Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 18, 2008

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

Subject: Docket No. R-1314

Dear Ms. Johnson:

This letter responds to the request by the Board of Governors of the Federal Reserve System (Board) for comment on its May 19, 2008, proposed rule (Proposed Rule) amending the provisions of Regulation AA, issued jointly with the Office of Thrift Supervision (OTS) and the National Credit Union Association (NCUA).

The Office of the Comptroller of the Currency (OCC) is the primary federal regulator of national banks, which collectively account for almost 80 percent of all credit card lending in the United States. As the primary supervisor for these credit card activities, the OCC strongly supports efforts to provide consumers with full and accurate disclosures and protections from unfair or deceptive acts or practices in connection with credit cards and deposit accounts. Although the OCC does not have rulemaking authority under the Federal Trade Commission Act (FTC Act), we have used various tools available to us, including enforcement actions and supervisory guidance, to ensure that national banks' credit card and deposit businesses operate in compliance with the FTC Act and other applicable standards.

The OCC supports rulemaking by the Board in this area, and as discussed below, we support key parts of the Proposed Rule. Nevertheless, as also discussed below, we believe that particular aspects of the Proposed Rule would have unintended and undesirable consequences that: (1) raise safety and soundness concerns; (2) are not necessary to assure fair treatment of consumers, and in some respects run counter to consumers' interests; and, (3) could result in a significant reduction in credit availability.

The Proposed Rule represents a major shift away from the Board's longstanding reliance on disclosure rules as its primary form of consumer protection regulation. In particular, with respect to credit cards, the Proposal represents a significant change in direction from the enhanced credit card disclosure rules the Board proposed just over a year ago, to substantive restrictions on particular practices that would be promulgated pursuant to the Board's rulemaking authority under the Federal

Trade Commission Act. The OCC has several reactions to this changed paradigm as it relates to the proposed substantive regulation of credit card practices.

A number of credit card practices have evolved over the years in ways that have generated substantial numbers of consumer complaints. In part, the complaints stem from shortcomings in the disclosures provided to consumers explaining the features of their accounts. But in other respects, the underlying practices may be inherently questionable, or so complex that effective disclosure is very difficult. In each of the last few years, for example, complaints about credit cards accounted for approximately 40 percent of the total complaints and inquiries received by the OCC's Customer Assistance Group (CAG). In 2006, almost 14 percent of such complaints concerned changes to existing account terms. About seven percent concerned fees and other charges, such as the amount of over-limit and late payment fees, late fees assessed in error, allegations of "bait and switch" tactics in connection with fee increases, and the adequacy of fee disclosures. The remaining complaints dealt with a variety of other issues, such as those related to allocation of payments, balance transfers, periodic statements, advertisements and solicitations, and credit balances.

Our experience in addressing these complaints leads us to conclude that enhanced disclosure alone may not always be effective. We understand why the Board and many members of Congress have turned to substantive regulation in an effort to restrict or curtail a number of the aggressive credit card practices that have developed. In that context, we support as a policy matter many of the specific substantive restrictions included in the Proposed Rule.

For example, we support the restrictions that the Board would impose on so-called "fee harvester" subprime credit cards. This provision addresses an area where the OCC has taken several enforcement actions to address our concerns about unfair practices involving the imposition of substantial fees and "security deposits" in connection with subprime credit cards – in particular, where consumers were not put on notice that such fees would consume most of the available credit line and leave the card with little utility for use as a payment device. The Proposed Rule appropriately prohibits card issuers from financing fees and charges when those charges are unreasonably high in relation to the initial credit limit (50 percent or more). It also would impose appropriate restrictions on an issuer's ability to charge to the account during the first billing cycle any fees in excess of 25 percent of the initial credit limit.

In addition, we support the proposed prohibition on two-cycle billing. This practice currently permits the assessment of interest on not only the balance for the current billing cycle, but also on the balance for the preceding billing cycle. Consumers who pay their balance in full one month, but not the next, are sometimes understandably surprised to learn that their grace period has been retroactively revoked and that they have been charged interest on balances preceding the current billing cycle that have already been repaid. Although Regulation Z currently allows this billing method, it has been evident that disclosures alone are inadequate to enable consumers to understand and thereby avoid the higher interest charges that result from this computation method. The substantive prohibition in the Proposed Rule would address this problem.

The Board notes that there are circumstances in which creditors will accelerate repayment of an outstanding balance to mitigate risk. In such circumstances, the Proposed Rule would provide consumers a reasonable period of time in which to repay the card balance. This provision is limited to circumstances where the creditor has raised the rate for a category of transactions, such as new transactions, but is prohibited from also increasing the rate on any outstanding purchase transactions balance because that rate increase is not permitted by one of the three exceptions in the rule and therefore determines to accelerate repayment of the outstanding balance. We agree with the Board that this proposed substantive restriction would provide meaningful protection for consumers in such circumstances.

In addition to these aspects of the Proposed Rule that we support, there are two other parts of the Proposed Rule that we urge the Board to reconsider: (1) the overly broad restriction on the repricing of outstanding credit card balances; and, (2) the potentially retroactive application of the proposed new substantive restrictions, which could result in unintended and unfair litigation risk exposure.

With respect to our first concern, we support the need to place significant new boundaries on the ability of credit card lenders to reprice existing balances. We also agree that it is appropriate to prohibit practices in which "hair triggers" have led to the repricing of certain accounts. In particular, we agree that the bases for repricing need to be a specified set of events that are readily understandable by consumers and can be effectively disclosed in advance to them. The pricing restriction in the Proposed Rule, however, is much more sweeping in its scope than it needs to be to assure such fair treatment of consumers.

In particular, the proposed restriction would prohibit card issuers from repricing outstanding balances after the expiration of the term of the card – even where the expiration date is plainly printed on the front of the card and the customer is fully informed of the potential for repricing of outstanding balances well in advance of that time.[1] Such a restriction would mean that unsecured, revolving credit card debt – one of the riskiest forms of consumer debt that can be extended by a lender – could only be provided with pricing terms that could not change when the risk of repayment clearly increased dramatically. This would be true even where the customer could be clearly informed in advance that the pricing terms of the loan would only last until the expiration date printed on the card. We believe that such a regulatory "freeze" of pricing terms for unsecured revolving credit, wholly without regard to the substantial changes in customer risk profile that can occur over extended periods, is not consistent with safe and sound lending practices. We also believe it is not consistent with customer expectations: provided adequate advance disclosure is provided, a consumer has little reason to assume that the pricing terms provided in a credit card agreement are supposed to last beyond the term of the card, and certainly not forever.

Similarly, the Proposed Rule would prohibit the repricing of outstanding balances even where, before the end of the expiration period, the customer makes payments on that card that are clearly late – but less than thirty days late – that demonstrably indicate increased risk of default. This would occur, for example, when the lender's historical payment data shows a clear correlation between increased risk of default and either payments that are late by more than ten days, or a pattern of late payments such as two or more within a 12-month period. Again, we believe the inability to reprice with respect to such demonstrable increases in risk is inconsistent with safe and sound lending practice. And again, we do not believe it is consistent with customer expectations: so long as adequate advance notice is provided, consumers can reasonably understand that late payments on their credit card loans will lead to increased pricing with respect to those loans.

[1] The Proposed Rule would permit repricing during the term of the account only if the rate changed pursuant to a variable-rate feature tied to an external public index, upon expiration of an introductory rate, or if the consumer's payment is at least 30 days' late.

Moreover, in both of the examples described above, any lingering concerns about fair treatment can and should be further mitigated by providing the consumer with a right to opt out of the rate increase, with the understanding that the account would be closed to new purchases and that the consumer could pay off the outstanding balance over a reasonable period under the preexisting pricing terms.

Finally, we urge the Board to take into account the legitimate concern that the exceptionally broad repricing restriction in the Proposed Rule could lead to a significant and unpredictable constriction in credit availability. Lenders are likely to reduce both the availability of cards generally and consumers' credit limits if they are no longer permitted to reprice account balances based on demonstrable credit risk factors.

For all these reasons, we suggest in our comments below that the Board address our first area of concern by modifying its proposed repricing restriction so that lenders can better correlate price to risk in ways that remain fundamentally fair to the consumer.

Our second area of concern is the way in which the Proposed Rule would apply the new substantive restrictions, which we believe could result in unintended, retroactive, and unfair litigation risk exposure for credit card lenders. In particular, we are concerned about lenders' exposure for conduct that is allowed under current rules, but which has been labeled as unfair by the Proposed Rule. Based on the rationale advanced in the preamble of the Proposed Rule for prohibiting the practices prospectively, litigants could argue that the Board has deemed conduct addressed in the Proposed Rule as *per se* unfair under <u>existing</u> legal standards. Unless the Board takes some additional steps when it finalizes the rule, this argument could be advanced even if the Board declares that its provisions are intended to be prospective only. For the reasons described below, we believe that this potentially retroactive application of the Proposed Rule to practices that are lawful today is both unjustified and unnecessary. Accordingly, we also offer several suggestions to address this issue.

I. Flexibility to Adjust Rates on Outstanding Balances to Reflect Increased Risk

With limited exception, the Board proposes to prohibit a creditor from increasing the APR applicable to a borrower's outstanding credit card balance. Other than variable rate changes and the expiration or loss of a promotional rate, the only exception would be when a minimum payment is late by more than 30 days. We agree with the Board that substantive regulation is appropriate to prohibit practices in which "hair triggers" have led to the penalty rate pricing increases on account balances. And we support the general approach of limiting the events that allow repricing to a select few that are readily understood and for which consumers can receive effective advance notice. However, we believe the proposed restriction is unnecessarily stringent and would severely curtail the ability of creditors to react to adverse changes in a borrower's risk characteristics during the term of the account.

The exceptionally broad proposed restriction raises significant safety and soundness concerns because it would not permit card issuers to adjust pricing in response to other consumer behaviors associated with demonstrable increases in risk. Risk-based pricing, including repricing existing balances, is a key risk-mitigation technique that has allowed issuers to expand credit availability and to reduce the cost of credit for many borrowers. Consumers reap benefits from the ease of obtaining and using credit cards and from favorable terms such as competitive rates, the lack of annual fees, and limited liability for unauthorized transactions. However, while credit card issuers have an interest in maintaining the widespread availability of credit cards, they also must mitigate the unique risks presented by extending unsecured, revolving credit.

Moreover, the proposed restriction is unnecessary to assure fair treatment of consumers. Today, consumers may experience repricing for a variety of reasons, and some triggering events may be difficult to know in advance. In contrast, with effective advance notice, consumers can and do understand that failure to make timely payment on their cards can lead to increased rates on their outstanding balances. Similarly, again assuming there is adequate advance notice, consumers also can understand that terms may be changed when their card is due to expire, if the consumer wants to continue the credit relationship. We suggest an addition to the Proposed Rule in this regard below. And in either case, consumer protection could be enhanced if the Board provided consumers with a right to opt out of the rate increase by closing the account to new purchases and paying off the balance over a reasonable period of time under the preexisting terms.

A. Suggested Additional and Modified Exceptions

1. *Changes in Terms at Card Expiration and Renewal.*

As we read the Proposed Rule, creditors would not be permitted to increase the rate on an outstanding balance even when the credit card expires and a new card must be issued in order for the cardholder to continue to be able to conduct transactions. We recommend that the Board add an exception to permit creditors to re-underwrite and price any outstanding balance at the expiration date of a particular credit card, which is a logical point for both parties to assess the terms, if any, on which the credit relationship should continue. In doing so, the Board could also impose reasonable limitations on this exception in order to prevent abuse. For example, it could set a minimum period for the duration of the card, such as no less than 12 months. Further, the Board could provide that this exception may be used only if the creditor: (1) provided sufficient notice at account opening (where applicable) that the rates applicable to card balances may increase upon account renewal; (2) provided the consumer with multiple advance notices of any such change as the expiration date approached; and (3) permitted the consumer to opt out of the rate increase, close the account, and pay off the balance under the preexisting terms within a reasonable period.

2. *Thirty-Day Late Payment Trigger Is Excessive.*

We share the Board's concerns about a "hair trigger" for rate increases that penalizes the consumer with an increased rate on existing balances for minor delays in making a payment, such as a payment that is one day late. However, we are concerned that the 30-day late payment exception does not allow creditors to react to their credit exposure in circumstances that demonstrate a material increase in risk. Our experience with national banks' credit card lending operations is that their risk of loss is highly correlated with the extent of the delay in receiving a customer's payment after the due date, and that higher risk of loss becomes evident at a point in time well before a payment is 30 days late. Preventing a creditor from reacting to a consumer's failure to pay until the payment is 30 days late substantially undermines the ability of the creditor to adjust its pricing to reflect risk at a time when such action would be meaningful. Therefore, we urge the Board to modify the Proposed Rule to select a considerably shorter late payment period representing a period indicative of increased risk of payment default by consumers. The period should be long enough so that payment on the account is clearly late, for example, five days after the payment due date, and before a new credit cycle begins and the next periodic statement is prepared.

3. *Other Risk-Based Exceptions.*

For the same reasons, we also urge the Board to modify the Proposed Rule to permit a rate adjustment on an outstanding balance whenever the consumer has made a certain number of late payments within a specified period, such as two late payments within a twelve month period, provided the lender can correlate the number of late payments with actual increased risk of default. This would be another standard that is easy to understand, so long as consumers are provided with multiple, simple advance notices of the consequences of repeated late payments.

II. Risk of Unforeseen Liability

Our second concern is with the potentially retroactive liability and unnecessary litigation risks that could flow from the Proposed Rule. In issuing the Proposed Rule, the Board undertook to exercise its rulemaking authority under section 18(f)(1) of the FTC Act to prohibit seven unfair or deceptive acts or practices relating to credit card lending and two unfair acts or practices relating to overdraft services. While the preamble to the Proposed Rule states that the proposal "should not be construed as a definitive conclusion by the Agencies that a particular act or practice is unfair or deceptive,"[2] the Board's analysis concludes with the determination that each practice "appears" to be unfair or deceptive under standards articulated in the FTC Act and Federal Trade Commission (FTC) precedent. For example, the Board states that increasing the annual percentage rate (APR) applicable to the balances outstanding before the effective date of the rate increase "appears to meet the test for unfairness under 15 U.S.C. 45(n) and the standards articulated by the FTC."[3]

We take issue with significant aspects of this analysis, particularly its discounting of the value of effective disclosures and opt-out opportunities to enable consumers to avoid harm from the practices at issue. However, we are especially concerned that the Proposed Rule, should it be adopted by the Board as currently framed and in reliance on the rationales contained in the proposal, would expose banks to retroactive civil liability under a variety of laws for prior conduct that was lawful at the time it was conducted. For instance, every state has adopted its own unfair or deceptive acts or practices (UDAP) law, and virtually all of these laws provide for both civil liability and the possibility of class actions.[4] Further, many of the state UDAP laws are patterned after section 5 of the FTC Act, and, by operation of either express provisions in the state statute or principles developed under the relevant case law, rely on or are guided by interpretations of the FTC Act in determining whether an act or practice is unfair or deceptive.[5]

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[2] 73 Fed. Reg. 28,904, 28,912 (2008).
[3] *Id.* at p. 28,917.
[4] Many state UDAP laws also provide exemptions for certain actions, transactions, or entities, and these exemptions could be relevant to a case brought against a bank on the basis of practices prohibited by the Proposed Rule.
[5] *See, e.g.,* Ariz. Rev. Stat. Ann. § 44-1522 (West Supp. 2007); Conn. Gen. Stat. Ann. § 42-110b(b) (West 2007); 815 Ill. Comp. Stat. Ann. § 505/2 (West 1999); Mass. Ann. Laws. Ann. ch. 93A, § 2 (Lexis Nexis 2005). While the state statutes generally refer to "interpretations given by the Federal Trade Commission and the federal courts" to the FTC Act, the fact that an interpretation in the banking arena has been given by the Board would likely guide state courts in a similar manner. Moreover, the preamble to the Proposed Rule notes that in proposing it, the Agencies applied the Act's and the FTC's standards for determining whether an act or practice is unfair or deceptive. 73 Fed. Reg. at 28,908.

Particularly troubling is the prospect that conduct that would be prohibited as unfair by the Proposed Rule, but that occurred before the effective date of any final rules, could be held to be unfair without regard to the particular facts and circumstances at issue, or the quality of disclosure afforded consumers or other measures available to enable them to avoid harm from the practice at issue. Based on the rationale provided in the preamble for prohibiting the practices at issue, litigants could argue that the Board, the OTS, and the NCUA, view certain practices as *per se* unfair under existing legal standards. This argument might be advanced even if the Board declares that the new federal regulations are intended to be prospective only.

The unfairness of creating this legal uncertainty and risk arising from past conduct is made more acute by the fact that many of the practices are permitted, or have been countenanced without criticism, under current federal law. For example, the Proposed Rule would define two-cycle billing as an unfair practice, with limited exceptions. While we agree that a prospective prohibition would be an appropriate response to this practice, Regulation Z has for many years expressly recognized the use of the "two-cycle average daily balance (including new purchases)" and the "two-cycle average daily balance (excluding new purchases)" methods for calculating balances (as two of four commonly used methods), and it specifies how the methods must be disclosed.[6]

Similarly, as described above, the Proposed Rule would largely prohibit as unfair the practice of increasing the interest rate on an existing balance. Here again, Regulation Z has long recognized the ability of lenders to increase rates on such balances; that is, rather than prohibiting such practices, it requires 15 days advance notice of a change in the periodic rate that is used to compute the finance charge, including a change to the rate due to risk-based pricing.[7] A change in terms notice is also required, but not in advance, if the rate is changed due to the consumer's delinquency or default.[8] The Commentary to these provisions specifically states that the regulation does not address "[h]ow changed terms affect existing balances, such as when a periodic rate is changed and the consumer does not pay off the entire existing balance before the new rate takes effect," because this issue is "controlled by State or other applicable law."[9] The treatment of these two practices under current Board rules and Commentary is difficult to reconcile with the position, implicit in the Proposed Rule, that the practices appear to be unfair under another federal law – the FTC Act – that the Board has exclusive authority to implement for banks.

In the Board's June 14, 2007 notice of proposed rulemaking to amend the credit card-related provisions in Regulation Z, for example, the Board expressly declined to ban certain practices that would increase the rates on existing balances. Instead, it proposed to require 45 days advance notice of rate increases, in part to help consumers avoid rate increases on existing balances that might result from these practices.[10] The Board stated that, in addition to improving consumer awareness about changes in account terms, the "revisions also are intended to enhance consumers' ability to shop for alternative financing before such account terms become effective."[11] Nowhere in this document did the Board suggest that risk-based price adjustments for outstanding credit balances were unfair and should be prohibited. Again, it is difficult to reconcile the Board's

[6] 12 C.F.R. § 226.5a(g)(2).
[7] 12 C.F.R. § 226.9(c).
[8] 12 C.F.R. § 226.9(c)(1).
[9] 12 C.F.R. Part 226, Supp. I, § 226.9, ¶ 9(c), Comment 2.
[10] *See* 72 Fed. Reg. 32,948, 33,009 (2007).
[11] *Id.*

enhanced disclosure and advance notice approach of June 2007 with statements only a year later that, even with such disclosures and advance notice, repricing is inherently "unfair."[12]

The OCC also has recognized the practice of risk-based pricing adjustments for outstanding credit card balances as a credit risk management tool used by credit card issuers. And in order to address the risk of unfair or deceptive acts or practices, the OCC has stated in its supervisory guidance that national banks should make full and prominent disclosure of their ability to change credit card terms in solicitations and card agreements, whether pursuant to the consumer's default or pursuant to a unilateral change in terms provision.[13] The OCC's comment letter on the Board's June 2007 proposal endorsed that proposal's basic approach of enhanced disclosure and advance notice, coupled with an opportunity for the consumer to opt out of such rate changes.

We therefore urge the Board to take steps to avoid creating a significant litigation trap for creditors that have relied on existing law and the Board's prior interpretive statements under Regulation Z in structuring their credit card lending activities.[14] We recommend an approach that uses the Board's rulemaking authority under the Truth in Lending Act to set the operative restrictions and prohibitions, and then link those to rules promulgated under the FTC Act for the purpose of preventing unfair or deceptive acts or practices.[15] This proposed approach is detailed below.

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[12] It is also difficult to reconcile this position with the Board's simultaneous proposal affecting overdraft programs that would define an unfair practice to be *failure to provide* enhanced disclosures and advance notice about the costs of such programs. A further example relates to the provision of the Proposed Rule that would define as unfair the practice of assessing a fee on a consumer's deposit account in connection with an overdraft service unless the depository institution has provided the consumer with the right to opt out of the payment of overdrafts. The Board and the other federal banking agencies have previously published interagency guidance addressing overdraft protection programs. *Joint Guidance on Overdraft Protection Programs,* 70 Fed. Reg. 9,127 (2005). The guidance included a list of "best practices," one of which was to obtain the affirmative consent of consumers to receive overdraft protection, or, where overdraft protection is automatically provided, to permit consumers to "opt-out" of the overdraft program and provide a clear disclosure to consumers about this option. *Id.* at 9,132. The Proposed Rule would transform one of these alternative "best practices" into a legal requirement, notwithstanding the fact that the guidance did not even mention such an opt out opportunity in its analysis of the FTC Act or other legal risks presented by overdraft protection programs.

[13] OCC Advisory Letter 2004-10 at p. 3 (Credit Card Practices) (Sept. 14, 2004).

[14] Some of the practices that would be restricted by the Proposed Rule, particularly those that have been countenanced by the federal banking agencies previously, are common industry-wide, such as allocating payments to the lowest rate balance first. *See* 73 Fed. Reg. at p. 28,915. In contrast, in connection with the Board's credit practices rule promulgated under the FTC Act in 1985 – following the FTC's promulgation of the credit practices rule in 1984 – the Board stated that the FTC's rulemaking record suggested that banks used the remedies subject to the prohibitions in the rule less than finance companies did. 49 Fed. Reg. 47,041, 47,045-46 (1984). Consequently, that rulemaking did not create comparable litigation risks for banks.

In contrast, some of the practices the Board proposed to prohibit as unfair practices have not been countenanced (and indeed, have been the subject of supervisory and enforcement actions under the FTC Act) by the banking agencies, such as assessing fees on subprime credit cards exceeding greater than half of the credit limit, and imposing overlimit fees due solely to a hold placed on the account. Defining these practices as unfair practices in Regulation AA would not appear to create similar litigation risks.

[15] The Board has authority under section 18(f)(1) both to prescribe regulations "defining with specificity . . . unfair or deceptive acts or practices" and "containing requirements prescribed for the purpose of preventing such acts or practices." 15 U.S.C. § 57a(f)(1) (emphasis added).

A. Alternative Proposal for Credit Card Rulemaking: Use of Authority Under Truth in Lending Act in Combination with FTC Act

1. *Addressing Credit Card Practices through Truth in Lending Act Rulemaking.*

Some of the credit card practices at issue could be similarly and effectively prohibited or limited – but only prospectively – through amendments to Regulation Z in conjunction with a targeted FTC Act rulemaking.

The Board has expansive rulemaking authority under the Truth in Lending Act (TILA), and this authority could be used to address the potential consumer harms that have been identified. Moreover, any requirements imposed in Regulation Z would be applicable to all creditors, and thus would apply more broadly to cover companies that would not be subject to the FTC Act rules proposed by the Board, the OTS, and the NCUA.[16] Prohibitions applicable to all creditors would cover not only the entities that are subject to the Agencies' FTC Act jurisdiction, but also any entities providing consumer credit card accounts independent of a depository institution.[17]

The purpose of the TILA is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available . . . and avoid the uninformed use of credit, and to protect the consumer against . . . unfair credit billing and credit card practices."[18] TILA also provided the Board with authority to: "prescribe regulations to carry out the purposes of this subchapter."[19] The statute thus provides the Board with clear authority to impose both disclosure requirements and affirmative restrictions as appropriate to address particular credit card practices. We believe the Board could issue regulations under TILA to prohibit or restrict credit card practices at issue here.

2. *Use of FTC Act for Companion Rulemaking.*

In addition, as a companion to a Regulation Z rulemaking, the Board, (and the OTS and NCUA) could adopt rules under the FTC Act that provide that failure to comply with some or all of the new Regulation Z prohibitions constitutes a violation of Regulation AA (and the counterpart regulations of OTS and NCUA) adopted under the FTC Act to prevent unfair and deceptive practices.

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[16] 15 U.S.C. § 1602(f); 12 C.F.R. § 226.2(a)(17) (for open-end provisions of Regulation Z, a "creditor" is any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments).

[17] To the extent that the Board adopts these provisions in Regulation Z, it could be done through an interim final rule with a request for additional comment on the use of different rulemaking authority affecting the scope of coverage. *See* 70 Fed. Reg. 33,958 (June 10, 2005) (Fair Credit Reporting Medical Information Regulations – Interim Final Rules with Request for Public Comments).

[18] 15 U.S.C. § 1601(a) (emphasis added).

[19] *Id.* at § 1604(a). The Board's regulations may "may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *See also* 15 U.S.C. § 1637(a)(5) (for credit card account opening disclosures, Board may require identification of other charges not listed in TILA that may be imposed and how they will be computed); § 1637(c)(5) (for applications and solicitations relating to credit and charge cards, Board may require disclosures in addition to or modify those specified in TILA).

This approach would have the benefit of achieving the Board's consumer protection goals while limiting the risk that the rulemaking would result in retroactive liability, because a creditor could not be held liable retroactively for failure to comply with a regulation that did not exist. And, as noted above, prohibiting these practices in Regulation Z would also result in a greater number of entities that would be covered by the new requirements and would be fully enforceable by the federal banking agencies <u>and</u> the FTC. In determining which violations of the new Regulation Z provisions to also characterize as unfair and deceptive under Regulation AA, the Board could take into account a number of factors, including whether such additional action would help promote compliance with, and enforcement of, the new Regulation Z provisions. In particular, with respect to practices that have been permitted or countenanced under current federal law, consideration should be given to whether circumstances have changed so fundamentally to support not only restricting these practices under the new provisions in Regulation Z, but also to labeling them as unfair or deceptive under applicable legal standards.

To illustrate, whatever restrictions the Board ultimately determines to impose on the application of an increased rate to existing balances could be imposed through amendments to Regulation Z. New Regulation Z provisions could require creditors to disclose, in advance of a transaction, the periodic rate that will apply to the resulting balance for the life of the account, absent the existence of one of the specified exceptions (such as late payment on the account, expiration of the card, or a variable-rate feature), and could prohibit rate changes unless pursuant to such an exception and provision of adequate advance notice and an opportunity to opt-out for the consumer. The Board (and OTS and NCUA) could then also provide in new rules that failure to comply with these specific Regulation Z requirements would be a violation of Regulation AA (and the counterpart new rules of OTS and NCUA). Before making this additional determination, however, it would be appropriate to take into consideration the fact that risk-based pricing of outstanding balances has been countenanced in many of the circumstances that would now be prohibited.

B. <u>Revisiting the Rationale for the Proposed Rule</u>

As noted above, we also have concerns that undue litigation risks may stem from the Board's legal analysis of some of the practices addressed by the Proposed Rule. To the extent that the Board relies on its FTC Act rulemaking authority to restrict certain credit card practices, it would be more consistent with precedents defining unfair and deceptive practices and could reduce the chance of unintended liability for prior conduct to provide a somewhat different rationale and analysis for any final amendments to Regulation AA. The Board itself has recognized that:

> Because a determination of unfairness or deception depends heavily on the facts of an individual case . . . compliance with the FTC Act has been approached typically on a case-by-case basis. A rule attempting to define a specific practice as unfair or deceptive and, therefore, prohibited in all circumstances, is often difficult to construct.[20]

[20] Letter from Chairman Ben Bernanke to Hon. Barney Frank at p. 2 (March 26, 2006); Letter from Chairman Alan Greenspan to Hon. John LaFalce at p. 2 (May 30, 2002); *see also* Board of Governors of the Federal Reserve System & FDIC, *Unfair or Deceptive Acts or Practices by State-Chartered Banks* at p. 2 (Mar. 11, 2004); OCC Advisory Letter 2002-3, *Guidance on Unfair or Deceptive Acts or Practices* at pp. 1, 3 (March 22, 2002).

The Board has thus acknowledged the difficulty of delineating the circumstances in which a practice would be unfair through a regulation of general applicability. In the credit card context, any number of factors may be relevant to evaluating unfairness in particular circumstances, making this task particularly difficult. These factors include the overall terms of particular accounts, the prominence and quality of the disclosures, the consumer's alternatives, including the range of available products, the prevalence of the practice, the degree of competition, market conditions, and the creditor's rationale for employing the practice in question.

The Board has authority under the FTC Act to:

> Prescribe regulations to carry out the purposes of [section 18 of the FTC Act relating to UDAP rulemaking proceedings], including regulations defining with specificity such unfair or deceptive acts or practices, and containing *requirements prescribed for the purpose of preventing such acts or practices.*[21]

Thus, the statute specifically grants the Board authority both to prevent unfair or deceptive acts or practices, as well as to define acts or practices that are unfair or deceptive. The authority to prevent is particularly useful and appropriate here, where effective disclosures and opt-out opportunities can affect whether a practice should be labeled *per se* unfair. Thus, if the Board adopts the alternative rulemaking approach we recommend above, we urge that it clarify in those cases where violation of a new Regulation Z prohibition also would be a violation of Regulation AA, that the Regulation AA prohibition is being adopted to prevent an unfair or deceptive practice. Similarly, if the Board acts solely under its authority under the FTC Act with respect to certain practices, we urge it to clearly state that the purpose of the Regulation AA rule is to prevent unfair acts or practices.

III. Other Comments and Concerns

A. Payment Allocation: Need for Appropriate Transition Adjustments

The Proposed Rule also would impose restrictions on how creditors allocate payments to balances when different rates of interest apply to different balances. Although many consumers benefit from balance transfer and promotional rate programs that are common in the credit card marketplace today, concerns have been raised about the fairness of payment allocation practices associated with those programs.[22] If in the final rule the Board does impose substantive restrictions on how payments must be allocated for credit card accounts, card issuers will need to make substantial systems processing changes affecting millions of customer accounts. To address these practical implications, the Board should provide that any new requirements will apply only to new promotional accounts offered after the effective date of the final rules or provide that they will not become effective until after an appropriate transition period.

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[21] 15 U.S.C. § 57a(f)(1) (emphasis added). At the time Congress granted rulemaking authority under the FTC Act to the Board, the FTC's rulemaking authority was revised in a similar manner to state that rules which define with specificity acts or practices that are unfair or deceptive "may include requirements prescribed for the purpose of preventing such acts or practices." 15 U.S.C. § 57a(a)(1)(B). As noted in the Senate conference report on the 1975 amendments, the conferees added this provision "for the purpose of clarifying . . . [that the FTC] may specify what must be done in order to avoid engaging in an unfair or deceptive practice." S. Conf. Rep. No. 93-1408 at p. 31 (1974).

[22] 73 Fed. Reg. at 28, 914 – 28,917 (2007).

B. Implications of the Proposed Rule on Overdraft Services

Finally, the Board has proposed restrictions on assessing a fee or charge on a consumer's account in connection with overdraft services. As the Board noted in its April 2007 *Report to Congress on the Check Clearing for the 21st Century Act of 2003*, "banks are generally providing faster availability of funds to consumers than required by the [Expedited Funds Availability Act (EFAA)] and Regulation CC."[23] If depository institutions either believe or find that more checks will be returned unpaid because overdraft protection programs will not automatically cover the nonsufficient funds checks, a likely result will be that they lengthen their availability schedules to the extent allowed by Regulation CC.[24] Thus, it would take longer for consumers to gain access to funds that have been deposited into their account. This, in turn, could lead to a greater number of overdrafts for some consumers and would be contrary to public policy objectives of enhancing funds availability. We recommend that the Board revisit this aspect of the Proposed Rule in order to assure that it has taken take into account the potential impact on consumer costs and to funds availability of any final rules affecting overdraft services.

IV. Conclusion

We appreciate the opportunity to comment on the Proposed Rule. If you have any questions concerning these recommendations, please do not hesitate to contact us.

Sincerely,

John C. Dugan
Comptroller of the Currency

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[23] Board of Governors of the Federal Reserve System, *Report to the Congress on the Check Clearing for the 21st Century Act of 2003* at pp. 2-3 (April 2007). Local checks and nonlocal checks are generally subject to maximum permissible hold periods under the EFAA of two days and five days, respectively. The Board's March 2006 survey data indicated that "banks provided prompter availability than required by the EFAA on about 90 percent of all consumer deposits of local and nonlocal checks and half of all deposits of next-day checks." *Id.*

[24] Should the Board go forward with restrictions on overdraft services, for the reasons discussed in the context of the credit card provisions of the Proposed Rule, in order to limit the risk of unintended liability for past conduct, it should consider relying on its rulemaking authority under the Truth in Savings Act to effectuate the new provisions, in combination with its authority under the FTC Act as appropriate.