MasterCard Worldwide
Law Department
2000 Purchase Street
Purchase, NY 10577-2509
tel 1-914-249-2000
www.mastercard.com

MasterCard
Worldwide

October 12, 2007

Via Electronic Mail

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Docket No. R-1286

Dear Ms. Johnson:

MasterCard Worldwide ("MasterCard")[1] submits this comment letter in response to the Proposed Rule pertaining to the open-end provisions of Regulation Z ("Proposal") published by the Board of Governors of the Federal Reserve ("Board") in the *Federal Register* on June 14, 2007. MasterCard appreciates the opportunity to provide its comments on the Proposal.

Executive Summary

- MasterCard commends the Board for its thorough and comprehensive proposed revisions to Regulation Z.
- The Proposal, if adopted, will significantly increase the clarity and usefulness of the application and solicitation disclosures for consumers, as well as the initial disclosures, required for open-end credit under the Truth in Lending Act ("TILA").
- For the most part, the Board has correctly avoided imposing price controls through regulatory action. Such price controls would only reduce the credit available to consumers, and increase the cost of credit for consumers.

[1] MasterCard Worldwide (NYSE:MA) advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. Through the company's roles as a franchisor, processor and advisor, MasterCard develops and markets secure, convenient and rewarding payment solutions, seamlessly processes more than 16 billion payments each year, and provides industry-leading analysis and consulting services that drive business growth for its banking customers and merchants. With more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to 25,000 of the world's leading financial institutions. With more than 24 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard. For more information go to www.mastercard.com.

- MasterCard believes that the proposed revisions to the application and solicitation disclosures, as well as those for the account opening disclosures, are generally appropriate and should be retained.

- In light of the fact that card issuers have demonstrated that uniformity among periodic statements is not necessary to provide significant amounts of information in an understandable manner, we question whether the Board should essentially standardize periodic statements. To the extent the Board intends to standardize periodic disclosures, we believe more flexibility for card issuers is necessary so that they may communicate with cardholders in an effective and efficient manner.

- The new requirements pertaining to changes in terms and penalty pricing will impose significant restrictions on card issuers to protect against credit or other risk. These restrictions could result in increased credit costs, or less available credit, for all consumers.

In General

MasterCard applauds the Board for its effort in crafting a critically important update to Regulation Z and consumer credit disclosures. In general, we believe the Board's Proposal represents a significant improvement in open-end credit disclosures, particularly as they relate to credit cards. Although credit card offerings have evolved significantly over the past twenty years to meet ever-changing consumer desires and demands, the disclosure requirements under Regulation Z have generally not evolved with them. The net result is that, while consumers obviously benefit from these product developments, consumers deserve federally required disclosures that are relevant and updated.

We are particularly impressed with the Board's comprehensive efforts to survey consumers and test a variety of disclosures to understand what would serve consumers best. The Proposal appears to reflect the Board's commitment to understanding consumers' *actual* desires, as opposed to the suppositions of industry, consumer groups, or even the Board itself. While survey data cannot be the sole determinant of how the final rule ("Final Rule") is crafted, especially when the Board must also consider legal, cost-benefit, and other issues, the survey data provides meaningful information regarding what consumers deem to be useful and important.

MasterCard applauds the Board for generally improving consumer disclosures without attempting to impose price controls on a fiercely competitive industry. We do not believe that price controls benefit consumers as such controls tend to distort product pricing and development. Furthermore, as studies conducted by the Board staff and others demonstrate, price controls tend not to deliver net benefits to consumers in the long run.[2] Rather, the Board

[2] *See, e.g.*, Kathryn L. Combs and Stacy L. Schreft, *Do Consumers Really Want Credit Card Reform?*, Economic Review, Federal Reserve Bank of Kansas City (Third Quarter 1999); Glenn B. Canner *et al.*, *The Effects on Consumers and Creditors of Proposed Ceilings on Credit Card Interest Rates*, Board of Governors of the Federal Reserve System (October 1987); Christopher C. DeMuth, *The Case Against Credit Card Interest Rate Regulation*, 3 Yale Journal on Regulation 201 (1986); Todd J. Zywicki, *The Economics of Credit Cards*, 3 Chapman Law Review 79 (2000).

has taken the more appropriate approach to consumer protection in a highly competitive market, *i.e.*, ensuring consumers have sufficient information on which they may make rational decisions. Having said this, we do note that at least one portion of the Proposal relating to so-called "penalty" pricing would be a price control. We discuss this provision in more detail below.

Generally speaking, MasterCard supports the Board's efforts with respect to its revisions to the application and solicitation disclosures and to the account opening disclosures. Although we have some suggestions with respect to the Board's revisions to these disclosures, the Proposal represents a fundamentally sound approach to improving them. We are concerned, however, about the direction the Board has taken with respect to periodic statements. While some limited regulatory structure with respect to periodic statements may be necessary, we do not believe that periodic statements need the complete overhaul embodied in the Proposal. Indeed, it seems unusual that periodic statements are the disclosures arguably most altered by the Proposal despite the fact that they were the disclosures probably least in need of updating. We also have comments on several specific items in the Proposal, which we provide below.

Solicitation and Application Disclosures

In general, MasterCard supports the Board's efforts to simplify and update the solicitation and application disclosures under Regulation Z, also known as the "Schumer box." We believe the Board has organized a significant amount of information in a meaningful manner that will allow consumers to review the key terms applicable to a credit card account in an efficient manner. Importantly, the Board has relied on consumer testing to craft a Schumer box that meets the needs of consumers who are shopping for, and comparing, credit card offers.

Range of Rates

With respect to specific changes to the Schumer box, we commend the Board for explicitly permitting card issuers to include a range of APRs in the Schumer box. Although we do not believe this is a change in the law, we believe the Board's clarification is appropriate. In light of the fact that many card issuers will not know the APR that will apply to the consumer's prospective account until more information is known about the consumer, such as the consumer's creditworthiness, employment status, or income. To require an issuer to include a specific APR in the Schumer box would make it very difficult for card issuers to offer products to a variety of consumers through risk-based pricing. Indeed, such a rigid requirement could have the unintended consequence of forcing card issuers to develop products based on the disclosure requirements instead of having disclosure requirements designed around products developed to serve the marketplace.

Payment Allocation

We also applaud the Board for proposing to address issues relating to payment allocation in the Schumer box. We strongly believe that card issuers should have the flexibility to allocate payments in a manner that allows them to develop and offer consumers a variety of credit options. MasterCard also believes that a card issuer's payment allocation practices should be disclosed in a manner that the consumer can easily understand. Rather than mandate how an issuer allocates payments—and risk the possibility that a card issuer may no longer offer discount interest rates as a result—we believe the Board has chosen the correct approach by attempting to improve consumers' understanding of payment allocation practices.

MasterCard believes, however, that the payment allocation disclosure proposed by the Board could be made more simple and useful for consumers. In particular, we believe the Board should consider revising the proposed payment allocation disclosure to state that the issuer may apply payments to the balance with the lowest interest rate, and that interest may accrue on unpaid balances. We believe that such a concise disclosure may be simpler for consumer's to understand, and is more broadly applicable than the proposed revision, which applies only when there is a promotional APR on a balance transfer at account opening. As we mention below, these suggested revisions are equally applicable with respect to the account-opening tabular disclosures in the Proposal.

Paper Size

The Staff Commentary for the official forms state that "[a]lthough creditors are not required to use a certain paper size" for disclosing the Schumer box, the sample forms "are designed to be printed on an 8 x 14 sheet of paper." We ask the Board to state affirmatively that a card issuer may use paper other than an 8 x 14 sheet of paper to comply with the disclosure requirement. Although the Staff Commentary appears to disclaim any minimum paper size requirement, it is our understanding that examiners may, in fact, view the 8 x 14 sheet as a *de facto* requirement. To avoid an such an application of the Staff Commentary, we believe it is necessary for the Board to note expressly that paper-based Schumer box disclosures may be given in sizes other than 8 x 14 paper. These comments are also equally applicable with respect to the account-opening tabular disclosure.

Electronic Delivery

We take this opportunity to restate our recent comments to the Board with respect to the electronic delivery of the Schumer box disclosures. Specifically, we do not believe that a card issuer that provides a clear and conspicuous link to the Schumer box disclosures must ensure that a consumer does not bypass such disclosures before submitting an application. There is no similar requirement with respect to paper disclosures, and in fact the Board has stated previously that an issuer can comply with the regulatory requirements by providing a reference to where the disclosures may be found (*i.e.*, the functional equivalent of a hyperlink) in a paper document. We believe similar treatment should be afforded to electronic disclosures.

Account Opening Disclosures

As with the application and solicitation disclosures, MasterCard supports the Board's proposed revisions to the disclosures required under § 226.6 of Regulation Z, the so-called "account opening" disclosures. We believe that the Proposal will give consumers a simple reference chart for purposes of understanding their account terms. We urge the Board to retain its approach with respect to the account opening disclosures in the Final Rule.

Oral Disclosures

MasterCard strongly supports the Board's intention to allow card issuers to provide certain disclosures orally to consumers when such disclosures would be more timely. In particular, the Board proposes to allow card issuers to disclose orally certain charges not specifically identified in § 226.6(b)(4) (*i.e.*, those required in the account opening table) prior to the consumer agreeing to pay or becoming obligated to pay for the charges. We believe this approach is sound for at least two reasons. First, the Proposal ensures that consumers receive such disclosures when they can be acted upon, such as when the consumer is deciding whether to use a service offered by the card issuer. Second, the Board's approach reduces the need for additional, extraneous disclosures in the account-opening table or with the account opening materials.

Timing of Disclosures for Telephone Transactions

MasterCard urges the Board to provide card issuers the opportunity to provide consumers with account opening disclosures in a manner that would allow consumers to open an account over the telephone and gain immediate access to the account. The Proposal retains the general requirement in Regulation Z that the initial (or account-opening) disclosures must be provided to the consumer "before the first transaction is made under the [credit card] plan." The Proposal, however, grants a merchant (although apparently not banks extending credit on behalf of the merchant) the ability to open a new open-end credit account for, and extend credit to, a consumer via a telephone transaction without necessarily providing the account-opening disclosures to the consumer prior to such extension of credit if certain conditions are met.

We do not believe that Regulation Z should distort the credit market with respect to telephone sales. Specifically, if Regulation Z permits one type of entity to extend credit to a consumer without providing the full account-opening disclosures, it should provide similar flexibility to other entities. We ask the Board to allow any card issuer, in connection with an account opened telephonically, to provide account opening disclosures as soon as reasonably practicable after the first transaction if the issuer provides key account terms to the consumer orally (*e.g.*, comply with § 226.5a(d)(1)) and the consumer consents to receiving the other required disclosures as soon as reasonably practicable thereafter.

Disclosing APR in Table

The Proposal would require a card issuer to disclose, among other things, the APR(s) applicable to a credit card account in the account-opening table. We concur with the Board's belief that a consumer should be informed of the applicable APR(s) as part of the account-opening disclosures. However, we believe that it may be more appropriate to permit a card issuer to disclose the applicable APRs as part of account-opening disclosures on the condition that if the applicable APRs are not disclosed in the account-opening table, the table provide a clear and conspicuous reference to the location of the applicable APRs. Under our suggested change, the table would not need to be reformatted. Rather, instead of the APR in the box, the card issuer would include the clear and conspicuous reference.

We believe this flexibility is appropriate in light of the logistical hurdles that may arise in connection with the requirement in the Proposal. For example, with respect to an account opened at the point of sale, a card issuer would need to rely on the efforts of a sales clerk to ensure that the appropriate pre-printed account-opening table was provided. This may not provide for optimal compliance, especially when there is an alternative available that allows for only one pre-printed account-opening table to be used. We believe it would be equally effective to permit the creditor to provide the account-opening table with a reference to a register receipt that contains the APR or other form of disclosure that minimizes the chance that the consumer may not receive the appropriate disclosure form.

Payment Allocation

As we mentioned above in connection with the application and solicitation disclosures, we believe the Board should require a more concise and broadly applicable account opening disclosure with respect to payment allocation practices.

Paper Size

As we mentioned above in connection with the application and solicitation disclosures, we believe the Board should explicitly condone the use of paper other than 8 x 14 paper for purposes of providing the account-opening disclosures.

Periodic Statements

Rigidity of Proposal

The Proposal includes several significant revisions to the periodic disclosure requirements under Regulation Z. Indeed, the Proposal would essentially standardize periodic statements provided by issuers and impose relatively rigid format and content requirements. We urge the Board to reconsider this approach to periodic statements. Historically the Board has not prescribed formatting requirements for periodic statements. This flexibility has provided card issuers the opportunity to refine on a continual basis their (usually) monthly communications with cardholders so that cardholders receive important periodic disclosures in addition to other beneficial information, such as tips to prevent against identity theft, or information relating to rewards programs that may be of significant interest to consumers.

Despite, or perhaps due to, the flexibility available to issuers with respect to periodic statement design, it is our understanding that consumers generally understand the information included in periodic statements (with one significant exception pertaining to the effective APR disclosures discussed below). The Board suggests in the Supplementary Information that consumers' understanding of certain information is improved when it is located in proximity with other logically related information. While this may be correct, we do not necessarily believe that it is necessary to prescribe rigid formatting requirements applicable to the entire periodic disclosure so that certain discrete portions of information can be located in proximity to one another. We believe that the rigidity in the Proposal would stifle continued innovation with respect to periodic disclosures and eliminate the ability of card issuers to communicate a wealth of information to their cardholders in the most efficient and effective manner possible. In short, there is only a limited amount of space available to card issuers to communicate with their consumers in an effective and efficient manner. It is our hope that they will retain the ability to determine how to provide such communications while meeting broad and flexible, but effective, regulatory requirements.

Although we discuss specific formatting concerns relating to late payments and minimum payments below, a significant concern with the Proposal's formatting of periodic statements relates to the Board's treatment of change-in-terms ("CIT") and penalty pricing disclosures if such disclosures are provided on or with the periodic statement. The Board appears to have made a value judgment that the penalty pricing and CIT disclosures are more important than those disclosures relating to transaction activity or any other information (except for the "Summary of Account Activity" and the "Payment Information" boxes) that an issuer would generally provide in the periodic statement. We do not necessarily agree with this determination. Furthermore, this requirement could have significant operational issues as it could require a card issuer to design and lay out multiple formats for each monthly periodic statement, depending on whether the cardholder will be receiving one, two, or none of the CIT/penalty pricing disclosures in a given month.

We also note that the formatting requirements imply that the periodic statement must be provided in a "portrait" orientation for the paper. For example, the CIT/penalty pricing disclosures must be placed "above" the transaction information. Yet, if the periodic statement's design involved a "landscape" orientation, it is not clear whether such disclosures could be to the left, but technically on a level even with or possibly below, the first transaction provided on the right side of the page.

Late Payment Disclosure

TILA requires a card issuer to disclose "on the billing statement" the date on which the payment is due (or if different, the earliest date on which a late payment fee may be charged) and the amount of the late payment fee. The Board would augment this provision by requiring a card issuer to disclose any increased APR that may result from a late payment, and to provide all of the late payment disclosures on the front side of the first page of the periodic statement. The Proposal also includes a model form to which such disclosures must be substantially similar.

MasterCard believes that the content of the late payment disclosures suggested by the Board is appropriate, and that they should be provided in a clear and conspicuous manner to consumers. In light of our comments above with regard to formatting and the benefits of flexibility, however, we question whether it is necessary to provide the augmented late payment disclosures on the front of the first page of the periodic statement, when they could be disclosed effectively, clearly, and conspicuously elsewhere. In fact, the Board implicitly recognizes that it is possible to provide equally (if not more) important disclosures than the late payment disclosures effectively even if such disclosures are not included on the front of the first page of the statement, such as those pertaining to the transaction activity during the billing cycle. We also note that the periodic statement is not the only (nor even the first) place the consumer will learn about late payment fees and the penalty APR that could result from late payments. These items must be disclosed as part of the Schumer box and the account-opening table, further mitigating the need to call special attention to these disclosures relative to others as part of the periodic statement.

We understand the Board's desire to locate certain information in a manner proximate to other information. The fact is, however, that not all payment-related information can be grouped together without significant unintended consequences. For example, an issuer could provide information on or with the periodic statement relating to electronic payments, recurring payments, payment by phone, the impact a late payment may have on the cardholder's credit history, including correspondence with payments, or other types of payment information. Yet none of this information should necessarily be *required* to be on the front of the first page of the billing statement. We question whether the late payment disclosures in the Proposal are so clearly more important than other payment-related disclosures—or any of the other required disclosures that need not appear on the first page—such as to mandate their placement on the front of the first page.

Minimum Payment Disclosure

Congress amended TILA to require card issuers to provide certain minimum payment disclosures to cardholders. The Proposal includes several options for card issuers to comply with this requirement, and also includes the criteria to be used in calculating the minimum payments. Recognizing that the minimum payment disclosures will be of little (if any) value to certain segments of cardholders, the Board also proposes to allow card issuers to omit the disclosure for cardholders who have paid the entire balance in full for that billing cycle and the previous billing cycle (or did not owe on a balance for those two billing cycles).

TILA provides card issuers with two alternatives regarding minimum payment disclosures. As one option, a card issuer could provide a bulky "generic" disclosure regarding minimum payments with a toll-free telephone number the cardholder may call to obtain "an estimate of the time" it would take the cardholder to repay the balance making only the minimum payments. The statute specifies that if a card issuer chooses to provide this generic disclosure, the issuer must place it "on the front of the billing statement." The alternative provided by Congress is for the card issuer to include a relatively concise disclosure if the card issuer provides a toll-free number the cardholder may call to learn the "actual" number of months it would take to repay the balance making only minimum payments. It is important to note that Congress did not require the more concise disclosure to be "on the front" of the billing statement.

The Proposal would implement the two disclosure options provided by TILA and provide a third minimum payment disclosure option. The additional option proposed by the Board would be the more concise disclosure, but instead of the toll-free number, the card issuer would state the number of months or years needed to repay the balance making only minimum payments. Regardless of the disclosure option chosen by the card issuer, the Proposal would require the minimum payment disclosure to be provided on the front of the first page of the billing statement in proximity to other payment-related information.[3]

[3] MasterCard appreciates the Board's provision of assumptions for purposes of calculating the necessary estimates, regardless of which option an issuer chooses. We ask the Board to state clearly that reliance on those assumptions precludes liability in connection with the accuracy of the estimates provided.

We applaud the Board for providing card issuers an option to provide the repayment period on the periodic statement and obviating the need to establish and maintain a toll-free telephone number for purposes of complying with the minimum payment disclosure requirements. We believe that this option may serve both issuers and consumers well, although we also believe that some issuers may want to encourage direct contact by the cardholder through the telephone number if the cardholder is concerned about minimum payments.

In the Supplementary Information, the Board states that it "strongly encourages card issuers to provide the actual repayment disclosure on periodic statements, and solicits comments on whether the Board can take other steps to provide incentives to card issuers to use this approach." MasterCard believes that card issuers may find the "actual" repayment disclosure more appealing if the Board were to adopt the incentive structure provided by Congress in the law. Specifically, we believe that card issuers would be more likely to provide one of the "actual" repayment disclosures (either the toll-free number for the actual repayment estimate or providing the estimate on the statement itself) if they were granted more flexibility with respect to the location of the disclosure. We believe a card issuer should have the option of providing the disclosure in a clear and conspicuous manner anywhere on the billing statement, similar to many of the other disclosures required by TILA and Regulation Z. For the reasons stated above with respect to the late payment disclosures, we do not believe it necessary for the minimum payment disclosures to be located in proximity to other payment information. Furthermore, in light of the fact that the minimum payment disclosure will be of limited or no utility to many cardholders, it is surprising to us that the Board would require such a disclosure to be more prominent than other arguably more important and broadly applicable disclosures (such as those relating to transaction activity).

We applaud the Board for providing card issuers the option of omitting the minimum payment disclosures for billing statements sent to cardholders who have paid the entire balance in full for that billing cycle and the previous billing cycle (or did not owe on a balance for those two billing cycles). As the Board explains in the Supplementary Information, this disclosure would be of limited utility to cardholders who do not revolve a balance. We urge the Board, however, to expand this exemption so that the disclosure is required only when the consumer demonstrates behavior that may be mitigated by the disclosure. It is widely understood that the disclosure will have no applicability to a specific consumer's behavior, since virtually no cardholders pay off a balance making only minimum payments without incurring additional charges on the account. Therefore, the disclosure can be meant to be no more than illustrative to consumers who may be making minimum payments for an extended period of time. The Board should require a card issuer to provide the minimum payment disclosures, therefore, to those consumers who make minimum payments for more than three consecutive billing cycles. We believe such a requirement would balance the costs and burdens associated with providing the disclosure with any potential benefit one could allege the disclosure has.

If the Board retains the Proposal's exemption, we ask the Board to provide a clarification. It appears that the exemption applies only if the consumer paid the balance in full for the previous two billing cycles, or maintained a zero (or credit) balance for the previous two billing cycles. This suggests that if the cardholder had a zero balance in one cycle, and then engaged in transactions on the account but paid the balance in full the next cycle, that the card issuer would still be required to provide the minimum payment disclosure. We do not believe this was the

Board's intent, nor would it be consistent with the purpose of the exemption. For example, a cardholder may *never* revolve a balance, but due to sporadic card use, may repeatedly alternate between having a zero balance and paying a balance in full. We do not believe a card issuer should be required to provide the minimum payment disclosure to cardholders who would fall into this category.

Elimination of the Effective APR

The Proposal includes two alternatives regarding the EAPR. Under one alternative, the Board would eliminate the requirement to disclose the EAPR on the periodic statement. The other alternative attempts to improve the EAPR disclosure for consumers and card issuers. We believe the concept of an EAPR is so inherently flawed as it relates to a credit card account that it cannot be "improved" satisfactorily, and therefore card issuers should not be required to provide such a disclosure.

The Supplementary Information provides an accurate assessment of the significant shortcomings of the EAPR. In sum, as the EAPR relates to credit card accounts, (i) it is inherently inaccurate, (ii) consumers do not understand it, (iii) it cannot be used to predict the future cost of transactions on the same account, and (iv) it cannot be used to compare costs across different accounts. Furthermore, the disclosure does not fill a "disclosure gap"—any fees or costs used to calculate the EAPR are disclosed multiple times to the cardholder in a clear and conspicuous manner, including on the periodic statement. We fail to see a legitimate defense for an inaccurate disclosure that confuses consumers, hinders their understanding of the cost of credit, and does not provide any yardstick by which to compare the price of credit. MasterCard strongly urges the Board to eliminate this disclosure requirement from Regulation Z.

Timeframe for Mailing Periodic Statements

The Board also solicits comment as to whether it should make a recommendation to Congress regarding the mailing of periodic statements. Under section 163(a) of TILA, if a card issuer provides a grace period, the issuer must send the consumer his or her periodic statement at least 14 days before the grace period ends. The Board requests comment on whether it should recommend to Congress that the 14-day period be increased and, if so, what time period the Board should recommend.

MasterCard does not believe it is necessary to increase the 14-day period in section 163(a) of TILA. As a primary matter, we are unaware of any changes in technology or mail delivery since 1974—the year this provision was enacted—that would necessitate a longer period of time than the 14 days specified in TILA. In fact, if anything, the opposite is true. Consumers today have significantly more payment and billing options that allow for a more rapid delivery of the periodic statement (*e.g.*, through e-mail or web site) and payment (*e.g.*, through electronic bill payment or payment through the issuer's web site).

Subsequent Disclosure Requirements

Change In Terms

The Proposal includes revisions to the CIT notification requirements under Regulation Z. Generally speaking, if a card issuer changes a term that must be disclosed under § 226.6 (or increases the required minimum periodic payment), Regulation Z currently requires the card issuer to mail or deliver a CIT notice at least 15 days prior to the effective date. The Board proposes to extend the CIT notification requirement to include changes in late-payment fees and over-limit fees. The Board also provides an alternative method of notification for changes or imposition of fees not required to be disclosed in the account-opening table. Perhaps most notably, the Proposal would also increase the current 15-day period to 45 days.

MasterCard generally agrees with several of the changes proposed by the Board relating to changes in terms. We believe, however, that the Board should weigh the potential costs of extending the CIT notification time period and compare them to the expected benefits. As the Board notes in the Supplementary Information, consumers already generally receive at least 30 days notice before a CIT takes effect due to the logistics of sending the notice (oftentimes as part of the periodic statement) and effectuating the change. We believe that this provides consumers time to shop for other credit card products, especially given the prevalence of those offered through the mail.[4]

If the Board were to require an issuer to mail the CIT notice at least 45 days before the CIT becomes effective, and the issuer wants to include the notification in the periodic statement, the Board's requirement could have the effect of requiring a card issuer to wait almost three billing cycles before implementing a CIT. For example, if an issuer intends to adopt a CIT, and the next periodic statement to the consumer will not be sent for 29 days due to the timing of the billing cycle, and the CIT doesn't become effective until the next possible full billing cycle, the card issuer could need to wait almost a full cycle before notice is placed in the mail, another cycle and a half before the 45-day period runs, and another half cycle before the CIT can take effect. In short, it could be three months before a card issuer could implement a CIT as a result of the Proposal.

It is important for the Board to understand how its Proposal could adversely affect cardholders. Today, card issuers generally have the flexibility to respond quickly if a consumer's creditworthiness deteriorates. This flexibility allows card issuers to price credit more cheaply for all cardholders since the issuer knows it will be able to address increased future risk relatively quickly. If the Proposal were adopted, however, card issuers may be forced to increase the cost of credit for all cardholders to compensate for the additional risk created by the 45-day requirement that, in reality, could be as much as a 90-day requirement. Therefore, we urge the Board to consider the costs and benefits associated with this portion of the Proposed Rule before it issues a Final Rule.

[4] We also note that several state laws require a card issuer to provide the cardholder with the opportunity to opt out of the changed terms.

Terms Included in Prior Disclosures and Cardholder Agreement

The Proposal includes a requirement for a card issuer to notify a cardholder 45 days prior to activating certain pricing mechanisms that are part of the underlying credit card account agreement. Specifically, the Board would prohibit the imposition of an increased penalty APR, even if the increase is not a CIT, unless the card issuer discloses the increase to the cardholder at least 45 days before it becomes effective. MasterCard believes the Board should strongly consider the unintended consequences of this proposed change.

The Board is relying on Regulation Z to impose substantive restrictions on an agreement between a cardholder and a card issuer. Specifically, the Board is effectively nullifying any agreement between a cardholder and a card issuer that would allow the card issuer to increase an APR if the cardholder does not honor the terms of the agreement or engages in certain actions. Rather, the card issuer would need to provide a 45-day notice of the "penalty" pricing before implementing it. In this regard, the penalty pricing is treated the same as a CIT (with negative consequences for consumers).

Our concerns about the potential to increase the cost of credit to consumers as a result of the 45-day requirement with respect to CITs are equally applicable in this context. However, this portion of the Proposal could also potentially reduce the transparency of, and distort, the pricing of credit card accounts. For example, because the Board would treat CITs and penalty pricing in the same manner for purposes of advance notice, it is not clear that card issuers would continue to include penalty pricing as an explicit contract term, nor would they necessarily disclose penalty pricing information on a Schumer box. This could occur because a card issuer could just as easily engage in a CIT—the specific terms of which need not be in the account agreement and therefore do not require prior disclosure—to reprice the account. Why would a card issuer disclose penalty rates on a Schumer box or include them as part of the account agreement when such disclosures do not grant them any additional rights or flexibility relative to a CIT?[5] In other words, the practical implication of the Proposal could be the elimination of disclosures of penalty pricing in the Schumer box and account-opening table with no meaningful change in how the account may ultimately be priced.

We also note that the Board's proposed price control may simply result in an artificial distortion of the pricing of credit card accounts. If a card issuer is prevented from adjusting a rate based on the cardholder's risk as evidenced by his or her behavior on the account, which is the undisputable effect of the Proposal, card issuers may be forced to consider other methods to compensate for the risk. These methods could include establishing higher penalty fees as part of the initial account terms, reducing credit limits, or even cancelling an account altogether. We question whether these or other results produce a net benefit to consumers, especially when the potential for an increased APR, and the circumstances under which is may be increased, is disclosed so thoroughly as a result of other portions of the Proposal. Again, we simply ask the Board to consider these potential consequences as it formulates the Final Rule.

[5] We recognize that an issuer may need to provide an opt out to the CIT under certain state laws that would not be necessary in connection with the application of different account terms that were included in the original contract. This may or may not have a material impact on issuers' decisions in this regard.

The Board may also consider different notice requirements depending on whether the penalty pricing stems from a default with the issuer (commonly called "on-us repricing") or whether the penalty results from some other activity (commonly called "off-us repricing"). There may be a material distinction between consumer expectations regarding penalty pricing depending on whether such repricing is "on us" or "off us." Indeed, in a recent speech, the Comptroller of the Currency suggested that consumers may more readily expect and understand repricing generated as a result of an "on us" default.

If, after considering its relative costs and benefits, the Board retains the 45-day penalty pricing notification requirement, we ask the Board to consider how the timing requirement would apply to card issuers that reprice based only on a *second* default by the consumer. MasterCard believes the issuer should be permitted to provide the penalty pricing notice after the first "trigger" and allow the 45-day period to run from that notice. The notice would inform the cardholder of the default and inform him or her of the consequences of a second default. If the second default occurs, the issuer would be able to reprice the account (assuming that 45 days has passed from the first notice). We believe this flexibility is important and necessary so as not to provide an unintended regulatory disincentive for issuers that provide consumers with additional options to avoid repricing.

Format of Disclosures

In addition to the conceptual issues we discuss immediately above with respect to the CIT and so-called penalty pricing disclosures, we also believe that the Proposal's formatting requirements for these disclosures should be more flexible. In particular, if a card issuer chooses to include one or both of these disclosures in a billing statement, the Proposal would require the card issuer to place these disclosures on the front of the first page of the periodic statement. We believe that this requirement would act as a significant disincentive to including these disclosures in the periodic statement as it would significantly reduce the issuer's flexibility with respect to its presentation of information on the periodic statement. We therefore ask the Board to allow a card issuer to provide these two types of disclosures in a clear and conspicuous manner with the periodic statement, but not necessarily mandate a specific location.

Billing Error Provisions

Third-Party Intermediaries

Section 161(b) of TILA defines a "billing error" to be, among other things, "[a] reflection on a statement of goods or services not accepted by the [consumer] or not delivered to the [consumer] in accordance with the agreement made at the time of the transaction." Section 226.13(a)(3) of Regulation Z implements this portion of TILA almost verbatim. The Proposal would add a new Comment 226.13(a)(3)-2 relating to the applicability of Regulation Z's billing error provisions to those circumstances in which a consumer uses a credit card, for example, to fund a separate account with a third party (*e.g.*, PayPal). The Board proposes to "clarify" that the billing error provisions in Regulation Z apply when the consumer uses the third party account to purchase goods or services that are not accepted by, or are not delivered to, the consumer. We urge the Board to reconsider this clarification.

We do not believe that the Board's proposed interpretation of 226.13(a)(3) of Regulation Z is consistent with the plain language of TILA or Regulation Z. In this regard, both the statute and the regulation give the consumer ability to seek redress through the billing error resolution process for transactions that appear on their statement for goods that were not delivered or not accepted. When a consumer funds an account with a credit card, the transaction for which the consumer is billed is the transfer of funds from the card issuer to the third party operator of the account, such as PayPal. The statute and the regulation provide consumers with protections if the third party operator does not deliver those funds to the consumer, or if the consumer does not accept those funds. We do not believe there is support for an interpretation of this portion of TILA or Regulation Z that would confer billing error protections for any subsequent transactions involving that third party intermediary account, especially since such transactions are not "reflect[ed] on a statement" provided by the card issuer.

If the Board retains the substance of this clarification, we ask that the Board narrow its applicability. In many instances, it may be possible to trace a specific credit card transaction to a specific purchase of goods or services indirectly through a third-party payment intermediary. In those circumstances, it is possible for MasterCard to resolve a chargeback in a manner similar to other chargebacks initiated as a result of an alleged billing error. On the other hand, if the third-party payment intermediary submits the transaction into our system in a manner similar to a cash advance, for example, with no way to tie the transaction to a specific purchase by the consumer, the consumer should not be able to allege a billing error in connection with the use of cash-like proceeds in the third party's account. Aside from the logistical difficulties in tracing a billing error back to what is essentially the equivalent of a cash advance, we do not believe a consumer can reasonably believe that he or she receives TILA protections in connection with a purchase funded by a cash advance, regardless of the "currency" involved.

Timeframe to Investigate

Regulation Z provides card issuers "two complete billing cycles (but in no event [more] than 90 days)" to complete a billing error investigation. The Staff Commentary states that "[t]he phrase two complete billing cycles means 2 actual billing cycles occurring after receipt of the billing error notice, not a measure of time equal to 2 billing cycles." The Board does not propose to change this Comment as part of the Proposal. We concur with the Board's choice to retain the existing interpretation. The Supplementary Information to the Proposal states, however, that "the creditor must complete its investigation within the time period represented by two billing cycles. Thus, for example, if a creditor's billing cycle is 30 days, it would only have 60 days to conclude its investigation of alleged billing errors." Despite this apparently inconsistent explanation in the Supplementary Information, we believe the Staff Commentary is the correct and historical interpretation of the billing error investigation time limit. We urge the Board to revise the Supplementary Information in the Final Rule to ensure that there is no discrepancy between the Staff Commentary and the Supplementary Information on this point.

Miscellaneous

Definition of Open-End Credit

The Proposal would not alter the definition of "open-end credit" in § 226.2(a)(20) of Regulation Z. The Proposal would amend, however, the Staff Commentary provision relating to that definition. In particular, the proposed revisions to Comment 2(a)(20)-2 indicate that repayments allocated to a "sub-account" of an account "must generally replenish" the line of credit made available in that sub-account. The Board notes that an open-end credit account may have different sub-accounts, and that "[a]dvances and payments may be allocated to different sub-accounts for the purpose of prescribing different terms (such as different periodic rates or other payment options) for those advances." We ask that the Board clarify that the proposed revision to the Staff Commentary is not applicable to an account simply because the account may have features with varying APRs, especially if those varying APRs do not signify the existence of sub-accounts. For example, a card issuer may offer a promotional APR on a balance transfer. As that balance transfer is repaid, the card issuer may "replenish" the line of credit, but subject to different terms than the promotional APR. This circumstance should not have any impact on a determination on whether the underlying account is an open-end account. We do not believe the Board intended for such a result, but we ask for specific clarification on this point.

The Board also calls into question the status of credit card offerings that may involve transaction-based underwriting by card issuers, suggesting that such accounts may not be open-end accounts for purposes of Regulation Z. For example, some credit cards offered by issuers have no preset spending limit. Many consumers find these types of cards valuable. Yet, some issuers may need to review a cardholder's credit history in connection with certain transactions on such accounts. Regardless of whether how a card issuer handles individual transactions on such an account, it would be difficult to characterize it as anything other than open-end. We ask the Board to clarify that such accounts (or any similar account) continue to be "open-end" for purposes of Regulation Z.

Effective Date

MasterCard strongly urges the Board to provide card issuers with sufficient time to review and implement the Final Rule. As the Board knows, the Proposal is extremely comprehensive and its implementation will require significant systems work, operational revisions, and testing. We believe the Final Rule should be effective immediately, but with a mandatory compliance date of 2 years from the date it is published in the *Federal Register*. The immediate effective date will allow issuers to come into compliance gradually while being able to rely on an effective regulation for liability purposes. The extended mandatory compliance deadline will ensure sufficient time for issuers to come into full compliance.

Safe Harbor

MasterCard asks the Board to provide a safe harbor to card issuers that comply in good faith with the requirements of Regulation Z, as amended by the Final Rule. Card issuers should not be subject to liability relating to the disclosures they provide in connection with a credit card account if the card issuer is compliant with the Board's regulatory requirements.

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Again, MasterCard appreciates the opportunity to provide its comments on the Proposal. Please do not hesitate to contact me at (914) 249-5978, or our counsels at Sidley Austin LLP in connection with this matter, Michael McEneney at (202) 736-8368 or Karl Kaufmann at (202) 736-8133.

Sincerely,

Jodi Golinsky

Jodi Golinsky
Vice President and
Regulatory & Public Policy Counsel