Department of Consumer Affairs
Office of Financial Empowerment

The New York City Department of Consumer Affairs'
Comments to Docket No. R-1370, Regulation Z
Submitted to
The Board of Governors of the Federal Reserve System

November 20, 2009

**Introduction**

Based on forty years of experience protecting consumers in New York City, The New York City Department of Consumer Affairs (DCA) through its Office of Financial Empowerment (OFE) offers the following comments on the rules the Board of Governors (the Board) has proposed in its Docket No. R-1370 to implement the Credit CARD Act of 2009 (the Act).

We urge the Board to make several changes to the proposed rules to ensure the implementation of an opt-in requirement for over-the-limit coverage facilitates meaningful consumer information and choice. We also urge the Board to adopt DCA's proposed changes to strengthen the regulations regarding the issuance of credit cards to young adults and the disclosure of affinity agreements between creditors and institutions of higher education. DCA supports the Board's proposed rule restricting subprime credit card fees and encourages the Board to clarify the language in its final rule. Finally, the Board should require creditors to include municipal financial education and counseling efforts in its requirements for creditors' referrals to credit counseling services.

The Act, signed by President Obama in May, affords consumers a range of new protections from unfair and deceptive practices by credit card issuers and improves transparency in the marketplace. In promulgating its changes to Regulation Z consistent with DCA's recommendations, the Board has the power to ensure that the true legislative intent is met and that consumers are given a fair deal with respect to credit cards.

**Background on DCA and OFE**

As an agency charged with enforcing municipal consumer protection and licensing laws[1] with an office expressly charged with educating, empowering and protecting those with low incomes in the financial services marketplace, DCA considers consumer information and choice as fundamental to a fair transaction.

To ensure a fair and vibrant marketplace for consumers and businesses, DCA licenses 71,000 businesses in 57 different industries; mediates thousands of individual consumer complaints annually; educates consumers and businesses through press releases, press conferences, educational materials, community outreach and public hearings; and works with other city, state and federal law enforcement agencies to protect consumers from deceptive practices. The Department enforces the City's consumer protection law and other laws that prohibit deceptive acts and misleading marketing practices.

[1] New York City Charter, Chapter 64, Section 2203(a)

DCA's Office of Financial Empowerment is the first local government initiative in the nation aimed expressly at educating, empowering, and protecting those with low incomes, so they can build assets and make the most of their financial resources. Launched in December 2006, OFE was the first initiative to be implemented under Mayor Michael R. Bloomberg's Center for Economic Opportunity (CEO), a comprehensive, research-driven effort to design and implement innovative poverty-reduction strategies. OFE spearheads an array of efforts designed with potential for scale: protecting New Yorkers with low incomes from unfair and predatory practices, conducting large-scale public education campaigns, implementing innovative asset-building strategies, and coordinating a dynamic citywide network of quality financial service providers.

OFE works with financial institutions to negotiate safe, starter bank accounts and implements innovative asset building programs to encourage savings among consumers with low incomes. OFE also provides free financial counseling and coaching through Financial Empowerment Centers throughout New York and coordinates a Citywide network of quality financial education providers. DCA and OFE also spearhead the Mayor's Earned Income Tax Credit awareness campaign, including a network of free tax preparers.

OFE's efforts have also spawned a new field of municipal financial empowerment. To share lessons learned and advocate jointly for national policy reforms, New York City founded and co-chairs the Cities for Financial Empowerment (CFE) coalition, a group of ten city governments working to improve financial services for households with low incomes. It is this broad and varied experience that informs these comments.

**DCA Recommendations**

**<u>I. Opt-In Standards for Over-the-Credit Limit Coverage</u>**

Consumer protection demands informed choice and a level playing field. It is widely documented that consumers are unlikely to deviate from the default status.[2] To defeat this built-in consumer resistance to change, marketers have perfected the art of promoting products and services through "negative options" that result in consumers unwittingly purchasing unwanted products and services.[3]

To effectively combat negative options, consumer protection requires the creation of default options that are in the best interest of the majority of consumers. Requiring affirmative consent for products that may be costly or confusing to consumers, such as over-the-credit limit coverage, helps ensure that consumers are able to make educated decisions in their own best interests.

DCA commends the Board's recognition of the importance of affirmative consent in its recent rulemaking regarding fee-based overdraft protection (Regulation E) and its strong standards for implementing opt-in in the overdraft context. Credit card over-the-limit fees also warrant strong

[2] For example, a study of a large U.S. corporation found that 86% of employees who were automatically enrolled in the company's retirement plan continued to participate in the plan at least three months after being enrolled, compared to a participation rate of 37% for employees with three to fifteen months of tenure who were not defaulted into the plan. The disparity was even greater for employees earning less than $20,000 a year, with a rate of 80% for those defaulted, compared to 13% for those that had to sign up for the plan. Madrian, Brigitte C. and Dennis F. Shea, "The Power of Suggestions: Inertia in 401(k) Participation and Savings Behavior," The Quarterly Journal of Economics, November 2001.

[3] Burg, Elliot, et. al., Response of Attorneys General of Arkansas, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, Ohio, Oregon, Tennessee, Vermont and West Virginia to the Federal Trade Commission's rule on Use of Prenotification Negative Option Plans, Matter No. PO64202, October 13, 2009.

protection, and Congress took an important step in recognizing the need for an opt-in model in this context.

The goal of the opt-in requirement for over-the-credit limit coverage should be to ensure that consumers who consent to such coverage have knowingly made an informed choice. The Board's proposed rulemaking in this area is strong in many respects. Key provisions of the Board's proposal include: requiring credit card companies to obtain a consumer's consent separately from other consents or acknowledgments; applying the opt-in requirement to existing accounts; and providing notice of the consumer's right to revoke a prior election for the creditor's over-the-limit service on periodic statements.

The rules should do more, however, to reach the goal of informed consumer consent. DCA suggests the following changes regarding the over-the-credit limit coverage disclosure requirements, the manner by which consumer consent is obtained, and the validity of consents obtained prior to the rules' effective date. These changes are essential to ensure that the opt-in requirement for over-the-limit coverage realizes its goal of increasing transparency and consumer information in the financial services marketplace.

**A. Disclosures**

- **Segregated Disclosures: The Board should require a stand-alone written disclosure of the option to request over-the-credit limit coverage.**

  For a disclosure to be clear and conspicuous, it should be a written document separate from other disclosures, offerings or application forms.

  Separating the disclosure ensures that the information is highlighted, so that consumers clearly know the choice being offered and that coverage of over-the-limit transactions is an option, not a required part of applying for or maintaining an account. A stand-alone disclosure form is also less susceptible to manipulation of layout or other techniques that may minimize these important disclosures.

  The Board has recognized the importance of stand-alone disclosures in the overdraft protection context, requiring opt-in notices to be segregated from all other information.[4] Similarly, DCA requires stand-alone disclosures in a variety of industries. For example, New York City home improvement contractors must provide separate disclosures of consumers' rights to cancellation[5] and paid tax preparers must provide consumers with a separate legal rights disclosure.[6]

  Placement and separation of the disclosure on the Internet is particularly important. As we discuss below, information can too easily be buried on the web or displayed in a manner that subverts the intent of the required posting.

  Creating and requiring a stand-alone disclosure document using the format and content we describe below will serve the broader purpose of better informing consumers of their new right to choose, and of the important considerations when deciding whether or not to opt in.

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[4] Regulation E § 205.17(b)(1)(i),
[5] Rules of the City of New York, Title 6, § 2-221 (b). Available at http://www.nyc.gov/html/dca/downloads/pdf/home_improvement_law_rules.pdf
[6] New York City Administrative Code, Title 20, § 20–740.1. Available at http://www.nyc.gov/html/dca/downloads/pdf/tax_prep_law.pdf

A stand-alone disclosure document would provide local and state consumer protection agencies and advocates with a clear tool to educate consumers of their new right to choose and factors to consider when deciding whether or not to opt in.

- **Understandable Disclosures: The Board should adopt DCA's proposed clear and conspicuous, plain-language changes to Model Form G-25(A) and require consistent format and style of opt-in notices.**

  Requiring "plain language", comprehensible language and formatting is essential to ensuring the disclosures are effective and that the intent of this landmark law is accomplished. DCA demands disclosures that conform to these standards in its laws and rules, and uses these same standards in providing informational materials to consumers and to the businesses it regulates.[7] DCA's proposed revisions to Model Form G-25(A) are informed by this experience.

  DCA urges the Board to adopt its revisions to Model Form G-25(A) as shown in Appendix A. The proposed changes incorporate the principle that disclosures must be clear and conspicuous to prevent ads from being misleading, ensure consumers receive material information about the terms of a transaction, or further public policy goals.[8] In addition, the changes reflect the principle that disclosures must be in "plain language" so that consumers can easily grasp the important concepts at issue, and written at a reading level no higher than eighth grade.[9]

  Accordingly, DCA's proposed format and content is comprehensible; it features prominent, large-print headings, indicates that over-the-credit limit coverage is optional, not required, and fully lays out the costs and other considerations consumers should evaluate when making their decision.

  Mandating clear and conspicuous, plain language disclosures that are uniform in language and format is important to ensuring disclosures are not deceptive and are universally understood. Such uniform disclosure standards have been required in a number of contexts, including DCA's requirements regarding the content of contracts given by home improvement contractors.[10] Another illustrative example, the Nutrition Labeling and Education Act of 1990, requires uniform labeling of nutritional content of conventional foods.[11] Consumers now have expectations about what information is disclosed on food products. By adopting DCA's suggestions, the Board would create similar consumer expectation and awareness of rights and choices in the credit card context, fostering consumer empowerment.

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[7] See http://nyc.gov/html/dca/html/publications/publications.shtml for examples of how DCA discloses information to consumers and to businesses.

[8] See, e.g., Rules of the City of New York, Title 6, §5-09; Rules of the City of New York, Title 6, §5-102

[9] Mayor's Office of Adult Education; Mayor's Office of Immigrant Affairs, *Easy-to-Read NYC, Guidelines for Clear and Effective Communication*. www.nyc.gov/easytoread (describing educational levels of New York City residents and guides for plain language); Plain language is variously defined and described in statutes and regulations, but the thrust is consistently explicitness and clarity. *See, e.g.* N.Y. Gen.Oblig. Law § 5-702 (Consol. 2008); HIPPA regulatory guidelines (Section 164.52(b), Final Privacy Preamble); Washington State Executive Order 05-03, http://www.accountability.wa.gov/plaintalk/default.asp; U.S. Securities and Exchange Commission, *A Plain English Handbook: How to create clear SEC disclosure documents by the Office of Investor Education and Assistance U.S. Securities and Exchange Commission* (1998) http://www.sec.gov/pdf/handbook.pdf

[10] Rules of the City of New York, Title 6, § 2-221 (b). Available at http://www.nyc.gov/html/dca/downloads/pdf/home_improvement_law_rules.pdf

[11] Ciocchetti, Corey A., "The Future of Privacy Policies: A Privacy Nutrition Label Filled with Fair Information Practices," 26 J. Marshall J. Computer & Info. L. 1, Fall 2008.

Akin to the requirements outlined in the new Regulation E § 205.17(d), for a disclosure to be clear and conspicuous, it should only contain the information specified in the Board's regulation and included in the model opt-in notice. The Board's rules should specifically prohibit creditors from including any additional explanation or marketing of the benefits associated with over-the-limit coverage. Allowing creditors to provide their own explanation of benefits would dilute consumer understanding of the opt-in disclosure and could result in abuse or deception.

**B. Consents**

- **Separate Choice: The Board should require consent be obtained on separate forms from other consents or acknowledgments provided by the consumer.**

  As proposed, the regulations do not sufficiently separate a consumer's choice regarding over-the-limit coverage from other disclosures and consents. Proposed comment 56(b)-5 would allow a creditor to include a separate check box or signature line for requesting the over-the-limit service in the signature block on a credit application if the check box or signature is used solely to indicate the consumer's opt-in decision. While this is preferable to allowing a single signature on an application to signify consent to all terms and conditions, a check-box approach does not sufficiently isolate consent to over-the-limit coverage as a separate decision that is not a required part of the credit card application. The Board should explicitly require that both disclosures and written consents are presented separately from other account disclosures, calling for stand-alone plain language documents that clearly present over-the-limit features as discretionary.

  DCA's experience is that practices do not necessarily comply with written mandates. For example, DCA has found that, in the context of automobile dealers, home improvement contractors and tax preparers, whether because of a lack of training or incentives, financial or otherwise, sales personnel too often do not adhere to the requirements in the law. The Board must take steps to ensure that disclosure and consent requirements are not evaded and that the goal of giving consumers a fair choice is met. For creditors obtaining written consents through in-person interactions with consumers, the Board should require the adoption of written policies and procedures to ensure that creditors are not evading the requirements by accompanying written disclosures with verbal sales pitches aimed at steering consumers to opt in. In addition, the Board should conduct periodic audits to make sure such policies are actually followed.

- **Verbal Consent: The Board should limit verbal consent to consumer-initiated telephone calls for the express purpose of opting-in.**

  The Board should clarify that verbal consent is not permitted under any circumstances where written consent is an available option. For example, verbal consent should be insufficient at in-person or online account applications or openings. In its Official Staff Interpretations of the new Regulation E, the Board only provided verbal consent as an acceptable means of affirmative consent over the telephone, noting that in-person affirmative consent should be obtained through a written form.

  As in the overdraft context, acceptable verbal consent should be limited to telephone calls initiated by the consumer for the specific purpose of opting into coverage. The Board should use its authority to promulgate rules implementing the Act's requirements regarding oral, electronic and written consent to enhance consumer protection by adding this important

limitation. This is consistent with the requirement promulgated by the Board in Regulation E § 205.17(b)(1), which limits notices regarding overdraft protection to written or electronic means, but allows consumers to call a readily-available telephone line.

Customer service and marketing representatives from credit card companies are well-trained to sell product features, and, in some cases, are actually compensated based on products sold. Given the challenges associated with monitoring compliance on telephone calls and the incentives to mislead or under-inform consumers about the costs of the feature, the federal government has recognized the problems associated with telephone sales and marketing by imposing limitations on telemarketers, such as do not call lists and other strict requirements.[12]

The Board should also require that creditors maintain and make available to their regulators recordings of all telephone calls, in their entirety, received from consumers in connection with over-the-limit coverage. Along the lines of DCA's proposed rules for recordkeeping requirements for debt collection agencies in New York City[13], requiring auditable records of phone conversations will help to ensure consumers receive consistent information and are not improperly steered to opt in.

- **Electronic Consent: The Board should mandate the font size and placement of links in online disclosures.**

DCA supports proposed comment 56(b)-4.iv, which illustrates that a creditor may provide an electronic means for the consumer to affirmatively consent. As described in the proposed comment, a creditor meets the requirement by providing a distinct form on its website that enables the consumer to check a box to indicate his or her agreement to the over-the-limit service and confirm that choice by clicking on a consent box. As recognized by the Board it is important that online disclosures and consents are segregated from other web pages and that the consumer is required both to check a box and to click a separate box to confirm their selection.

Creditors must be held to the principles of plain language and clear and conspicuous disclosures and consents irrespective of the medium. However, experience with online privacy policies has demonstrated that businesses will manipulate font size and the placement of links to obscure such policies on their websites.[14] Because of the opportunities for fraud and deception, DCA urges the Board to adopt specific rules addressing the issues unique to online disclosures and consents.

With respect to advertising, the FTC has provided substantial guidance on how marketers should apply basic web-based disclosure principles. According to the FTC[15],

> In evaluating whether disclosures are likely to be clear and conspicuous in online ads, advertisers should consider the *placement* of the disclosure in an ad and its *proximity* to the relevant claim. Additional considerations include: the *prominence*

[12] 16 C.F.R. Part 310
[13] DCA's Proposed Rule Regarding Debt Collection Agencies, *City Record*, May 26, 2009. Proposed Rules of the City of New York, Title 6, Section 1, Chapter 2, § 2-193. Available at http://www.nyc.gov/html/dca/downloads/pdf/collection_agency_hearing_notice.pdf
[14] Ciocchetti, Corey A., "The Future of Privacy Policies: A Privacy Nutrition Label Filled with Fair Information Practices," 26 J. Marshall J. Computer & Info. L. 1, Fall 2008.
[15] "Dot Com Disclosures: Information about Online Advertising," Federal Trade Commission. Available at: http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf

of the disclosure; whether items in other parts of the ad *distract attention* from the disclosure; whether the ad is so lengthy that the disclosure needs to be *repeated;* whether disclosures in audio messages are presented in an adequate *volume and cadence* and visual disclosures appear for a sufficient *duration*; and, whether the language of the disclosure is *understandable* to the intended audience.

Given the prevalence of online credit card marketing, the FTC's guidance, which addresses critical elements such as hyperlinks, ease of accessing disclosures and common prohibited practices, should inform the Board's rulemaking in this area.[16]

- **Written Confirmation: The Board should require issuers to provide written confirmation.**

  To ensure consumers understand their decisions and are given full, consistently-presented information, the Board should require creditors to provide consumers written confirmation of affirmative consents. This is particularly crucial for consents obtained verbally, where verification that information was presented thoroughly and without undue influence is more difficult to guarantee.

  DCA has required written confirmation in its own regulation of debt collectors in New York City, proposing rules to require debt collection companies to provide written confirmation after a consumer has entered into a settlement.[17] The Board has also adopted this confirmation requirement for overdraft protection in its recent Regulation E § 205.17(b)(1)(iv) and should apply the same standard to consents for over-the-limit coverage. We urge the Board to provide model plain language confirmation disclosures to reinforce consumer understanding of over-the-credit limit coverage on their accounts.

  Consumers should not have to demand written confirmation of important decisions; this protection should always be a part of these transactions. DCA works to educate consumers that maintaining records and documentation of transactions is essential to being empowered participants in the marketplace. The Board's rules should support these important consumer education efforts.

- **Customer Discrimination Prevention: The Board should specifically prohibit any conditioning based on a consumer's choice, including a ban on inducements for opting-in.**

  The Board's proposed § 226.56(j)(3) would prohibit a creditor from conditioning the amount of available credit or access to credit provided on the consumer's affirmative consent to the over-the-limit coverage. The Board's proposal should be expanded, along the lines of the requirement in the new Regulation E § 205.17(b)(3), to require creditors to provide the same account terms, conditions or features regardless of whether or not a consumer affirmatively consents to over-the-limit coverage.

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[16] For future consideration, the Department is also concerned about marketers' collection of data and information on consumers accessing online disclosure and consent forms. Use of such data and information for targeted marketing could undermine the purposes of these rules, as well as pose security and privacy risks to consumers. We encourage the Board to work with the FTC and state and local consumer protection agencies to develop standards concerning behavioral marketing.

[17] DCA's Proposed Rule Regarding Debt Collection Agencies, *City Record*, May 26, 2009. Proposed Rules of the City of New York, Title 6, Section 1, Chapter 2, § 2-192. Available at http://www.nyc.gov/html/dca/downloads/pdf/collection_agency_hearing_notice.pdf

Further, the Board should specifically ban any inducements, such as rewards or prize schemes, offered to lure consumers to elect to opt in. To ensure the efficacy of this ban, the Board should bar creditors from posting such types of promotions in close proximity to the opt-in disclosure on their websites. These protections are essential to ensuring that consumers have meaningful choice and are not unduly pressured to opt in.

- **Revocation of Consent: The Board should require consumers to be notified of their right to change their decision regarding over-the-limit coverage after incurring fees and should require creditors to allow consumers to revoke their consent using the same methods available for opting in.**

  DCA supports proposed § 226.56(d)(2), which provides that notice of the consumer's right to revoke a prior election for the creditor's over-the-limit service must appear on each periodic statement that reflects the assessment of an over-the-limit fee or charge on a consumer's account. The Board should apply the same standards developed for overdraft protection plans in the new Regulation E § 205.17(f) by affording consumers the flexibility to change their election using any of the forms of election made available to those providing consent. Further, the Board should specifically require that each creditor provide a separate toll-free number, available at all the times that their other phone lines are available, where consumers can revoke their election.

**C. Early Compliance: For any affirmative consent made prior to February 22, 2010 to be recognized as valid, it must have been obtained pursuant to the final regulations promulgated by the Board.**

While allowing for early processing of consumer opt-ins could alleviate the compliance burden that may otherwise occur if notices could not be sent and opt-ins obtained until February 22, 2010, it is essential that such notices and consents are obtained in a manner compliant with all of the Board's final regulations.

Giving creditors leeway as to the manner of obtaining and the format of consents obtained prior to the effective date of these regulations would allow for evasion of the requirements outlined by the Act, which are crucial to facilitating real consumer choice in relation to this feature. An October, 2009 study found that all of the credit cards offered by the 12 largest banks continued to use practices deemed "unfair or deceptive" under the Board's guidelines.[18] Credit card issuers, who have continued these abusive practices as the regulations are being drafted, should not be allowed to evade the opt-in requirement by obtaining under the radar consents before the effective date.

## II. Independent Means of Repayment for Young Consumers

**A. Documentation Requirements: The Board's regulations regarding independent means of repayment for consumers under age 21 should require issuers to verify borrowers' income and assets.**

The Act and the Board's proposed rules offer a number of important protections for young consumers. Credit card debt among young adults has grown exponentially in recent years. In 2008, 84 percent of undergraduates had at least one credit card, up from 74 percent in

[18] Bourke, Nick and Ardie Hollifield, "Still Waiting: 'Unfair or Deceptive' Credit Card Practices Continue as Americans Wait for New Reforms to Take Effect," The Pew Health Group, October 2009.

2004.[19] Fifty percent of college students had four or more cards, with undergraduates carrying record high balances of, on average, $3,173.[20]

DCA supports the Act's restrictions on the ability of creditors to provide inducements on or near campuses of higher education institutions and at related events. New York City is home to over 110 institutions of higher education, so these provisions are particularly important to the welfare of the City's young adults.[21]

In including this requirement, Congress recognized the problems associated with extensions of instant credit facilitated by tangible inducements to students. Nonetheless, the Board can improve its rules by implementing income and asset verification requirements.

Section 301 of the Act prohibits a card issuer from opening a credit card account for a young consumer without a cosigner unless the consumer submits information showing an independent means of repaying any obligation arising from the proposed extension of credit. To effectuate this provision of the Act, the Board should amend its proposal to require creditors to verify the income and assets reported by applicants under the age of 21. The Act clearly aims to curb irresponsible extensions of credit to young adults who have no means to repay, but the Board's proposed rule does not adequately give effect to this intent by not requiring any verification income and assets.

The Board should take into consideration information from other lending contexts. For example, research from the Mortgage Asset Research Institute comparing the stated incomes of 100 mortgage applicants with the incomes on their tax filings found that 90% of stated incomes were exaggerated by 5% or more and almost 60% of the stated amounts were exaggerated by more than 50%.[22] Although mortgage broker influence on income reporting may have contributed to these findings, it is likely that this same type of steering could influence self-reported income by young consumers. Stated-income (or "no-doc") loans clearly exacerbated the subprime crisis; such insufficient income verification should be reigned in by the Board's regulations to minimize similar effects in the credit card marketplace.

DCA suggests the Board adopt language comparable to that applied to higher-priced mortgage loans in Regulation Z § 226.34(a)(4), as amended in July, 2008, which requires creditors to verify amounts of income or assets, which are relied on to determine consumers' repayment ability. The Board should adopt language from this rule specifically authorizing a creditor to rely on W–2 forms, tax returns, payroll receipts, and financial institution records, such as bank statements. The verification process should be in full compliance with all privacy and data security standards applicable to consumer financial information. These requirements are not unduly burdensome to young consumers. As the Board acknowledged in its final mortgage rule:

> "…most consumers can, or should be able to, produce one of these kinds of documents with little difficulty. For other consumers, the rule is quite flexible. It

[19] Sallie Mae, "How Undergraduate Students Use Credit Cards: Sallie Mae's National Study of Usage Rates and Trends 2009," April 2009.
[20] Ibid., Sallie Mae.
[21] "Number of Institutions of Higher Education in New York City: Operating Degree-Granting Colleges and Universities," Baruch College, 2008-2009. Accessed online on November 18, 2009 at http://www.baruch.cuny.edu/nycdata/chapter12_files/sheet002.htm
[22] Sharick, Merle, et. al., "Eighth Periodic Mortgage Fraud Case Report to Mortgage Bankers Association," Mortgage Asset Research Institute, Inc., April 2006.

> permits a creditor to rely on any third-party document that provides reasonably reliable evidence of the income or assets relied on to determine repayment ability. Examples include check-cashing or remittance receipts or a written statement from the consumer's employer."[23]

Given that consumers can reasonably produce documents to verify income "with little difficulty" and the clear intent of the legislation is to put an end to irresponsible extensions of credit to students without independent income, the Board should adopt these income and asset verification requirements for consumers under the age of 21.

## III. Affinity Agreements

### A. Public Disclosure: The Board should require creditors to disclose agreements with institutions of higher education on account solicitations and issue model disclosures.

Agreements between creditors and educational institutions are extremely prevalent. As of 2006, each of the largest ten colleges and universities, through its alumni or athletic association, had partnered with a bank to issue co-branded credit cards to alumni and students, earning some colleges millions of dollars in annual fees.[24] For example, as of January, 2009, Bank of America had an $8.4 million, seven-year contract with Michigan State University, giving it access to students' names and addresses and use of the university's logo.[25]

The Act's requirement, being implemented by the Board's rulemaking, that institutions of higher education publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card is a major step forward in improving transparency regarding these arrangements. However, the Board should go further in ensuring consumers are aware of these partnerships and that university branding does not necessarily mean a card's terms are in a consumer's best interest. In § 226.48(b) of TILA under its August, 2009 final rule implementing the Higher Education Opportunity Act of 2008, the Board required co-branded marketing disclosures for private education loans to include, in a clear and conspicuous statement, equally prominent and closely proximate to the reference to the covered educational institution, that the creditor's loans are not offered or made by the covered educational institution, but are made by the creditor.[26] DCA proposes that, consistent with this rule, the Board requires solicitations associated with affinity cards to be required to prominently include the following disclosure:

> "Shop Around: [Name of credit card] is not being offered or made by [name of institution of higher education], but by [name of creditor]. Although [name of institution of higher education] benefits from a marketing agreement with this credit card issuer, you may be eligible for more favorable terms with another credit card."

In the spirit of the Act's call for transparency regarding these agreements, including this disclosure on credit card solicitations will ensure consumers are aware that factors beyond an assessment of the terms of the card led to the higher education institution's implicit

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[23] Federal Register, Vol. 23 No. 147, 12 CFR Part 226, Truth in Lending: Final Rule, July 30, 2008. P. 44547.
[24] Chu, Kathy, "Credit cards go after college students," USA Today, March 30, 2008.
[25] Glater, Jonathan D. "Colleges Profit as Banks Market Credit Cards to Students," The New York Times, January 1, 2009.
[26] Federal Register, Vol. 74 No. 156, 12 CFR Part 226, Truth in Lending: Final Rule, August 14, 2009. P. 41254

endorsement of the card. This disclosure also will encourage consumers to evaluate whether the card is appropriate for their needs.

## IV. Subprime Fees

### A. Limitation on Fees: DCA supports the Board's broad application of the Act with regard to limiting first-year fees.

Subprime credit cards, often referred to as "fee harvesters," are costly options for consumers that often carry initial fees totaling more than 25 percent of the credit limit. These cards stack the deck against a consumer actually being able to repay the balance. As the National Consumer Law Center notes, "Millions of consumers are being victimized by 'credit' card offers that charge hundreds of dollars in fees and extend minimal available credit – sometimes as little as $50."[27]

Section 105 of the Act limits account fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) charged from the credit made available under the terms of the account in the first year to 25% of the credit authorized at account opening.

DCA strongly supports the Board's decision to apply this provision to fees "with respect to the account," as well as those directly financed by the account. It appears that the Board's intent is to include fees paid directly by the consumer, financed from different credit lines or by other means. To ensure compliance, the Board's final rule regarding these fees should specify that the 25% limitation applies to fees paid directly by the consumer or financed from other credit lines. DCA also supports the Board's proposed comment 52(a)(1)(i)-3, which clarifies that a subsequent increase in the credit limit during the first year does not permit the card issuer to charge additional fees on the account.

## V. Provision of Information about Credit Counseling Services

### A. Referrals: The Board should require creditors to include existing municipal financial counseling infrastructure in consumer referrals to credit counseling agencies.

As required by the Act, the Board's proposed guidelines that creditors establish and maintain a toll-free number disclosed on periodic statements through which consumers can obtain information on credit counseling services is an important step to empower and educate consumers. However, beyond the required agencies approved by the United States bankruptcy trustee, the Board should also mandate that creditors provide information on municipal financial counseling initiatives for consumers in localities where such services exist.

In New York City, DCA's OFE operates Financial Empowerment Centers which provide free, one-on-one financial counseling and coaching to any New York City resident seeking help. In addition, OFE has organized a Financial Education Network of 71 direct service providers offering financial education classes and counseling in nearly 100 locations throughout the City's five boroughs. These organizations were identified and selected based on a comprehensive survey of service offerings locations, delivery mechanisms, and target populations serviced. New York City residents who call the City's "311" 24-hour, seven-

[27] Jurgens, Rick and Chi Chi Wu, "Fee Harvesters: Low-Credit, High-Cost Cards Bleed Consumers," National Consumer Law Center, November 2007.

days-a-week helpline seeking financial counseling are referred to one of OFE's Financial Empowerment Centers or to another network provider.

Municipal "311" and "211" call centers can be effective conduits to legitimate resources. More than 60 cities across the U.S. – covering 78% of the American population – have "311" or "211" information and referral systems, generally available 24 hours a day, seven days a week, in dozens of languages. These systems are well-known, trusted resources.

The Board should require creditors to provide referrals to such services to consumers whose billing addresses are located in those cities and maintain a registry of cities providing such services. Creditors should be permitted to reduce the number of other referrals when referrals to municipal resources are included, as routing consumers through "311" and "211" call centers can reach a comprehensive listing of local resources.

**Conclusion**

DCA acknowledges the strides that the Board's proposed rules make toward carrying out Congress's intent to improve transparency and fairness in the credit card marketplace, finally putting an end to unfair and deceptive industry practices.

Yet, the Board's proposals could be strengthened to more adequately inform, empower, and protect consumers. The Board should adopt strong requirements for consumer disclosure and election to participate in over-the-credit limit coverage. To effectively capture the spirit of the law, the Board must require income and asset verification for consumers under the age of 21 applying for credit cards without a co-signor. The Board should also improve transparency of relationships between creditors and institutions of higher education. In addition, the Board should broadly apply the Act's limitation on first-year fees. Finally, the Board should require creditors to include existing municipal financial counseling efforts in their required provision of information regarding credit counseling services.

The Credit CARD Act of 2009 brought hope to consumers who have been abused by credit card companies for too long. Unfortunately, those hopes have been dampened as issuers have raised rates and scrambled to offer new costly products and services before the law goes into effect. Consumers, facing increasing economic instability, deserve the strongest possible execution of this law. The rule changes DCA has recommended will significantly improve fairness and transparency in the marketplace, consumer economic security, and the future strength of the financial system.

Respectfully submitted,

Jonathan Mintz
Commissioner
New York City Department of Consumer Affairs

**Appendix A. Proposed Changes to Model Over-the-Limit Disclosures**

G-25(A)—Consent Form for Over-the-Credit Limit Transactions

# Optional Over-the-Credit Limit Coverage

Your credit limit is $XX. Unless you tell us otherwise, you will not be able to make any purchase that causes you to go over your credit limit. If you want us to authorize these transactions, you can request over-the-credit limit coverage.

If you have over-the-credit limit coverage and you go over your credit limit, we will charge you $XX and may increase your interest rates (APRs) to the Penalty Interest Rate (APR) of XX.XX%. You will only pay one fee per billing cycle, even if you go over your limit multiple times in the same cycle.

You are not required to request over-the-credit limit coverage or to complete this form. You will not receive any special terms or incentives for requesting over-the-credit limit coverage.

Even if you request over-the-credit limit coverage, in some cases, we may still decline a transaction that would cause you to go over your limit, for example if you are past due or significantly over your credit limit.

If you would like to request over-the-credit limit coverage (to allow us to authorize transactions that go over your credit limit), please:
- Call us at [telephone number];
- Visit [Web site]; or
- Check the corresponding box and sign below, and return the form to us at [address].

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__ I do not want over-the-credit limit coverage. I understand that [creditor name] will not authorize transactions that exceed my credit limit.

__ I want over-the-credit limit coverage. I would like [creditor name] to authorize transactions that exceed my credit limit. I understand that if I go over my credit limit, I will be charged a fee of $XX and my interest rates (APRs) may increase.

**Signature:** _____

**Printed Name:** _____

**Date:** _____