("FTC Comment Letter"), available at www.ftc.gov/os/2007/12/P084800anpr.pdf.

[4] *See* FTC Comment Letter at 7-14.

- interest rate adjustment practices affecting existing balances that are authorized under the laws of various states and fundamental to the very nature of open-end credit, which are the subject of proposed Section 24;

- the two-cycle balance computation method, which simply charges customers for every day they have borrowed money, has been an integral part of Regulation Z for 20 years and in common use for far longer, and is the subject of proposed Section 26; and

- a new disclosure requirement for credit card solicitations involving multiple interest rates or credit lines that is indistinguishable from the many other disclosures set forth in Regulation Z, which is the subject of proposed Section 28.

The Agencies' use of their FTCA authority to address these practices is as unnecessary as it is unwarranted. As the Agencies are well aware, TILA grants the Board broad authority to regulate disclosures and practices in support of the statute's goals of comparison shopping for credit and the informed use of credit. TILA § 102(a), 15 U.S.C. § 1601(a). In our view, all of the practices catalogued in the previous paragraph are squarely covered by TILA and the Board's authority to regulate under that statute. In one way or another, all deal with the informed use of credit and the effectiveness of various disclosures in supporting the informed use of credit.[5]

For this reason, we oppose proposed Section 26, which prohibits the two-cycle billing computation method, and proposed Section 28, which requires a new disclosure for credit offers with multiple interest rates or credit lines, even though we do not object to the result of those provisions. With respect to Section 26, it is surprising that the Agencies would even consider characterizing as unfair a common and well-established method that is woven into the fabric of Regulation Z and has been recognized as an accepted method of calculating interest for more than 20 years.[6] Nevertheless, we acknowledge that the two-cycle balance computation method is relatively complex in application and perhaps difficult for consumers to grasp. We therefore would not object to its prohibition under the auspices of Regulation Z, provided there is an appropriate implementation period for an orderly transition to alternative balance methods.

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[5] This contrasts with the Board's use of a general grant of authority to prohibit "unfair or deceptive" practices in its recently published final rule on advertising and disclosure practices for higher-priced mortgages under the Home Ownership and Equity Protection Act (the "HOEPA Rule"). 73 Fed. Reg. 44522 *et seq.* (July 30, 2008). In the HOEPA Rule, the Board was compelled to use that general authority to reach consumer mortgage loans that did not fall within relatively narrow definitional requirements specified in HOEPA's rate or fee trigger under TILA § 103aa. *Id.* at 44529. The current Proposal does not present a similar jurisdictional quandary for the Agencies. Under Regulation Z, the Board can regulate any and all consumer credit card loans of $25,000 or less that are not secured by real property, 12 C.F.R. § 226.3, so, unlike the HOEPA situation, there is no need to resort to the potentially more disruptive FTCA authority.

[6] In this regard, it is worth remembering that The Fair Credit and Charge Card Disclosure Act of 1988, P.L. 100-583, directed the Board to "define and name not more than 5 balance computation methods determined by the Board to be the most commonly used methods." 102 Stat 2960, 2968, (Nov. 3, 1988), 15 U.S.C. § 1637(c)(1)(A)(iv)(II). When the Board issued its proposed rule, it listed two-cycle billing as one of those "5 most common methods." 53 Fed. Reg. 51785, 51787 (Dec. 23, 1988). The final rule was adopted in 1989, and two-cycle billing has been a part of Regulation Z ever since. 54 Fed. Reg. 13855 (Apr. 6, 1989), 12 C.F.R. § 226.5a(g)(2).

With respect to Section 28, we are similarly surprised by the Agencies' use of their FTCA authority to require a garden variety solicitation disclosure -- even though our credit offers with multiple credit rates or credit lines already contain a disclosure substantially similar to the model disclosure proposed by the Agencies. We firmly believe that this new disclosure requirement belongs in Regulation Z or, perhaps, regulations implementing the "firm offer of credit" definition under § 603 of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681a(*l*). Misplacing the requirement in a UDAP regulation would be illogical, harm compliance by making the requirement hard to find, and cause interpretive confusion by suggesting unintended distinctions between the nature of the proposed disclosure and the solicitation disclosures set forth in Regulation Z or the regulations implementing the FCRA.

In contrast, we believe the Proposal's prohibition of excessive account-opening fees and security deposit requirements represents an appropriate use of the Agencies' FTCA authority to prohibit "fringe" lending practices. The practices subject to this prohibition have no consumer benefit and are not reasonably related to risk management or other legitimate business needs. We support the Agencies' decision to prohibit them and their use of FTCA authority to do so.

The Proposal must have prospective effect only and an implementation period of at least 18 months.

If the Agencies nevertheless proceed with the use of their FTCA authority to promulgate the Proposal, they must at least ensure that the final rules are given prospective effect only. Doing so would limit (although, in our view, not eliminate) the unfounded litigation and reputational risks that are likely to flow from the apparent re-characterization of heretofore lawful practices as unfair or deceptive. It is also imperative that the Agencies provide an implementation period of at least 18 months for such rules. Credit card issuers will require an implementation period of at least that length to make the extensive systems and operational changes likely to be required by the rules at the same time they are making the many changes required by the Board's pending revisions of Regulation Z's open-end credit rules.

On the issue of prospective effect, the Agencies should provide expressly in a provision of the final rules that all rules have prospective effect only. The provision or accompanying commentary should also state clearly that nothing in the rules in final or proposed form will be used by the Agencies or should be used by any other federal, state, or local authority to deem or construe as unfair or deceptive any credit card practice proscribed by the rules that was (1) undertaken prior to the effective date of the rules, and (2) was lawful under other applicable laws or regulations when undertaken. In addition, the provision or commentary should explain that the prospective effect of the rules and the implementation period for them were "integral" to the Agencies' decisions to promulgate the rules and proscribe, on a going forward basis, the practices subject to the rules. The Agencies should also explain that, but for their power to give the rules prospective effect following an implementation period, those practices would not have been deemed "unfair or deceptive" following the effective date.[7] Even if the Agencies follow

[7] The Board took substantially this approach in the supplemental information to the HOEPA Rule. *See* 73 Fed. Reg. 44523 (July 30, 2008). However, we believe these pronouncements need to be memorialized in the rule and commentary themselves to enhance the accessibility of the pronouncements and the prospects that they will be found, read, and heeded.

our recommendations in this regard, however, we remain concerned that it may not be enough to preclude vexatious and costly (though ultimately unfounded) litigation under state UDAP statutes and otherwise based on the apparent re-characterization of formerly lawful practices as unfair or deceptive.

On the issue of the implementation period, we believe that credit card issuers will require *at least* 18 months to develop and deploy the systems and operational changes necessary to implement any final rules resulting from this rulemaking and the pending Regulation Z rulemaking. Together, they present credit card issuers with an expensive and daunting implementation task, particularly in light of the unfavorable economic and financial conditions pressing financial institutions of every stripe. In particular, any final rules on payment allocation and interest rate increases on existing balances approximating Sections 23 and 24 as proposed would present a difficult systems modification challenge for credit card issuers. This challenge would include an extended design and planning period, perhaps involving multiple systems platforms, followed by a major effort to program systems changes, test them, refine them, and then test them again prior to rollout. It would also include equally significant changes to printed materials and Internet sites, operational procedures, employee training, and a host of other business processes.

At Citi, we estimate that the systems changes required by the Proposal would involve multiple phased implementations on multiple system platforms. Sound change management practices require that we limit the volume of systemic changes introduced at one time. To apply the proposed changes, we estimate that three slightly overlapping implementation phases would be required. Each of these implementations would require a minimum of 6 to 9 months of preparation, development and testing work. In addition, due to the complexity and magnitude of these changes, a unique testing period would be required to ensure the multi-phased implementations are integrated and work in concert. The end result requires the replication of identical rules across multiple and different card processing system platforms. An 18 month timeframe would be extremely aggressive to achieve all of this. We believe that any shorter time would introduce unacceptable implementation risks and encumber Citi and other card issuers with unacceptable expense and resource burdens during a time of economic stress.

We urge the Agencies to approach the implementation period for any final rules resulting from the Proposal in much the same way the Board approached the implementation of its recent HOEPA Rule. There the Board recognized the difficult implementation challenges facing the industry by providing a baseline implementation period of approximately 14 months, with longer implementation periods of approximately 20 and 26 months respectively for parts of the rule presenting greater implementation challenges.[8] We urge the Agencies to do the same here using a baseline implementation period of at least 18 months.

Proposed Section 23 also must apply to prospective balances only.

It is equally vital that any final rules resulting from proposed Section 23 regarding payment allocation apply only to credit card account balances that accrue after the effective date

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[8] *Id.* at 44594-95.

of that provision. Pricing for both promotional and existing balances assumed that lower cost balances would be paid first. Changing the contractual terms and assumptions applicable to those balances could cause significant harm to individual institutions by compressing margins, diminishing the expected investor return, and impacting the quality of credit card securitizations.

Proposed Section 24 must grant card issuers the ability to reprice the entire portfolio to appropriately recalibrate the risk/reward equation to a new paradigm or must also be limited to prospective balances.

If Section 24 is promulgated, card issuers must be granted the authority to reprice their existing balances to appropriately re-calibrate the risk-reward equation presented by the new restrictions on interest rate increases to existing balances. More than $1 trillion in loans have been priced and booked by card issuers based, in part, on the assumption that should systemic or individual customer credit risk profiles change, the card issuers would have the ability to reprice existing balances in response to those changes. Should Section 24 be promulgated, issuers would need to adjust their pricing on existing balances to factor for future risks that can no longer be managed by future repricings. Put simply, accounts and loans were booked and approved with competitive pricing that assumed credit card issuers had the ability to reprice the loans should critical underwriting or funding assumptions change. Without that right going forward, the institutions will have to consider the extent to which that risk must now be included in the current pricing of existing balances.

In the alternative, if the Agencies do not give card issuers the opportunity to re-calibrate their portfolios to adjust for the new environment that would be created by Section 24, the Agencies must limit Section 24 to apply only to credit card account balances that accrue after the effective date of the provision. For reliance reasons, account balances as of the effective date should be grandfathered and subject to continued treatment under the contractual terms that applied to them when the balances were created. These reasons include valuations of the balances for purposes of outstanding securities backed by credit card receivables, as well as valuations for purposes of the financial statements of the financial institutions that issue credit cards.

B. Discussion

Citi concerns about the Proposal are discussed in more detail below. For the Agencies' convenience, we have organized our comments in the same order as the Proposal. We look forward to continued dialogue with the Agencies regarding our concerns and the Proposal as a whole.

Section 22
Time to make payment

Section 22 is a solution in search of a problem.

We object to Section 22 to the extent it would lengthen from 14 to 21 days the standard interval between the mailing of a consumer credit card statement and the payment due date. The

14-day interval was effectively mandated by Congress in § 163(a) of TILA, 15 U.S.C. § 1666b(a). Moreover, we believe that improvements in mail delivery and electronic payment procedures make that an even better legislative judgment today than when it was made.

In general, we believe Section 22 is a solution in search of a problem. Under this provision, credit card issuers are required to provide consumers with a "reasonable amount of time" to make payment. They are also provided a "safe harbor" for compliance with that general standard if they establish "reasonable procedures designed to ensure" that periodic statements are mailed at least 21 days prior to a consumer's payment due date. This provision would therefore establish 21 days as the *de facto* industry standard for the time to make payment, rather than the 14 days mandated in TILA. Based on the supplemental information accompanying the Proposal, the provision is designed to avoid the harm to consumers of late fees arising from the receipt of periodic statements "with little time" remaining to mail payments before they are considered late. According to the supplemental information, the provision is based on "anecdotal" evidence that this timing problem affects some consumers, although the number is unspecified.

We are unaware of substantial empirical evidence to support the Agencies' apparent conclusion that appreciable numbers of consumers incur late fees because they are given little time to pay on their credit card accounts. In fact, we believe such empirical evidence as there is suggests that extended due dates generate a higher incidence of late payments and late fees than shorter ones. For example, Citi typically gives consumers who revolve a balance on their account four or five days more to pay than consumers who do not revolve a monthly balance. Yet the bulk of our late fees comes from those who revolve a balance, suggesting that the time to make payment is not the reason that late fees are incurred. If it were, there would be a higher incidence of late fees in the non-revolver population.

The unintended effect of Proposed Section 22 would be to extend the monthly interest free loan period for non-revolvers and in essence require consumers who revolve a balance to subsidize those consumers who do not. The provision would increase the cost of credit for consumers who revolve, because card issuers would pass through the costs associated with the lengthier payment periods. The provision would also increase the amount of interest paid by these consumers due to the demonstrated tendency of most consumers to pay their credit card bills close to the due date. In contrast, consumers who do not revolve credit would be the only ones who receive an undiluted benefit from the provision. The longer time to make payment would lengthen the monthly interest-free loans received by these consumers. However, this benefit would be subsidized by and come at the expense of the many consumers who use their credit cards to revolve credit.

Section 22 overrides the judgment of the Congress and is inconsistent with advances in payment procedures.

On top of the sparse evidence and questionable cost-benefit equation on which it is based, proposed Section 22 overrides the longstanding judgment of the Congress that a 14-day interval between the mailing of a periodic statement and a payment due date is sufficient for consumer credit card accounts. In 1974, Congress adopted the Fair Credit Billing Act, P.L. 93-495, which provides that if a creditor allows a period of time to repay credit without incurring a finance charge, the creditor must mail the billing statement 14 days before the expiration of that period. This provision, now codified as § 163(a) of TILA, 15 U.S.C. § 1666b(a), has molded the payment procedures of the credit card industry for over 30 years. It is incorrect for the Agencies to suggest that credit card issuers who have been and continue to comply with this 14-day interval are engaging in an "unfair" practice. It is also inexplicable that the 14 days considered adequate under TILA for consumers to review a periodic statement and repay a balance to avoid the loss of a grace period for finance charges has been deemed by the Agencies an inadequate period of time to review a statement for the purpose of avoiding a late payment fee.

The 14-day time to make payment interval established by the Congress more than 30 years ago remains a sound and, in many respects, even better public policy judgment today. The reason is that technology is expanding and not contracting the time to make payment for virtually all consumers, making the 14 days an effectively larger interval than it was in 1974. First, mail delivery is more efficient today than in 1974 due to improved technology and enhanced pre-sorting and other arrangements between the U.S. Postal Service and large scale commercial mailers like credit card issuers. Second, consumers now have the option to receive periodic statements and make payments online, and increasing numbers are choosing both options. For example, almost 50% of our consumer credit card holders make payments on line or through recurring ACH charges at no cost to them. Third, consumers now have tools to track and be prompted about payment due dates, such as our free online payment alert service. In short, consumers have never had more time to consider and pay credit card bills than they have today, and that time will surely expand tomorrow with continued improvements in technology and the increasing use of online statement and payment options.

Any changes regarding time to make payment belong in Regulation Z.

For the foregoing reasons, we do not believe that time to make payment is an issue that warrants action by the Agencies. However, we appreciate that the "reasonable time to make payment" standard, safe harbor concept, and other general terms of proposed Section 22 address the issue more comprehensively than § 163(a) of TILA, 15 U.S.C. § 1666b(a), as implemented by Regulation Z, 12 C.F.R. § 226.5(b)(2)(ii). Accordingly, we would support an expansion of that provision of Regulation Z with the general terms of proposed Section 22, provided the time to make payment in the provision is the 14 days mandated by Congress and not the 21 days currently proposed by the Agencies.

Section 23
Allocation of Payments

Section 23 would adversely affect promotional offers, harm consumers, and harm competition in the credit card industry.

Proposed Section 23 would have a significant adverse affect on low rate promotional credit card offers by prohibiting the use of the current industry standard "low to high" payment allocation formula. This formula, which gives priority to the payment of low rate balances before high rate ones, results in a priority pay down of low rate promotional balances, which is a key component to the economics of those offers. The "high to low," equal portion, and *pro rata* allocation formulas required by the rule would substantially change those economics and make promotional offers less attractive financial propositions for credit card issuers. This would reduce the number of promotional offers substantially and perhaps end their reign as a preeminent credit card marketing technique. The result would harm consumers as well as competition in the industry.

Consumers benefit from promotional credit card offers in a substantial way. Among credit card accounts with both promotional and non-promotional balances, the median weighted average APR on the non-promotional balances during the past two years was 15.8%, while the median weighted average APR for those accounts as a whole (considering both the promotional and non-promotional balances together) was 5.5%. In other words, promotional balances typically reduced the effective APR on accounts with one or more promotional balances by more than 10 percentage points. The result was an overall account cost roughly two-thirds less than what it would have been otherwise -- a remarkable savings by any reasonable measure.[9]

The benefits of promotional credit card offers also are widely spread among consumers. Industry-wide, approximately 17% of active consumer credit accounts had a promotional balance over the past two years.[10] In our case, the percentages are even higher.

Promotional offers also promote competition in the credit card industry. They impose market pressure on card issuers to keep rates low due to the perpetual threat of losing customers as a result of low rate offers from competitors. With a diminished flow of offers, consumers would have less notice and opportunity to switch card issuers. As a result, consumers would be less likely to vote with their feet based on the rates and practices of their current card issuer compared to other issuers, and competition among issuers would diminish considerably.

Section 23 is based on faulty economic assumptions and poses risks to consumer understanding.

Proposed Section 23 is based on faulty assumptions about its effect on credit card issuers, which would be far more significant than assumed by the Agencies. It may even harm consumer understanding of payment allocation.

First, the Agencies erroneously assume that the revenue impact to credit card issuers of the provision will be, as stated in the supplemental information "muted." In fact, industry-wide data show that the revenue impact would be substantial and would not be "muted."[11]

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[9] *See* Industry Data Letter at Exhibit 7, Table 2. The median reduction in weighted average APR was 10.4 percentage points.

[10] *See* Industry Data Letter at Exhibit 7, Table 1b. The median over the past two years was 17.2% of active accounts.

[11] Industry Data Letter at Exhibit 1, Table 1.

Second, the Agencies erroneously assume, again as stated in the supplemental information, that the provision would leave credit card issuers "with considerable flexibility in the allocation of payments, particularly with regard to the minimum payment." In fact, required minimum payments are relatively small and, for various consumer-driven and competitive reasons, are likely to stay that way. That minimum payments are not affected by the provision is a positive for credit card issuers but not all that significant economically. Consumers typically pay in excess of the minimum payment, making the allocation of the excess amounts important to card issuers. The provision as proposed substantially constrains issuers in the allocation of those excess amounts, particularly as applied to promotional balances.

Third, we believe Section 23 could harm consumer understanding of payment allocation. The current industry standard of allocating payments to low interest rate balances before higher ones is relatively simple. In contrast, the proposed allocation represents a very complex approach involving three specified alternatives, tailor-made options "no less beneficial" to consumers than one of the specified options, and exceptions applicable to each. If, as the Agencies assert, consumers find it difficult to understand the low to high allocation method and its implications, it is virtually inconceivable that they will master the much more complex, multi-method approach set forth in the provision as proposed. Without that understanding, any differentiation among credit card issuers on payment allocation created by the provision would be of no use for comparative shopping purposes. In addition, payment allocation would be detrimental to the informed use of credit. Both would be unhappy results in light of TILA's goals and that of credit card regulation generally.

Enhanced disclosure is the better approach to payment allocation.

For some time now, Citi has been providing clear and forceful disclosures of our low to high payment allocation method in our solicitation letters for promotional offers, beneath our Schumer box, and in our card agreement. In our experience, consumers are satisfied with the way we disclose and implement payment allocation. We receive very few consumer calls or complaints about it. Perhaps most telling is the use of promotional offers repeatedly by the same Citi customers, suggesting their satisfaction with the offers and the way payments are allocated against them.

We believe enhanced disclosure under Regulation Z can address any consumer confusion about payment allocation without the adverse consequences of Section 23 as proposed. First, we urge the Agencies to mandate payment allocation disclosures in solicitation letters, in or beneath the Schumer box, and in initial disclosure statements/card agreements in a clear and simple manner. As a possible model disclosure, we offer the language we currently place beneath our Schumer box, which we believe has proven effective:

> We apply your payments to low APR balances first. You cannot pay off higher APR balances until you pay off lower APR balances. That means your savings from this promotional offer will be reduced if you make purchases or cash advances that have higher APRs.

In addition, we urge the Agencies to mandate a tabular disclosure illustrating the effect of the payment allocation method used by the card issuer on the amortization of promotional and other balances on the card account. This tabular disclosure would serve as a powerful educational tool for consumers and, we believe, would allow those first time users of our and other promotional offers to "experience" the effect of payment allocation before choosing to accept an offer. In short, we believe this tabular disclosure plus the other payment allocation disclosures we have recommended would address the Agencies' concerns about the transparency of payment allocation methods and their effect on promotional offers. The following is a possible prototype of the tabular disclosure:

How Different Balances May Affect Your Promotional Rate

	Example 1	Example 2	Example 3
Purchase APR @ 12%	$1000	$0	$500
Promotion APR @ 0%	$0	$1000	$500
Blended APR	12%	0%	6%
Interest Owed Each Month	$10	$0	$5

We urge the Agencies to consider a fourth allocation method.

We believe strongly that any issues perceived by the Agencies with payment allocation can and should be addressed through enhanced disclosure under Regulation Z, and that none of the three allocation methods specified in Section 23 are sufficient to preserve promotional offers as we currently know them or the consumer and competitive benefits that flow from them. If the Agencies choose to continue with their current approach, we urge them to at least consider a fourth allocation method that allows card issuers to allocate payments to the largest account balance first and then, when balances are equal, proportionally among all balances. This proposal would certainly be no more complex than what is now in Section 23 and might preserve the economic viability of promotional offers as an account acquisition tool—when the promotional balance is likely to be the account's largest.

We urge the Agencies to delete the special rule insulating promotional rate offers from amortization.

We urge the Agencies to delete Section 23(b)(1)(i) to the extent it prohibits payments to be allocated to promotional rate balances while other balances remain on a consumer credit card account.

First, this provision exacerbates the damage Section 23 does to the economic viability of low rate promotional offers. It insulates the balances resulting from those offers from any pay down on a well-used account. This is likely to suppress the number, size, and duration of low rate offers and threatens their usefulness as a marketing technique.

Second, the provision is based on an illogical premise. The Agencies assert that the provision is necessary for the consumer to get the "full benefit" of a promotional offer. However, the same could be said of any other balance on the account: for a consumer to get the "full benefit" of an advertised purchase APR, cash advance APR, or any other APR, those balances would need to be segregated for payment allocation purposes as well. If the Agencies are convinced that the payment allocation formulas mandated in Section 23(a) are the only ones that can be fairly applied, they should be applied to all balances concurrently so that the "full benefit" of one APR is not received at the expense of another. Further, we believe that the Agencies' concerns for consumers receiving the "full benefit" of the promotional offer can be addressed through enhanced disclosure that permits the consumer to understand the extent of the benefit and how it may change depending upon how the product is used.

We also urge the Agencies to delete the special rule effectively mandating grace periods for consumers who revolve promotional balances.

For similar reasons, we urge the Agencies to delete Section 23(b)(2), which effectively mandates grace periods for consumers who revolve promotional balances. This provision requires issuers to provide for an interest free loan period (a grace period) when making low rate promotional offers to consumers who transfer a balance.

First, this provision also damages the viability of low rate promotional offers. The mandatory grace period limits the freedom of card issuers to integrate promotional balances with other balances on a credit card account. It may also create very complicated account structures, which would be difficult for credit card issuers to disclose and difficult for consumers to understand.

Second, the provision is also based on a questionable premise. The premise appears to be that a mandatory grace period is required for consumers who revolve low rate balance transfer and other promotional offers so that consumers can take advantage of both a low rate offer and a grace period on purchases. As a result, the provision prohibits credit card issuers from segmenting their customers and prospects as they deem fit to shape offers that might appeal to one group but not another. To be more specific, the provision prohibits credit card issuers from shaping offers that might appeal to consumers who revolve credit, for whom low rates and not grace periods are primarily of interest, instead of consumers who pay in full each month, for whom grace periods are primarily of interest. The Agencies do not explain, however, why fairness requires creditors to offer the same incentives to all segments of consumers, or why this basic market segmentation decision is the province of the Agencies and not private businesses.

Section 24
Application of increased rates to outstanding balances

We strongly oppose Section 24, which would mean higher prices and less credit availability for consumers

We strongly oppose Section 24, which would restrict interest rate increases on existing consumer credit card balances. These restrictions would negatively impact safety and soundness and impede risk management practices by credit card issuers by preventing timely and effective repricing actions in response to market conditions and consumer defaults. The restrictions are also contrary to the nature of open-end credit, would force changes in credit card pricing and underwriting decisions to the detriment of consumers, would have an adverse effect on the use of securities to fund credit card receivables, and override well-established state law.

Section 24 undermines how credit card issuers manage market and credit risk by protecting existing balances from repricing. Yet, it continues to endorse the management of interest rate risk through the very same mechanism—index-based repricing. To understand the premise for repricing existing balances it is important to examine its roots. In the early 1980s, most credit card issuers offered only fixed rate credit card products to consumers. These card issuers managed interest rate risk by hedging against possible future rate changes. With the many innovations in the credit card industry, card issuers then found more effective ways of managing interest rate risk by offering products with variable rates. As the prime rate changed so did the rate that was applied to the loan balance. Significantly the rate change applied not only to new balances, but to existing balances as well. As innovation in the industry continued and competitors sought to provide consumers with competitive pricing, they used the ability to reprice customers for changing market or credit risk conditions to manage those risks, while keeping prices low. The fairness of the practice is no less compelling when managing market or credit risk than it is when managing interest rate risk. And just as the practice of applying variable rate changes to the full balance and not just new balances is an acceptable banking practice, so should the practice of repricing existing balances to manage market or credit risk. This is particularly true for non-term, open-end, unsecured consumer loan products such as credit card loans, which pose the greatest risks to the lender.

Section 24 represents bad public policy.

Proposed Section 24 and its restrictions on the repricing of existing balances represent bad public policy for a number of reasons.

First, proposed Section 24 would have a significant economic impact. Restrictions on the repricing of existing balances would substantially reduce interest yields.[12] Industry data suggest that if card issuers compensated for the lost interest yield through a general increase in interest rates, the APRs on revolving balances would increase by substantial amounts.[13] The data also

[12] Industry Data Letter at Exhibit 1, Table 1.

[13] Industry Data Letter at Exhibit 1, Table 8b.

suggest that if issuers instead reacted to the reduced interest yields by decreasing credit lines, the impact on credit lines would be similarly substantial.[14]

Second, proposed Section 24 would impair risk management practices by prohibiting the repricing of risky accounts to mitigate credit loss. Credit card accounts with large existing balances represent almost all of the credit risk faced by credit card issuers. At Citi, accounts that pay a small percentage of the outstanding balance per month, and therefore tend to maintain large outstanding balances, are responsible for the overwhelming majority of credit losses over the course of a year. Moreover, accounts that are repriced with a penalty APR are significantly more risky than accounts that are current.[15] The increase in risk of accounts subject to penalty repricing is not caused by the penalty repricing itself, in our experience. We periodically test the effect of penalty repricing by holding out a control group of risky accounts from a repricing action. The loss rate for the control group is not significantly higher than the loss rate for the repriced group.

Third, proposed Section 24 is contrary to the nature of open-end credit and would force changes in credit card pricing and underwriting decisions to the detriment of consumers. Repricing of existing balances is a key and inherent characteristic of open-end credit. It allows credit card issuers to manage market and other risks that affect the cost of providing revolving credit over long periods of time. As a result, card issuers can extend credit more cheaply and more broadly than they could otherwise. They can forego large pricing cushions that might otherwise be necessary to accommodate future market and credit risk.

Without the freedom to reprice existing balances, credit card issuers would be unable to effectively price for risk absent the power to divine the future direction of interest rates, health of the general economy, creditworthiness of particular customers, and other risks. As a consequence, both pricing and underwriting would change to the detriment of consumers. Card issuers would be forced to make speculative predictions about future conditions, would likely raise or "front load" prices to provide the necessary cushion for mistakes in those predictions, and would likely make more extreme adjustments in the pricing of new balances, as this would be the only remnant of traditional risk-based pricing left to them. In simpler terms, credit card prices are likely to be higher and, as far as new balances are concerned, more volatile. Similarly, card issuers are likely to tighten underwriting standards to compensate for the significant burden on their ability to manage risk through pricing responses. Instead of asking higher risk customers to pay for their higher costs, proposed Section 24 would require all customers to bear these higher costs and restrict the general availability of credit as card issuers take steps to manage future, but unknown, credit risk.

Fourth, proposed Section 24 could have a considerable adverse effect on the use of securities to fund and spread the risk of credit card receivables. The right of credit card issuers to reprice existing balances is a material component of the risk and reward characteristics of

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[14] Industry Data Letter at Exhibit 1, Table 3c.

[15] *Cf* Industry Data Letter at Exhibit 5, Table 1a, Current (Not Late) column and Industry Data Letter at Exhibit 6, Table 2a, Overall column.

these securities. Without that right, the securities would become riskier and less attractive to investors, thereby increasing the cost of those securities and making them less liquid. The resulting reduction in the amount of secondary market capital to credit card issuers would raise their funding costs and, ultimately, the cost of credit for consumers.

Fifth, proposed Section 24 overrides an area of credit card law traditionally reserved for and controlled by state law. The commentary to Regulation Z, for example, expressly recognizes that "[h]ow changed terms affect existing balances, such as when a periodic rate is changed and the consumer does not pay off the entire existing balance before the new one takes effect" is an issue "controlled" by state law. 12 C.F.R. § 226, comment 9(c)-2. In South Dakota, where Citi's card issuing bank is located, state law expressly permits interest rate increases "effective as to existing balances" but, in return, mandates that card issuers provide consumers with a right to opt out of such increases among other account changes. S.D. Codified Laws § 54-11-10. This exemplary state statute has been in effect for 25 years, and we have built and managed our card business in compliance with it. We believe the balance it strikes between a card issuer's right to price for risk and a consumer's right to reject those increases is far superior to the approach taken in proposed Section 24.

The goals of Section 24 can be achieved through changes to Regulation Z.

We believe that any action by the Agencies to address price increases on existing balances can and should be undertaken through the Board's pending Regulation Z rulemaking. In that proceeding, we have recommended the following changes to Regulation Z:

(1) a rule prohibiting voluntary interest rate increases or other changes in the term of a new credit card account for at least one year from the date the card is issued (with exceptions for the expiration of promotional APRs and the operation of variable APR, penalty APR, and other contractual provisions), and

(2) limiting the new 45-day penalty APR notice proposed by the Board to "off-us" defaults with another creditor, plus the addition of a consumer opt out right for any rate increases resulting from such defaults.

We believe both of the Regulation Z changes we have recommended would achieve the underlying goals of Section 24 while permitting legitimate risk management practices by card issuers. The one year moratorium on voluntary rate increases on new card accounts would ensure that consumers benefit from disclosures made to them in solicitation and account-opening materials. Limiting the proposed penalty APR notice to "off-us" defaults would address the problems of consumer surprise and perceived unfairness in rate increases in the context in which they occur while preserving the right of card issuers to take risk-based pricing actions in the event of "on-us" defaults. As the Board's own consultant found, the problems of consumer surprise and perceived unfairness are not associated with late payments and other "on-us" defaults with the same creditor,[16] where terms are fully disclosed to the consumer. Instead, they are associated with "off-us" defaults where, as the Agencies note in the supplemental information for Section 24, the increase is based on consumer behavior that is unrelated to the credit card account in question or on factors that the consumer may not have been aware of or able to control.

These Regulation Z changes should include additional repricing exceptions and a 5-day rather than 30-day late payment exception.

If the Agencies are nevertheless determined to restrict increases on existing balances, we urge them to do so within the context of Regulation Z and to add exceptions that would permit reasonable repricing actions by credit card issuers.

First, the Agencies should add exceptions that would permit the repricing of existing balances under either of the following circumstances:

(1) upon the expiration of a credit card, typically in 2 years, but which may be 1 year for risk-related reasons; or

(2) upon the acquisition of a credit card portfolio or other seminal event affecting the ownership or characteristics of a card portfolio.

Under this proposal, the adverse consequences of Section 24 would be mitigated to some extent because card issuers would be assured of the right to update or "re-set" the APRs on consumer credit card accounts at reasonable intervals or following a significant change in circumstances. This would allow them to make pricing and underwriting decisions for a more manageable horizon and relieve concerns about the effect locked in rates may have on future business decisions regarding a card portfolio. At the same time, this proposal would promote the rate stability and predictability for consumers that the Agencies are endeavoring to achieve through proposed Section 24. We should also note that state law would give many consumers the further protection of a right to opt out of rate increases permitted under our proposal. This would certainly be the case for our customers due to the opt out right provided under South Dakota law.

Second, the Agencies should modify the exception currently in proposed Section 24(b)(3), which permits card issuers to increase interest rates on existing balances in the event a consumer's payment is late by 30 days or more. Although we strongly support an exception permitting interest rate increases in the event of a late payment, we believe the 30-day waiting period delays a risk-based pricing response far too long in the face of an account's deteriorating risk profile. It should be reduced to a waiting period of no more than 5 days.

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[16] Macro International Inc., Design and Testing of Effective Truth in Lending Disclosures, submitted to Board of Governors of the Federal Reserve System, May 16, 2007. See, for example, page 10, which states that consumers understand that the APRs on their credit card accounts can increase "if they mess up somehow" through a late payment or similar default.

Industry-wide data show that the risk associated with late payment is substantial as soon as the payment is past due and that such risk increases steadily each day the payment is past due. In particular, accounts that were 2-5 days late showed twice the risk of loss as accounts that were current. For example, industry data showed that 2.8% of accounts that were current became 90 or more days late, charged off, or bankrupted over the next 12 months, while more than twice that percentage—5.9%—of accounts that were 2-5 days late went bad in one of those ways over that period. The increased risk of loss was significant even after a payment was only one day late. Specifically, 4.4% of accounts that were one day late went bad in one of those ways over the next 12 months or more than one and a half times the percentage of accounts that were current and went bad in that same period.[17]

Waiting for an account to go 30 days past due would expose card issuers to an even more significant risk of loss. Specifically, 33.1% of accounts that were 30 or more days past due in a given month became 90 or more days late, charged off, or bankrupted over the next 12 months. That is more than *10 times* the risk of an account that was current.[18] Moreover, it should be kept in mind that the 30-day waiting period imposed by proposed Section 24 would be overlaid by the 45-day penalty APR notice proposed for Regulation Z, which would actually be a 60-day notice period for the many card issuers unable to make mid-cycle APR changes due to systems limitations. During that 60-day period, the risk of loss associated with the overdue account would continue to grow while the card issuer's most potent tool for mitigating that loss, repricing, would lie unused. An extraordinary 50.1% of accounts that were two cycles past due went bad over the next 12 month—more than *17 times* the percentage of current accounts. [19]

Accordingly we urge the Agencies to change the 30-day late exception to an exception for any late payment that is past due for (1) 5 days, or (2) as of the close of the billing cycle following the missed payment due date, whichever is earlier. The 5-day late rule approximates a typical interval between a payment due date and cycle closing date. In connection with the cycle closing date alternative, we would support an amendment to Regulation Z requiring that each periodic statement disclose the next cycle closing date. Many periodic statements already include such a disclosure.

By permitting a more expeditious risk-based pricing response by card issuers in the event of late payment, our proposal would reduce the risks and costs associated with the 30-day late payment exception. As shown in the industry-wide data, a palpable risk of loss attaches immediately to any late payment and grows the longer a payment remains overdue. Reducing the late payment trigger period from 30 days past due to no more than 5 days past due should substantially reduce the risk and resulting costs to issuers as discussed above. In addition, our proposal continues to safeguard against "hair trigger" late payment deadlines for the imposition of penalty APRs by establishing a standard period of 5 days before a payment is deemed late.

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[17] Industry Data Letter at Exhibit 5, Table 1a (Apr-07 row).

[18] *Id.*

[19] *Id.*

The confusing distinction between existing and new balances shows the unworkable nature of Section 24.

The dividing line between existing and new balances established by Section 24(a)(2) -- the amount owed as of the end of the 15th day following a 45-day change in terms or penalty APR notice as proposed under Regulation Z -- would be confusing to consumers, result in significant costs to card issuers, and generally shows the unworkable nature of Section 24.

Proposed Model Form G-20 in the pending Regulation Z proposal illustrates how this dividing line would work for a change in terms notice issued on January 1 as follows:

> Beginning 2/15/08, any rate increases described below will apply to transactions made on or after 1/15/08. Current rates will continue to apply to transactions made before 1/15/08.

The use of the January 15 date in this notice is one of its most confusing elements. The consumer receiving it on or about January 1 is told that January 15 will serve as a dividing line between balances that will receive the new APR and those that will not as of February 15. The choice of January 15 as the date for the dividing line is unexplained and may be perceived as a complete mystery by most consumers. The message being communicated by the January 15 date is unclear as well. For example, a consumer might interpret the date as a recommendation to accelerate spending to receive an economic advantage before the change in the APR. The results of such accelerated spending may be anything but an advantage to the consumer if it encourages unwise spending or lengthens the duration of outstanding balances.

In practice, the 15-day dividing line between existing and new balance also belies the reality faced by the many card issuers who cannot make mid-cycle changes in APRs due to systems limitations. For those issuers, the 15-day dividing line is actually a 30-day dividing line. In the context of this notice, February 1 and not January 1 would be the dividing line between existing and new balances. Put another way, balances would be insulated against the APR increase for 30 and not 15 days, thereby doubling the cost to issuers suggested by the notice.

The 15-day dividing line also plays a large part in making the relationship between Section 24 and the proposed 45-day penalty APR notice in Regulation Z almost impossible for anyone to understand. For example, the Board's illustration in proposed comment 9(g)-1.ii.A to Regulation Z posits a scenario in which a consumer would experience the following time line:

- June 15: payment due date, which is missed,
- June 24: is sent a notice stating that the penalty APR has been triggered and will apply as of Aug. 9 to transactions made on or after July 9,
- June 30: pays late,
- July 9: dividing line date referenced in notice passes with no change in APR,
- Aug. 9: penalty APR can be applied to balances as of July 9 forward but not to earlier balances, and

- Late Aug: penalty APR actually applied to balances as of July 9 forward by card issuer that does not make mid-cycle APR changes, and consumer thereafter receives first billing statement showing the application of the penalty APR to those balances.

Understanding this scenario, understanding the relationship of the July 9 dividing line and the missed June 15 payment due date, understanding that the June 30 payment stops the penalty APR for balances before July 9 but not after, and understanding the relationship between the August 9 penalty APR activation date and the July 9 dividing line date, let alone the June 15 missed payment due date, is almost an exercise in legal due diligence and certainly not an exercise designed for the average consumer. At the same time, the credit card issuer's opportunity to implement even an initial risk-based pricing response to the consumer's default is extraordinarily delayed. Here, for card issuers that do not make mid-cycle APR changes, the consumer's payment default in mid-June would not result in a penalty APR being applied to the account until late August. In other words, the consumer would not experience any consequences from a default that occurred at the beginning of summer until just about Labor Day. In the mean time, the consumer's behavior on the account may have deteriorated further.

The exception for variable rates requires clarification.

Citi supports proposed Section 24(b)(1), which permits increases on existing balances pursuant to methods used to adjust variable rates.

We are concerned, however, that the provision's description of "an index that is not under the [card issuer's] control and is available to the public" is too narrow. We believe the restrictions on risk-based pricing in proposed Section 24, if promulgated, may compel credit card issuers to use more sophisticated variable rate indices to mitigate risk. For example, instead of an index based solely on the U.S. Prime Rate, a card issuer may want to use a blended index of the U.S. Prime Rate and other publically available measures, such as the U.S. Consumer Price Index and U.S. Unemployment Rate. We believe such a blended index should be allowed under the provision, so long as each component is publically available and not under the card issuer's control and the card issuer discloses to the consumer the percentage of each component used in the blend. We urge the Agencies to clarify that the use of such a blended index is permissible, because the provision's current reference to a singular "index …available to the public" might be construed as suggesting otherwise.

We are also concerned about comment 24(b)(1)-1, which states broadly that a card issuer "may not increase the rate on an outstanding balance by changing the method used to determine that rate." This comment could ensnare card issuers that change the index used for a card program or portfolio in the ordinary course of business, because at some point the different index may have an effect on the rates applied to existing balances. Accordingly, we urge the Board to clarify this comment to provide that a change in an index does not take the issuer outside the exception set forth in Section 24(b)(1), so long as the consumer's rate remains the same at the time the index is changed.

The amortization rule for the repayment of existing balances should be changed to 2 years.

Proposed Section 24(c)(1) further restricts risk mitigation by card issuers by limiting the repayment terms that issuers can impose on existing balances subject to a rate increase prohibition under Section 24(c)(1). We oppose this provision as another unwarranted intrusion on risk management practices by card issuers. To the extent it interferes with the negotiation of work-out arrangements, it may even be harmful to consumers. At the very least, we urge the Agencies to decrease the mandatory amortization period in proposed Section 24(c)(1)(ii) from 5 years to 2 years. This would provide card issuers with more flexibility to implement new repayment structures to compensate for the restrictions on pricing as a risk mitigation tool.

Section 25
Fees for exceeding the credit limit caused by credit holds

Citi does not support Section 25, because we believe it is another solution in search of a problem. This provision would prohibit credit card issuers from charging consumers over-the-credit limit fees caused by credit holds. We do not believe that this is a common practice in the credit card industry. To the extent this practice arises from time to time as a source of consumer complaint, we believe it is one that should be addressed through supervisory guidance or enforcement. If the Agencies nevertheless insist on promulgating a rule against the practice, we believe such a rule belongs in Regulation Z.

Section 26
Balance computation method

Citi opposes the Agencies' use of their FTCA authority to prohibit the longstanding and commonly used two-cycle balance computation method as an unfair practice. As discussed in the Introduction section of this letter, we would not object to the prohibition of the practice under Regulation Z.

Section 27
Security deposits and fees for the issuance or availability of credit

As discussed in the Introduction section of this letter, Citi supports Section 27, and we believe it also represents an appropriate use of the Agencies' FTCA authority.

Section 28
Firm offers of credit

Citi opposes the Agencies' use of their FTCA authority to require this straightforward credit card solicitation disclosure, even though the Agencies' model disclosure is similar to one we already provide. As discussed in the Introduction section of this letter, we would not object to the new disclosure if it were required under Regulation Z or regulations implementing the FCRA.

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On behalf of Citigroup, I thank you again for this opportunity to comment on the Agencies' proposed amendments. If you have questions on any aspects of this letter, please call me at (212) 559-2938, Joyce ElKhateeb at (212) 559-9342, or Karla Bergeson at (718) 248-5712.

Sincerely,

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cc: Joyce ElKhateeb
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