Capital One Financial Corporation
1680 Capital One Drive
McLean, VA 20170

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Ms. Jennifer J. Johnson
Secretary
Board of Governors
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
regs.comments@federalreserve.gov

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attn: OTS-2008-0004
www.regulations.gov

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

Re: Proposed Regulation AA Unfair or Deceptive Acts or Practices (UDAP) In Connection With Consumer Credit Card Accounts
Board (Docket No. R-1314)
OTS (OTS-2008-0004)
NCUA (RIN 3133-AD47)

Ladies and Gentlemen:

Capital One Financial Corporation ("Capital One") is pleased to submit comments on the Regulation AA credit card rule proposed by the Federal Reserve Board ("Board"), Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA") (collectively, "Agencies").[1] We have already submitted comments on the

[1] Proposed Regulation AA, 73 Fed. Reg. 28904 (May 19, 2008). The OTS and NCUA issued proposed rules similar to Regulation AA to be contained in 12 CFR Part 535 and 12 CFR Part 706, respectively. References in this comment letter to Regulation AA also apply to the OTS and NCUA's proposed rules.

Board's 2008 Regulation Z proposal, and on the Agencies' Regulations AA and DD overdraft proposals.[2]

Capital One Financial Corporation (www.capitalone.com) is a financial holding company whose subsidiaries collectively had $92.4 billion in deposits and $147.2 billion in managed loans outstanding as of June 30, 2008. Headquartered in McLean, VA, Capital One has 740 locations in New York, New Jersey, Connecticut, Texas and Louisiana. It is a diversified financial services company whose principal subsidiaries, Capital One, N.A., Capital One Bank (USA), N. A., and Capital One Auto Finance, Inc., offer a broad spectrum of financial products and services to consumers, small businesses and commercial clients. Among its product lines, Capital One is one of the largest issuers of Visa and MasterCard credit cards in the world. A Fortune 500 company, Capital One trades on the New York Stock Exchange under the symbol "COF" and is included in the S&P 100 index.

Capital One applauds the Agencies for taking steps to address concerns regarding certain credit card practices. Capital One has been an advocate for reform since the Board first proposed its extensive revisions to Regulation Z in 2004.[3] In our comment letters relating to that and subsequent proposals, we supported the Board's overall objectives to improve and simplify disclosures, as well as to provide consumers with additional notice of any material change in the terms of their credit card account.[4] We urged the Board to go even further, however, and provide consumers not only with extended notice, but also the opportunity to opt-out of all forms of notice-based or penalty-based repricing.[5]

Capital One continues to believe in empowering its customers with notice and choice. As noted above, we have advanced this position in our public statements as well as in our business practices. More recently, Capital One reiterated its support of this framework in advising the Agencies to require financial institutions to give consumers the opportunity to opt out of overdrafts of their deposit accounts.[6]

As the Agencies recognize in the proposal, effective choice can only come with effective notice. To be effective, a notice must be simple, direct, timely and free of

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[2] Capital One Letter on Regulation Z of July 18, 2008 ("2008 Regulation Z Letter"). Capital One Letter on Regulation DD and Regulation AA Overdrafts of July 18, 2008 ("Overdraft Letter").

[3] Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 70925 (Dec. 8, 2004). Capital One Letter on the Advance Notice of March 28, 2005 ("ANPR Letter").

[4] ANPR Letter; 2008 Regulation Z Letter; Capital One Letter on the Second Advance Notice of December 16, 2005; and Capital One Letter on Regulation Z of October 11, 2007 ("2007 Regulation Z Letter").

[5] This opt-out regime would not apply in cases where a consumer has a variable interest rate tied to movements in a specific underlying index such as the Prime rate or LIBOR that has been predisclosed.

[6] Overdraft Letter.

distracting or irrelevant content.[7] At Capital One, we have spent considerable resources ensuring our disclosures, notices and other consumer communications are readable. We word, design, and consumer test our communications, including legal documents like the customer agreement, to make them clear and understandable.[8] We have revamped our account solicitation disclosures entirely, adopting a plain English, question and answer format, with bold headings and larger font sizes. We have employed a nutrition food label-style Fact Pact to summarize key terms, including our repricing policy. Lastly, we also include our repricing policy in the actual text of the solicitation we send to our potential customers. We take these steps to help arm our customers with information so that they can make informed decisions for themselves.

Capital One applauds and shares the Agencies' goal of "ensur[ing] that consumers have the ability to make informed decisions about the use of credit card accounts without being subjected to unfair or deceptive acts or practices."[9] We are concerned, however, that the Agencies have not achieved this goal through this proposal. By relying almost entirely on its authority under the Federal Trade Commission Act ("FTC Act"), rather than utilizing the more clear and relevant framework provided under Regulation Z, the Agencies have been forced to rationalize their proposed solutions through largely ungrounded assumptions about creditor practices and consumer behavior. Put more plainly, we believe that the Agencies, in declaring many long-standing industry practices as "unfair," have failed to meet the clear standards laid out in that statute and adopted by the Agencies.[10] We believe that the proposal's fragile framework is difficult to support, and creates substantial risk of significant unintended consequences that benefit neither consumers nor the industry.

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[7] In responding to the Board's request for comment on Regulation Z disclosures, we have stated that disclosures should be focused on the following desirable characteristics:

- Importance
- Comparability
- Clarity
- Simplicity
- Specificity

ANPR Letter at 3.

[8] Capital One recently redesigned the credit card customer agreement. The agreement was revised to have a Flesch-Kincaid score of 61.2 with a ninth grade readability level, was reviewed by a nationally known plain language writing expert, and was submitted to two days of one-on-one usability testing with consumers from various financial and educational backgrounds.

[9] 73 Fed. Reg. at 28909.

[10] Congress codified the "unfair" rulemaking standard for the Federal Trade Commission (FTC) at 15 U.S.C. §45(n). The Board, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) have adopted this standard. *See* Board and FDIC, Unfair or Deceptive Acts or Practices by State-Chartered Banks (Mar. 11, 2004) ("UDAP Guidance"); and OCC Advisory Letter 2002-3, Guidance on Unfair or Deceptive Acts or Practices (Mar. 22, 2002). The Agencies also adopt this standard in this proposal. *See* 73 Fed. Reg. at 28908.

As noted above, Capital One has vigorously supported the concept of progressive, balanced reform. We believe that elements of the Agencies' proposal meet this test; however, certain provisions, as well as the overarching framework, fail to live up to these standards. We believe that the Agencies' objectives could be better achieved through the use of a more appropriate legal authority and well-established regulatory scheme, and carefully defining the problems and appropriate solutions so as to not eliminate benefits to consumers and create unnecessary costs, complexity and risks. Further, we believe that several of the specific provisions of the proposal are ill-advised and unnecessarily restrictive, sacrificing legitimate and beneficial consumer choice and empowerment on the altar of dubious notions of "fairness."

We offer our comments below.

I. Any credit card rule should be promulgated under Regulation Z

a. Benefits of coverage under Regulation Z instead of Regulation AA.

The Agencies issue the proposed Regulation AA credit card rules under their authority to prohibit unfair or deceptive acts or practices ("UDAP") in section 5(a) of the FTC Act. While we acknowledge the Agencies' authority to conduct rulemaking under UDAP, we urge them to use that authority judiciously and to implement any specific new requirements through Regulation Z – consistent with the process the Board is currently undertaking for its 2007 and 2008 Regulation Z proposals. Doing so has several important advantages over creating a new, untested and largely unsupported regulatory regime under Regulation AA:

- Implementing the credit card prohibitions through Regulation Z will ensure that the prohibitions and rules will apply to all credit card issuers, not just those regulated by the Agencies. As the Agencies note, "state-chartered credit unions and any entities providing consumer credit card accounts independent of a depository institution...would not be subject to these rules."[11] Their credit card customers are as worthy of protection as are the customers of the financial institutions that the Agencies regulate. In fact, if the prohibitions in the rule result in certain credit card products no longer being offered or being offered on more expensive terms, it is plausible that the number of un- or under-regulated credit card issuers will increase, enticing unwary consumers with seemingly attractive product largely outside the protective scope of the Agencies' rules. As business migrates to these entities, the ironic result is borrowers receiving *less* protection, not more.[12]

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[11] 73 Fed. Reg. at 28909.

[12] This phenomenon is observed in the mortgage context where serious consumer abuses were perpetrated by institutions or brokers not directly regulated by the federal banking and thrift regulators. Comptroller Dugan, in discussing banking standards tightened by the federal banking and thrift regulators noted that

- Implementing the prohibitions through Regulation Z will facilitate melding any specific prohibitions with their related disclosures and consumer protections already required by Regulation Z or proposed as part of the 2007 and 2008 Regulation Z proposals.[13] This construct would offer a significant opportunity to minimize compliance burdens and consumer confusion, while permitting the consumer protections and disclosures to work meaningfully together.[14] The attached appendix identifies gaps and areas of overlap between the proposal and Regulation Z.

- Implementing the prohibitions through Regulation Z will result in these protections being enforced in a clearly defined framework of remedies, damages, administrative enforcement, and private right of action.

For all of the foregoing reasons, a regime of credit card prohibitions and consumer protections cries out for incorporation in Regulation Z through a rulemaking process conducted by the Board.

b. The Board has authority under the Truth in Lending Act to prohibit specific credit card practices, including any practices deemed to be "unfair"

We emphasize that many of the practices proposed to be prohibited under Regulation AA are not inherently unfair or deceptive. On the contrary, these practices are permitted by the Board's Regulation Z and have been sanctioned by the Agencies in the course of conducting regulatory examinations. If the Agencies would now like to stop certain practices, the Truth in Lending Act (TILA) provides sufficient authority for the Board to promulgate rules to end these practices. TILA authorizes the Board to "prescribe regulations to carry out the purposes of [the Act],"[15] and those purposes include "to protect the consumer against inaccurate and unfair credit billing and credit card

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> [T]hese standards apply only to federally regulated institutions. They do not address similar practices at state-regulated institutions that are not banks, even though, by nearly all accounts, such institutions engaged in some of the most aggressive mortgage practices. As a result, the federal banking agency standards cannot be truly effective unless they extend to non-federally regulated institutions as well, to create truly national standards.

Testimony of John C. Dugan, Comptroller of the Currency, before the House Committee on Financial Services (October 24, 2007).

[13] The provisions in this proposal could easily be inserted into existing Regulation Z sections such as §226.5, §226.9, §226.10, and §226.12.

[14] The Agencies under the plain language requirement of section 722 of the Gramm-Leach-Bliley Act seek comment on how to make the proposal easier to understand. We emphasize that the rule would be much easier to understand if it is in Regulation Z where the related disclosures and other requirements are contained.

[15] TILA §105(a), 15 U.S.C. §1604(a).

practices."[16] The credit card practices the Agencies propose declaring unfair or deceptive under the FTC Act could instead be found to violate TILA and be prohibited in Regulation Z. The courts have given great deference to the Board in the use of its TILA authority.[17]

c. The Agencies have not met the UDAP standard in the proposed Regulation AA credit card rule.

The Agencies propose declaring six credit card practices to be unfair.[18] We discuss each of these practices in more detail later in this letter, but offer significant examples here to illustrate the shortcomings of the Agencies' proposal to rely on its UDAP authority to effect certain changes in industry practices. The test for "unfairness" is clear and necessarily sets a high bar for declaring a practice "unfair".[19] In short, we do not believe that one or more of the three elements of "unfairness" have been satisfied in the rationales for declaring specific practices to be unfair.[20]

Notably, the Agencies state that consumers are not able to avoid injury because disclosures are ineffective. For example, in rejecting the concept of notice and choice to address concerns regarding the repricing of credit card accounts, the Agencies state that "no matter how well the right is disclosed, a substantial number of consumers might inadvertently forfeit that right by failing to read, understand, or even act on the notice."[21] This argument is inconsistent with disclosure requirements proposed elsewhere in

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[16] TILA §102(a), 15 U.S.C. §1601(a).

[17] The Federal Reserve's interpretation of TILA, as implemented by Regulation Z, is given a high degree of deference and controls unless it is "demonstrably irrational" or "arbitrary, capricious, or manifestly contrary to the statute." *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980); and Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232 (2004).

[18] The Agencies propose declaring a seventh credit card practice concerning firm offers of credit to be deceptive. As this letter discusses later, this proposal overlaps with a 2007 Regulation Z proposal and should be eliminated.

[19] For a practice to be unfair, (1) it must cause or be likely to cause substantial injury to consumers; (2) the injury must not be reasonably avoidable by consumers themselves; and (3) the injury must not be outweighed by countervailing benefits to consumers or to competition. Public policy may be considered but may not serve as the primary basis for determining whether an act or practice is unfair. 15 U.S.C. §45(n) as adopted by the Agencies in the UDAP Guidance and this proposal. This standard does not apply to TILA rulemaking. For example, see the analysis for the proposed 2007 and 2008 Regulation Z rules at 72 Fed. Reg. 32948 (June 14, 2007), and 73 Fed. Reg. 28866 (May 19, 2008).

[20] One of the six "unfair" practices the Agencies propose restricting is associated with card products where high, upfront fees consume over 50 percent of the available credit line. Capital One supports such a restriction and the Agencies' use of their UDAP authority to do so. In this instance, Capital One agrees that the Agencies have met the standards under UDAP.

[21] 73 Fed. Reg. at 28919.

Regulation AA[22] and in the numerous consumer banking laws, regulations, and guidance issued and implemented by the Agencies.[23]

Our own experience with notice and choice shows that consumers read the disclosures and take action when the issue is important to them and when it is in their interest to do so. For example, there is a significant increase in opt-outs in response to a notice about a credit card rate increase compared to a notice about non-APR related changes. Moreover, the rate of opt-out accelerates as the rate increase accelerates; put another way, the higher the rate increase, the higher the opt-out rate. Analysis of a notice-based repricing effort undertaken in the first half of 2007, in which Capital One repriced certain accounts due to increases in our cost of funding, reveals that customers receiving the largest increases opted out at a rate double those receiving the lowest rate increases. Our experience clearly supports the notion that consumers do read and understand their notices when the information is presented clearly and the issue is important to them.[24] Disclosures are effective and consumers will take action to avoid "injury."

Even if a consumer does not take action, that does not make a practice unfair. As the FTC stated, "[a] practice is only unfair if the injury is not one that a consumer can reasonably avoid. If a consumer could reasonably have made a different choice, but did not, the practice is not unfair under the [FTC Act]."[25] The Agencies also reference the FTC's statements, noting that "[t]he test is not whether the consumer could have made a wiser decision but whether an act or practice unreasonably creates or takes advantage of an obstacle to the consumer's ability to make that decision freely."[26] Regardless of whether consumers take action, clear disclosures provide a reasonable way for consumers to avoid injury.

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[22] In this same proposal, the Agencies are requiring additional disclosures for firm offers of credit, and notice and opt-out for overdrafts on deposit accounts.

[23] For example, TILA, the Truth in Savings Act, the Equal Credit Opportunity Act, the Electronic Fund Transfers Act, the financial privacy provisions of the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act/Fair and Accurate Credit Transactions Act, and numerous regulations and guidance issued by the Agencies rely principally on timely and accurate disclosures to ensure consumers are effectively informed of their rights or of financial products available in the marketplace.

[24] The Agencies' assertion that there is no rational explanation for why a consumer would agree to a rate increase is simply misplaced. A modest increase from a former market based rate to a current market based rate is entirely appropriate, and consumers are likely to recognize changes to the overall economic environment given typically expansive media coverage of Federal Reserve rate increases and other changes to the interest rate environment. Thus, their willingness to accept a rate increase is based on their recognition of current market conditions. Such market movements in interest rates will also typically be reflected in the contemporaneous credit card offers they receive. As the Agencies and others note, the volume of such solicitations is high, thus providing consumers with a clear lens into the current state of the credit card marketplace at any moment in time.

[25] See FTC Letter to OTS on UDAP Rulemaking of December 12, 2007 ("FTC Letter").

[26] 73 Fed. Reg. at 28908.

In addition to the "reasonably avoidable" prong of the "unfair" standard, the other two prongs have not been satisfied either. In some cases, the Agencies define substantial injury as the monetary injury resulting from an increased interest rate applied to a consumer's credit card account.[27] This ignores situations where the increased rate may be equal to or lower than the rate offered the consumer by other issuers due to the consumer's increased risk or changes in the economic environment. In such cases, the consumer is not injured by the increased rate. Even if there is an injury, the analysis for the third prong includes considering both the cost of imposing a remedy and any benefits that consumers enjoy as a result of the existing practice.[28] Some of the prohibitions alone, but especially in combination with other parts of proposed Regulation AA and Regulation Z, result in highly complex analysis and costly system changes. Consumers would also be confused as their various balances and various APRs multiply, as different APRs on different balances change at different times, and as certain balances are paid down and not others.[29] In addition, credit costs for all consumers may rise and certain preferred credit card products (e.g., fixed-rate cards) or features (e.g., longer term introductory rates) may simply be eliminated as uneconomic or impractical. Credit availability will also be reduced. Consumer confusion, loss of consumer benefits, and the ultimate cost of the Agencies' proposed remedies are high, and would appear clearly to outweigh the benefits of decreasing the amount of interest paid by a segment of consumers at the expense of other consumers.

The Agencies have rulemaking authority under the FTC Act. This rulemaking authority, however, should be used carefully and only (1) when there is no other statutory or regulatory regime available, and (2) the unfair or deceptive standard is met. That is most assuredly not the case in this instance where a clearly relevant and adequate regime, Regulation Z, is available, and critical elements of the UDAP standard have not been satisfied. Thus, to the extent that the Agencies ultimately adopt any of the restrictions outlined in the proposed rule, in whole or in modified form, we urge the Board to do so within the context of Regulation Z.

II. Application of Increased APR to Outstanding Balances

a. Consumers should have the right to reject unilateral increases in interest rates, including penalty repricing.

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[27] Examples include the legal analysis for the rule on payment allocation and the rule on application of a higher interest rate to an outstanding balance. 73 Fed. Reg. at 28917 and 19.

[28] 73 Fed. Reg. at 28908, citing the FTC Letter.

[29] For example, consumers may be unpleasantly surprised when the deferred interest period expires and they still have a balance despite having made monthly payments during the period when interest was deferred.

The most significant and controversial element in the Agencies' proposed revisions to the UDAP rules is the proposal that credit card issuers be prohibited from applying rate increases to existing balances. It is a dramatic change from the current regulatory regime where a credit card issuer may increase rates on existing balances with appropriate advance notice to the consumer and, if the credit card issuer discloses to the consumer the penalty-repricing triggers at the inception of the account, it need not give notice prior to implementing the penalty interest rate on existing balances. [30]

We agree that action is needed to ensure that any repricing of credit card accounts is conducted in a manner that is fully transparent to consumers, and provides consumers with choices on how to respond to such changes. We do not believe, however, that repricing of existing balances is inherently unfair, and thus subject to remedy only under a UDAP rulemaking. In truth, particularly in the context of penalty repricing, the risk to the issuer lies in the existing balance, not in future purchases. A significant majority of consumers who experience difficulties managing their accounts – for example, through multiple late payments – do so only after running up a significant balance on their account. As such, repricing of only future balances does little to mitigate the increased risk of default presented by that consumer. Taking away all forms of repricing of existing balances, therefore, creates significant potential safety and soundness concerns for card issuers.

Repricing

To provide greater context to this discussion, we believe it is necessary to understand the two broad circumstances under which repricing of credit card accounts may take place.[31] Credit card accounts are typically subject to notice-based repricing and penalty-based repricing. Notice-based (or economic-based) repricing generally reflects a response to changing market conditions, where an issuer may choose to increase or decrease an individual's APR based on periodic movements in interest rates, increases in the cost of wholesale funding or deposit rates, or other changes in market conditions. Consumers in these cases will be notified of such changes in advance (Capital One already has adopted the Board's proposed 45-day advance notice regime under Regulation Z) and provided with an opportunity to opt out of such increases in exchange for agreeing to cease further activity on the account and pay off the balance over time at the prior rate.

The ability to reprice existing balances of credit card accounts has been an important feature of the resiliency of the product for card issuers. Unlike most consumer loans, a

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[30] Some credit card issuers also engage in penalty repricing if the consumer has broken an account rule on another account, or on an account with some other creditor, or if the consumer's creditworthiness as reflected in a credit bureau report has declined. This practice is sometimes referred to as "universal default."

[31] For obvious reasons, this discussion will not include normal movements in variable rates tied to a particular market index or the increase in rates due to the timely expiration of the term of a promotional rate

credit card loan has no stated term; it can last many years. It is revolving credit with built in flexibility for the consumer to choose how much to pay each month above the minimum payment amount. Unlike most loans, it does not have a set amortization schedule. Those consumers who choose to pay the minimum payment each month could have loans that amortize over a very long period of time. As a result, card issuers need the ability to reprice existing balances, with appropriate notice to the consumer, periodically as economic conditions might change.

Because notice-based rate increases are designed to reflect changing market conditions, rate increases are typically modest as compared to penalty-based rate increases. Put another way, such rate increases are designed to provide issuers with a natural hedge against underlying movements in their cost of funding, thus ensuring that they can continue to offer consumers competitive, market-driven rates while maintaining safety and soundness. Because such rate increases are market-driven and require extensive consumer communication and operational controls (i.e., a mechanism to offer and fulfill upon an opt-out), they are typically infrequent. At Capital One, we offer our non-variable rate customers APRs that will remain in effect for at least a three-year period.[32] At the end of this period, depending on the cost of funding and other economic conditions at that time, we reserve the right to change the customer's interest rate. As noted above, however, in all such cases, we provide 45 days advance notice and the right to opt out of the change, close the account, and pay off the balance over time.[33]

The second form of repricing is penalty-based (or default-based) repricing. Such repricing is typically based on an individual consumer's account performance or specific credit profile. Factors that may trigger a penalty rate include: (1) violations of the terms of the card account itself, including late payment, exceeding one's credit limit or having a check returned for insufficient funds; (2) violations of the terms of another account or loan with the same lender ("cross default"); or (3) declines in one's overall credit profile, including negative factors present on one's credit bureau ("universal default"). Such factors are typically disclosed to consumers in credit card solicitations and account opening materials such as the customer agreement. Generally, these rate increases can be imposed without advance notice, and consumers are not provided an opportunity to opt out of such increases.[34] As noted above, penalty rates are typically substantially higher than purchase or core interest rates on an account.

We share the Agencies' concerns that penalty-based repricing has grown in complexity and frequency over time. By way of background, Capital One does not

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[32] Such accounts may still be subject to penalty-based repricing, as discussed further below.

[33] Capital One does not impose any specific amortization period for balances remaining at the time of opt-out. The consumer can choose to pay off their balance at a pace of their choosing so long as they continue to make the required minimum payment.

[34] In the case of bureau driven increases based on third party performance data, some issuers do provide advance notice and an opportunity to opt out.

engage in any form of "universal" or "cross" default. We have a single penalty repricing policy, which requires that a customer pay us late twice, each time by three or more days, in a twelve month period before they will be considered for repricing. After the first infraction, we send the customer a warning notice indicating that they may be repriced if they pay us late again. To ensure balance in our policies, a customer can regain their prior rate automatically by paying us on time for 12 consecutive months.

Notice and choice

As discussed above, we believe that notice and choice is the most balanced and effective solution. We further believe that the self-evident benefits of a notice and choice regime undermine the argument that repricing of existing balances meets the statutory definition of "unfair." In our October 2007 comment on the Board's 2007 Regulation Z proposal, we stated our support for the Board's proposal that a notice be sent 45 days in advance of any repricing to give consumers an opportunity to shop for alternative credit. We also urged, however, that the Board permit consumers to reject the new interest rate, cease using the credit card, and pay off the existing balance at the previously applicable rate. This is a right that most credit card issuers give consumers with respect to notice-based repricing subject to Regulation Z §226.9(c) (currently requiring 15 days' advance notice); we think that consumers should have the same right with respect to penalty-based repricing.

As an alternative to the prohibitions on repricing proposed in Regulation AA, we continue to believe that the Board through Regulation Z should give consumers the right to reject the new interest rate, cease using the credit card and pay down the existing balance on the previous terms. Furthermore, we think that that right should apply to all forms of repricing, including all penalty repricing. In the case of penalty repricing, we believe that consumers should be given an explicit and automatic ability to earn back their previous rate through responsible behavior.[35] This solution not only empowers consumer with information, time to take action and make a choice, but also avoids the significant complexities, and unintended consequences, of trying to define specific repricing practices in order to prohibit them. Put another way, the Agencies should be seeking greater simplicity and consistency, not creating a solution that is equally, or arguably more, complex than the problem it seeks to remedy.

Further, if the "injury" sought to be remedied is that "penalty repricing can come as a costly surprise to consumers who are not aware of, or do not understand, what behavior is considered a 'default' under their agreement,"[36] notice and choice is a reasonable way for consumers to avoid this "costly surprise." It is also a reasonable way to avoid "injury" due to all repricings for any reason. Under our proposal, consumers would receive

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[35] Our current policy permits customers who have been penalty repriced – in our case, only if they have paid us late twice by three or more days in a twelve month period – to earn back their previous rate automatically after 12 months of on-time payments.

[36] 73 Fed. Reg. at 28917.

advance notice, and if they so choose, may opt-out, cease using that credit card, pay down their balance at the original rate. Consumers exercising such a choice could, in the alternative, use a debit card[37] or other credit cards they already own,[38] or apply for a new credit card. We think that a fair and balanced credit card regulatory regime requires that consumers be provided notice and enabled to reject interest rate increases, yet provides issuers the ability to respond to changes in market conditions.

b. The prohibition on rate increases to existing balances should allow for increases due to legitimate changes in market conditions such as increases in the cost of funding.

At a minimum, should the Agencies continue to pursue a prohibition on rate increases to existing balances, the Agencies should consider an additional exception to the prohibition for repricings that result from an increase in the issuer's cost of funding and other legitimate changes in market conditions. As discussed, such notice-based repricing occurs when issuers raise the interest rate on a portfolio of credit cards because the cost of funds has increased. Again, we see no support for the argument that an issuer repricing an account solely because its cost of funding for a loan it makes to a consumer could reasonably be construed as "unfair." Every profit-making venture in every industry on the globe passes its operating costs onto its consumers. This practice defines the very essence of commerce. Issuers need to reprice because they cannot predict the long-term cost of funds at the outset of a credit relationship that may extend for years or decades, and where the amount of the outstanding balance at any point in time is largely outside of the issuer's control. The proposed rule appropriately acknowledges that issuers need to increase rates due to increases in cost of funding by permitting rate increases for variable rate accounts.[39] Without the ability to adjust rates on fixed-rate cards to reflect the cost of funds, however, lenders would likely stop offering fixed-rate cards.

We propose creating a fourth exception for a fixed-rate card that cannot be repriced for any reason prior to a specific, predisclosed date.[40] Substantial numbers of consumers, accounting for 100s of millions of current credit card products, want certainty in their

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[37] A recent Federal Reserve study finds that "[t]he number of debit card payments now exceed the number of credit card payments." The 2007 Federal Reserve Payments Study: Noncash Payment Trends in the United States 2003-2006 (Dec. 10, 2007).

[38] U.S. consumers have an average of more than four credit cards. Experian National Score Index Study available at http://www.nationalscoreindex.com/USScore.aspx.

[39] 73 Fed. Reg. at 28919.

[40] By way of clarification, we note that this fourth exception would not prevent an issuer from offering a customer a promotional rate during the specified two or three year period. Consistent with current practice and the Board's proposed Regulation Z, the time span for the promotional rate and the subsequent fixed rate would be clearly and conspicuously disclosed upfront in marketing materials, solicitation and application disclosures, account opening disclosures, and other materials. We also recommend that the Agencies allow issuers the flexibility to set the fixed-rate time period under this exception but in no case should it be less than two years.

rates, even if only for two or three years. We believe that this fourth exception to the general prohibition on retroactive repricing could be an affirmative benefit to consumers designed to preserve the viability of fixed-rate products. Upon expiration, current and future balances on the card could be repriced to a new, market rate. Clear notice of the fixed term of the card would be provided in all solicitations and account opening disclosures, and the proposed 45 day notice for repricing would apply, as well. Notice of changed terms would also be sent with the renewed credit card.

We propose tying any possible rate increase to the expiration of the original credit card and its renewal so that consumers would be aware of the expiration date of the original rate throughout the account relationship. The expiration date is well known to consumers, who typically and frequently must disclose the date when conducting many purchase transactions, most especially by phone or online. This high level of awareness would help ensure that consumers could adjust their purchase and payment behavior as their fixed rate period winds down.

Such options would protect consumers from rate increases during a clearly stated amount of time while allowing issuers to handle increases to cost of funds and to continue offering fixed-rate credit cards. Failure to add such an exception produces an ironic, and wholly illogical result: passing interest rate risk from the issuer (presumably a sophisticated financial institution with resources and expertise to manage that risk) to the consumer in the form of variable rates. We find it difficult to accept that the Agencies intended such an outcome.

Moreover, eliminating the ability to reprice existing balances under these circumstances will significantly reduce the resiliency of the product for card issuers. The inevitable result will be higher prices for all consumers and reduced credit availability for many consumers, as card issuers necessarily will be less willing to take risk in determining to whom to make credit available and at what price.

c. The prohibition on rate increases on existing balances should allow more flexibility to respond to increased safety and soundness risk.

In creating an exception for payments that are delinquent by more than 30 days, the Agencies recognize the importance of penalty repricing as a risk-management tool, as well as the increased costs presented by consumers who demonstrate a significantly heightened risk of default. A 30 day delinquency trigger, however, is far too restrictive to be of any practical use in credit risk management. Based on recently compiled industry data,[41] the rate of loss within 12 months for consumers who are 30 days delinquent at any given time is approximately one-third of all accounts. For higher risk portfolios, this rate of loss almost doubles. The rate of loss within 12 months for consumers who have gone 30 days or more delinquent – effectively missing two consecutive payments – is over 10 times higher than a consumer who is current. Further, rather than being profitable to an

[41] The law firm of Morrison & Foerster, in conjunction with Argus, will submit a comment letter with data compiled from several large issuing banks.

issuer, repricing of such consumers only if they reach 30 or more days of delinquency would do little to mitigate the significant losses issuers would experience. As such, to make up for these increased losses, issuers would be forced to raise prices across the board, compelling the least risky to subsidize the behavior of the most risky, and to reduce credit availability to those consumer who present greater marginal risk.

Under our current policy, Capital One seeks to balance its use of penalty repricing, recognizing its necessity in reflecting a consumer's increased risk of default, while placing significant constraints on and applying it only in limited circumstances. We believe that our repricing policy is both equitable and progressive. As mentioned, at Capital One, a customer cannot be repriced on an account unless the customer pays late on that account by at least three days, two times in one 12-month period. After the first infraction, the customer receives clear notice at the top of their periodic statement that a second late payment may trigger a repricing.[42] This repricing is not automatic, and we often choose not to do so. Further, any customer who is repriced may earn back their previous rate if they pay us on time over the next 12 months. This action is automatic.

We note that we do not reprice our customers for any other infractions, including if they pay us late only once, exceed their credit limit or bounce a check. We also do not practice any form of universal default or bureau based repricing. As such we do not reprice customers based on their activities on other accounts, whether the accounts are with us or with other lenders. We believe this is an extremely consumer-friendly regime, and superior to the Agencies' proposal from a consumer perspective for the reasons articulated above. We also believe, as noted above, that it carefully balances safety and soundness needs with regard to proper risk underwriting.

The Agencies' proposed prohibition would move issuers with dual-infraction regimes to a single-infraction regime, a move that we submit would be detrimental to consumers. The Agencies should avoid that result by revising the exception permitting repricing of existing balances where a consumer is 30 days late to allow repricing of existing balances when a consumer pays late on that account by at least three days, two times in a 12-month period.

d. The existing balance should be defined as the balance existing when the consumer receives notice of the rate increase.

Again, should the Agencies choose to move forward on their proposal, we believe that they should revise the definition of "existing balance" in the context of repricing so as to avoid significant unintended consequences. The proposal currently defines the existing balance (to which the new rate cannot apply) as the balance that exists 14 days after the notice is mailed to the consumer. This time period is meant to "enable

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[42] We note that unlike the Agencies' proposal to allow repricing on a single infraction (30+ day delinquency), a dual infraction regime permits a "teachable moment" wherein we can provide customers with a warning about the consequences of their behavior before any penalty is imposed.

consumers to reasonably avoid any injury caused by application of an increased rate to new transactions by providing consumers sufficient time to receive and review the 45-day notice and to decide whether to continue using the card."[43]

As the second largest customer of the US Postal Service (USPS), Capital One has extensive quantities of data regarding mail delivery times. Based on years of historical data, we have found that first class mail takes no more than 3.5 days to reach 94% of consumers. As such, these consumers will have upwards of 10 or 11 days after receiving the notice in which to significantly increase their purchase activity to the limit knowing that this balance will be frozen at a low interest rate. Under the proposal, this existing balance would be guaranteed at least a five year amortization period. We believe this situation to be quite plausible in a sufficiently material number of cases, particularly with consumers who have been repriced as a result of delinquency on their account. The result could pose a material safety and soundness risk for issuers. This situation also encourages risky behavior on the part of the consumer, creating unintended opportunities for consumers to render themselves deeper in debt.[44]

As such, we suggest that the outstanding balance be defined as the balance that exists five days after the notice is sent, providing enough time for consumers to receive the notice and refrain from using their credit card.

e. The payment allocation and pay down rule for existing balances should be eliminated or shortened consistent with the Agencies' safety and soundness guidance.

The increased risk and costs posed by the prohibition on repricing is further compounded by the rule limiting the percentage of the outstanding balance included in the minimum periodic payment and the requirement that issuers amortize the outstanding balance over a period no less than five years.[45] It is debatable whether consumers benefit from this requirement since it prolongs the time period their balance is outstanding and thus increases the total amount of interest they will pay.

In addition, the Agencies offer no convincing data or basis for these requirements. They are silent on how they determined the percentage of the outstanding balance included in the minimum periodic payment. In addition, the five year minimum for amortization is based on a misapplication and misinterpretation of the credit card

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[43] 73 Fed. Reg. at 28919.

[44] In the case of consumers repriced for defaulting on their accounts, we note that such individuals will be encouraged to increase their balances at precisely the time they have demonstrated their most significant level of risk. Again, we do not believe the Agencies intended such an illogical outcome.

[45] Proposed Regulation AA §227.24(c)(1). The Agencies state that they base the 5 years on guidance issued by the Board, OTS, OCC and FDIC suggesting that credit card workout programs should strive to have borrowers repay debt within 60 months. *See* Account Management and Loss Allowance Methodology for Credit Card Lending (Jan. 8, 2003) ("Account Management Guidance").

Account Management Guidance. Unlike the existing balances in this proposal, the Account Management Guidance applies to balances consumers are unwilling or unable to repay.[46] Furthermore, it states that a five year amortization period is the *maximum* repayment time period issuers must permit and not a *minimum* repayment time period as required by the Agencies.[47]

As a result, we do not believe the five-year limitation used for workout loan arrangements should apply to current balances related to performing loans. To be consistent with the concerns and guidance provided by the Agencies in the Account Management Guidance, the Agencies should eliminate the payment allocation and pay down rule for the existing balance to leave issuers some flexibility to manage risk. At a minimum, the Agencies should act consistently with the Account Management Guidance and allow issuers to amortize the existing balance over a period less than five years. For the same reasons, since the proposed rule is silent on the application of amounts in excess of the minimum payment to the existing balance, we agree with the Agencies that a clarification is necessary to explain that issuers may apply amounts in excess of the minimum payment first to balances on which issuers are prohibited from increasing the rate.

f. By utilizing two separate statutory regimes, the Agencies inadvertently create significant redundancies and conflicts.

We have previously discussed the merits of implementing any new restrictions on credit card practices under Regulation Z. Consistent with this argument, we believe that the interaction between the rule on payment allocation, the prohibition on applying an increased rate to an outstanding balance, the definition of outstanding balance, and the proposed Regulation Z requirement to provide 45 day advance notice of any rate increase requires careful analysis of and thoughtful review of the need for each requirement and all the requirements acting in concert. For example, proposed Regulation AA provides

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[46] The Account Management Guidance states:

> For purposes of this guidance, a workout is a former open-end credit card account upon which credit availability is closed, and the balance owed is placed on a fixed (dollar or percentage) repayment schedule in accordance with modified, concessionary terms and conditions. Generally, the repayment terms require amortization/liquidation of the balance over a defined payment period. Such arrangements are typically used when a customer is either unwilling or unable to repay the open-end credit card account in accordance with its original terms, but shows the willingness and ability to repay the loan in accordance with its modified terms and conditions.

Account Management Guidance at fn. 2.

[47] The Account Management Guidance states

> Workout programs should be designed to maximize principal reduction. Workout programs should generally strive to have borrowers repay credit card debt *within* 60 months."

Account Management Guidance at 4 (emphasis added).

several complex examples, and the 2008 proposed Regulation Z provides even more numerous and complicated examples, illustrating the interaction between these prohibitions and requirements and Regulation Z's 45 day rule. [48]

Again, our notice and choice proposal would avoid such complexities and conflicts. If the Agencies choose to move forward with specific prohibitions, however, we urge that they be issued in Regulation Z to eliminate gaps, conflicts, and redundancies, and to ease compliance risk and burden.

III. Allocation of Payments

The Agencies propose mandating: (1) use of one of three payment allocation methods; (2) prohibiting paying down a promotional rate balance until all other balances are paid off; and (3) prohibiting issuers to require payment of a promotional rate balance in order to receive any grace period offered for purchases. We recommend that the Agencies refrain from issuing a rule until they determine whether the proposed Regulation Z payment allocation disclosures are effective.[49]

If a payment allocation rule is issued, we suggest that it be a more simplified rule in Regulation Z. Again, we do not believe it is necessary to declare past methodologies to be "unfair" in order to prescribe a new regime. The Agencies fail to provide a grounded basis for reaching such a determination, and thus should not seek to manipulate the UDAP construct when adequate and relevant authority exists in another statute.

Specifically, the exception to the payment allocation rule for promotional rate balances and deferred interest rate balances should be eliminated. As the lowest rate balances, these two balances would be the last to be paid off under the high-to-low payment allocation method without the need for special, complex rules. Use of this method, or either of the two methods otherwise proposed by the Agencies, would eliminate the Agencies' concern about how to handle fairly payments to avoid consumers being left with promotional rate or deferred interest rate balances when their respective periods expire.

In addition, we propose a fourth payment allocation method where older transactions may be paid off before newer transactions. This "first-in, first-out" method is fair to and easily understood by consumers – for example, having a payment apply to an item purchased last year before paying for an item purchased this year.

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[48] See staff commentary to proposed Regulation AA §227.24 and proposed 2008 Regulation Z §226.9(g).

[49] Proposed 2007 and 2008 Regulation Z §226.5a and §226.6. Capital One also provided suggested payment allocation disclosures based on our consumer testing. 2007 Regulation Z Letter at 10.

IV. Time to Make Payments

The Agencies are concerned that consumers are provided less than seven days in which to review their periodic statements.[50] Capital One provides most customers with at least seven days to review their statements, even more if they also view their statements online, as more and more customers do every day. We also let our customers choose the monthly due date for their credit card payments resulting in consistent predictable payment due dates.

The Agencies are requiring reasonable procedures designed to ensure that consumers are given a reasonable amount of time to make payments. The Agencies provide a safe harbor for statements mailed 21 days before the payment due date.[51] The 21 day safe harbor assumes that mail takes seven days to go from the credit card issuer to the consumer and another seven days to go from the consumer to the issuer.[52] While we agree with the Agencies' goal,[53] the Agencies' assumptions do not match our data. As noted above, Capital One, as the second largest customer of the USPS, knows that 94% of our first class mail (all periodic statements are mailed first class) is received by our customers within 3.5 days. As such it is not necessary to have a 21 day safe harbor in order to give consumers at least a week to review their statements.

The Agencies can achieve the goal of providing consumers at least seven days to review their periodic statements by focusing the proposed rule on the seven days and requiring reasonable procedures to ensure that consumers have that number of days. Reasonable procedures could include data showing how long it takes for the issuer's mail to reach consumers. Such a rule would be flexible enough to keep up with improvements in mail technology and processing times as well as various ways issuers process mail. Issuers that do not have mailing data could rely on a safe harbor. Given that the delivery time for first class mail is typically no more than 3.5 days, the proposed 21 day safe harbor could be reduced, say to no more than 19 days, and yet still achieve the Agencies'

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[50] Agencies state that "[c]ompliance with the safe harbor would allow...seven days for the consumer to review the statement and make payment...." 73 Fed. Reg. at 28913.

[51] Proposed Regulation AA §227.22(b). While the 21 days is a safe harbor, the Agencies provide no other standard to determine whether the proposed rule is satisfied. As such, issuers will revise their policies and operations to meet the 21 day safe harbor.

[52] 73 Fed. Reg. at 28913.

[53] We do not agree with the Agencies' UDAP analysis. The Agencies state the injury includes consumers not being given enough time to dispute items that appear on their periodic statement. We note that Regulation Z §226.13 provides consumers 60 days after the issuer transmits the periodic statement to submit a dispute. The proposed rule does not provide any additional time or preserve any of the 60 days for disputes. The Agencies also state that the injury is not reasonably avoidable where consumers are traveling or otherwise not able to view their statements in a timely manner. Given that many consumers travel or are otherwise occupied for more than seven days and yet are able to pay their bills, this argument is weak. In fact, it highlights that the Agencies' goal of seven days and safe harbor of 21 days are arbitrary.

goal. Such a general rule and safe harbor would be flexible enough to handle mailing differences and innovations yet provide certainty for issuers that need it.

On a final note, we again question the basis, need and wisdom of declaring previous practices in this regard "unfair" when they were specifically sanctioned under Regulation Z. It would appear to be far more logical and reasonable simply to implement these new requirements under Regulation Z in combination with the current Regulation Z timing requirements for periodic statements.[54]

V. Balance Computation Method

Capital One has never engaged in double-cycle billing and thus complies with the Agencies' stated goal of prohibiting this practice.[55] The wording of the proposed rule, however, has the unintended consequence of prohibiting assessment of finance charges in many perfectly reasonable situations. For example, if certain transactions occur at the end of the first billing cycle, such as use of a convenience check or a cash advance, the issuer may not know about these transactions until after the first billing cycle has ended. The proposed rule would prohibit, by its terms, charging interest in the second billing cycle on these transactions that occurred at the end of the first billing cycle. The proposed rule would also prohibit charging interest on transactions in the first billing cycle when the consumer submits a check to pay the first cycle's balance, the payment is credited on date of receipt as required by Regulation Z, and the issuer does not know until later that the consumer's check is returned unpaid for insufficient funds. In such circumstances, it would be appropriate to charge finance charges on transactions that occurred in the first billing cycle. We do not believe that the Agencies intended these results.

We propose that the Agencies either redefine double-cycle billing more precisely or provide exceptions for the mentioned situations. We also suggest that such a rule be issued under Regulation Z where the Board proposes to retain the double-cycle billing disclosure for issuers that may continue to engage in double-cycle billing because they are not subject to Regulation AA.[56]

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[54] Regulation Z §226.5(b) requires that a statement be sent at least 14 days prior to the end of a grace period.

[55] Regulation AA press release issued by the Board on May 2, 2008 and by the NCUA and OTS on May 1, 2008.

[56] The proposed 2008 Regulation Z states that

> The Board proposes to prohibit some issuers from using a balance computation method commonly referred to as the "two-cycle" balance method. Nonetheless, the Board does not propose deleting the two-cycle average daily balance method from the list in §226.5(g) [sic] because the prohibitions, if adopted, would not apply to all issuers, such as state chartered credit unions that are not subject to National Credit Union Association rules.

73 Fed. Reg. at 28874 discussing Regulation Z §226.5a(g).

VI. Other Issues

a. Capital One's current practices also comply with other proposed provisions.

Capital One and other issuers already comply with the Agencies' intent that issuers notify consumers receiving firm offers of credit that the terms received depends on the consumer's creditworthiness.[57] In addition, the 2007 Proposed Regulation Z already requires solicitations with more than one rate offered to include such a disclosure in close proximity to the APR.[58] As such, this proposed firm offer of credit rule is unnecessary and should be eliminated.

Capital One's current practices also comply with the Agencies' proposed rule to prohibit issuers from assessing a fee for exceeding the credit limit caused by credit holds.[59]

b. Capital One believes that use of UDAP authority to restrict specific practices associated with certain high fee card products is appropriate.

Capital One supports the use of the Agencies' UDAP authority to prohibit credit card products where sizable, up-front fees consume over 50 percent of the available line.[60] Capital One also supports increased disclosure under Regulation Z for such products where up-front fees account for more than 25 percent of the available line. We believe that this careful, targeted and limited use of UDAP authority to prohibit products with dubious consumer benefits more squarely fits the intent and purpose of the statute.

c. Issuers need sufficient time to implement these rules.

The Board has announced that it intends to finalize and issue the 2007 and 2008 Regulation Z rules with the Regulation AA rules. Regardless of whether the Regulation AA rules are issued separately or as part of Regulation Z, the implementation date needs to provide issuers with sufficient notice and time to implement the extensive 2007 and 2008 rules. Significant system changes, disclosure redesign, and employee re-training as well as significant costs are required to implement these rules. As such, we suggest an implementation time of at least 18 months.

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[57] Proposed Regulation AA §227.28.

[58] Proposed 2007 Regulation Z §226.5a(b)(1)(v) and Model Disclosures G-10(B) and (C).

[59] Proposed Regulation AA §227.25.

[60] Proposed Regulation AA §227.27.

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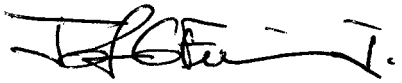
Capital One appreciates the opportunity to comment on the Agencies' proposed Regulation AA credit card rules. If you have any questions about this matter or our comments, please contact me at 703-720-1000.

Sincerely,



John G. Finneran, Jr.
General Counsel

Appendix

Interplay of Regulation Z and Regulation AA Provisions

As stated in our comment letter, Capital One recommends implementing the proposed Regulation AA prohibitions through Regulation Z to facilitate melding any specific prohibitions with their related disclosures and consumer protections already required by Regulation Z or proposed as part of the 2007 and 2008 Regulation Z proposals. This construct would offer a significant opportunity to minimize compliance burdens and consumer confusion, while permitting the consumer protections and disclosures to work meaningfully together. Below, we identify some examples of gaps, conflicts, or confusion that exists due to the credit card rules being split between Regulation Z and Regulation AA.

- Definitions (§226.2, §226.4, §226.5a, §226.14): Proposed Regulation AA defines terms that are currently or will be defined in Regulation Z. If the Regulation AA requirements are not implemented through Regulation Z, we recommend that the Regulation AA definitions simply refer back to the applicable Regulation Z definitions and sections to ensure consistency at all times, including in the future when there may be amendments to these definitions.

- Regulation Z exemption for credit over $25,000 (§226.3): Regulation Z exempts from its coverage credit over $25,000 not secured by real property or a dwelling. If the Regulation AA requirements are not implemented through Regulation Z, we request a similar exemption to apply to Regulation AA.

- E-Sign applicability and exceptions (§226.5(a)): Regulation Z provides an E-Sign consumer-consent exemption for certain disclosures. If the Regulation AA requirements are not implemented through Regulation Z, we recommend a similar exemption for disclosures under Regulation AA.

- Mailing of periodic statement (§226.5(b)(2)): Regulation Z requires mailing a periodic statement 14 days prior to the expiration of a grace period while proposed Regulation AA requires providing consumers a reasonable time period in which to make payments. We recommend an explanation in Regulation Z (and in Regulation AA, if applicable) explaining various ways creditors may comply with these two timing requirements for periodic statements.

- Decoupling of grace period and due date (§226.5, §226.5a, §226.6, §226.7): Current and proposed Regulation Z provides model disclosures describing the grace period. Since the grace period end date and the payment due date may be decoupled under proposed Regulation AA, model disclosures may be needed to help creditors disclose and explain the difference between the grace period end

date and the payment due date so as not to inadvertently mislead or confuse consumers.

- Description of grace period (§226.5a, §226.6): Current and proposed Regulation Z provides model disclosures describing the grace period. These model disclosures may need to be revised to explain the proposed Regulation AA grace period carve-outs for promotional rate balances or deferred interest rate balances and to explain the end of the grace period carve-outs when the promotional rate or deferred interest rate period terminates.

- Schumer Box disclosure regarding creditworthiness (§226.5a): Issuers currently provide disclosures about creditworthiness similar to the disclosures proposed in Regulation Z and Regulation AA. We recommend retaining the proposed Regulation Z disclosure and eliminating the proposed Regulation AA disclosure. Having the disclosure requirement in Regulation Z, instead of Regulation AA, will help creditors understand how the disclosure should be combined with the Schumer Box and advertising disclosures required by Regulation Z.

- Disclosure of penalty APR and balance to which penalty rate will apply (§226.5a, §226.6, §226.7): Proposed Regulation Z provides model language explaining the penalty APR and its application to the account. This model language may need to be revised to explain the prohibition on rate increases on existing balances and the exceptions to this prohibition.

- Balance computation disclosure including double-cycle billing (§226.5a, §226.6, §226.7): Regulation Z provides model language describing double-cycle billing. If the prohibition on double-cycle billing is implemented, Regulation Z should note that such model language may not be used by certain creditors.

- Periodic statement disclosure of each periodic rate used to compute the finance charge, the amount of each applicable balance, and an explanation of how each balance was determined; or disclosure of the proposed "fee-inclusive APR" (if implemented) for each category of transactions (§226.7): The current and proposed Regulation Z requires disclosure of each applicable periodic rate, each balance, and/or a fee-inclusive APR, and provides model periodic statements with such information. Under proposed Regulation AA, the number of balances and APRs may multiply at different points in time. We request that the Board analyze the periodic statement disclosures and clarify how these various pieces of information would be disclosed when a periodic statement is sent under various scenarios, including within 14 days after a change-in-terms or rate increase notice is sent, 14 days after the notice is sent, and 45 days after the notice is sent.

- Disclosure of actual or estimated time to repay customer's outstanding balance provided on periodic statement or by toll-free number (§226.7): Proposed Regulation Z requires a Bankruptcy Act disclosure to the consumer on the periodic statement or by telephone of the actual or estimated time to repay the

consumer's outstanding balance. Proposed Regulation AA provides specific rules on payment allocation generally, payment allocation with promotional rate and deferred interest rate balances, and payment allocation for outstanding balances. We request that the Board explain how creditors should calculate the customer's actual or estimated time to repay their outstanding balance under various scenarios created by Regulation AA, including if there are one or multiple closed-end outstanding balances created at different time periods and being repaid using each of the two permitted payment allocation methods for outstanding balances. We also recommend that the Board permit the brief statement "determined by law" to be disclosed with the Bankruptcy Act disclosure to explain that minimum payment requirements and proposed payment allocation rules drive the length of time to pay off the existing balance.

- Change-in-terms or penalty repricing summary table (§226.9): Proposed Regulation Z offers model disclosures of the summary table. We agree with the Board that the model disclosure explaining rate increases and their applicability or inapplicability to various balances should be consumer tested.

- Change-in-terms or penalty repricing notice (§226.9): Proposed Regulation Z and proposed Regulation AA provide different examples of the interplay between the change-in-terms or increase penalty rate notice content and timing requirements, and the proposed prohibition on increasing balances on existing balances. If the examples are split between Regulation Z and Regulation AA, we request in the rules streamlined and consistent examples that cover more scenarios.

- Prompt crediting of payments and reasonable payment requirements (§226.10): The current Regulation Z provides requirements regarding prompt crediting of payments, and reasonable payment requirements. Proposed Regulation Z overlays this with a mandatory 5pm cut-off time for mailed payments and the requirement to treat payments received after a non-working day as timely. Proposed Regulation AA provides a third layer of requirements by prohibiting creditors from treating payments as late unless consumers are given a reasonable time to make their payments. We request examples in the rules clarifying the interplay between all these requirements.

- Determination of the APR (§226.7 and §226.14): Current and proposed Regulation Z require disclosure of the "historic" APR. If the prohibition on increasing interest rates on existing balances is implemented, we request clarification on how to calculate the APR under various circumstances, including when there is one or multiple closed-end outstanding balances as part of the credit card account.