BARCLAYS

Clinton W. Walker
General Counsel
Tel 302-255-8700
CWalker@BarclaycardUS.com

August 4, 2008

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

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G. Street, NW
Washington, DC 20552

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

RE: Unfair or Deceptive Acts or Practices; Docket No. R-1314 (Federal Reserve Board); OTS-2008-0004 (Office of the Thrift Supervision); RIN 3133-AD47 (National Credit Union Administration)

Ladies and Gentlemen:

Barclays Bank Delaware ("Barclays") is pleased to be able to submit these comments in response to the proposal by the Federal Reserve Board ("Board"), the Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA") (together referred to as the "Agencies") to classify certain consumer credit card acts or practices as unfair or deceptive under the authority of section 5(a) of the Federal Trade Commissions Act ("Act") ("Proposed Rule").

Barclays is a partnership focused issuer of credit cards with over $7 billion in credit card receivables and approximately 4.8 million credit card accounts. Founded in 2001, Barclays is one of the fastest growing credit card issuers in the United States. Some of its credit card partnerships include the LL Bean card, the US Airways card, the Barnes & Noble card and the Carnival Cruise Lines card. As a bank wholly focused on the issuance of credit cards, Barclays appreciates the opportunity to make its views known on this important proposal.

Summary of Argument

Barclays understands that the purpose of the Proposed Rule is to protect consumers from practices that the Agencies believe might hurt certain consumers and which consumers themselves can not reasonably avoid. Barclays supports that goal but is concerned about the potential that the Proposed Rule could create consequences that will be harmful to consumers, credit card issuers and the economy.

Barclays believes that the net effect of the Proposed Rule will be to increase the cost of credit card credit generally and to cause harm to the same individuals it is intended to help. Those consumers who take care to pay their bills on time each month will find their costs increased regardless of their good behavior. Certain individuals who need access to credit card credit the most, might find themselves denied access to that credit. Certain credit card benefits might be reduced. Finally, the Proposed Rule actually makes the credit card product more complicated and harder to explain and therefore harder to understand than ever before. It does not simplify disclosures or improve transparency.

Barclays urges the Agencies to consider alternatives that are less disruptive to consumers and the economy. Barclays believes that the Agencies' concerns can be largely addressed via simplified and more transparent disclosures along the lines currently proposed by the Board in its proposed amendments to Regulation Z ("Regulation Z") as published in the *Federal Register* on June 14, 2007 and May 19, 2008. Barclays submits that clear, conspicuous, simple and effective disclosures are the best way to ensure fairness. Complete transparency enables consumers to make educated decisions about what type of credit card best serves the needs of each individual consumer and how the consumer may best use his or her card.

One of the noteworthy potential unintended consequences of the Proposed Rule could be litigation regarding certain common place industry-wide practices that currently are legal and which have been implicitly or explicitly sanctioned as safe and sound banking by the Board and other banking Regulators. This potential consequence arises as a result of the Agencies' proposed use of their Unfair and Deceptive Acts and Practices ("UDAP") authority. Barclays believes the Agencies can achieve their goals without creating litigation risk. As stated above, to the extent credit card practices need to be reformed, they can be adequately reformed pursuant to the Board's authority under Regulation Z or pursuant to the Agencies' safety and soundness authority. Should the Agencies nonetheless feel compelled to employ their UDAP authority as the vehicle for changing certain of the credit card practices at issue, they could reword the Proposed Rule by describing practices or standards that would not constitute a UDAP violation – thereby avoiding declarations that certain commonplace industry practices are unfair or deceptive. In any event, Barclays urges that a safe-harbor be created to protect against the retroactive application of the Proposed Rule.

Barclays also urges the Agencies to modify their proposed restrictions slightly to allow issuers to price for risk and to simplify the proposed restrictions. Specifically, Barclays requests that the Agencies adopt additional triggers for default repricing on outstanding balances, the ability to reprice accounts at the expiration date of the card if meaningful opt-out notice is provided, a more straightforward payment allocation proposal, and 19 as opposed to 21 days to mail the billing statement prior to the payment due date. Barclays also requests an 18 month period for implementation of the final rule in connection with the implementation of the Board's final revision to Regulation Z ("Regulation Z") insofar as it applies to credit cards.

Background

The credit card industry is an extremely competitive industry and one that has become more competitive over time. A little over twenty years ago, the standard credit card carried an annual fee of $20 and an APR of 19.8%. Credit cards were not available to substantial segments of credit worthy individuals. Whereas cards were accepted at a significant number of merchants, few incremental benefits were added to the card. Since then, competition has since kicked in in a big way. Credit cards have become a financial instrument used by most American households, providing consumers choice, convenience and access to credit at lower costs. APRs have steadily decreased over the years (see GAO study supra) and the average APR for credit cards is at an all time low. Annual fees have disappeared with the exception of certain cards such as co-branded airline cards where the fees are required in part to fund the miles awarded. Considerable enhancements and benefits have been added to credit cards, such as rewards features, year-end spending summaries and travel benefits. Competition has caused issuers to create different types of cards to appeal to different segments of the credit-worthy population. The easiest example of this is to contrast airline co-branded cards which appeal to frequent flyers who conduct a lot of transactions on their cards with low rate introductory rate cards which appeal to consumers who like to borrow money at low rates. Cards may be used in many more locations now including at types of establishments where twenty years ago, cards were not accepted, such as supermarkets, medical offices and fast food outlets. Whole industries, such as internet retail have developed as a result of the ability to use cards as the payment mechanism.

This overall reduction in pricing and increase in the availability of credit is buttressed by the 2006 report on credit cards prepared by the General Accountability Office ("GAO")[1]. The GAO report found that since the advent of risk-based pricing, the average interest rate on cards has declined by 6 percentage points, annual fees have been eliminated on most cards and almost half of all credit card cardholders now avoid all finance charges. Consumers, especially those consumers who pay their bills on time, have a much better deal now in terms of price, ubiquity and usage.

[1] GAO-06-929 – Credit Cards, Increased complexity in Rates and Fees Heighten Need for More Effective Disclosures for Consumers, September 2006.

(See GAO Study) Just as important, consumers who in prior years would not have had access to the credit card market and who for the most part manage their finances responsibly, now have access to credit cards. These improvements in part are the result of credit card issuers' ability to price and to reprice credit cards in accordance with the risks posed by different individuals and different portfolio segments. As technology has improved over the years, card issuers' ability to price for risk has improved commensurately. This ability to differentiate pricing in accordance with risk has enabled issuers to reduce prices generally, provide even lower APRs to consumers with better credit histories and to make credit card credit more generally available to the credit worthy population.

At the same time, it must be remembered that credit cards constitute open-end credit. Cardmembers' ability to repay their credit card loans changes over time as their risk personal circumstances change. Since cardmembers can continue to access their open-end accounts over time even as their circumstances change, changes in riskiness can create serious reverberations for credit card issuers. It is for this reason that credit card issuers require the ability to change the terms of their accounts – so that when risk profiles change so can pricing change to reflect increased risk. That way issuers can generally keep prices low for the majority of their customers who pay on time. Most people would agree that charging the least risky customers less and charging the most risky customers more is fair.

In addition, as stated above, as competition in the industry has increased, the product offered to consumers for the most part has become a more enticing proposition for the consumer. Low introductory and other promotional rate offers abound as issuers attempt to convince consumers to switch to and use their cards. The net effect of these promotional offers has been to reduce the effective APR individuals pay. Rewards programs have become commonplace. The average consumer has a much better deal now than he or she ever had as a result of this competition.

__The Impact of the Proposed Rule__

The Proposed Rule threatens to undo much of this. Barclays submits that the dollar impact of the Proposed Rule is so significant that various components of credit cards would need to be restructured – potentially in ways that would harm those consumers the Proposed Rule is intended to help. According to ARGUS data, [2] the net effect of the Proposed Rule industry wide would be to decrease credit card issuers' revenue by approximately 164 basis points per cardholder who pays interest on their account (1.418% on all accounts). While that may not sound huge, the fact

[2] Argus Information and Advisory Services LLC ("Argus") compiled historical data of several credit card issuers and aggregated that data to create a set data that is not identifiable to any particular institution but is believed to be reflective of the credit card industry in general. By separate letter from Oliver Ireland of the firm of Morrison & Foerster, the results of the study are being submitted to the Agencies. References to Argus data are references to aggregate numbers in that data study.

is, given the fact that the industry average return on assets is 280 basis points, if no countervailing actions are taken, industry profits would be cut roughly in half. Moreover, the impact on the return on equity ("ROE") is just as great – it would reduce industry ROE from 17.8% to 8.74%, well below the ROE hurdle for many financial institutions for all financial products. Assuming total credit card industry balances of $749.48 billion, the total cost to the industry on an annualized basis would be $10.63 billion. The impact of the proposed restrictions on repricing alone on accounts that would currently be repriced would be approximately 565 basis points an account...

Credit card issuers would be compelled to take action to make up that revenue. According to ARGUS, credit card issuers would either have to a) increase APRs across the board by an industry average of 1.937% to make up the lost revenue or b) decrease credit lines on all existing accounts by an average of $2,029 per account on an approximate average credit line of $9,500 (24%) or c) some combination of the two to achieve the current rate of return on their investment. Obviously, given the proposed restrictions on repricing outstanding balances, there would not be an across the board increase for all cardmembers, and the repricing that did occur would in many instances be significantly greater. With regard to new accounts, issuers would increase the APRs of different customer segments by different amounts – some significantly more and some less depending on a variety of factors including credit risk, the likelihood on how various segments would respond to the increased rate, etc.

In addition, there could be certain classes of consumers where the APR on the account could not be set at a level to compensate for the increased risk imposed by not being able to reprice existing balances for those who pay late or exceed their credit limit. For certain segments of the population, the APR on new accounts would have to be set so high that response rates would be impacted and "negative select" would occur – in other words only those consumers most desperate for credit would respond to solicitations with rates that high. The consequential loss rate would make it uneconomic to offer credit to those segments of the population. For existing accounts, the inability to reprice existing balances on such accounts until they were 30+ days past due might also make those accounts uneconomic and the appropriate solution would be to close those accounts. ARGUS estimates that one way to address this would be to deny credit card credit to all consumers with a FICO score of 620 or less. This would mean that 44.8 million consumers (over 15%) of the US population (even through the majority of them manage their cards appropriately and do not charge-off) would find themselves with no access to credit card credit and would have to resort to other potentially much more expensive sources of credit to satisfy their needs. Combined with the credit line decreases mentioned above, a huge amount of existing and available credit will be taken out of the market.

By regulating how issuers must price and reprice their products, and how issuers must allocate their payments, the Proposed Rule threatens to increase APRs for all consumers, including those who take care to pay their bills on time each month. By imposing restrictions on how payments are to be allocated, the Proposed Rule also threatens to reduce the amount and duration of promotional offers. Finally, those consumers who need credit the most might find themselves without access to the credit card market place. Barclays submits that the Agencies can ameliorate most of these impacts by making changes suggested below.

Impact on Securitizations

One other potentially significant impact of the Proposed Rule is on securitizations. Most credit card issuers[3] securitize a significant portion of their credit card portfolio to fund that part of the portfolio. This provides liquidity to issuers and the commensurate ability to issue more credit card loans, thereby increasing the amount of credit available to lend and lowering borrowing costs. Any reduction in credit card revenue caused by the Proposed Rule could reduce the "excess spread" on securitizations which in turn has the potential of causing a reduction in the secondary market for such securities, causing an increase in the required rating enhancement levels, triggering spread account funding requirements and potentially causing a pay out event requiring the early repayment of outstanding securities. Even if one were to assume that APRs generally would be raised in an attempt to compensate for the loss in revenue, it is doubtful that the pricing of securitizations would remain unchanged. Investors in credit card securitizations have taken comfort from issuers' ability to reprice for risk to minimize the performance deterioration that borrower default risk can create. In addition, the potential for litigation (see "The Use of Unfair or Deceptive Acts and Practices Authority" below) will further unnerve potential investors. If nothing else, by reducing investor yield and rendering risk assessment more difficult, the Proposed Rule would reduce investor confidence, increase the cost of future offerings and potentially shrink the amount of securitizations. The credit card securitization market is the best performing and the safest securitization market in the United States; the Proposed Rule threatens that.

In addition, securitized trusts issued prior to the implementation of the Proposed Rule could be more seriously impacted. The Proposed Rule will directly impact the securitizations of receivables that were issued based on the expectation that rates could be repriced and certain fees changed. It is possible that the Proposed Rule will cause certain triggers to be tripped requiring issuers to sell additional receivables into the pool or provide overcollateralization thereby greatly increasing the costs of those securitizations. Moreover, litigation regarding existing accounts underlying existing securitization could further exacerbate the riskiness of the accounts. It is even possible that the impact of the Proposed Rule could cause a pay out event.

[3] Barclays did securitize much of its portfolio in the past. It does not now.

Unfortunately, issuers would not be able to enact compensating measures to keep themselves whole in such an instance.

__The Use of Unfair & Deceptive Acts & Practices ("UDAP")Authority__

Barclays urges the Agencies to employ an approach other than UDAP to address the practices that are of concern to the Agencies. The Proposed Rule enunciates principles of unfairness regarding various credit card practices. An obvious concern is once the Agencies issue findings that certain commonplace industry practices are unfair or deceptive, certain private parties and state attorneys general will attempt to argue that those practices have always been unfair or deceptive. A UDAP analysis of the type proposed by the Agencies opens banks to litigation risk under state law for practices previously considered to be industry standard and implicitly or even explicitly acknowledged as appropriate and safe and sound banking practices by banking regulators. Banks who have designed practices in accordance with regulatory guidance could suddenly find themselves exposed to litigation attacking previously approved practices.

Barclays submits that the Agencies proposed UDAP analysis is not the appropriate method for addressing the practices at issue for several reasons. First, broad prohibitions, such as those set forth in the Proposed Rule, in addition to outlawing practices, the Agencies wish to curb, can inadvertently prohibit legitimate acts or practices that otherwise benefit consumers. A case by case application, such as that generally employed by the Federal Trade Commission and supported by Governor Krozner in his testimony before the Financial Services Committee of the House of Representatives,[4] seems a better way to employ UDAP so as to limit the potential for unintended consequences.

Second Barclays submits there should be a substantial and clearly documented factual record before a UDAP finding is made. The Proposed Rule would dramatically impact industry practices. In order to be certain that legitimate practices are not outlawed and that unintended consequences do not inadvertently hurt consumers there should be an actual study (as opposed to anecdotal evidence) of the extent of consumer harm and the actual advantages and disadvantages of the various alternatives being considered. There should be some sort of proof of market failure. The Agencies' extant analysis of consumer behavior for the most part concerns studies conducted in connection with the Board's proposal to amend Regulation Z, such as the effectiveness of proposed disclosures of payment allocation methods, and not on the effect of the Proposed Rule. For instance, little factual analysis is done as to why the repricing of accounts 30 plus days past due is fair but the

[4] Testimony of Federal Reserve Board of Governor Krozner before the House Committee on Financial Services, June 13, 2007; see also letter to Honorable Barney Frank from Federal Reserve Board Chairman Ben S. Bernanke, March 21, 2006.

repricing of accounts 29 days past due is unfair. The Agencies' analysis should be supported by a clear factual record on all points.

Third, as mentioned above, several of the acts and practices identified have been implicitly or explicitly sanctioned by banking agencies and are consistent with federal and state laws that authorize the practice. For example, the Office of the Comptroller of the Currency ("OCC"), in an Advisory Letter dated September 14, 2004, stated that the repricing of credit card interest rates due to a consumer's failure to make timely payments on the consumer's account or on another account that the consumer has with another creditor "may well be appropriate measures for managing credit risk" on the credit card account (the OCC letter went on to condition this risk-based exercise on clear, conspicuous and appropriate disclosures). Similarly, the Board in its proposed revision of Regulation Z issued on May 23, 2007, specifically rejected imposing a prohibition on risk based pricing. In addition, these practices are consistent with federal and state laws. Under Section 85 of the National Bank Act and Section 27(a) of the Federal Deposit Insurance Act, banks' ability to set interest rates is governed by the laws of the state in which the credit card issuing bank is located (the "exportation doctrine"). Barclays is "located" in Delaware and Delaware law (Del Code Sec. 952) expressly allows banks to increase APRs on outstanding balances. Similarly, Regulation Z expressly provides that creditors must mail billing statements 14 days prior to the payment due date (12 C.F.R. Sec. 226.5(b)(2)(ii). Banks have relied on the exportation doctrine, state laws, Regulation Z and regulatory agency guidance to design their practices. For the Agencies to now opine that this same practice is suddenly unfair, is not only inconsistent with prior regulatory pronouncements but places banks at risk for having taken direction and guidance from those pronouncements.

Fourth, some of the acts or practices at issue provide benefits to consumers that outweigh any alleged harm that the Proposed Rule attempts to address. For example we posit that the reduction in the blended APR that occurs when a cardmember takes advantage of an introductory or other promotional rate offer, far outweighs the difficulty some consumers might have in understanding disclosures that payments are allocated to the lowest APR balances first (to be discussed in more detail supra). The Proposed Rule does not pass the balancing test employed by the FTC to classify acts as unfair or deceptive.

Finally, as stated above, the Proposed Rule's application of a UDAP analysis could expose the industry to significant litigation.

The purpose of any final rule should be to describe a standard for permissible conduct going forward and not to create a retroactive standard of unfairness. The Agencies should not choose a remedy without considering less burdensome alternatives – and if a less drastic or burdensome remedy achieves the same goal, it should be pursued – especially where, as here, the use of UDAP could create significant litigation risk for credit card issuers. Here less burdensome remedies do exist.

Alternatives

Leaving aside the merits of the substantive aspects of the Proposed Rule, the best way to obviate this concern is for the Board to use its authority under Regulation Z or for the Agencies to employ their safety and soundness authority to regulate the practices they wish to control. Certain of the practices could easily be regulated under Regulation Z. One of the stated purposes of the Truth in Lending Act ("TILA") is to "protect the consumer against inaccurate and unfair credit billing and credit card practices". (15 U.S.C. 1601(a)) The Board is specifically authorized to "prescribe regulations to carry out the purposes of this title" (15 U.S.C. 1604). This is broad authority. Barclays therefore urges the Board to exercise its authority under TILA, as opposed to UDAP, to address the credit card acts and practices specified in the Proposed Rule. For instance, since Regulation Z currently contains a provision requiring creditors to mail billing statements 14 days prior to the payment due date (12 C.F.R. Sec. 226.5(b)(2)(ii)). It would be easy for the Board just to amend that particular regulation to provide that billing statements be mailed 21 days (or 19 days as we urge later on) prior to the payment due date. Similarly, since Regulation Z already has change in terms notice requirements, and the Board has proposed to amend those requirements to allow consumers to have more opportunity to transfer balances in the event of APR increases, Barclays submits that it is within the Board's purview also to add any restrictions on repricing of existing balances pursuant to Regulation Z. To the extent the Agencies do not believe that the Board's authority under TILA is sufficient, they can certainly employ their authority under Section 39 of the Federal Deposit Insurance Act to prescribe standards by regulation or guideline for depository institutions within their scope of supervision.

Should the Agencies feel compelled to employ some sort of UDAP analysis to address one or more of the practices at issue, the Agencies nevertheless need not analyze and conclude that practice is unfair. They need not conduct a step by step analysis as to why the practices sought to be prohibited are unfair; they need not make declarative findings that plaintiffs' attorneys can attempt to latch on to. The Agencies can simply indicate that they are trying to prevent unfair practices in the future and have not determined that the practices at issue are unfair.

One way to do this, rather than hold that certain practices are unfair or deceptive, would be simply to describe certain acts or standards of practice as <u>not</u> unfair nor deceptive. The Agencies would simply establish a safe-harbor for activities not to be considered unfair or deceptive. That way the Agencies would not opine that certain current industry-wide practices are unfair with the consequent risk that plaintiffs' attorneys might bring litigation alleging that those practices have always been unfair. In effect the Agencies came close to doing this with regard to the proposed requirement that billing statements be mailed 21 days before the payment due date. The Agencies could do this with regard to their other Proposed Rules. An example would be for the Agencies to hold that the repricing of existing balances, after due notice, where the account is thirty or more days past due or upon other specified circumstances (see "Repricing of Existing Balances" supra) does not constitute an unfair or deceptive trade practice. This would minimize the threat of vexatious litigation concerning common industry-wide practices previously explicitly or implicitly condoned by Regulators.

Third Barclays urges that the final rule be explicit that its application is to be prospective only. Barclays is concerned that unless the final rule is clearly identified as prospective in nature and unless existing practices are explicitly sanctioned, that private litigants, in employing under their state UDAP statutes, might assert a contrary view. Barclays requests that the Agencies take a strong stance in this regard – that the final rule contain a statement that in the past the practices being regulated were industry standard and consistent with regulatory agency guidance. For instance, the Agencies could refer to the fact that the current requirement set forth in Regulation Z for mailing billing statements is 14 days prior to the payment due date. The final rule could also refer to the Board's proposed amendment to Regulation Z in so far as it applies to credit cards which discusses how best to provide notice to consumers regarding the repricing of outstanding balances and payment allocation practices and provide that such practices did not and do not currently violate UDAP. It could refer to guidance issued by the Agencies and by other regulators, such as the OCC, as to these practices and explicitly state that credit card issuers were and are acting appropriately and fairly in employing these practices up to the effective date of any final rule. Finally, the Proposed Rule could explicitly provide that State or private enforcement of the rule retroactively or prior to the effective date of such rules violates federal policy. All this would be extremely helpful in ensuring that vexatious and potentially damaging litigation does not become the primary outcome of these rules.

<u>Repricing of Existing Balances</u>

a. Background

Barclays appreciates the fact that the Agencies have attempted in the Proposed Rule to strike a balance between prohibiting the repricing of existing balances altogether and allowing issuers to protect themselves from risk. Barclays believes however that improvement can and should be made to the Proposed Rule so that issuers can price and reprice in accordance with risk. It is a basic tenet of safe and sound banking to adjust the cost of credit commensurate with the amount of risk the borrower poses to the creditor. This is especially important with regard to unsecured open-end loans. Initial underwriting focuses on default risk at the time of account opening; it can not capture such risk over the life of an unsecured open-end account. Issuers need to recalculate risk periodically over time, and should the level of risk change, take appropriate actions to offset any increased risk.

This is not a carte blanche to increase rates. Competition ensures that those credit card banks who reprice indiscriminately or inappropriately face consequences. Consumers do not commit to borrow a specific amount of money, maintain a particular balance on their credit card accounts or maintain a balance for a specified period of time. They are free to and often do move their balances to another account without any prepayment penalty. Moreover, the Argus data demonstrates that there is a significant correlation between the repricing of accounts and risk – that the loss rates on accounts that were penalty repriced were significantly higher than the loss rates on other accounts. This demonstrates that credit card issuers have been repricing on a rational basis. Creditors simply require flexibility to be able to change pricing in accordance with risk over time. Unfortunately, despite the Agencies' efforts to strike an appropriate balance, the Proposed Rule's restrictions would greatly impede issuers' ability to re-price according to risk.

According to Argus data there is a direct correlation between paying late, going over the limit and charge-off. Every incremental day a cardmember is late in paying his or her bill, the risk of charge-off on the account increases. For instance, the loss rate[5] on a unit basis of accounts that have been on the books for at least a year that are 1 day late is 37-63% greater than for accounts that are current (it is a range because the loss rate varies depending upon the length of time the account has been on books – e.g., the loss rates on accounts that have been on the books for two years is greater than accounts on the books for only a year). The loss rate for accounts on the books for at least a year that are 2-5 days late is 79-103% (i.e., approx. twice as risky) greater than the loss rate for accounts that are current and increases to 9.5% over time. The numbers continue to increase exponentially. The loss rate for accounts on books for at least a year that are one cycle past due is 370-516% greater than current accounts (or almost 5 times likely to default) and approaches 25%. The increase in loss rates for all accounts that were on the books on May, 2006 for accounts that are one cycle past due is 20% (25-5.3). According to Argus, and ignoring increased administration costs and the tendency of accounts to "max out" on their credit line before going bad, in order to achieve the same rate of return, the APR on those accounts would have to be increased by a whopping 25% (assuming an average initial APR of 15%, this would mean increasing the APR to 40%). This obviously would be prohibitive.

Significantly, if the cardmember is late twice in 12 months, the loss rate increases by 90-103% over accounts that are current and have not been late (i.e., twice as likely to go bad). Even more interesting, going over one's credit limit is an even greater indicator of risk. The risk of loss on a cardmember who is currently over his or her credit limit versus a cardmember who is currently current on his or her account goes up by a whopping 362-470%. If the cardmember is over the limit and late, the unit risk of loss goes up by 620-900%. Again, issuers can never recover the potential loss posed by these accounts by repricing alone.

As indicated above, there obviously comes a time when the risk of loss increases to such a level that the issuer can not make up that risk of loss if they are limited to repricing only those accounts. Barclay submits that 30+ days past due is one such

[5] Argus defined loss rate as accounts that later become 90 days past due, charged-off or bankrupt.

level. According to ARGUS, the amount of repricing of accounts 30+ days pays due to make up for the increased risk of charge-off would be prohibitive since loss rates increase so dramatically. As a result, enabling issuers to reprice existing accounts when they are 30 plus days past due is not sufficient for issuers to protect themselves against risk.

As stated previously, the likely result of issuers' inability to reprice for risk is that the cost of credit generally will go up. Those who pay on time will subsidize those who do not. Eliminating the ability for continual risk re-evaluation will also depress issuers' yields. For securitizations, this means investors' yield will be decreased accordingly investors will pay less for securitized loans, thereby increasing issuers' cost of funds. Barclay also submits that if there are fewer accounts subject to being repriced, the amount that those remaining accounts subject to repricing would have to be repriced at substantially greater levels.

Barclays submits that the relative risk levels will become even greater when the new requirement about the timing of mailing of billing statements is instituted since that requirement should reduce the incidence of cardmembers who pay late inadvertently due to the failure to pay bills promptly when received. Individuals paying late after the new mailing of billing statements rule is enacted will have fewer excuses for paying late – therefore those who pay late will pose even greater risks for charge-off than the numbers cited above.

Therefore, any repricing system that is based on the cardmember paying late appropriately compensates for risk and ensures that those consumers who pose the highest risk pay the highest rates and are not subsidized by those consumers who carefully make their payments on time each month. We note that most late payers do not turn into uncollectible accounts. However, since late payments or over credit limit behavior are such predictive indicators of loss rates, it is fair that those so identified are charged more for their increased risk of loss.

b. Additional Triggers

Accordingly, Barclays encourages the Agencies to adopt additional and alternative triggers for the repricing of existing balances commensurate with the risk posed to the issuer. Barclays proposes the following as appropriate triggers for the repricing of existing balances and consistent with safety and soundness: 1) paying late twice in any 12 month period (those accounts display a risk of loss that is 90-103% greater than current accounts) , 2) going over the credit limit twice in any 12 month period (accounts that go over the credit limit just once have a risk of loss 360-570% greater than current accounts), 3) both paying late and going over the credit limit during that 12 month period (provided it is not a late fee that causes the cardmember to exceed the credit limit) (the probability of loss for those accounts is 6 to 9 times greater than a cardmember who is current); 4) paying late by 5 or more days (which approximately doubles the probability of default). There are other alternative triggers that could be employed, but Barclays believes that the above proposed triggers would be the most appropriate. These triggers would allow issuers to reprice more accurately commensurate with risk. This would assist issuers not to increase APRs across the Board. At the same time, sloppy payers who occasionally miss their payment due date by a day or two or who go over their credit limit just once would not be adversely impacted. Barclay submits that without these triggers for repricing, it would need to increase APRs by 200 basis points across the board to all cardmembers including those who consistently and pay their bills on time.

c. *Repricing Restrictions Should Not Apply to Balances Outstanding as of Effective Date of the Final Rule*

Barclays submits that a prohibition on the retroactive repricing of balances incurred before the effective date of the regulatory changes could create safety and soundness issues. Those accounts and those balances were issued and underwritten in the expectation that APRs could be adjusted if the cardmember displayed increased indicia of risk. If issuers understood that they could not raise APRs, the initial APRs undoubtedly have been higher to absorb some of the increased risk. Prohibiting credit card issuers from taking action with regard to existing balances as of the effective date of the rule could undermine the profitability and creditworthiness of those accounts

Barclays accordingly submits that it is critical that the limitation on retroactive repricing apply only to balances created after the effective date of the final rule. This would be consistent with safety and soundness considerations. It would also be consistent with the doctrine that changes in usury laws should not apply to existing contracts. Finally, it would have the added benefit of clarifying that litigation should not be commenced against issuers for practices employed before the effective date of the final rule.

d. *Ability to Reprice at Expiration Period*

Barclays also requests that issuers be permitted to reprice existing balances on credit card accounts upon the expiration date of the card provided that clear and conspicuous notice is provided and the cardmember is afforded a meaningful opportunity to opt-out of the repricing and pay the existing balance off pursuant to existing terms. As stated previously, credit card credit is open end credit. Cardmembers' risk profiles change. More importantly, outside influences such as the economy and the cost of funds also change. The ability to reprice existing balances upon the expiration date of the card would allow issuers to protect themselves better from risks posed by those changes. It would also enable issuers to continue issuing fixed rate cards with the understanding that if the cost of funds increases significantly, issuers can protect themselves after the expiration date of the card. At the same time, it provides cardmembers with the benefit of their bargain for a meaningful period and it enables cardmembers to protect themselves. Cardmembers can choose to pay off existing balances under existing terms and look for another card on which to make future purchases, or should they want to keep that card, they can simply pay the new rate.

Payment Allocation

Barclays understands that the Agencies have again attempted to strike a balance with regard to the allocation of payments by proposing a payment allocation process that attempts to accommodate the needs of both consumers and issuers. The fact is, however, the proposed allocation method will reduce issuer revenue, especially with regard to accounts with promotional pricing. Barclays believes that the net effect of the proposal, as acknowledged by the Agencies, will be for issuers to reduce or eliminate the amount and duration of promotional rate offers and believes this would harm consumers. The Agencies proffer that a payment allocation system that allocates payments to the lowest APR balances first is not fair to consumers because some consumers have a hard time understanding such a system and all its ramifications. Barclays submits that consumers are better served by a system that provides a lower effective APR than a system that is easy to explain but creates higher APRs. Barclays further submits that improved disclosure, such as that proposed by the Board in its proposed amendment to Regulation Z, will address many of the Agencies' concerns.

Argus industry numbers indicate that the average effective APRs for all accounts with promotional balances is between 5.3% and 5.6%. The average effective APR paid by cardholders on non-promotional balances is between 14.8% and 16.2% and the average APRs on promotional balances ranged from 2.5 to 2.9%. Therefore, the difference between the effective APRs on accounts with promotional balances and non-promotional APRs is between 9.5% and 10.7%. These numbers include the effect that the duration of promotional rate offers is somewhat reduced when payments are allocated to the lowest APR balances first. This indicates that cardmembers truly get substantial benefit from promotional rate offers and that allocating payments to the lowest APR balances first does not negate that benefit. Eliminating or reducing the benefit of promotional APRs would seem to benefit no one and actually might reduce competition between issuers for each other's customers.

If the rationale for creating a new payment allocation system is that the current system is unfair because it is difficult to explain to consumers, Barclays submits that the Agencies' proposed payment allocation system is even more unfair. It is harder to understand, more difficult to explain and to implement and will reduce the incidence of promotional rate offers. Barclays submits that current industry practice of allocating payments to the lowest APR balance first does not cause that many complaints – and clearly has resulted in a lower blended APR for those cardmembers who take advantage of it.

Should the Agencies feel compelled to alter how payments are allocated, Barclays requests that any payment allocation system treat all balances the same – that there be no special restriction on applying payments to promotional balances. In other words, if the Agencies push for pro rata application of payments, it be pro rata for all balances including promotional balances. It would seem hard to argue that a system of pro rata payment allocation that treated all balances similarly would be unfair, it would likely have the least impact on reducing the length or amount of promotional rate offers and would be easier to explain than the Agencies' proposed system.

a) *Grace Period on Purchases*

In addition, the Proposed Rule would require credit card issuers to disregard promotional rate balances for purpose of determining whether the consumer is entitled to a grace period on purchases. Barclays does not believe that such a requirement should be imposed. Credit card issuers are not required by law to provide a grace period on purchases. Instead, these interest-free loans are provided as a customer service to enhance the utility of the credit card. Credit card issuers should be able to determine when and under what conditions they will offer such an interest free loan. Should the issuer choose not to offer such an interest free loan to consumers who are taking advantage of promotional rate offers and therefore are getting a great blended rate, the issuer should be permitted to do so.

Reasonable Time to Pay

Barclays agrees with the Agencies that consumers should have a reasonable time after they receive their billing statement to pay their bills. That is partly why Barclays encourages its cardmembers to receive billing statements on-line, to pay on-line and why it sends monthly electronic reminders to cardmembers about billing due dates and encourages alternative payment options to ensure timely payments. In today's electronic age, this is more and more feasible and very common . Payment habits of consumers are moving away from mail. That stated, Barclays also agrees with the Agencies that consumers should have at least seven days from the date of receipt of their bill to send in their payment whether it be by mail or electronically and avoid a late fee.

Barclays believes that the Agencies proposed "safe harbor" will become the de facto standard. The date of any grace period and the date to impose a late fee will become the same date – issuers will not create different due dates on their bill statements for grace periods and late fees – everyone will go to one due date.

Barclays simply requests that the Agencies study the systems issues created by the Proposed Rule – especially in short months such as February and when billing dates fall on weekends or holidays. After the payment is received, issuers must process and post payments, process and print the billing statements and then mail the billing statements out. In months like February and for billing cycles where the payment due dates falls on a holiday or on a weekend, it could be difficult to complete all that during that month. Accordingly, a 19 day standard would go a long way in meeting the systems issues posed by the Proposed Rule.

Implementation

Barclays requests an eighteen month period to implement the final rule to give credit card issuers sufficient time to make the significant changes required by any final rule. It will take substantial time and effort to redesign billing and payment processing systems and methodologies. The complexity of redesigning billing and payment processing systems will be exacerbated by the fact that issuers will need to be implementing the new provisions of Regulation Z at the same time, which will require redesigning and implementation of new billing statements, initial disclosure statements, card solicitations, and change in terms notices as well as the systems processes underlying them. This will be a monumental effort. Substantial amounts of time will be required to bring systems into compliance and to reduce the risk of system errors. Issuers will also need to determine how these rules will effect their credit card programs. They will need to create new products that can still be profitable under the new pricing regime, and will require time to test those products before rolling them out. Simply rolling out new products without in depth testing could constitute unsafe and unsound banking. Finally issuers may need to analyze how any final rule impacts existing accounts and what, if any actions need to be taken with regard to those accounts.

Conclusion

In summary, Barclays requests that the Agencies proceed cautiously in exercising their UDAP authority – that to the extent possible, they employ other authority to regulate the policies at issue. If the Agencies feel compelled to employ UDAP, Barclays urges the Agencies to draft the final rule in such a way as to avoid creating potential litigation issues. Importantly, Barclays requests that the Agencies modify their Proposed Rule so as to minimize its unintended consequences by providing alternative triggers for repricing outstanding balances, simplifying the payment allocation proposal by treating promotional balances the same as other balances and slightly shorten the time frame for mailing billing statements. Barclays also requests that a reasonable amount of time be granted to implement the final rule before it becomes effective.

Again, Barclays appreciates the opportunity to comment on the proposed rule. Should any of the Agencies have any questions or wish for more information, please do not hesitate to contact the undersigned at cwalker@barclaycardus.com or at 302-255-8700.

Thank you.

Sincerely,

Clinton W. Walker

CWW/cm