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FEDERAL RESERVE SYSTEM

12 CFR Part 227

[Regulation AA; Docket No. R-1314]

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 535

[Docket ID. OTS-2008-0004]

[RIN 1550-AC17]

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 706

[RIN 3133-AD47]

Unfair or Deceptive Acts or Practices

AGENCIES: Board of Governors of the Federal Reserve System (Board); Office of Thrift Supervision, Treasury (OTS); and National Credit Union Administration (NCUA).

ACTION: Proposed rule; request for public comment.

SUMMARY: The Board, OTS, and NCUA (collectively, the Agencies) are proposing to exercise their authority under section 5(a) of the Federal Trade Commission Act to prohibit unfair or deceptive acts or practices. The proposed rule would prohibit institutions from engaging in certain acts or practices in connection with consumer credit cards accounts and overdraft services for deposit accounts. This proposal evolved from the Board's June 2007 Notice of Proposed Rule under the Truth in Lending Act and OTS's August 2007 Advance Notice of Proposed Rulemaking under the Federal Trade Commission Act. The proposed rule relates to other Board proposals under the Truth in

Lending Act and the Truth in Savings Act, which are published elsewhere in today's **Federal Register**.

DATES: Comments must be received on or before **[Insert date that is 75 days after the date of publication in the Federal Register].**

ADDRESSES:

Because paper mail in the Washington DC area and at the Agencies is subject to delay, we encourage commenters to submit comments by e-mail, if possible. We also encourage commenters to use the title "Unfair or Deceptive Acts or Practices" to facilitate our organization and distribution of the comments. Comments submitted to one or more of the Agencies will be made available to all of the Agencies. Interested parties are invited to submit comments as follows:

Board: You may submit comments, identified by Docket No. R-1314, by any of the following methods:

- Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.
- Facsimile: (202) 452-3819 or (202) 452-3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, DC 20551.

All public comments are available from the Board's web site at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP-500 of the Board's Martin Building (20th and C Streets, NW) between 9:00 a.m. and 5:00 p.m. on weekdays.

OTS: You may submit comments, identified by OTS-2008-0004, by any of the following methods:

- Federal eRulemaking Portal: Go to http://www.regulations.gov, select "Office of Thrift Supervision" from the agency drop-down menu, then click submit. Select Docket ID "OTS-2008-0004" to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The "User Tips" link at the top of the page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- Mail: Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, Attention: OTS-2008-0004.
- Facsimile: (202) 906-6518.
- Hand Delivery/Courier: Guard's Desk, East Lobby Entrance, 1700 G Street, NW, from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: OTS-2008-0004.

- Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be entered into the docket and posted on Regulations.gov without change, including any personal information provided. Comments, including attachments and other supporting materials received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.
- Viewing Comments Electronically: Go to http://www.regulations.gov, select "Office of Thrift Supervision" from the agency drop-down menu, then click "Submit." Select Docket ID "OTS-2008-0004" to view public comments for this notice of proposed rulemaking.
- Viewing Comments On-Site: You may inspect comments at the Public Reading Room, 1700 G Street, NW, by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906-6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10:00 a.m. and 4:00 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

NCUA: You may submit comments, identified by number RIN 3133-AD47, by any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

- NCUA Web Site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include "[Your name] Comments on Proposed Rule Part 706" in the e-mail subject line.
- Facsimile: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.
- Hand Delivery/Courier: Same as mail address.

FOR FURTHER INFORMATION CONTACT:

Board: Benjamin K. Olson, Attorney, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

OTS: April Breslaw, Director, Consumer Regulations, (202) 906-6989; Suzanne McQueen, Consumer Regulations Analyst, Compliance and Consumer Protection Division, (202) 906-6459; Glenn Gimble, Senior Project Manager, Compliance and Consumer Protection Division, (202) 906-7158; or Richard Bennett, Senior Compliance Counsel, Regulations and Legislation Division, (202) 906-7409, at Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552.

NCUA: Matthew J. Biliouris, Program Officer, Office of Examination and Insurance, (703) 518-6360; or Moisette I. Green or Ross P. Kendall, Staff Attorneys,

Office of General Counsel, (703) 518-6540, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

SUPPLEMENTARY INFORMATION:

The Federal Reserve Board (Board), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) (collectively, the Agencies) are proposing several new provisions intended to protect consumers against unfair or deceptive acts or practices with respect to consumer credit card accounts and overdraft services for deposit accounts. These proposals are promulgated pursuant to section 18(f)(1) of the Federal Trade Commission Act (FTC Act), which makes the Agencies responsible for prescribing regulations that prevent unfair or deceptive acts or practices in or affecting commerce within the meaning of section 5(a) of the FTC Act. See 15 U.S.C. 57a(f)(1), 45(a).

I. Background

A. The Board's June 2007 Regulation Z Proposal on Open-End (Non-Home Secured) Credit

On June 14, 2007, the Board requested public comment on proposed amendments to the open-end credit (not home-secured) provisions of Regulation Z, which implements the Truth in Lending Act (TILA), as well as proposed amendments to the corresponding staff commentary to Regulation Z. 72 FR 32948 (June 2007 Proposal). The purpose of TILA is to promote the informed use of consumer credit by providing disclosures about its costs and terms. See 15 U.S.C. 1601 et seq. TILA's disclosures differ depending on whether the consumer credit is an open-end (revolving) plan or a closed-end (installment) loan. The goal of the proposed amendments was to improve the effectiveness of the

disclosures that creditors provide to consumers at application and throughout the life of an open-end (not home-secured) account.

As part of this effort, the Board retained a research and consulting firm (Macro International) to assist the Board in conducting extensive consumer testing in order to develop improved disclosures that consumers would be more likely to pay attention to, understand, and use in their decisions, while at the same time not creating undue burdens for creditors. While the testing assisted the Board in developing improved disclosures, the testing also identified the limitations of disclosure, in certain circumstances, as a means of enabling consumers to make decisions effectively. See 72 FR at 32948-52.

In response to the June 2007 Proposal, the Board received more than 2,500 comments, including approximately 2,100 comments from individual consumers. Comments from consumers, consumer groups, a member of Congress, other government agencies, and some creditors were generally supportive of the proposed revisions to Regulation Z. A number of comments, however, urged the Board to take additional action with respect to a number of credit card practices, including late fees and other penalties resulting from perceived reductions in the amount of time consumers are given to make timely payments, allocation of payments to balances with the lowest annual percentage rate, application of increased annual percentage rates to pre-existing balances, and the so-called two-cycle method of computing interest.

B. The OTS's August 2007 FTC Act Advance Notice of Proposed Rulemaking

On August 6, 2007, OTS issued an ANPR requesting comment on its rules under section 5 of the FTC Act. See 72 FR 43570 (OTS ANPR). The purpose of OTS's ANPR

was to determine whether OTS should expand on its current prohibitions against unfair and deceptive acts or practices in its Credit Practices Rule (12 CFR part 535).

OTS's ANPR discussed a very broad array of issues including:

- The legal background on OTS's authority under the FTC Act and the Home Owners' Loan Act (HOLA);
- OTS's existing Credit Practices Rule;
- Possible principles OTS could use to define unfair and deceptive acts or practices, including looking to standards the FTC and states follow;
- Practices that OTS, individually or on an interagency basis, has addressed through guidance;
- Practices that other federal agencies have addressed through rulemaking;
- Practices that states have addressed statutorily;
- Acts or practices OTS might target involving products such as credit cards, residential mortgages, gift cards, and deposit accounts; and
- OTS's existing Advertising Rule (12 CFR 563.27).

OTS recognized in its ANPR that the financial services industry and consumers have benefited from consistency in rules and guidance as the federal banking agencies and the NCUA have adopted uniform or very similar rules in many areas. 72 FR at 43571. OTS emphasized in its ANPR that it would be mindful of the goal of consistent interagency standards as it considered issues relating to unfair and deceptive acts or practices. Id.

OTS received 29 comment letters on its ANPR, including thirteen from financial institutions and their trade associations, three from consumer advocacy organizations,

two from members of Congress, one from the FTC, and ten from others. Generally speaking, the commenters agreed on only one point . . . that OTS should adopt the same principles-based standards for unfairness and deception used by the FTC, the other federal banking agencies, and the NCUA.

Financial industry commenters opposed OTS taking any further action beyond issuing guidance along those lines. They argued that OTS must not create an unlevel playing field for OTS-regulated institutions and that uniformity among the federal banking agencies and the NCUA is essential. They questioned the need for any new OTS rules. They challenged the list of practices OTS had indicated it could consider targeting, arguing that the practices listed were neither unfair nor deceptive under the FTC standards. They explained the reasons they use the particular practices listed and how some benefit consumers. Some commenters urged OTS to await the Board's rulemaking under the Home Ownership and Equity Protection Act (HOEPA) on unfair or deceptive acts or practices and then follow the Board's lead.[1] They also opposed using state laws as a model or converting guidance to rules. Further, they opposed OTS expanding its advertising rules.

In contrast, the consumer commenters urged OTS to move ahead with a rule that would combine the FTC's principles-based standards with prohibitions on specific practices. They urged OTS to ban numerous practices, including but not limited to those the ANPR indicated OTS might target. One emphasized that whatever OTS does must not preempt state laws on unfair and deceptive acts or practices.

[1] The Board issued its HOEPA proposal in January 2008. See 73 FR 1672 (Jan. 9, 2008).

A joint comment from House Financial Services Committee Chairman Barney Frank and Subcommittee on Financial Institutions and Consumer Credit Chairman Carolyn Maloney urged OTS to proceed promptly to adopt comprehensive regulations on unfair and deceptive acts or practices. A comment from Senator Carl Levin urged OTS to move ahead with rulemaking; he focused his comment on unfair or deceptive credit card practices.

A comment from the FTC summarized the FTC's interest and experience with respect to financial services, described how the FTC has used its unfairness and deception authority in rulemaking and law enforcement actions, and recommended that OTS consider the FTC's experience in determining whether to impose rules prohibiting or restricting particular acts and practices.

OTS received comments on several practices relevant to the specific credit card practices addressed in today's proposal:

- OTS received comments on the practice of "universal default" or "adverse action pricing," which the OTS ANPR described as imposing an interest rate increase that is triggered by adverse information unrelated to the credit card account. The OTS ANPR contrasted this practice to long-established risk based pricing. Consumer groups supported prohibiting these practices as abusive and unfair to consumers. They cited inaccuracies in the credit reporting system and disparate racial impact as reasons to prohibit using credit reports or credit scores to impose penalty rates. On the other hand, several industry commenters defended these practices. They commented that credit cards should be priced to reflect their

current risk. They argued that otherwise, credit card issuers would build a risk premium into all rates to the detriment of other customers.

- OTS received comments on the practice of applying payments first to balances subject to a lower rate of interest before applying payments to balances subject to higher rates of interest, as well as the practice of applying payments first to fees, penalties, or other charges before applying them to principal and interest. Consumer groups supported prohibiting these practices as abusive and unfair to consumers. On the other hand, several industry commenters defended these practices. They commented that if these practices were prohibited fewer products would be available to consumers such as zero or low-cost balance transfers. Some commented that applying payments in this manner was fundamental and would impose significant implementation costs to change.
- OTS received comments on the practice of imposing an over-the-credit-limit fee that is triggered by the imposition of a penalty fee (such as a late fee) and the practice of charging penalty fees in consecutive months based on previous late or over-the-credit-limit transactions, not on new actions. Consumer groups supported prohibiting these practices and prohibiting any over-the-credit-limit fee where the creditor approved the transaction or padded the credit limit, as abusive and unfair to consumers. On the other hand, several industry commenters defended these practices. They commented that the practices deter future defaults and are a way to charge a little more to a customer who has demonstrated higher risk without permanently raising the customer's borrowing costs. They argued

that otherwise, these costs would be passed on to borrowers who do not go over their credit limit or pay late.

Consumer groups also commented on additional credit card practices of concern that are relevant to the practices addressed in today's proposal. They urged that payment cut-off times be prohibited and that payments be treated as timely if they are postmarked as of the due date. They also urged that subprime credit cards be prohibited if less than $300 of available credit is left after initial fees are subtracted or initial fees total more than 10% of the overall credit line.

C. Related Action by the Agencies

In addition to receiving information via comments, the Agencies have conducted outreach regarding credit card practices, including meetings and discussions with consumer group representatives, industry representatives, other federal and state banking agencies, and the FTC. On April 8, 2008, the Board hosted a forum on credit cards in which card issuers and payment network operators, consumer advocates, counseling agencies, and other regulatory agencies met to discuss relevant industry trends and identify areas that may warrant action or further study. Among the topics discussed were the Board's previously announced plan to issue a proposal under the FTC Act and the Board's June 2007 Proposal. In addition, the Agencies have reviewed consumer complaints received by each of the federal banking agencies and several studies of the credit card industry.[2] The Agencies' understanding of credit card practices and consumer

[2] See, e.g., Am. Bankers Assoc., Likely Impact of Proposed Credit Card Legislation: Survey Results of Credit Card Issuers (Spring 2008); Darryl E. Getter, Cong. Research Srvc., The Credit Card Market: Recent Trends, Funding Cost Issues, and Repricing Practices (Feb. 2008); Tim Westrich & Christian E. Weller, Ctr. for Am. Progress, House of Cards: Consumers Turn to Credit Cards Amid the Mortgage Crisis, Delaying Inevitable Defaults (Feb. 2008) (available at http://www.americanprogress.org/issues/2008/02/pdf/house_of_cards.pdf); Jose A. Garcia, Demos, Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America (Nov. 2007) (available

behavior has also been informed by the results of consumer testing conducted on behalf of the Board in connection with its June 2007 Proposal under Regulation Z. Based on this and other information discussed below, the Agencies have developed proposed rules under the FTC Act prohibiting specific unfair acts or practices regarding consumer credit card accounts.

Finally, the Agencies have also gathered information from a number of recent Congressional hearings on consumer protection issues regarding credit cards.[3] In these hearings, members of Congress heard testimony from individual consumers, representatives of consumer groups, representatives of financial and credit card industry groups, and others. Consumer and community group representatives generally testified that certain credit card practices (including those discussed above) unfairly increase the cost of credit after the consumer has committed to a particular transaction. These witnesses further testified that these practices should be prohibited because they lead

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at http://www.demos.org/pubs/borrowing.pdf); Nat'l Consumer Law Ctr., Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers (Nov. 2007) (available at http://www.consumerlaw.org/issues/credit_cards/content/FEE-HarvesterFinal.pdf); Jonathan M. Orszag & Susan H. Manning, Am. Bankers Assoc., An Economic Assessment of Regulating Credit Card Fees and Interest Rates (Oct. 2007) (available at http://www.aba.com/aba/documents/press/regulating_creditcard_fees_interest_rates92507.pdf); Cindy Zeldin & Mark Rukavia, Demos, Borrowing to Stay Healthy: How Credit Card Debt Is Related to Medical Expenses (Jan. 2007) (available at http://www.demos.org/pubs/healthy_web.pdf); U.S. Gov't Accountability Office, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers (Sept. 2006) ("GAO Credit Card Report") (available at http://www.gao.gov/new.items/d06929.pdf); Board of Governors of the Federal Reserve System, Report to Congress on Practices of the Consumer Credit Industry in Soliciting and Extending Credit and their Effects on Consumer Debt and Insolvency (June 2006) (available at http://www.federalreserve.gov/boarddocs/rptcongress/bankruptcy/bankruptcybillstudy200606.pdf); Demos & Ctr. for Responsible Lending, The Plastic Safety Net: The Reality Behind Debt in America (Oct. 2005) (available at http://www.demos.org/pubs/PSN_low.pdf).

[3] See, e.g., The Credit Cardholders' Bill of Rights: Providing New Protections for Consumers: Hearing before the H. Subcomm. on Fin. Instits. & Consumer Credit, 110th Cong. (2007); Credit Card Practices: Unfair Interest Rate Increases: Hearing before the S. Permanent Subcomm. on Investigations, 110th Cong. (2007); Credit Card Practices: Current Consumer and Regulatory Issues: Hearing before H. Comm. on Fin. Servs., 110th Cong. (2007); Credit Card Practices: Fees, Interest Rates, and Grace Periods: Hearing before the S. Permanent Subcomm. on Investigations, 110th Cong. (2007).

consumers to underestimate the costs of using credit cards and that disclosure of these practices under Regulation Z is ineffective. Financial services and credit card industry representatives agreed that consumers need better disclosures of credit card terms but testified that substantive restrictions on specific terms would lead to higher interest rates for all borrowers as well as reduced access to credit for some. Members of Congress have proposed several bills addressing consumer protection issues regarding credit cards.[4]

D. Agency Actions on Overdraft Services

Overdraft services are sometimes offered to transaction account customers as an alternative to traditional ways of covering overdrafts (e.g., overdraft lines of credit or linked accounts). Coverage is generally "automatically" provided to consumers that meet a depository institution's criteria, and the service may extend to check as well as other transactions, such as automated teller machine (ATM) withdrawals, debit card transactions and automated clearinghouse (ACH) transactions. Most institutions state that payment of an overdraft is at their discretion. If an overdraft is paid, the consumer will be charged a flat fee for each item. A daily fee also may apply for each day the account remains overdrawn.

In response to the increased availability and customer use of these overdraft protection services, the FDIC, Board, OCC, OTS, and NCUA published guidance on

[4] See, e.g., The Credit Card Reform Act of 2008, S. 2753, 110th Cong. (Mar. 12, 2008); The Credit Cardholders' Bill of Rights Act of 2008, H.R. 5244, 110th Cong. (Feb. 7, 2008); The Stop Unfair Practices in Credit Cards Act of 2007, H.R. 5280, 110th Cong. (Feb. 7, 2008); The Stop Unfair Practices in Credit Cards Act of 2007, S. 1395, 110th Cong. (May 15, 2007); The Universal Default Prohibition Act of 2007, H.R. 2146, 110th Cong. (May 3, 2007); The Credit Card Accountability Responsibility and Disclosure Act of 2007, H.R. 1461, 110th Cong. (Mar. 9, 2007).

overdraft protection programs in February 2005.[5] The Joint Guidance addresses three primary areas – safety and soundness considerations, legal risks, and best practices – while the OTS guidance focuses on safety and soundness considerations and best practices. The best practices focus on the marketing and communications that accompany the offering of overdraft services, as well as the disclosure and operation of program features, including the provision of a consumer election or opt-out of the overdraft service. The Agencies have also published a consumer brochure on overdraft services.[6]

In May 2005, the Board separately issued revisions to Regulation DD and the staff commentary pursuant to its authority under the Truth in Savings Act (TISA) to address concerns about the uniformity and adequacy of institutions' disclosure of overdraft fees generally, and to address concerns about advertised overdraft services in particular.[7] The goal of the final rule was to improve the uniformity and adequacy of disclosures provided to consumers about overdraft and returned-item fees to assist consumers in better understanding the costs associated with the payment of overdrafts. In addition, the final rule addressed some of the Board's concerns about institutions' marketing practices with respect to overdraft services.

In addition to regulatory actions, there has also been significant Congressional interest in overdraft services, with legislation introduced seeking to curb some of the

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[5] See Interagency Guidance on Overdraft Protection Programs (Joint Guidance), 70 FR 9127 (Feb. 24, 2005) and OTS Guidance on Overdraft Protection Programs, 70 FR 8428 (Feb. 18, 2005).

[6] The brochure, entitled "Protecting Yourself from Overdraft and Bounced-Check Fees," can be found at: http://www.federalreserve.gov/pubs/bounce/default.htm.

[7] 70 FR 29582 (May 24, 2005). A substantively similar rule applying to credit unions was issued separately by the NCUA. 71 FR 24568 (Apr. 26, 2006). The NCUA issued an interim final rule in 2005. 70 FR 72895 (Dec. 8, 2005).

perceived abusive practices associated with these services. In June 2007, a hearing was held to discuss the proposed legislation with testimony from consumer advocates and industry representatives.[8]

II. Statutory Authority Under the Federal Trade Commission Act to Address Unfair or Deceptive Acts or Practices

A. Rulemaking and Enforcement Authority Under the FTC Act

Section 18(f)(1) of the FTC Act provides that the Board (with respect to banks), OTS (with respect to savings associations), and the NCUA (with respect to federal credit unions) are responsible for prescribing "regulations defining with specificity . . . unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices." 15 U.S.C. 57a(f)(1).[9]

The FTC Act allocates responsibility for enforcing compliance with regulations prescribed under section 18 with respect to banks, savings associations, and federal credit unions among the Board, OTS, and NCUA, as well as the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC). See 15 U.S.C. 57a(f)(2)-(4). The FTC Act grants the FTC rulemaking and enforcement authority with respect to other persons and entities, subject to certain exceptions and limitations. See 15 U.S.C. 45(a)(2); 15 U.S.C. 57a(a). The FTC Act, however, sets forth

[8] H.R. 946, "The Consumer Overdraft Protection Fair Practices Act." See also Overdraft Protection: Fair Practices for Consumers: Hearing Before the House Subcomm. on Financial Institutions and Consumer Credit, 110th Cong. (2007).

[9] The FTC Act refers to OTS's predecessor agency, the Federal Home Loan Bank Board (FHLBB), rather than to OTS. However, in section 3(e) of HOLA, Congress transferred this rulemaking power of the FHLBB, among others, to the Director of OTS. 12 U.S.C. 1462a(e). The FTC Act refers to "savings and loan institutions" in some provisions and "savings associations" in other provisions. Although "savings associations" is the term currently used in the HOLA, see, e.g., 12 U.S.C. 1462(4), the terms "savings and loan institutions" and "savings associations" can be and are used interchangeably. OTS has determined that the outdated language does not affect OTS's rulemaking authority under the FTC Act.

specific rulemaking procedures for the FTC that do not apply to the Agencies. See 15 U.S.C. 57a(b)-(e), (g)-(j); 15 U.S.C. 57a-3.

B. Standards for Unfairness Under the FTC Act

Congress has codified standards developed by the Federal Trade Commission (FTC) for the FTC to use in determining whether acts or practices are unfair under section 5(a) of the FTC Act.[10] Specifically, the FTC Act provides that the FTC has no authority to declare an act or practice is unfair unless: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. In addition, the FTC may consider established public policy, but public policy may not serve as the primary basis for its determination that an act or practice is unfair. See 15 U.S.C. 45(n).

In proposing rules under section 18(f)(1) of the FTC Act, the Agencies have applied the statutory elements consistent with the standards articulated by the FTC. The Board, FDIC, and OCC have issued guidance generally adopting these standards for purposes of enforcing the FTC Act's prohibition on unfair or deceptive acts or practices.[11] Although the OTS has not taken similar action in generally applicable

[10] See 15 U.S.C. 45(n); FTC Policy Statement on Unfairness, Letter from the FTC to the Hon. Wendell H. Ford and the Hon. John C. Danforth, S. Comm. on Commerce, Science & Transp. (Dec. 17, 1980) (FTC Policy Statement on Unfairness) (available at http://www.ftc.gov/bcp/policystmt/ad-unfair.htm).

[11] See Board and FDIC, Unfair or Deceptive Acts or Practices by State-Chartered Banks (Mar. 11, 2004) (available at http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf); OCC Advisory Letter 2002-3, Guidance on Unfair or Deceptive Acts or Practices (Mar. 22, 2002) (available at http://www.occ.treas.gov/ftp/advisory/2002-3.doc).

guidance,[12] the commenters on OTS's ANPR who addressed this issue overwhelmingly urged OTS to be consistent with the FTC's standards for unfairness.

According to the FTC, an unfair act or practice will almost always represent a market failure or imperfection that prevents the forces of supply and demand from maximizing benefits and minimizing costs.[13] Not all market failures or imperfections constitute unfair acts or practices, however. Instead, the central focus of the FTC's unfairness analysis is whether the act or practice causes substantial consumer injury.[14]

First, the FTC has stated that a substantial consumer injury generally consists of monetary, economic, or other tangible harm.[15] Trivial or speculative harms do not constitute substantial consumer injury.[16] Consumer injury may be substantial, however, if it imposes a small harm on a large number of consumers or if it raises a significant risk of concrete harm.[17]

Second, the FTC has stated that an injury is not reasonably avoidable when consumers are prevented from effectively making their own decisions about whether to incur that injury.[18] The marketplace is normally expected to be self-correcting because

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[12] See OTS ANPR, 72 FR at 43573.

[13] Statement of Basis and Purpose and Regulatory Analysis for Federal Trade Commission Credit Practices Rule (Statement for FTC Credit Practices Rule), 49 FR 7740, 7744 (Mar. 1, 1984).

[14] Id. at 7743.

[15] See id.; FTC Policy Statement on Unfairness at 3.

[16] See Statement for FTC Credit Practices Rule, 49 FR at 7743 ("[E]xcept in aggravated cases where tangible injury can be clearly demonstrated, subjective types of harm – embarrassment, emotional distress, etc. – will not be enough to warrant a finding of unfairness."); FTC Unfairness Policy Statement at 3 ("Emotional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair.").

[17] See Statement for FTC Credit Practices Rules, 49 FR at 7743; FTC Policy Statement on Unfairness at 3 & n.12.

[18] See FTC Policy Statement on Unfairness at 3.

consumers are relied upon to survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.[19] Accordingly, the test is not whether the consumer could have made a wiser decision but whether an act or practice unreasonably creates or takes advantage of an obstacle to the consumer's ability to make that decision freely.[20]

Third, the FTC has stated that the act or practice causing the injury must not also produce benefits to consumers or competition that outweigh the injury.[21] Generally, it is important to consider both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice.[22] The FTC has stated that both consumers and competition benefit from prohibitions on unfair or deceptive acts or practices because prices may better reflect actual transaction costs and merchants who do not rely on unfair or deceptive acts or practices are no longer required to compete with those who do.[23]

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[19] See Statement for FTC Credit Practices Rule, 49 FR at 7744 ("Normally, we can rely on consumer choice to govern the market."); FTC Policy Statement on Unfairness at 3.

[20] See Statement for FTC Credit Practices Rule, 49 FR at 7744 ("In considering whether an act or practice is unfair, we look to whether free market decisions are unjustifiably hindered."); FTC Policy Statement on Unfairness at 3 & n.19 ("In some senses any injury can be avoided—for example, by hiring independent experts to test all products in advance, or by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue.").

[21] See Statement for FTC Credit Practices Rule, 49 FR at 7744; FTC Policy Statement on Unfairness at 3; see also S. Rep. 103-130, at 13 (1994), reprinted in 1994 U.S.C.C.A.N. 1776, 1788 ("In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.").

[22] See FTC Public Comment on OTS-2007-0015, at 6 (Dec. 12, 2007) (available at http://www.ots.treas.gov/docs/9/963034.pdf).

[23] See FTC Public Comment on OTS-2007-0015, at 8 (citing Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose, 40 FR 53506, 53523 (Nov. 18, 1975) (codified at 16 CFR 433)); see also FTC Policy Statement on Deception, Letter from the FTC to the Hon. John H. Dingell, H. Comm. on Energy & Commerce (Oct. 14, 1983) (FTC Policy Statement on Deception) (available at

C. Standards for Deception Under the FTC Act

The FTC has also adopted standards for determining whether an act or practice is deceptive under the FTC Act.[24] Under the FTC's standards, an act or practice is deceptive where: (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that information is material to consumers.[25] Although these standards have not been codified, they have been applied by numerous courts.[26] Accordingly, in proposing rules under section 18(f)(1) of the FTC Act, the Agencies have applied the standards articulated by the FTC for determining whether an act or practice is deceptive.[27]

A representation or omission is deceptive if the overall net impression created is likely to mislead consumers.[28] The FTC conducts its own analysis to determine whether a representation or omission is likely to mislead consumers acting reasonably under the circumstances.[29] When evaluating the reasonableness of an interpretation, the FTC

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http://www.ftc.gov/bcp/policystmt/ad-decept.htm) ("Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted.").

[24] FTC Policy Statement on Deception.

[25] Id. at 1-2. The FTC views deception as a subset of unfairness but does not apply the full unfairness analysis because deception is very unlikely to benefit consumers or competition and consumers cannot reasonably avoid being harmed by deception. Id.

[26] See, e.g., FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003); FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001); FTC v. QT, Inc., 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006); FTC v. Think Achievement, 144 F. Supp. 2d 993, 1009 (N.D. Ind. 2000); FTC v. Minuteman Press, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998).

[27] As noted above, the Board, FDIC, and OCC have issued guidance generally adopting these standards for purposes of enforcing the FTC Act's prohibition on unfair or deceptive acts or practices. As with the unfairness standard, comments on OTS's ANPR addressing this issue overwhelmingly urged the OTS to adopt the same deception standard as the FTC.

[28] See, e.g., FTC v. Cyberspace.com, 453 F.3d 1196, 1200 (9th Cir. 2006); Gill, 265 F.3d at 956; Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1497 (1st Cir. 1989).

[29] See FTC v. Kraft, Inc., 970 F.2d 311, 319 (7th Cir. 1992); QT, Inc., 448 F. Supp. 2d at 958.

considers the sophistication and understanding of consumers in the group to whom the act or practice is targeted.[30] If a representation is susceptible to more than one reasonable interpretation, and if one such interpretation is misleading, then the representation is deceptive even if other, non-deceptive interpretations are possible.[31]

A representation or omission is material if it is likely to affect the consumer's conduct or decision regarding a product or service.[32] Certain types of claims are presumed to be material, including express claims and claims regarding the cost of a product or service.[33]

D. Choice of Remedy

The Agencies have wide latitude to determine what remedy is necessary to prevent an unfair or deceptive act or practice so long as that remedy has a reasonable relation to the act or practice.[34] Thus, the Agencies are not required to adopt the most restrictive means of preventing the act or practice, nor are they required to adopt the least restrictive means.

III. Summary of Proposed Revisions

In order to best ensure that all entities that offer the products addressed in the proposed rule are treated in a like manner, the Board, OTS, and NCUA have joined together to issue today's proposal. This interagency approach is consistent with section

[30] FTC Policy Statement on Deception at 3.

[31] Id.

[32] Id. at 2, 6-7.

[33] See FTC Public Comment on OTS-2007-0015, at 21; FTC Policy Statement on Deception at 6; see also FTC v. Pantron I Corp., 33 F.3d 1088, 1095-96 (9th Cir. 1994); In re Peacock Buick, 86 F.T.C. 1532, 1562 (1975), aff'd 553 F.2d 97 (4th Cir. 1977).

[34] See Am. Fin. Servs. Assoc. v. FTC, 767 F.2d 957, 988-89 (D.C. Cir. 1985) (citing Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946)).

303 of the Riegle Community Development and Regulatory Improvement Act of 1994. See 12 U.S.C. 4803. Section 303(a)(3), 12 U.S.C. 4803(a)(3), directs the federal banking agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. In today's proposal, two federal banking agencies – the Board and OTS – are primarily implementing the same statutory provision, section 18(f) of the FTC Act, as is the NCUA. Accordingly, the Agencies have endeavored to propose rules that are as uniform as possible. The Agencies also consulted with the two other federal banking agencies, OCC and FDIC, as well as with the FTC.

The effort to achieve an even playing field is also furthered by the Agencies' focus on unfair and deceptive acts or practices involving credit cards and overdraft services, which are generally provided only by depository institutions such as banks, savings associations, and credit unions. The Agencies recognize that state-chartered credit unions and any entities providing consumer credit card accounts independent of a depository institution fall within the FTC's jurisdiction and therefore would not be subject to these rules. The Agencies believe, however, that FTC-regulated entities represent a small percentage of the market for consumer credit card accounts and overdraft services. For OTS, addressing certain deceptive credit card practices in today's proposal, rather than through an interpretation or expansion of its Advertising Rule, also fosters consistency because the other Agencies do not have comparable advertising regulations.

Credit Practices Rule

The Agencies are proposing to make non-substantive, organizational changes to the Credit Practices Rule. Specifically, in order to avoid repetition, the Agencies would

move the statement of authority, purpose, and scope out of the Credit Practices Rule and revise it to apply not only to the Credit Practices Rule but also to the proposed rules regarding consumer credit card accounts and overdraft services. OTS and NCUA have made additional, non-substantive changes to the organization of their versions of the Credit Practices Rule.

Consumer Credit Card Accounts

The Agencies are proposing seven provisions under the FTC Act regarding consumer credit card accounts. These provisions are intended to ensure that consumers have the ability to make informed decisions about the use of credit card accounts without being subjected to unfair or deceptive acts or practices.

First, institutions would be prohibited from treating a payment as late for any purpose unless consumers have been provided a reasonable amount of time to make that payment. The proposed rule would create a safe harbor for institutions that adopt reasonable procedures designed to ensure that periodic statements (which provide payment information) are mailed or delivered at least 21 days before the payment due date. Elsewhere in today's **Federal Register**, the Board has made two additional proposals under Regulation Z that would further ensure that consumers receive a reasonable amount of time to make payment. Specifically, the Board is proposing to revise 12 CFR 226.10(b) to prohibit creditors from setting a cut-off time for mailed payments that is earlier than 5:00 p.m. at the location specified by the creditor for receipt of such payments. The Board is also proposing to add 12 CFR 226.10(d), which would require that, if the due date for payment is a day on which the U.S. Postal Service does

not deliver mail or the creditor does not accept payment by mail, the creditor may not treat a payment received by mail the next business day as late for any purpose.

Second, when different annual percentage rates apply to different balances, institutions would be required to allocate amounts paid in excess of the minimum payment using one of three specified methods or a method that is no less beneficial to consumers. The specified methods are applying the entire amount first to the balance with the highest annual percentage rate, splitting the amount equally among the balances, or splitting the amount pro rata among the balances. Furthermore, when an account has a discounted promotional rate balance or a balance on which interest is deferred, institutions would be required to give consumers the full benefit of that discounted rate or deferred interest plan by allocating amounts in excess of the minimum payment first to balances on which the rate is not discounted or interest is not deferred (except, in the case of a deferred interest plan, for the last two billing cycles during which interest is deferred). Institutions would also be prohibited from denying consumers a grace period on purchases (if one is offered) solely because they have not paid off a balance at a promotional rate or a balance on which interest is deferred.

Third, institutions would be prohibited from increasing the annual percentage rate on an outstanding balance. This prohibition would not apply, however, where a variable rate increases due to the operation of an index, where a promotional rate has expired or is lost (provided the rate is not increased to a penalty rate), or where the minimum payment has not been received within 30 days after the due date.

Fourth, institutions would be prohibited from assessing a fee if a consumer exceeds the credit limit on an account solely due to a hold placed on the available credit.

If, however, the actual amount of the transaction would have exceeded the credit limit, then a fee may be assessed.

Fifth, institutions would be prohibited from imposing finance charges on balances based on balances for days in billing cycles that precede the most recent billing cycle. The proposed rule would prohibit institutions from reaching back to earlier billing cycles when calculating the amount of interest charged in the current cycle, a practice that is sometimes referred to as two- or double-cycle billing.

Sixth, institutions would be prohibited from financing security deposits or fees for the issuance or availability of credit (such as account-opening fees or membership fees) if those deposits or fees utilize the majority of the available credit on the account. The proposal would also require security deposits and fees exceeding 25 percent of the credit limit to be spread over the first year, rather than charged as a lump sum during the first billing cycle. In addition, elsewhere in today's **Federal Register**, the Board is proposing to revise Regulation Z to provide that a creditor that collects or obtains a consumer's agreement to pay a fee before providing account-opening disclosures must permit that consumer to reject the plan after receiving the disclosures and, if the consumer does so, must refund any fee collected or take any other action necessary to ensure the consumer is not obligated to pay the fee.

Seventh, institutions making firm offers of credit advertising multiple annual percentage rates or credit limits would be required to disclose in the solicitation the factors that determine whether a consumer will qualify for the lowest annual percentage rate and highest credit limit advertised.

Overdraft Services

The Agencies are proposing two provisions prohibiting unfair acts or practices related to overdraft services in connection with consumer deposit accounts. The proposed provisions are intended to ensure that consumers understand overdraft services and have the choice to avoid the associated costs where such services do not meet their needs.

The first would provide that it is an unfair act or practice for an institution to assess a fee or charge on a consumer's account for paying an overdraft unless the institution provides the consumer with the right to opt out of the institution's payment of overdrafts and a reasonable opportunity to exercise the opt out, and the consumer does not opt out. The proposed opt-out right would apply to all transactions that overdraw an account regardless of the whether the transaction is, for example, a check, an ACH transaction, an ATM withdrawal, a recurring payment, or a debit card purchase at a point of sale.

The second proposal would prohibit certain acts or practices associated with assessing overdraft fees in connection with debit holds. Specifically, the proposal would prohibit an institution from assessing an overdraft fee if the overdraft is caused solely by a hold placed on funds that exceeds the actual purchase amount of the transaction, unless this purchase amount would have caused the overdraft.

Elsewhere in today's **Federal Register**, the Board is also proposing to address potentially misleading balance disclosures by generally requiring depository institutions to provide only balances that reflect the consumer's own funds (without funds added by the institution to cover overdrafts) in response to consumer inquiries received through an

automated system such as a telephone response system, ATM, or an institution's web site.

IV. Section-by-Section Analysis of the Credit Practices Subpart

On March 1, 1984, the FTC adopted its Credit Practices Rule pursuant to its authority under the FTC Act to promulgate rules that define and prevent unfair or deceptive acts or practices in or affecting commerce.[35] The FTC Act provides that, whenever the FTC promulgates a rule prohibiting specific unfair or deceptive practices, the Board, OTS (as the successor to the Federal Home Loan Bank Board), and NCUA must adopt substantially similar regulations imposing substantially similar requirements with respect to banks, savings and loan institutions, and federal credit unions within 60 days of the effective date of the FTC's rule unless the agency finds that such acts or practices by banks, savings associations, or federal credit unions are not unfair or deceptive or the Board finds that the adoption of similar regulations for banks, savings associations, or federal credit unions would seriously conflict with essential monetary and payment-systems policies of the Board. The Agencies have adopted rules substantially similar to the FTC's Credit Practices Rule.[36]

As part of this rulemaking, the Agencies are proposing to reorganize aspects of their respective Credit Practices Rules. Although the Agencies have approached these revisions differently in some respects, the Agencies do not intend to create any substantive difference among their respective rules.

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[35] See 42 FR 7740 (Mar. 1, 1984) (codified at 16 CFR part 444); see also 15 U.S.C. 57a(a)(1)(B), 45(a)(1).

[36] See 12 CFR part 227, subpart B (Board); 12 CFR 535 (OTS); 12 CFR 706 (NCUA).

Proposal

Subpart A—General Provisions

Subpart A contains general provisions that apply to the entire part. As discussed below, there are some differences among the Agencies' proposals.

__.1 Authority, purpose, and scope[37]

The provisions in proposed §__.1 are largely drawn from the current authority, purpose, and scope provisions in the Agencies' respective Credit Practices Rules.

__.1(a) Authority

Proposed §__.1(a) provides that the Agencies have issued this part under section 18(f) of the FTC Act. In OTS's proposed rule, this provision further provides that OTS is also exercising its authority under various provisions of HOLA, although the FTC Act is the primary authority for OTS's rule.

__.1(b) Purpose

Proposed §__.1(b) provides that the purpose of the part is to prohibit unfair or deceptive acts or practices in violation of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1). It further provides that the part contains provisions that define and set forth requirements prescribed for the purpose of preventing specific unfair or deceptive acts or practices. The Agencies note that these provisions define and prohibit specific unfair or deceptive acts or practices within a single provision, rather than setting forth the definitions and remedies separately. Finally, it clarifies that the prohibitions in subparts

[37] The Board, OTS, and NCUA would place the proposed rules in, respectively, parts 227, 535, and 706 of title 12 of the Code of Federal Regulations. For each of reference, the discussion in this **Supplementary Information** uses the shared numerical suffix of each agency's rule. For example, proposed §__.1 would be codified at 12 CFR 227.1 by the Board, 12 CFR 535.1 by OTS, and 12 CFR 706.1 by NCUA.

B, C, and D do not limit the Agencies' authority to enforce the FTC Act with respect to other unfair or deceptive acts or practices.

__.1(c) Scope

Proposed §__.1(c) describes the scope of each agency's rules. The Agencies have each tailored this paragraph to describe those entities to which their part applies. The Board's provision states that its rules would apply to banks and their subsidiaries, except savings associations as defined in 12 U.S.C. 1813(b). The Board's provision further explains that enforcement of its rules is allocated among the Board, OCC, and FDIC, depending on the type of institution. This provision has been updated to reflect intervening changes in law. The Board's Staff Guidelines to the Credit Practices Rule would be revised to remove questions 11(c)-1 and 11(c)-2 and the substance of the Board's answers would be updated and published as commentary under proposed § 227.1(c). See proposed Board comments 227.1(c)-1 and -2. The remaining questions and answers in the Board's Staff Guidelines would remain in place.

OTS's provision would state that its rules apply to savings associations and subsidiaries owned in whole or in part by a savings association. OTS also enforces compliance with respect to these institutions. The entire OTS part would have the same scope. OTS notes that this scope is somewhat different from the scope of its existing Credit Practices Rule. OTS's Credit Practices Rule currently applies to savings associations and service corporations that are wholly owned by one or more savings associations, which engage in the business of providing credit to consumers. Since the proposed rules would cover more practices than consumer credit, the reference to engaging in the business of providing credit to consumers would be deleted. The

reference to wholly owned service corporations would be updated to refer instead to subsidiaries, to reflect the current terminology used in OTS's Subordinate Organizations Rule.[38]

The NCUA's provision would state that its rules apply to federal credit unions.

227.1(d) Definitions

Proposed §__.1(d) of the Board's rule would clarify that, unless otherwise noted, the terms used in the Board's proposed §__.1(c) that are not defined in the FTC Act or in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101). OTS and NCUA do not have a need for a comparable subsection so none is included in their proposed rules.

227.2 Consumer-Complaint Procedure

In order to accommodate the revisions discussed above, the Board would consolidate the consumer complaint provisions currently located in 12 CFR 227.1 and 227.2 in proposed § 227.2. OTS and NCUA do not currently have and do not propose to add comparable provisions.

Subpart B—Credit Practices

Each agency would place the substantive provisions of their current Credit Practices Rule in Subpart B. In order to retain the current numbering in its Credit Practices Rule, the Board would reserve 12 CFR 227.11, which currently contains the Board's statement of authority, purpose, and scope. The other provisions of the Board's Credit Practices Rule (§§ 227.12 through 16) would not be revised.

[38] 12 CFR part 559. OTS has substantially revised this rule since promulgating its Credit Practices Rule. See, e.g., Subsidiaries and Equity Investments: Final Rule, 61 FR 66561 (Dec. 18, 1996).

OTS is proposing the following notable changes to its version of Subpart B:

Section 535.11 Definitions (existing section 535.1)

OTS would delete the definitions of "Act," "creditor," and "savings association" as unnecessary. For the convenience of the user, OTS would incorporate the definition of "consumer credit" into this section, instead of using a cross-reference to a definition contained in a different part of OTS's rules. OTS would move the definition of "cosigner" to the section on unfair or deceptive cosigner practices. OTS would merge the definition of "debt" into the definition of "collecting a debt" contained in the section on late charges. OTS would move the definition of "household goods" to the section on unfair credit contract provisions.

Section 535.12 Unfair credit contract provisions (existing section 535.2)

OTS would revise the title of this section to reflect its focus on credit contract provisions. OTS would delete the obsolete reference to extensions of credit after January 1, 1986.

Section 535.13 Unfair or deceptive cosigner practices (existing section 535.3)

OTS would delete the obsolete reference to extensions of credit after January 1, 1986. OTS would substitute the term "substantially similar" for the term "substantially equivalent" in referencing a document that equates to the cosigner notice for consistency with the Board's rule and to avoid confusion with the term of art "substantial equivalency" used in the section on state exemptions. OTS would also clarify that the date that may be stated on the cosigner notice is the date of the transaction. NCUA would make similar amendments to its rule in § 706.13 (existing § 706.3).

Section 535.14 Unfair late charges (existing section 535.4)

OTS would revise the title of this section to reflect its focus on unfair late charges. OTS would delete the obsolete reference to extensions of credit after January 1, 1986. Similarly, NCUA would propose revisions to § 706.14 (existing § 706.4).

Section 535.15 State exemptions (existing section 535.5)

OTS would revise the subsection on delegated authority to update the current title of the OTS official with delegated authority to make determinations under this section.

Request for Comment

The FTC's Credit Practices Rule included a provision allowing states to seek exemptions from the rule if state law affords a greater or substantially similar level of protection. See 16 CFR 444.5. The Agencies adopted similar provisions in their respective Credit Practices Rules. See 12 CFR 227.16; 12 CFR 535.5; 12 CFR 706.5. In the absence of any legal requirement, however, the Agencies do not propose to extend this provision to the proposed rules for consumer credit card accounts and overdraft services.[39] The Agencies note that only three states have been granted exemptions under the Credit Practices Rule.[40] Because the exemption is available when state law is "substantially equivalent" to the federal rule, an exemption may provide little relief from regulatory burden while undermining the uniform application of federal standards. Accordingly, the Agencies request comment on whether states should be permitted to

[39] The provision of the FTC Act addressing exemptions applies only to the FTC. See 12 U.S.C. 57a(g).

[40] The Board and the FTC have granted exemptions to Wisconsin, New York, and California. 51 FR 24304 (July 3, 1986) (FTC exemption for Wisconsin); 51 FR 28238 (Aug. 7, 1986) (FTC exemption for New York); 51 FR 41763 (Nov. 19, 1986) (Board exemption for Wisconsin); 52 FR 2398 (Jan. 22, 1987) (Board exemption for New York); 53 FR 19893 (June 1, 1988) (FTC exemption for California); 53 FR 29233 (Aug. 3, 1988) (Board exemption for California). OTS has granted an exemption to Wisconsin. 51 FR 45879 (Dec. 23, 1986). The NCUA has not granted any exemptions.

seek exemption from the proposed rules on consumer credit card accounts and overdraft services if state law affords greater or substantially similar level of protection.

In addition, OTS also requests comment on whether the state exemption provision in its Credit Practices Rule should be retained.

V. Section-by-Section Analysis of the Consumer Credit Card Practices Subpart

Pursuant to their authority under 15 U.S.C. 57a(f)(1), the Agencies are proposing to adopt rules prohibiting specific unfair acts or practices with respect to consumer credit card accounts. The Agencies would locate these rules in a new Subpart C to their respective regulations under the FTC Act. These proposals should not be construed as a definitive conclusion by the Agencies that a particular act or practice is unfair or deceptive.

Section __.21—Definitions

Proposed § __.21 would define certain terms used in new Subpart C.

__.21(a) Annual percentage rate

Proposed § __.21(a) defines "annual percentage rate" as the product of multiplying each periodic rate for a balance or transaction on a consumer credit card account by the number of periods in a year. This definition corresponds to the definition of "annual percentage rate" in 12 CFR 226.14(b). As discussed in the Board's official staff commentary to § 226.14(b), this computation does not reflect any particular finance charge or periodic balance. See comment 14(b)-1. This definition also incorporates the definition of "periodic rate" from Regulation Z. See 12 CFR 226.2.

__.21(b) Consumer

Proposed § __.21(b) defines "consumer" as a natural person to whom credit is extended under a consumer credit card account or a natural person who is a co-obligor or guarantor of a consumer credit card account.

__.21(c) Consumer credit card account

Proposed § __.21(c) defines "consumer credit card account" as an account provided to a consumer primarily for personal, family, or household purposes under an open-end credit plan that is accessed by a credit or charge card. This definition incorporates the definitions of "open-end credit," "credit card," and "charge card" from Regulation Z. See 12 CFR 226.2. Under this definition, a number of accounts would be excluded consistent with exceptions to disclosure requirements for credit and charge card applications and solicitations. See proposed 12 CFR 226.5a(a)(5), 72 FR at 33045-46. For example, home-equity plans accessible by a credit card and lines of credit accessible by a debit card are not covered by proposed § __.21(c).

__.21(d) Promotional rate

Proposed §__.21(d) is similar to the definition of "promotional rate" proposed by the Board in 12 CFR 226.16(e)(2) elsewhere in today's **Federal Register**. The first type of "promotional rate" covered by this definition is any annual percentage rate applicable to one or more balances or transactions on a consumer credit card account for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period. Proposed comment 21(d)(1)-1 clarifies that, for purposes of determining whether a rate is a "promotional rate" when the rate that will apply at the end of the specified period is a variable rate, the rate offered by the institution is compared to the

variable rate that would have been disclosed at the time of the offer if the promotional rate had not been offered by the institution, subject to applicable accuracy requirements. See, e.g., 12 CFR 226.5a(b)(1)(iii); proposed 12 CFR 226.5a(c)(2)(ii), 72 FR at 33047.

The second type of "promotional rate" encompassed by the definition is any annual percentage rate applicable to one or more transactions on a consumer credit card account that is lower than the annual percentage rate that applies to other transactions of the same type. This definition is meant to capture "life of balance" offers where a special rate is offered on a particular balance for as long as that balance exists. Proposed comment 21(d)(2)-1 provides an example of a rate that meets this definition.

Section __.22—Unfair acts or practices regarding time to make payment

The Agencies are proposing to prohibit institutions from treating payments on a consumer credit card account as late for any purpose unless the institution has provided a reasonable amount of time for consumers to make payment. Currently, section 163(a) of TILA requires creditors to send periodic statements at least 14 days before expiration of any period during which consumers can avoid finance charges on purchases by paying the balance in full (i.e., the "grace period"). 15 U.S.C. 1666b(a). Federal law does not, however, mandate a grace period, and grace periods generally do not apply when consumers carry a balance from month to month. Regulation Z requires that creditors mail or deliver periodic statements 14 days before the date by which payment is due for purposes of avoiding additional finance charges or other charges, such as late fees. See 12 CFR 226.5(b)(2)(ii); comment 5(b)(2)(ii)-1.

In its June 2007 Proposal, the Board noted anecdotal evidence of consumers receiving statements relatively close to the payment due date, with little time remaining

to mail their payments in order to avoid having those payments treated as late. The Board observed that it may take several days for a consumer to receive a statement after the close of a billing cycle. The Board also observed that consumers who pay by mail may need to mail their payments several days before the due date to ensure that the payment is received on or before that date. Accordingly, the Board requested comment on whether it should recommend to Congress that the 14-day requirement in section 163(a) of TILA be increased. See 72 FR at 32973.

The Board received comments from individual consumers, consumer groups, and a member of Congress indicating that consumers were not being provided with a reasonable amount of time to pay their credit card bills. Comments indicated that, because of the time required for periodic statements to reach consumers by mail and for consumers' payments to reach creditors by mail, consumers had little time in between to review their statements for accuracy before making payment. This situation can be exacerbated if the consumer is traveling or otherwise unable to give the statement immediate attention when it is delivered or if the consumer needs to compare the statement to receipts or other records. In addition, some comments indicated that consumers are unable to accurately predict when their payment will be received by a creditor due to uncertainties in how quickly mail is delivered. Some comments argued that, because of these difficulties, consumers' payments were received after the due date, leading to finance charges as a result of loss of the grace period, late fees, rate increases, and other adverse consequences.

Comments from industry, however, generally stated that consumers currently receive ample time to make payments, particularly in light of the increasing number of

consumers who receive periodic statements electronically and make payments electronically or by telephone. These comments also stated that providing additional time for consumers to make payments would be operationally difficult and would reduce interest revenue, which would have to be recovered by raising the cost of credit elsewhere.

The Agencies understand that, although increasing numbers of consumers are receiving periodic statements and making payments electronically, a significant number still utilize mail. In addition, the Agencies recognize that, while first class mail is often delivered within three business days, in some cases it can take significantly longer.[41] Indeed, some large credit card issuers recommend that consumers allow up to seven days for their payments to be received by the issuer via mail. Accordingly, in some cases, a statement sent 14 days before the payment due date may not provide consumers with a reasonable amount of time to pay in order to avoid interest charges, late fees, or other adverse consequences.

The Agencies recognize that, in enacting § 163(a) of TILA, Congress set the minimum amount of time between sending the periodic statement and expiration of any grace period offered by the creditor at 14 days. At the time of its June 2007 Proposal, the Board believed that consumers might benefit from receiving additional time to make payment. The Board understands that most creditors currently offer grace periods and that they use a single due date, which is both the expiration of the grace period and the date after which a payment will be considered late for other purposes (such as the assessment of late fees). For that reason, the Board sought comment on whether it should

[41] See, e.g., Testimony of Jody Berenblatt, Senior Vice President—Postal Strategy, Bank of America, before the S. Subcomm. on Fed. Fin. Mgmt., Gov't Info., Fed. Srvs., and Int'l Security (Aug. 2, 2007).

request that Congress increase the 14-day minimum mailing requirement with respect to grace periods. Based on the comments and other information discussed herein, however, the Agencies are concerned that a separate rule may be needed that specifically addresses harms other than loss of the grace period when institutions do not provide a reasonable amount of time for consumers to make payment. This harm includes late fees and rate increases as a penalty for late payment. The Agencies' proposal does not affect the requirements of TILA § 163(a).

Legal Analysis

Treating a payment on a consumer credit card account as late for any purpose (other than expiration of a grace period) unless the consumer has been provided a reasonable amount of time to make that payment appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC.

Substantial consumer injury. An institution's failure to provide consumers a reasonable amount of time to make payment appears to cause substantial monetary and other injury. When a payment is received after the due date, institutions may impose late fees, increase the annual percentage rate on the account as a penalty, or report the consumer as delinquent to a credit reporting agency.

Injury is not reasonably avoidable. It appears that consumers cannot reasonably avoid this injury unless they have been provided a reasonable amount of time to pay. Although what constitutes a reasonable amount of time may vary based on the circumstances, it may be unreasonable to expect consumers to make payment if they are not given a reasonable amount of time to do so after receiving a periodic statement. TILA and Regulation Z provide consumers with the right to dispute transactions or other

items that appear on their periodic statements. In order to exercise certain of these rights, consumers must have a reasonable opportunity to review their statements. See 15 U.S.C. 1666i; 12 CFR 226.12(c). Furthermore, in some cases, travel or other circumstances may prevent the consumer from reviewing the statement immediately upon receipt. Finally, as discussed above, consumers cannot control when a mailed payment will be received by the institution. Thus, a payment mailed well in advance of the due date may nevertheless arrive after that date.

Injury is not outweighed by countervailing benefits. The injury does not appear to be outweighed by any countervailing benefits to consumers or competition. The Agencies are not aware of any direct benefit to consumers from receiving too little time to make their payments. Although a longer time to make payment could result in additional finance charges for consumers who do not receive a grace period, the consumer would have the choice whether to wait until the due date to make payment. The Agencies are also aware that, as a result of the proposed rule, some institutions may be required to incur costs to alter their systems and will, directly or indirectly, pass those costs on to consumers. It does not appear, however, that these costs would outweigh the benefits to consumers of receiving a reasonable amount of time to make payment.

Proposal

Proposed § __.22(a) prohibits institutions from treating a payment as late for any purpose unless the consumer has been provided a reasonable amount of time to make that payment. Proposed comment 22(a)-1 clarifies that treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, or assessing a late fee or any other

fee based on the consumer's failure to make a payment within the amount of time provided under this section. Although the proposed rule does not mandate a specific amount of time, the commentary to the proposal states that reasonableness would be evaluated from the perspective of the consumer, not the institution. See proposed comment 22(a)-2.

Proposed § __.22(b) provides a safe harbor for institutions that have adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date. Compliance with this safe harbor would allow seven days for the periodic statement to reach the consumer by mail, seven days for the consumer to review the statement and make payment, and seven days for that payment to reach the institution by mail. As noted above, some institutions already recommend that consumers allow seven days for receipt of mailed payments. The Agencies believe 21 days to be reasonable because it allows sufficient time for even delayed mail to be delivered while also allowing most consumers at least a week to review their bill and make payment.

In order to minimize burden and facilitate compliance, proposed comment 22(b)-1 clarifies that an institution with reasonable procedures in place designed to ensure that statements are mailed or delivered within a certain number of days from the closing date of the billing cycle may utilize the safe harbor by adding that number to the 21-day safe harbor for purposes of determining the payment due date on the periodic statement. For example, if an institution had reasonable procedures in place designed to the ensure that statements are mailed or delivered within three days of the closing date of the billing cycle, the institution could comply with the safe harbor by stating a payment due date on

its periodic statements that is 24 days from the close of the billing cycle (i.e., 21 days plus three days). Similarly, if an institution's procedures reasonably ensured that payments would be sent within five days of the close of the billing cycle, the institution could comply with the safe harbor by setting the due date 26 days from the close of the billing cycle. Proposed comment 22(b)-2 further clarifies that the payment due date is the date by which the institution requires the consumer to make payment in order to avoid being treated as late for any purpose (except with respect to expiration of a grace period).

Finally, in order to avoid any potential conflict with section 163(a) of TILA, proposed § __.22(c) provides that proposed § __.22(a) does not apply to any time period provided by the institution within which the consumer may repay the new balance or any portion of the new balance without incurring finance charges (i.e., a grace period).

Request for Comment

The Agencies request comment on:

- The percentages of consumers who receive periodic statements by mail and electronically.
- The percentages of consumers who make payment by mail, electronically, by telephone, and through other methods.
- The number of days after the closing date of the billing cycle that institutions typically mail or deliver periodic statements.
- Whether the proposed 21-day safe harbor period between mailing or delivery of the periodic statement and the due date would give consumers sufficient time to review their statements and make payment and is otherwise a reasonable amount of time to make payment.

- The cost to institutions of altering their systems to comply with the proposed rule and to mail or deliver periodic statements 21 days in advance of the payment due date.
- Whether the Agencies should adopt a rule that prohibits institutions from treating a payment as late if received within a certain number of days after the due date and, if so, the number of days that would be appropriate.
- Whether the Agencies should adopt a rule that requires institutions, upon the request of a consumer, to reverse a decision to treat a payment mailed before the due date as late and, if so, what evidence the institution could require the consumer to provide (e.g., a receipt from the U.S. Postal Service or other common carrier) and what time frame would be appropriate (e.g., payment mailed at least five days before the due date, payment received no more than two business days late).
- The impact of the proposed rule on the availability of credit.

Section __.23—Unfair acts or practices regarding allocation of payments

The Agencies are proposing to prohibit certain unfair acts or practices regarding the allocation of payments on consumer credit card accounts with multiple balances at different interest rates. In its June 2007 Proposal, the Board discussed the practice among some creditors of allocating payments first to balances that are subject to the lowest interest rate. 72 FR at 32982-83. Because many creditors offer different rates for purchases, cash advances, and balance transfers, this practice can result in consumers who do not pay the balance in full each month incurring higher finance charges than they would under a different allocation method. The Board was particularly concerned that,

when the consumer has responded to a promotional rate offer, the allocation of payments to balances with the lowest interest rate often prevents the consumer from receiving the full benefit of the promotional rate if the consumer uses the card for other transactions.

For example, assume that a consumer responds to an offer of 5% on transferred balances for six months by opening an account and transferring $3,000. Then, during the same billing cycle, the consumer uses the account for a $300 cash advance (to which an interest rate of 20% applies) and a $500 purchase (to which an interest rate of 15% applies). If the consumer makes an $800 payment, most creditors would apply the entire payment to the promotional rate balance and the consumer would incur interest on the more costly cash advance and purchase balances. Under these circumstances, the consumer is effectively denied the benefit of the 5% promotional rate for six months if the card is used for transactions because the consumer must pay off the entire transferred balance in order to avoid paying a higher rate on the transactions. Indeed, the only way for the consumer to receive the benefit of the 5% promotional rate is to not use the card for purchases, which would effectively require the consumer to use an open-end credit account as a closed-end installment loan.

Deferred interest plans raise the same basic concerns. Many creditors offer deferred interest plans where consumers may avoid paying interest on purchases if the balance is paid in full by the end of the deferred interest period. If the balance is not paid in full when the deferred interest period ends, these deferred interest plans often require the consumer to pay interest that has accrued during the deferred interest period. A consumer whose payments are applied to a balance on which interest is deferred instead

of a balance on which interest is not deferred incurs additional finance charges and therefore does not receive the benefit of the deferred interest plan.

In addition, creditors typically offer a grace period for purchases if a consumer pays in full each month but do not typically offer a grace period on balance transfers or cash advances. Because payments will be allocated to the transferred balance first, a consumer cannot take advantage of both a promotional rate on balance transfers or cash advances and a grace period on purchases. Under these circumstances, the only way for a consumer to avoid paying interest on purchases is to pay off the entire balance, including the transferred balance or cash advance balance subject to the promotional rate.

In preparing its June 2007 Proposal, the Board sought to address issues regarding payment allocation by developing disclosures explaining payment allocation methods on accounts with multiple balances at different annual percentage rates so that consumers could make informed decisions about card usage, particularly in regard to promotional rates. For example, if consumers knew that they would not receive the full benefit of a promotional rate on a particular credit card account if they used that account for purchases during the promotional period, they might use a different account for purchases and pay that account in full every month to take advantage of the grace period. The Board conducted extensive consumer testing in an effort to develop disclosures that would enable consumers to understand typical payment allocation practices and make informed decisions regarding the use of credit cards. In this testing, many participants did not understand that they could not take advantage of the grace period on purchases and the discounted rate on balance transfers at the same time. Model forms were tested that included a disclosure notice attempting to explain this to consumers. Nonetheless,

testing showed that a significant percentage of participants still did not fully understand how payment allocation can affect their interest charges, even after reading the disclosures tested. In the supplementary information accompanying the June 2007 Proposal, the Board indicated its plans to conduct further testing of the disclosure to determine whether the disclosure could be improved to more effectively communicate to consumers how payment allocation can affect their interest charges. 72 FR at 33047, 33050.

In the June 2007 Proposal, the Board did, however, propose to add § 226.5a(b)(15) to require a creditor to explain payment allocation to consumers. Specifically, the Board proposed that creditors explain how payment allocation would affect consumers, if an initial discounted rate was offered on balance transfers or cash advances but not purchases. The Board proposed that creditors must disclose to consumers that (1) the initial discounted rate applies only to balance transfers or cash advances, as applicable, and not to purchases; (2) that payments will be allocated to the balance transfer or cash advance balance, as applicable, before being allocated to any purchase balance during the time the discounted initial rate is in effect; and (3) that the consumer will incur interest on the purchase balance until the entire balance is paid, including the transferred balance or cash advance balance, as applicable. 72 FR at 32948, 33047.

In response to the June 2007 Proposal, several commenters recommended the Board test a simplified payment allocation disclosure that covers situations other than low rate balance transfers offered with cards. One credit card issuer, however, stated that, because creditors almost uniformly apply payments to the balance with the lowest annual

percentage rate, consumers could not shop for a better payment allocation method even if an effective disclosure could be developed. Furthermore, comments from consumers and consumer groups urged the Board to go further and prohibit payment allocation methods that applied payments to the lowest rate balance before other balances.

In consumer testing conducted for the Board in March 2008, the Board tested a revised payment allocation disclosure.[42] Some participants understood from earlier experience that creditors typically will apply payments to lower rate balances first and that this method causes them to incur higher interest charges. For those participants, however, that did not know about payment allocation methods from earlier experience, the disclosure tested was still not effective in communicating payment allocation methods.

Accordingly, the Agencies propose to address the foregoing concerns regarding payment allocation by prohibiting specific unfair acts or practices under the FTC Act. To the extent the Agencies' proposals are ultimately adopted, the Board would withdraw its proposal under Regulation Z to require a creditor to explain payment allocation to consumers.

Legal Analysis

Proposed § __.23 would prohibit three unfair acts or practices. First, when different annual percentage rates apply to different balances on a consumer credit card account, the Agencies would prohibit allocation among the balances of any amount paid by the consumer in excess of the required minimum periodic payment in a manner that is less beneficial to consumers than one of three listed methods. Second, when a consumer

[42] This disclosure stated: "Payments may be applied to balances with lower APRs first. If you have balances at higher APRs, you may pay more in interest because these balances cannot be paid off until all lower-APR balances are paid in full (including balance transfers you make at the introductory rate)."

credit card account has one or more promotional rate balances or balances on which interest is deferred, the Agencies would prohibit allocation of amounts paid by the consumer in excess of the minimum payment to such balances before other balances. Third, the Agencies would prohibit institutions from requiring consumers to repay any portion of a promotional rate balance or deferred interest balance in order to receive any grace period offered for purchases. As discussed below, these acts or practices appear to meet the definition of unfairness under 15 U.S.C. 45(n) and the standards articulated by the FTC.

Substantial consumer injury. Each of the three practices described above appear to cause substantial monetary injury to consumers in the form of higher interest charges than would be incurred if institutions did not engage in these practices. Specifically, as discussed above, consumers who do not pay the balance in full and whose payments in excess of the minimum payment are first applied to the balance with the lowest annual percentage rate incur higher interest charges than they would under other payment allocation methods, such as division of the amount among the balances or application of the amount to the balance with the highest rate first. Similarly, consumers who do not receive a grace period offered on a purchase balance solely because they also have a promotional rate balance or deferred interest balance incur higher interest charges than they would if they received the grace period.

Injury is not reasonably avoidable. Several factors appear to prevent consumers from reasonably avoiding these additional interest charges. First, consumers generally have no control over the institution's allocation of payments or provision of grace periods. Second, the Board's consumer testing indicates that disclosures may not enable

consumers to understand sufficiently the effects of payment allocation or the loss of the grace period. Even if disclosures were effective, it appears that consumers still could not avoid the injury by selecting a credit card account with more favorable terms because institutions almost uniformly apply payments to the balance with the lowest rate and do not provide a grace period when a consumer has a promotional rate balance or deferred interest balance.[43] Third, although a consumer could avoid the injury by paying the balance in full each month, this may not be a reasonable expectation as many consumers are unable to do so. Similarly, it may be unreasonable to expect a consumer to avoid the injury by, for example, taking a cash advance or transferring a balance in response to a promotional rate offer and then using a different account for purchases because this would effectively require the consumer to use an open-end credit account as a closed-end installment loan.

Injury is not outweighed by countervailing benefits. The prohibited practices do not appear to create benefits for consumers and competition that outweigh the injury. The Agencies understand that, if implemented, the proposal may reduce the revenue that institutions receive from interest charges, which may in turn lead institutions to increase rates generally or to offer higher promotional rates or fewer deferred interest plans. As a result, consumers who, for example, do not use an account for purchases after transferring a balance would lose the benefit of the lower promotional rate. This effect should be muted, however, because the Agencies' proposal prohibits only the practices that are most harmful to consumers and leaves institutions with considerable flexibility in

[43] See Statement for FTC Credit Practices Rule, 48 FR at 7746 ("If 80 percent of creditors include a certain clause in their contracts, for example, even the consumer who examines contract[s] from three different sellers has a less than even chance of finding a contract without the clause. In such circumstances relatively few consumers are likely to find the effort worthwhile, particularly given the difficulties of searching for contract terms. . . ." (footnotes omitted)).

the allocation of payments, particularly with regard to the minimum payment. Furthermore, the Agencies believe that the proposal would enhance transparency and enable consumers to better assess the costs associated with using their credit card accounts at the time they engage in transactions. To the extent that upfront costs have been artificially reduced because many consumers cannot reasonably avoid paying higher interest charges later, the reduction does not represent a true benefit to consumers as a whole. Finally, it appears that the Agencies' proposal should enhance rather than harm competition because institutions offering rates that reflect the institution's costs (including the cost to the institution of borrowing funds and operational expenses) would no longer be forced to compete with institutions that offer artificially reduced rates.

Proposal

Proposed § __.23(a) would establish a general rule governing payment allocation on accounts that do not have a promotional rate balance or a balance on which interest is deferred. Proposed § __.23(b) would establish special rules for accounts that do have a promotional rate balance or a deferred interest balance.

Proposed § __.23 does not limit or otherwise address the institution's ability to determine the amount of the minimum payment or how that payment is allocated. See proposed comment 23-1. Furthermore, an institution may adjust amounts to the nearest dollar when allocating. See proposed comment 23-2.

__.23(a) General rule for accounts within different annual percentage rates on different balances

Proposed § __.23(a) would require the institution to allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances in

a manner that is no less beneficial to consumers than one of three listed methods. Although the proposed rule does not prohibit institutions from using allocation methods other than those listed, the method used must be no less beneficial to consumers than one of the listed methods. A method is no less beneficial to consumers if the method results in the assessment of the same or a lesser amount of interest charges than would be assessed under the listed method. For example, an institution may not reasonably allocate the entire amount paid by the consumer in excess of the required minimum periodic payment to the balance with the lowest annual percentage rate because this method would result in higher interest charges than any of the methods listed in proposed § __.23(a). See proposed comment 23(a)-1. An example of an allocation method that is no less beneficial to consumers than a listed method is provided in proposed comment 23(a)-2.

Proposed § __.23(a) lists three permissible payment allocation methods. First, proposed §__.23(a) would allow an institution to apply the entire amount paid in excess of the minimum payment first to the balance with the highest annual percentage rate and any remaining amount to the balance with the next highest annual percentage rate and so forth. Although this method could result in none of the amount being applied to some balances, the Agencies believe that institutions should be able to use this approach because it will generally minimize interest charges. An example of this allocation method is provided in proposed comment 23(a)(1)-1.

Second, proposed §__.23(a) would allow an institution to allocate equal portions of the amount paid in excess of the minimum payment to each balance. Third, the proposal would allow an institution to allocate the amount among the balances in the

same proportion as each balance bears to the total balance (i.e., pro rata). Examples of these allocation methods are provided in proposed comments 23(a)(2)-1 and 23(a)(3)-1.

__.23(b) Special rules for accounts with promotional rate balances or deferred interest balances

The Agencies believe that separate requirements may be warranted for accounts with promotional rate balances or balances on which interest is deferred because, in many cases, the consumer will have engaged in transactions based on representations made by the institution regarding a promotional rate or a deferred interest plan. Proposed § __.23(b) seeks to ensure that consumers receive the benefit of promotional rates and deferred interest plans.

__.23(b)(1)(i) Rule regarding payment allocation

Proposed § __.23(b)(1)(i) would ensure that consumers receive the benefit of a promotional rate or deferred interest plan by requiring that amounts paid in excess of the minimum payment would be allocated to the promotional rate balance or the deferred interest balance only if other balances have been fully paid. Specifically, the proposal would require that amounts paid by the consumer in excess of the minimum payment be allocated first among balances that are not promotional rate balances or deferred interest balances, consistent with proposed § __.23(a). If there is any remaining amount, proposed § __.23(b)(1)(i) would require the institution to allocate the remaining amount to each promotional rate balance or deferred interest balance, consistent with proposed § __.23(a). Proposed comment 23(b)(1)(i)-1 would provide illustrative examples of how payments must be allocated under proposed § __.23(b)(1)(i).

__.23(b)(1)(ii) Exception for balances on which interest is deferred

Proposed §__.23(b)(1)(ii) would create an exception to the payment allocation rule in proposed §__.23(b)(1)(i) during the last two billing cycles of a deferred interest plan. The Agencies understand that currently some institutions begin to apply consumers' payments to the deferred interest balance during the last two billing cycles of a deferred interest plan because doing so will reduce or eliminate that balance and thereby reduce or eliminate the deferred interest that may be charged when the deferred interest plan expires. Because this practice appears to be beneficial to consumers, the Agencies propose to permit institutions to utilize this practice, at their option. Proposed comment 23(b)(1)(ii)-1 provides illustrative examples of how payments may be allocated under this exception. As noted below, the Agencies request comment on whether this exception is appropriate and, if so, whether it should apply during the last two billing cycles of the deferred interest plan or a different period of time.

__.23(b)(2) Rule regarding grace period

Proposed §__.23(b)(2) would prohibit institutions from requiring consumers who are otherwise eligible for a grace period to repay any portion of a promotional rate balance or deferred interest balance in order to receive the benefit of any grace period on other balances. Under the provision, a consumer would not be denied the benefits of a grace period solely because the consumer carries a balance covered by a promotional rate or deferred interest plan. Proposed comment 23(b)(2)-1 provides an example of when this prohibition would apply.

Request for Comment

The Agencies request comment on:

- Whether other methods of allocation should be listed in proposed §__.23(a).
- Whether proposed §__.23(a) should permit institutions to apply amounts in excess of the minimum payment first to balances on which the institution is prohibited from increasing the rate (pursuant to proposed § __.24).
- Whether the requirement in proposed §__.23(b)(1)(i) that amounts in excess of the minimum payment be applied to other balances before deferred interest balances may prevent consumers from paying the deferred interest balance in full by the end of the deferred interest period.
- The need for the exception regarding deferred interest balances in proposed §__.23(b)(1)(ii).
- Whether the exception regarding deferred interest balances in proposed §__.23(b)(1)(ii) should apply during the last two billing cycles of the deferred interest plan or during a different time period.
- Whether consumers should be permitted to instruct the institution regarding allocation of amounts in excess of the required minimum periodic payment.
- The cost to institutions of the proposed rule and the impact on the availability of credit.

Section __.24—Unfair acts and practices regarding application of increased rates to outstanding balances

The Agencies are proposing to prohibit the application of increased rates to pre-existing balances, except in certain limited circumstances. Currently, § 226.9(c) of Regulation Z requires 15 days advance notice of certain changes to the terms of an open-end plan as well as increases in the minimum payment. However, advance notice is not

required if an interest rate or other finance charge increases due to a consumer's default or delinquency. See 12 CFR 226.9(c)(1); comment 9(c)(1)–3. Furthermore, no change-in-terms notice is required if the creditor set forth the specific change in the account-opening disclosures. See 12 CFR 226.9(c), comment 9(c)–1.

In its June 2007 Proposal, the Board expressed concern that the imposition of penalty pricing can come as a costly surprise to consumers who are not aware of, or do not understand, what behavior is considered a "default" under their agreement. See 72 FR at 33009-13. The Board noted that penalty rates can be more than twice as much as the consumer's normal rate on purchases and may apply to all of the balances on the consumer's account for several months or longer.[44]

Consumer testing conducted for the Board indicated that some consumers do not understand what factors can trigger penalty pricing, such as the fact that one late payment may constitute a "default." In addition, some participants did not appear to understand that penalty rates can apply to all of their balances, including existing balances. Some participants also did not appear to understand how long a penalty rate could remain in effect. The Board observed that account-opening disclosures may be provided to the consumer too far in advance for the consumer to recall the circumstances that may cause his or her rates to increase. In addition, the consumer may not have retained a copy of the account-opening disclosures and may not be able to effectively link the information disclosed at account opening to the current repricing of his or her account.

[44] See also GAO Credit Card Report at 24 (noting that, for the 28 credit cards it reviewed, "[t]he default rates were generally much higher than rates that otherwise applied to purchases, cash advances, or balance transfers. For example, the average default rate across the 28 cards was 27.3 percent in 2005—up from the average of 23.8 in 2003—with as many as 7 cards charging rates over 30 percent").

The Board's June 2007 Proposal included revisions to Regulation Z and its commentary designed to improve consumers' awareness about changes in their account terms and increased rates, including rate increases imposed as a penalty for delinquency or other acts or omissions constituting default under the account agreement. These revisions were also intended to enhance consumers' ability to shop for alternative financing before such changes in terms or increased rates become effective. Specifically, the Board proposed to give consumers 45 days advance notice of a change in terms or an increased rate imposed as a penalty and to make the disclosures about changes in terms and increased rates more effective. See proposed 12 CFR 226.9(c), (g), 72 FR at 33056-58.[45] The Board also proposed to require that periodic statements for credit card accounts disclose the annual percentage rate or rates that may be imposed as a result of late payment. See proposed 12 CFR 226.7(b)(11)(i)(C), 72 FR at 33053.

When developing the June 2007 Proposal, the Board considered, but did not propose, a prohibition on so-called "universal default clauses" or similar practices under which a creditor raises a consumer's interest rate to the penalty rate if, for example, the consumer makes a late payment on an account with a different creditor. The Board also considered but did not propose a requirement similar to that in some state laws providing consumers with the right to reject a change in terms.

In response to its June 2007 Proposal, the Board received comments from individual consumers, consumer groups, another federal banking agency, and a member of Congress stating that notice alone was not sufficient to protect consumers from the harm caused by rate increases. These comments argued that many consumers would not read or understand the proposed disclosures and, even if they did, many would be unable

[45] The Board has proposed additional revisions to these provisions elsewhere in today's **Federal Register**.

to transfer the balance to a new credit card account with comparable terms before the increased rate went into effect. Some of these comments argued that creditors should be prohibited from increasing the rate on an existing balance in all instances. Others argued that consumers should be given the right to reject application of an increased rate to an existing balance by closing the account, but only if the increase was not triggered by a late payment or other violation of the terms of that account. This approach was also endorsed by some creditors. On the other hand, comments from the majority of creditors stated that the 45-day notice requirement would delay creditors from increasing rates to reflect a consumer's increased risk of default, requiring creditors to account for that risk by, for example, charging higher annual percentage rates at the outset of the account relationship. These comments also noted that, because creditors use rate increases to pass on the costs of funds the creditors themselves pay, delays in the imposition of increased rates could result in higher costs of credit or less available credit.

The Agencies are concerned that disclosure alone may be insufficient to protect consumers from the harm caused by the application of increased rates to pre-existing balances. Accordingly, the Agencies are proposing to prohibit this practice except in certain limited circumstances.

Legal Analysis

The Agencies propose to prohibit institutions from increasing the annual percentage rate applicable to the outstanding balance before the effective date of the rate increase, except in certain circumstances. As discussed below, this practice appears to meet the test for unfairness under 15 U.S.C. 45(n) and the standards articulated by the FTC.

Substantial consumer injury. Application of an increased annual percentage rate to an outstanding balance appears to cause substantial monetary injury by increasing the interest charges assessed to a consumer's credit card account.

Injury is not reasonably avoidable. Although the injury resulting from increases in the annual percentage rate may be avoidable by some consumers under certain circumstances, this injury does not appear to be reasonably avoidable by consumers as a general matter. As discussed above, the Board's consumer testing indicates that many consumers are not aware of the circumstances under which their rates may increase.[46] Thus, when deciding whether to use a credit card for a particular transaction or whether to pay off a credit card balance versus some other obligation, the consumer is likely to consider only the annual percentage rate in effect at that time. Although the disclosures proposed by the Board under Regulation Z should, if implemented, improve consumers' understanding, disclosures alone may not be sufficient to enable consumers to avoid injury. Consumers may ignore the disclosures because they overestimate their ability to avoid the penalty triggers.[47] Furthermore, although the Board's proposed 45 days advance notice of a rate increase would enable some consumers to transfer the balance to

[46] See also GAO Credit Card Report at 6 ("[O]ur interviews with 112 cardholders indicated that many failed to understand key terms or conditions that could affect their costs, including when they would be charged for late payments or what actions could cause issuers to raise rates.").

[47] See Statement for FTC Credit Practices Rule, 49 FR at 7744 ("Because remedies are relevant only in the event of default, and default is relatively infrequent, consumers reasonably concentrate their search on such factors as interest rates and payment terms."). This behavior is commonly referred to as "hyperbolic discounting." See, e.g., Angela Littwin, Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers, 80 Tex. L. Rev. 451, 467-478 (2008) (discussing consumers' tendency to underestimate their future credit card usage when they apply for a card and thereby failing to adequately anticipate the costs of the product); Shane Frederick, et al., Time Discounting and Time Preference: A Critical Review, 40 J. Econ. Literature 351, 366-67 (2002) (reviewing the literature on hyperbolic discounting); Ted O'Donoghue & Matthew Rabin, Doing It Now or Later, 89 Am. Econ. Rev. 103, 103, 111 (1999) (explaining people's preference for delaying unpleasant activities and accepting immediate rewards despite their knowledge that the delay may lessen potential future rewards or increase potential adverse consequences).

another account with a comparable annual percentage rate and terms, consumers who are not able to do so cannot avoid the resulting injury. For these reasons, disclosures alone may not enable consumers to avoid the injury caused by an increase in rate on an existing balance.

Consumers also lack control over many of the circumstances under which an institution increases an annual percentage rate. First, an institution may increase a rate for reasons that are completely unrelated to any individual consumer. For instance, an institution may increase rates to increase revenues or in response to changes in the cost to the institution of borrowing funds. Consumers lack any control over these increases and therefore cannot reasonably avoid the resulting injury. Furthermore, consumers cannot be reasonably expected to predict when such repricing will occur because many institutions reserve the right to change the terms of the consumer's account at any time for any reason.

Second, an institution may increase an annual percentage rate based on consumer behavior that is unrelated to the consumer's performance on the credit card account with that institution. For example, an institution may increase a rate due to a drop in a consumer's credit score or a default on an account with a different creditor even though the consumer has paid the credit card account with the institution according to the terms of the cardholder agreement.[48] As noted above, this type of increase is sometimes referred to as "universal default." The consumer may or may not have been aware of or able to control the factor that caused the drop in the consumer's credit score, and the

[48] See, e.g., Statement of Janet Hard before S. Perm. Subcomm. on Investigations, Hearing on Credit Card Practices: Unfair Interest Rate Increases (Dec. 4, 2007) (available at http://www.senate.gov/~govt-aff/index.cfm?Fuseaction=Hearings.Detail&HearingID=509).

consumer cannot control what factors are considered or how those factors are weighted in creating the credit score. For example, a consumer may be unaware that using a certain amount of the available credit on open-end credit accounts can lead to a reduction in credit score. Furthermore, as discussed below, a default may not be reasonably avoidable in some instances. Nor can the consumer control how the institution uses credit scores or other information to set interest rates.

Third, an institution may increase an annual percentage rate based on consumer behavior that is related to the consumer's credit card account with the institution but does not violate the account terms. For example, an institution may increase the annual percentage rates of consumers who are close to (but not over) the credit limit on the account or who make the minimum payment set by the institution for several consecutive months.[49] Although this type of activity may be within the consumer's control, the consumer may not be able to reasonably avoid the resulting injury because the consumer is not aware that this behavior may be used by the institution's internal risk models as a basis for increasing the rate on the account. Indeed, the institution's provision of a specific credit limit or minimum payment, for example, may be reasonably interpreted by the consumer as an implicit representation that the consumer will not be penalized if the credit limit is not exceeded or the minimum payment is made.

Fourth, an institution may increase an annual percentage rate based on consumer behavior that violates the account terms. What violates the account terms can vary from institution to institution and from account to account. The Agencies understand that the

[49] See, e.g., Statement of Bruce Hammonds, President, Bank of America Card Services before S. Perm. Subcomm. on Investigations, Hearing on Credit Card Practices: Unfair Interest Rate Increases at 5 (Dec. 4, 2007) (available at http://hsgac.senate.gov/public/_files/STMTHammondsBOA.pdf).

most common violations of the account terms that result in an increase in rate are exceeding the credit limit, a payment that is returned for insufficient funds, and a late payment.[50] In some cases, it appears that individual consumers may have been able to avoid these events by taking reasonable precautions. In other cases, however, it appears that the event may not be reasonably avoidable.

For example, consumers who carefully track their transactions may still exceed the credit limit because of charges of which they were not aware (such as the institution's imposition of interest or fees) or because of the institution's delay in replenishing the credit limit following payment. Similarly, although consumers can reduce the risk of making a payment that will be returned for insufficient funds by carefully tracking the credits and debits on their deposit account, consumers still lack sufficient information about key aspects on their accounts, including how holds will affect the availability of funds and when funds from a deposit or a credit will be made available by the depository institution.[51] Finally, although the Agencies' proposed §__.22 would, if implemented, ensure that consumers' payments will not be treated as late for any reason (including for purposes of triggering an increase in rate) unless they receive a reasonable amount of time to make payment, there may be other reasons why consumers pay late or miss a payment.[52]

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[50] See GAO Credit Card Report at 25.

[51] See discussion of overdrafts and debit holds in relation to proposed §__.32 below.

[52] See, e.g., Statement for FTC Credit Practices Rule, 49 FR at 7747-48 (finding that "the majority [of defaults] are not reasonably avoidable by consumers" because of factors such as loss of income or illness); Testimony of Gregory Baer, Deputy General Counsel, Bank of America before the H. Fin. Servs. Subcomm. on Fin. Instit. & Consumer Credit at 4 (Mar. 13, 2008) ("If a customer falls behind on an account, our experience tells us it is likely due to circumstances outside his or her control."); Sumit Agarwal & Chunlin Liu, Determinants of Credit Card Delinquency and Bankruptcy: Macroeconomic Factors, 27 J. of Econ. & Finance 75, 83 (2003) (finding "conclusive evidence that unemployment is critical in determining delinquency"); Fitch: U.S. Credit Card & Auto ABS Would Withstand Sizeable

Accordingly, although the injury resulting from the application of increased annual percentage rates to existing balances may be avoidable in some individual cases, it appears that, as a general matter, this injury is not reasonably avoidable. It does not appear, however, that this reasoning extends to the application of increased rates to new transactions. The Board's proposal under Regulation Z would, if implemented, require creditors to provide notice 45 days in advance of an increase in the annual percentage rate. See proposed 12 CFR 226.9(c), (g), 72 FR at 33056-58.[53] In addition, as discussed below, proposed § __.24 would not permit the institution to increase the rate on purchases made up to 14 days after provision of the 45-day notice. These proposals would enable consumers to reasonably avoid any injury caused by application of an increased rate to new transactions by providing consumers sufficient time to receive and review the 45-day notice and to decide whether to continue using the card. Finally, as also discussed below, it does not appear that, when a consumer has violated the account terms, application of an increased rate to an existing balance is an unfair practice in all circumstances.

Injury is not outweighed by countervailing benefits. It appears that the proposal will result in a net benefit to consumers because some consumers are likely to benefit substantially while the adverse effects on others are likely to be small. The Agencies are aware that some institutions may offer lower annual percentage rates to consumers at the outset of an account relationship knowing that the rate can be subsequently adjusted to compensate for an increase in the cost of funds or in the risk of default. The Agencies are also aware that, if institutions are prohibited from increasing rates on existing balances,

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Unemployment Stress, Reuters (Mar. 24, 2008) ("According to analysis performed by Fitch, increases in the unemployment rate are expected to cause auto loan and credit card loss rates to increase proportionally with subprime assets experiencing the highest proportional rate.") (available at http://www.reuters.com/article/pressRelease/idUS94254+24-Mar-2008+BW20080324).

[53] The Board has proposed additional revisions to these provisions elsewhere in today's **Federal Register**.

they may charge higher rates or set lower credit limits initially or curtail credit availability to higher risk consumers. As discussed below, however, the Agencies have crafted the proposal to protect consumers from the substantial injury caused by rate increases on existing balances while, to the extent possible, minimizing the impact on institutions' ability to adjust to market conditions and price for risk.

As an initial matter, because the prohibition on applying an increased annual percentage rate to an existing balance does not extend to variable rates, an institution can guard against increases in the cost of funds by utilizing a variable rate that reflects market conditions. Furthermore, the Agencies do not propose to prohibit institutions from increasing the annual percentage rate on an existing balance if a consumer becomes 30 days delinquent. Although the delinquency may not have been reasonably avoidable in certain individual cases, the consumer will have received notice of the delinquency (in the periodic statement and likely in other notices as well) and had an opportunity to cure before becoming 30 days delinquent. A consumer is unlikely, for example, to become 30 days delinquent due to a single returned item or the loss of a payment in the mail. Thus, even when the delinquency was not reasonably avoidable, it appears that the harm in such cases is outweighed by the benefit to consumers as a whole (in the form of lower annual percentage rates and broader access to credit) from allowing institutions to reprice for risk once a consumer has become significantly delinquent.[54]

Accordingly, although the proposal could ultimately result in higher upfront costs and less available credit for some consumers, it appears that consumers and competition

[54] The Agencies also note that, although some consumers may not have been able to avoid fees for violating the account terms (for example, late payment fees or fees for exceeding the credit limit), this injury does not appear to outweigh the countervailing benefit to consumers or competition. The application of an increased rate to an existing balance increases consumers' costs until the balance is paid in full or is transferred to an account with more favorable terms. The assessment of a fee, however, is generally an isolated cost that will not be repeated unless the account terms are violated again.

may benefit as a whole. Consumers will not only be protected against unexpected increases in the cost of transactions that have already been completed but will also be able to more accurately assess the cost of using their credit card accounts at the time they engage in new transactions. Furthermore, as discussed in regard to payment allocation, upfront annual percentage rates that are artificially reduced based on the expectation of future increases do not represent a true benefit to consumers as a whole. Similarly, competition may be enhanced because institutions that offer annual percentage rates that realistically reflect risk and market conditions will no longer be forced to compete with institutions offering artificially reduced rates.

The Agencies considered the suggestion raised in some comments that consumers be permitted to reject (or opt out of) the application of an increased rate to an existing balance by closing the account. As formulated in some of those comments, this proposal would not have addressed the injury to consumers whose rates were increased due to an unavoidable violation of the account terms. Even if consumers were given a right to reject application of an increased rate to an existing balance in all circumstances and were provided timely notice of that right (for example, in the Board's proposed 45-day notice under Regulation Z), it appears that the benefits to consumers of such a right do not outweigh the injury caused by application of an increased rate to an existing balance.

In most cases, it would not be economically rational for a consumer to choose to pay more for credit that has already been extended, particularly when the increased rate is significantly higher than the prior rate. Accordingly, assuming consumers understand their right to reject a rate increase, most would rationally exercise that right.[55] As a

[55] A consumer who cannot obtain a lower rate elsewhere may not reject application of an increased rate to an existing balance. This choice, however, may not enable the consumer to reasonably avoid injury.

result, the costs associated with prohibiting application of an increased rate to an existing balance and providing consumers with the right to reject such application should be similar. However, providing consumers with notice and a means to exercise an opt-out right (e.g., a toll-free telephone number) would create additional costs and burdens for institutions and consumers. Furthermore, a right to reject application of an increased rate to an existing balance would provide fewer benefits to consumers as a whole than the proposed rule because, no matter how well the right is disclosed, a substantial number of consumers might inadvertently forfeit that right by failing to read, understand, or act on the notice. In a 2006 report, the U.S. Government Accountability Office (GAO) noted that, although state laws applying to four of the six largest credit card issuers require an opt-out, representatives of those issuers stated that few consumers exercise that right.[56] Thus, a right to reject application of an increased rate to an existing balance could create similar or greater costs while producing fewer benefits than the proposed rule.

Proposal

__.24(a) General rule

Proposed § __.24(a)(1) prohibits institutions from increasing the annual percentage rate applicable to any outstanding balance on a consumer credit card account, except in the circumstances set forth in proposed § __.24(b). Proposed § __.24(a)(2) defines "outstanding balance" as meaning the amount owed on a consumer credit card account at the end of the fourteenth day after the institution provides a notice required by proposed 12 CFR 226.9(c) or (g) as set forth in the Board's June 2007 Proposal.

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[56] GAO Credit Card Report at 26-27.

As discussed above, the Board's June 2007 Proposal would require a creditor to provide consumers with a written notice of a rate increase at least 45 days before the effective date of that increase. See proposed 12 CFR 226.9(c) and (g), 72 FR at 33056, 33058. The definition of "outstanding balance" in proposed § __.24(a)(2) is intended to prevent the Board's 45-day notice requirement from creating an extended period following receipt of that notice during which new transactions can be made at the prior rate. Although institutions could address this concern by denying additional extensions of credit after sending the 45-day notice, that outcome may not be beneficial to consumers who have received the notice and wish to use the account for new transactions. Accordingly, under proposed § __.24(a), the balance to which an institution could not apply an increased rate is the balance 14 days after the institution has provided the 45-day notice. Consistent with the safe harbor in proposed § __.23(b), 14 days would allow seven days for the notice to reach the consumer and seven days for the consumer to review that notice.

Proposed comment 24(a)-1 provides the following example of the application of proposed § __.24(a): Assume that on December 30 a consumer credit card account has a balance of $1,000 at an annual percentage rate of 15%. On December 31, the institution mails or delivers a notice required by proposed 12 CFR 226.9(c) informing the consumer that the annual percentage rate will increase to 20% on February 15. The consumer uses the account to make $2,000 in purchases on January 10 and $1,000 in purchases on January 20. Assuming no other transactions, the outstanding balance for purposes of proposed § __.24 is the $3,000 balance as of the end of the day on January 14. Therefore, under proposed § __.24(a), the institution cannot increase the annual percentage rate

applicable to that balance. The institution can apply the 20% rate to the $1,000 in purchases made on January 20 but, consistent with proposed 12 CFR 226.9(c), it cannot do so until February 15.

Proposed comment 24(a)-2 clarifies that, consistent with the approach in proposed § __.22(b), an institution is not required to determine the specific date on which a notice required by proposed 12 CFR 226.9(c) or (g) was provided. For purposes of proposed § __.24(a)(2), if the institution has adopted reasonable procedures designed to ensure that notices required by proposed 12 CFR 226.9(c) or (g) are provided to consumers no later than, for example, three days after the event giving rise to the notice, the outstanding balance is the balance at the end of the seventeenth day after such event.

__.24(b) Exceptions

Proposed § __.24(b) provides that an institution may apply an increased annual percentage rate to an outstanding balance in three circumstances. First, when the rate is increased due to the operation of an index that is not under the institution's control and is available to the general public, the increased rate may be applied to the outstanding balance. This exception is similar to that in 12 CFR 226.5b(f)(1) and would apply to variable rates. Proposed comment 24(b)(1)-1 clarifies that an institution may not increase the rate on an outstanding balance based on its own prime rate but may use a published prime rate, such as that in the Wall Street Journal, even if the institution's prime rate is one of several rates used to establish the published rate. This comment would also clarify that an institution may not increase the rate on an outstanding balance by changing the method used to determine the indexed rate. Proposed comment 24(b)(1)-2 clarifies when a rate is considered "publicly available."

Second, when a promotional rate expires or is lost for a reason specified in the account agreement (e.g., late payment), an increased rate may be applied to the outstanding balance, provided that the institution increases the rate to the standard rate rather than the penalty rate. For example, as set forth in proposed comment 24(b)(2)-1, assume that a consumer credit card account has a balance of $1,000 at a 5% promotional rate and that the institution also charges an annual percentage rate of 15% for purchases and a penalty rate of 25%. If the consumer does not make payment by the due date and the account agreement specifies that event as a trigger for applying the penalty rate, the institution may increase the annual percentage rate on the $1,000 from the 5% promotional rate to the 15% annual percentage rate for purchases. The institution may not, however, increase the rate on the $1,000 from the 5% promotional rate to the 25% penalty rate, except as otherwise permitted under proposed § __.24(b)(3).

Third, an institution may apply an increased rate to the outstanding balance if the consumer's minimum payment has not been received within 30 days after the due date. An example is provided in proposed comment 24(b)(3)-1. As discussed above, a consumer will generally have notice and an opportunity to cure the delinquency before becoming 30 days past due.

__.24(c) Treatment of outstanding balances following a rate increase

Proposed § __.24(c) prohibits institutions that have increased the annual percentage rate applicable to a category of transactions on a consumer credit card account with an outstanding balance in that category from requiring payment of that outstanding balance using a method that is less beneficial to the consumer than one of two listed methods and from assessing fees or charges solely on an outstanding balance. Proposed

comment 24(c)-1 clarifies that proposed § __.24(c) does not apply if the account does not have an outstanding balance or if the rate on an outstanding balance is increased pursuant to proposed § __.24(b). Proposed comment 24(c)-2 clarifies that proposed § __.24(c) does not apply to balances in categories of transactions other than the category for which an institution has increased the annual percentage rate. For example, if an institution increases the annual percentage rate that applies to purchases but not the rate that applies to cash advances, proposed § __.24(c) applies to an outstanding balance consisting of purchases but not an outstanding balance consisting of cash advances.

Proposed §__.24(c)(1) would address the amount of time provided to the consumer in which to pay off the outstanding balance. While there may be circumstances in which institutions would accelerate repayment of the outstanding balance to manage risk, proposed § __.24(a) would provide little effective protection if consumers did not receive a reasonable amount of time to pay off the outstanding balance. Accordingly, proposed § __.24(c)(1) would require institutions to provide consumers with a method of paying the outstanding balance that is no less beneficial to the consumer than the methods listed in proposed § __.24(c)(1)(i) and (ii). See proposed comment 24(c)(1)-1. Proposed § __.24(c)(1)(i) would also allow an institution to amortize the outstanding balance over a period of no less than five years, starting from the date on which the increased rate went into effect.[57] Proposed § __.24(c)(1)(ii) would allow the percentage of the outstanding balance that was included in the required minimum periodic payment before the rate increase to be doubled. Proposed comment 24(c)(1)(ii)-1 clarifies that this provision

[57] This amortization period is consistent with guidance issued by the Board, OCC, FDIC, and OTS, under the auspices of the Federal Financial Institutions Examination Council, noting that credit card workout programs should generally strive to have borrowers repay debt within 60 months. See, e.g., Board Supervisory Letter SR 03-1 on Account Management and Loss Allowance Methodology for Credit Card Lending (Jan. 8, 2003) (available at http://www.federalreserve.gov/boarddocs/srletters/2003/sr0301.htm).

does not limit or otherwise address an institution's ability to determine the amount of the minimum payment on other balances. Proposed comment 24(c)(1)(ii)-2 provides an example of how an institution could adjust the minimum payment on the outstanding balance.

The protections of proposed §__.24(a) could also be undercut if institutions were permitted to assess fees or other charges as a substitute for an increase in the annual percentage rate. Accordingly, proposed §__.24(c)(2) would prohibit institutions from assessing any fee or charge based solely on the outstanding balance. As explained in proposed comment 24(c)(2)-1, this proposal would prohibit, for example, an institution from assessing a monthly maintenance fee on the outstanding balance. The proposal would not, however, prohibit an institution from assessing fees such as late payment fees or fees for exceeding the credit limit that are based in part on the outstanding balance.

Request for Comment

The Agencies request comment on:

- The extent to which institutions raise rates on pre-existing card balances.
- The extent to which credit cards are offered pursuant to agreements that do not permit institutions to raise rates on pre-existing card balances.
- The extent to which credit cards are offered pursuant to agreements that permit consumers to reject application of increased rates to pre-existing balances and the extent to which consumers take advantage of this opportunity.
- What consumer behavior with respect to an account institutions consider when determining whether to increase the rate on existing balances (other than late payment, returned payment for insufficient funds, or exceeding the credit limit).

- The reasons institutions currently increase rates on existing balances and, for each reason, what percentage it represents of all rate increases.
- What effect the restrictions in proposed § __.24(a) would have on outstanding securitizations and institutions' ability to securitize credit card assets in the future.
- Whether the restrictions in proposed § __.24(a) would limit an institution's ability to effectively manage risk if the default rate on credit cards is greater than anticipated in light of the exceptions in proposed § __.24(b).
- Whether the 14-day period in proposed § __.24(a)(2) is an appropriate amount of time to enable consumers to receive and review notice of a rate increase.
- Whether other means of protecting consumers from application of increased rates to existing balances (e.g., an opt-out) are more appropriate.
- Whether the exceptions in proposed § __.24(b) are appropriate or necessary and whether other exceptions would be appropriate. In particular, the Agencies seek comment on whether: (1) additional exceptions are needed to address safety and soundness concerns; (2) additional exceptions are needed for a consumer's failure to pay the account as agreed under the account terms, such as conduct that results in imposition of a penalty rate (including late payment, returned payment for insufficient funds, or exceeding the credit limit); and (3) 30 days is the appropriate measure of a serious delinquency.
- Whether additional or different approaches to the repayment of outstanding balances should be considered.
- Whether restrictions similar to those in proposed § __.24(c) should apply when, rather than increasing the rate on future transactions, an institution declines to

extend additional credit to the consumer. For example, the Agencies seek comment on whether, if an institution responds to an increased risk of default by declining to extend additional credit to a consumer, the consumer should receive the protections in proposed § __.24(c) with respect to any balance on the account.

Section __.25—Unfair acts or practices regarding fees for exceeding the credit limit caused by credit holds

Although the Board's June 2007 Proposal did not directly address over-the-credit-limit (OCL) fees, the Board received comments from consumers, consumer groups, and members of Congress expressing concern about the penalties imposed by creditors for exceeding the credit limit. Specifically, commenters were concerned that consumers may unknowingly exceed their credit limit and incur significant rate increases and fees as a result. The Agencies' proposal to prohibit the application of increased rates to existing balances addresses consumer harm resulting from rate increases imposed as a penalty for exceeding the credit limit. The Agencies also have concerns, however, about the imposition of OCL fees in connection with credit holds. This proposal is consistent with a parallel proposal in Subpart D with respect to overdraft fees assessed in connection with debit holds.

As further discussed below in Subpart D, some merchants place a temporary "hold" on an account when a consumer uses a credit or debit card for a transaction in which the actual purchase amount is not known at the time the transaction is authorized. For example, when a consumer uses a credit card to obtain a hotel room, the hotel often will not know the total amount of the transaction at the time because that amount may depend on, for example, the number of days the consumer stays at the hotel or the

charges for incidental services the hotel may provide to the consumer during the stay (e.g., room service). Therefore, to cover against its risk of loss, the hotel may place a hold on the available credit on the consumer's account in an amount sufficient to cover the expected length of the stay plus an additional amount for potential purchases of incidentals. In these circumstances, the institution may authorize the hold but does not know the amount of the transaction until the hotel submits the actual purchase amount for settlement.

Typically, the hold is kept in place until the transaction amount is presented to the institution for payment and settled, which may take place a few days after the transaction occurred. During this time between authorization and settlement, the hold remains in place on the consumer's account. The Agencies are concerned that consumers unfamiliar with credit hold practices may inadvertently exceed the credit limit and incur an OCL fee because they assumed that only the actual purchase amount of the transaction was unavailable for additional transactions.

Legal Analysis

Assessing an OCL fee when the credit limit is exceeded as a result of a credit hold appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC. First, an OCL fee constitutes substantial monetary injury. Second, this injury does not appear to be reasonably avoidable because consumers are generally unaware that a hold has been placed on their account. The Agencies do not believe that enhanced disclosures would enable consumers to avoid the injury because, even if consumers were to receive notice of the amount of the hold at point of sale, they could not know the length of time the hold will remain in place. Third, there do not appear to

be countervailing benefits to consumers or competition. The proposal does not prohibit the use of holds, only the assessment of an OCL fee caused by a hold. The Agencies note that there is little risk to the institution from an authorized transaction until the transaction is presented for settlement by the merchant. At that point, the risk of loss is not for the amount of the hold, but rather for the actual purchase amount of the transaction. The Agencies do not, however, propose to prohibit institutions from assessing an OCL fee if there is insufficient available credit to cover the actual purchase amount.

Proposal

Proposed §__.25 would prohibit institutions from assessing an OCL fee if the credit limit was exceeded due to a hold unless the actual amount of the transaction for which the hold was placed would have resulted in the consumer exceeding the credit limit. Proposed comments 25-2 and 25-3 provide examples of two situations in which this prohibition would apply. The first is where the amount of the hold for an authorized transaction exceeds the credit limit. Assume that a consumer has a credit limit of $2,000 and a balance of $1,500 on a consumer credit card account. The consumer uses the credit card to reserve a hotel room for five days. When the consumer checks in, the hotel obtains authorization from the institution for a $750 "hold" on the account to ensure there is adequate available credit to cover the total cost of the anticipated stay. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming that there is no other activity on the account, § __.25 prohibits the institution from assessing an OCL fee with respect to the $750 hold. If, however, the total cost of the stay had been more than $500, § __.25 would not prohibit the institution from assessing an OCL fee.

Another situation in which an institution would be prohibited from assessing an OCL fee is when the hold for a transaction causes a subsequent transaction to exceed the credit limit. Assume that a consumer has a credit limit of $2,000 and a balance of $1,400 on a consumer credit card account. The consumer uses the credit card to reserve a hotel room for five days. When the consumer checks in, the hotel obtains authorization from the institution for a $750 hold on the account to ensure there is adequate available credit to cover the total cost of the anticipated stay. While the hold remains in place, the consumer uses the credit card to make a $150 purchase. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming that there is no other activity on the account, § __.25 would prohibit the institution from assessing an OCL fee with respect to either the $750 hold or the $150 purchase. If, however, the total cost of the stay had been more than $450, § __.25 would not prohibit the institution from assessing an OCL fee.

Proposed comments 25-4 and 25-5 provide additional examples of the operation of this rule.

Request for Comment

The Agencies are concerned about other potentially unfair practices regarding the assessment of fees for exceeding the credit limit. In order to gather information for purposes of determining whether additional prohibitions are warranted, the Agencies solicit comment on:

- The extent to which institutions assess more than one fee per billing cycle for exceeding the credit limit and, if so, what factors determine whether a fee is

assessed (e.g., one fee for each transaction while the account is over the credit limit).

- The extent to which institutions tier or otherwise vary the fee for exceeding the credit limit based on the number or dollar amount of transactions while the account is over the credit limit.
- The extent to which institutions assess fees for exceeding the credit limit when the transaction that exceeded the credit limit occurred in an earlier billing cycle and the consumer has not engaged in subsequent transactions.

Section __.26—Unfair balance computation method

The Agencies propose to prohibit institutions, as an unfair act or practice, from imposing finance charges on consumer credit card accounts based on balances for days in billing cycles that precede the most recent billing cycle. Currently, TILA requires creditors to explain as part of the account-opening disclosures the method used to determine the balance to which rates are applied. 15 U.S.C. 1637(a)(2). In its June 2007 Proposal, the Board proposed that the balance computation method be disclosed outside the account-opening table because explaining lengthy and complex methods may not benefit consumers. 72 FR at 32991-92. That proposal was based on the Board's consumer testing, which indicated that consumers did not understand explanations of balance computation methods. Nevertheless, the Board observed that, because some balance computation methods are more favorable to consumers than others, it was appropriate to highlight the method used, if not the technical computation details.

In response to its proposal, the Board received comments from consumers, consumer groups, and members of Congress urging the Board to prohibit the balance

computation method sometimes referred to as "two-cycle" or "double-cycle." This method has several permutations but, generally speaking, an institution using the two-cycle method assesses interest not only on the balance for the current billing cycle but also on the balance for the preceding billing cycle. This method generally does not result in additional finance charges for a consumer who consistently carries a balance from month to month because interest is always accruing on the balance. Nor does the two-cycle method affect consumers who pay their balance in full within the grace period every month because interest is not imposed on their balances. The two-cycle method does, however, result in greater interest charges for consumers who pay their balance in full one month but not the next month.

The following example illustrates how the two-cycle method results in higher costs for these consumers than other balance computation methods. A consumer has a zero balance on a credit card account on January 1, which is the start of the billing cycle. The consumer uses the credit card for a $500 purchase on January 15. The consumer makes no other purchases and the billing cycle closes on January 31. The consumer pays $400 on the due date (February 25), leaving a $100 balance. Under the average daily balance computation method that is used by most credit card issuers, because the consumer did not pay the balance in full on February 25, the periodic statement showing February activity would reflect interest charged on the $500 purchase from the start of the billing cycle (February 1) through February 24 and interest on the remaining $100 from February 25 through the end of the billing cycle (February 28). Under the two-cycle method, however, interest would also be charged on the $500 purchase from the date of purchase (January 15) to the end of the January billing cycle (January 31).

Legal Analysis

Imposing finance charges on consumer credit card accounts based on balances for days in billing cycles that precede the most recent billing cycle appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC.

First, as described above, computing finance charges based on balances preceding the most recent billing cycle appears to cause substantial consumer injury because consumers incur higher interest charges than they would under a balance computation method that focuses only on the most recent billing cycle. Second, it does not appear that consumers can reasonably avoid this injury because, once they use the card, they have no control over the methods used to calculate the finance charges on their accounts. Furthermore, as noted above, the Board's consumer testing indicates that disclosures are not successful in helping consumers understand balance computation methods. Accordingly, a disclosure will not enable the consumer to avoid that method when comparing credit card accounts or to avoid its effects when using a credit card.

Third, there do not appear to be any significant benefits to consumers or competition from computing finance charges based on balances preceding the most recent billing cycle. The Agencies understand that many institutions no longer use the two-cycle computation method. Although prohibition of the two-cycle computation method may reduce revenue for the institutions that currently use it and those institutions may replace that revenue by charging consumers higher annual percentage rates or fees, it appears that this result would nevertheless benefit consumers because it will result in more transparent pricing.

Proposal

__.26(a) General rule

Proposed §__.26(a) would prohibit institutions from imposing finance charges on balances on consumer credit card accounts based on balances for days in billing cycles preceding the most recent billing cycle. Proposed comment 26(a)-1 cites the two-cycle average daily balance computation method as an example of balance computation methods that would be prohibited by the proposed rule and tracks commentary under Regulation Z. See 12 CFR 226.5a cmt. 5a(g)-2. Proposed comment 26(a)-2 provides an example of the application of the two-cycle method.

__.26(b) Exceptions

Proposed §__.26(b) would create two exceptions to the general prohibition in proposed §__.26(a). First, institutions would not be prohibited from charging consumers for deferred interest even though that interest may have accrued over multiple billing cycles. Thus, if a consumer did not pay a balance or transaction in full by the specified date under a deferred interest plan, the institution would be permitted to charge the consumer for interest accrued during the period the plan was in effect.

Second, institutions would not be prohibited from adjusting finance charges following resolution of a billing error dispute. For example, if after complying with the requirements of 12 CFR 226.13 an institution determines that a consumer owes all or part of a disputed amount, the institution would be permitted to adjust the finance charge accordingly, even if that requires computing finance charges based on balances in billing cycles preceding the most recent billing cycle.

Section __.27 Unfair acts or practices regarding security deposits and fees for the issuance or availability of credit

The Agencies propose to prohibit institutions from charging to a consumer credit card account security deposits and fees for the issuance or availability of credit during the twelve months after the account is opened that, in the aggregate, constitute the majority of the credit limit for that account. In addition, the proposal would prohibit institutions from charging to the account during the first billing cycle security deposits and fees for the issuance or availability of credit that total more than 25 percent of the credit limit. Finally, if security deposits and fees for the issuance or availability of credit total more than 25 percent but less than the majority of the credit limit during the first year, the institution would be required to spread that amount equally over the eleven billing cycles following the first billing cycle.

As the Board noted in its June 2007 Proposal, subprime credit cards often have substantial fees related to the issuance or availability of credit. See 72 FR at 32980, 32983. For example, these cards may impose an annual fee and a monthly maintenance fee for the card. In other cases, a security deposit may be charged to the account. These cards may also impose multiple one-time fees when the consumer opens the card account, such as an application fee and a program fee. Those amounts are often billed to the consumer as part of the first statement and substantially reduce the amount of credit that the consumer has available to make purchases or other transactions on the account. For example, after security deposits or fees have been billed to accounts with a minimum credit line of $250, the consumer may have less than $100 of available credit with which to make purchases or other transactions unless the consumer pays the deposits or fees. In

addition, consumers will pay interest on security deposits and fees until they are paid in full.

The federal banking agencies have received many complaints from consumers with respect to cards of this type. Consumers often say that they were not aware of how little available credit they would have after the assessment of security deposits and fees. In an effort to address these concerns, the Board's June 2007 Proposal included several proposed amendments to Regulation Z's solicitation and application disclosures for credit and charge cards.

Specifically, the Board proposed to require creditors to disclose both the annualized and the periodic amount of the fee and how often the periodic fee will be imposed. See proposed 12 CFR 226.5a(b)(2), 72 FR at 33046; see also 72 FR at 32980. The Board also proposed to require creditors to disclose the impact of security deposits and fees for the issuance or availability of credit on consumers' initial available credit. See proposed 12 CFR 226.5a(b)(16), 72 FR at 33047. Specifically, the Board proposed that, if the total amount of any security deposit or required fees for the issuance or availability of credit that will be charged against the card at account opening equals 25 percent or more of the minimum credit limit offered for the card, the creditor must disclose an example of the amount of available credit a consumer would have remaining, assuming that the consumer receives the minimum credit limit offered on the account. For example, if the minimum credit limit on an account is $250 and security deposits and covered fees total $150, the creditor would be required to disclose that the consumer may receive only $100 in available credit.

Elsewhere in today's **Federal Register**, the Board is proposing to clarify the circumstances in which a consumer who has received account-opening disclosures, but has not yet used the account or paid a fee, may reject the plan and not be obligated to pay upfront fees. Under proposed 12 CFR 226.5(b)(1)(iv), the right to reject an open-end (not home-secured) plan would apply when any fee (other than an application fee that is charged to all applicants whether or not they receive the credit) is charged or agreed to be paid before the consumer receives the account-opening disclosures. Similarly, under proposed 12 CFR 226.6(b)(4)(vii), creditors that require substantial fees at account opening and leave consumers with a limited amount of available credit would be required to provide a notice of the consumer's right to reject the plan and not pay fees (other than an application fee, as discussed above) unless the consumer uses the account or pays the fees after receiving a billing statement. As discussed below, however, the Agencies are proposing additional, substantive protections.

Legal Analysis

Charging to a consumer credit card account security deposits and fees for the issuance or availability of the credit during the first year that total a majority of the credit limit appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC. Similarly, charging to the account in the first billing cycle security deposits and fees for the issuance or availability of credit that total more than 25 percent of the credit limit also appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC.

Substantial consumer injury. Consumers incur substantial monetary injury when security deposits and fees for the issuance or availability of credit are charged to a

consumer credit card account, both in the form of the charges themselves and in the form of interest on those charges. Even in cases where the institution provides a grace period, many consumers may not be able to pay the charges in full during that grace period. The potential injury from interest charges increases when security deposits and fees for the issuance or availability of credit are charged to the account in the first billing cycle rather than over a longer period of time. In addition, when security deposits and fees for the issuance or availability of credit are charged to the consumer's account, they diminish the value of that account by reducing the credit available to the consumer for purchases or other transactions.[58]

Injury is not reasonably avoidable. It does not appear that consumers are able to avoid the injury caused by the financing of security deposits and fees for the issuance or availability of credit. As an initial matter, disclosures may not be effective in allowing consumers to avoid these charges, particularly where deceptive sales practices mislead consumers about the amount of credit available.[59] For example, in one recent case, the court found that credit card marketing materials sent to consumers who were otherwise unable to qualify for credit "did not represent an accurate estimation of a consumer's credit limit" and that, "at all times, it appeared that the confusion was purposely fostered

[58] See OCC Advisory Letter 2004-4, at 3 (Apr. 28, 2004) (stating that a finding of unfairness with respect to subprime cards with financed security deposits could be based on the fact that "because charges to the card by the issuer utilize all or substantially all of the nominal credit line assigned by the issuer, they eliminate the card utility and credit availability applied and paid for by the cardholder") (available at http://www.occ.treas.gov/ftp/advisory/2004-4.txt).

[59] See, e.g., OCC Advisory Letter 2004-4, at 2-3 (finding that "solicitations and other marketing materials used for [subprime] credit card programs have not adequately informed consumers of the costs and other terms, risks, and limitations of the product being offered" and that, "[i]n a number of cases, disclosures problems associated with secured credit cards and related products have constituted deceptive practices under the applicable standards of the FTC Act" (emphasis in original)); In re First Nat'l Bank in Brookings, No. 2003-1 (Dept. of the Treasury, OCC) (Jan. 17, 2003) (available at www.occ.treas.gov/ftp/eas/ea2003-1.pdf); In re First Nat'l Bank of Marin, No. 2001-97 (Dept. of the Treasury, OCC Dec. 3, 2001) (available at www.occ.treas.gov/ftp/eas/ea2001-97.pdf).

by [the defendant's] telemarketers."[60] In these circumstances, consumers may lack the information necessary to avoid harm.

Furthermore, because cards with high security deposits and fees are typically targeted at subprime consumers whose credit histories or other characteristics may prevent them from obtaining a credit card elsewhere, those consumers may not be able to avoid financing the fees associated with these cards because they lack the funds to pay the charges up front.[61] Furthermore, because the Board's proposals under Regulation Z focus on amounts charged when the account is opened, those disclosures could be evaded by subsequent charges, leaving consumers with less available credit than they anticipated. Thus, consumers may not reasonably be able to avoid the injury caused by the financing of security deposits and fees for the issuance or availability of credit.

Injury is not outweighed by countervailing benefits. The Agencies understand that, in some cases, consumer credit card accounts with financed security deposits and fees can provide benefits to consumers who are unable to obtain a credit card without such charges and who lack the available funds to pay the security deposit and fees at or before account opening. Once, however, security deposits and fees for the issuance or availability of credit consume a majority of the credit limit, it appears that the benefit to consumers from access to available credit is outweighed by the high cost of paying for that credit. The Agencies have sought to narrowly tailor the proposal by allowing institutions to charge to the account security deposits and fees that total less than a

[60] People v. Applied Card Sys., Inc., 805 N.Y.S.2d 175, 178 (App. Div. 2005).

[61] See Statement for FTC Credit Practices Rule, 48 FR at 7746 ("If 80 percent of creditors include a certain clause in their contracts, for example, even the consumer who examines contract[s] from three different sellers has a less than even chance of finding a contract without the clause. In such circumstances relatively few consumers are likely to find the effort worthwhile, particularly given the difficulties of searching for contract terms. . . ." (footnotes omitted)).

majority of the credit limit during the first year and by allowing institutions to charge amounts totaling no more than 25 percent of the credit limit during the first billing cycle. Security deposits and fees paid from separate funds would not be affected by the proposal.

Finally, although public policy does not serve a primary basis for the Agencies' determination, the established public policy in favor of the safety and soundness of financial institutions appears to support the proposed limitations on the financing of security deposits and fees for the issuance or availability of credit because that practice appears to create a greater risk of default.[62]

Proposal

__.27(a) Annual rule

Proposed § __.27(a) prohibits institutions from financing security deposits and fees for the issuance or availability of credit during the twelve months following account opening if, in the aggregate, those fees constitute a majority of the initial credit limit. Proposed § __.27(a) would not, however, apply to security deposits and fees for the issuance or availability of credit that are not charged to the account. For example, an institution would not be prohibited from providing a credit card account that requires a consumer to pay a security deposit equal to the amount of credit extended if that deposit is not charged to the account. Proposed comment 27-1 clarifies that the "initial credit limit" for purposes of this section is the limit in effect when the account is opened.

[62] See OCC Advisory Letter 2004-4, at 4 ("[P]roducts carrying fee structures that are significantly higher than the norm pose a greater risk of default. . . . This is particularly true when the security deposit and fees deplete the credit line so as to provide little or no card utility or credit availability upon issuance. In such circumstances, when the consumer has no separate funds at stake, and little or no consideration has been provided in exchange for the fees and other amounts charged to the consumer, the product may provide a disincentive for responsible credit behavior and adversely affect the consumer's credit standing.").

Proposed comment 27(a)-1 clarifies that the total amount of security deposits and fees for the issuance or availability of credit constitutes a majority of the initial credit limit if that total is greater than half of the limit. For example, assume that a consumer credit card account has an initial credit limit of $500. Under proposed § __.27(a), an institution may charge to the account security deposits and fees for the issuance or availability of credit totaling no more than $250 during the twelve months after the date on which the account is opened (consistent with proposed § __.27(b)).

__.27(b) Monthly rule.

Proposed § __.27(b) prohibits institutions from charging to the account during the first billing cycle security deposits and fees for the issuance or availability of credit that, in the aggregate, constitute more than 25 percent of the initial credit limit. Any additional security deposits and fees must be spread equally among the eleven billing cycles following the first billing cycle. Proposed comment 27(b)-1 clarifies that, when dividing amounts pursuant to proposed § __.27(b)(2), the institution may adjust amounts by one dollar or less. For example, if an institution is dividing $125 over eleven billing cycles, it may charge $12 for four months and $11 for seven months. Proposed comment 27(b)-2 provides the following example of the application of proposed § __.27(b): Assume that a consumer credit card account opened on January 1 has an initial credit limit of $500 and that an institution charges to the account security deposits and fees for the issuance or availability of credit that total $250 during the twelve months after the date on which the account is opened. Assume also that the billing cycles for this account begin on the first day of the month and end on the last day of the month. Under proposed § __.27(b), the institution may charge to the account no more than $250 in

security deposits and fees for the issuance or availability of credit. If it charges $250, the institution may charge as much as $125 during the first billing cycle. If it charges $125 during the first billing cycle, it may then charge $12 in any four billing cycles and $11 in any seven billing cycles during the year.

__.27(c) Fees for the issuance or availability of credit.

Proposed § __.27(c) defines "fees for the issuance or availability of credit" as including any annual or other periodic fee, any fee based on account activity or inactivity, and any non-periodic fee that relates to opening an account. This definition is based on the definition of "fees for the issuance or availability of credit" in proposed 12 CFR 226.5a(b)(2). See 72 FR at 33046. This definition does not include fees such as late fees, fees for exceeding the credit limit, or fees for replacing a card. Proposed comments 27(c)-1, 2, and 3 are based on similar commentary to proposed 12 CFR 226.5a(b)(2) and clarify the meaning of "fees for the issuance or availability of credit." See 72 FR at 33108.

Request for Comment

The Agencies seek comment on:

- The dollar amount of security deposits and fees for the issuance or availability of credit typically charged to the account in the first billing cycle.
- The percentage of the initial credit line that is typically made unavailable due to security deposits and fees charged to the account during the first billing cycle.
- The degree to which consumers (including consumers with limited or damaged credit histories) can secure credit cards without high fees for the issuance or availability of credit.

- Whether the proposal would inappropriately curtail consumers' access to credit.
- Whether the final rule should impose additional, specific restrictions on charges on credit card accounts that a creditor can impose without the consumer's advance authorization.
- Whether the twelve-month time period in the proposal is the appropriate time period to consider in determining how much of the credit limit is consumed by security deposits and fees.
- Whether disclosure of security deposits and fees enables consumers to understand the impact of those charges on the availability of credit.
- Whether alternatives to proposed § __.27(b) are appropriate.

Section __.28 – Deceptive acts or practices regarding firm offers of credit

Proposed § __.28 applies when institutions make firm offers of credit for consumer credit card accounts that contain a range of or multiple annual percentage rates or credit limits. When the rate or credit limit that a consumer responding to such an offer will receive depends on specific criteria bearing on creditworthiness, § __.28 requires that the institution disclose the types of eligibility criteria in the solicitation. The disclosure must be provided in a manner that is reasonably understandable to consumers and designed to call attention to the nature and significance of the eligibility criteria for the lowest annual percentage rate or highest credit limit stated in the solicitation. Under the proposal, an institution may use the following disclosure to meet these requirements, if it is presented in a manner that calls attention to the nature and significance of the eligibility information, as applicable: "If you are approved for credit, your annual percentage rate and/or credit limit will depend on your credit history, income, and debts."

Legal Analysis

The Fair Credit Reporting Act (FCRA) limits the purposes for which consumer reports can be obtained. It permits consumer reporting agencies to furnish consumer reports only for one of the "permissible purposes" enumerated in the statute.[63] One of the permissible purposes set forth in the FCRA relates to prescreened firm offers of credit or insurance.[64] In a typical use of prescreening for firm offers of credit, a creditor submits a request to a consumer reporting agency for the contact information of consumers meeting certain pre-established criteria that will be reflected in the consumer reporting agency's records, such as credit scores in a certain range. The creditor then sends offers of credit targeted to those consumers, which state certain terms under which credit may be provided. For example, a firm offer of credit may contain statements regarding the annual percentage rate or credit limit that may be provided.

The FCRA requires that a firm offer of credit state, among other things, that (1) information contained in the consumer's credit report was used in connection with the transaction; (2) the consumer received the firm offer because the consumer satisfied the criteria for creditworthiness under which the consumer was selected for the offer; and (3) if applicable, the credit may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any other applicable criteria bearing on creditworthiness or does not furnish any required

[63] See 15 U.S.C. 1681b. Similarly, persons obtaining consumer reports may do so only with a permissible purpose. See 15 U.S.C. 1681b(f).

[64] See 15 U.S.C. 1681a(l) (defining "firm offer of credit or insurance").

collateral.[65] The creditor may apply certain additional criteria to evaluate applications from consumers that respond to the offer, such the consumer's income or debt-to-income ratio.[66] As discussed below, the Agencies are concerned that consumers receiving firm offers of credit may not understand that they are not necessarily eligible for the lowest annual percentage rate and the highest credit limit stated in the offer.

It appears to be a deceptive act or practice under the standards articulated by the FTC to make a firm offer of credit for a consumer credit card account without disclosing that consumers may not receive the lowest annual percentage rate and highest credit limit offered.

Likely to mislead consumers acting reasonably under the circumstances. As discussed above, the FCRA requires that firm offers of credit state that the consumer was selected for the offer based on certain criteria for creditworthiness.[67] Indeed, firm offers of credit often state that consumers have been "pre-selected" for credit or make similar statements. Thus, in the absence of an affirmative statement to the contrary, consumers may reasonably believe that they can receive the lowest annual percentage rate and highest credit limit stated in the offer even though that is not the case.[68] For example, assume that an institution obtains from a consumer reporting agency a list of consumers

[65] See 15 U.S.C. 1681m(d)(1); see also 16 CFR 642.1-642.4 (Prescreen Opt-Out Notice Rule).

[66] See, e.g., 15 U.S.C. 1681a(l).

[67] See 15 U.S.C. 1681m(d)(1)(B).

[68] See FTC Policy Statement on Deception at 3 ("To be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation." (footnotes omitted)). In consumer testing conducted in relation to the Board's June 2007 Proposal, almost all participants understood that the credit limit for which they would qualify depended on their creditworthiness, such as credit history. See 72 FR at 32984. This testing did not, however, specifically focus on firm offers of credit, which, as discussed above, contain statements that the consumer has been selected for the offer.

with credit scores of 650 or higher for purposes of sending those consumers a solicitation for a firm offer of credit. The solicitation sent by the institution states that the consumer has been "pre-selected" for credit and advertises "rates from 8.99% to 19.99%" and "credit limits from $1,000 to $10,000." But under the criteria established by the institution before the selection of the consumers for the offer, the institution will only provide an interest rate of 8.99% and a credit limit of $10,000 to those consumers responding to the solicitation who are verified to have a credit score of 650 or higher, who have a debt-to-income ratio below a certain amount, and who meet other specific criteria bearing on creditworthiness. Because the consumers receiving the offer are not informed of these requirements, consumers who do not meet one or more of the requirements could reasonably interpret the offer as stating that they may receive an interest rate of 8.99% or a credit limit of $10,000 when, in fact, they will not.[69]

As noted above, the FCRA requires that firm offers of credit state, where applicable, that credit may not be extended if the consumer no longer meets the criteria used to select the consumer for the offer or does not meet any other applicable criteria bearing on creditworthiness.[70] This statement, however, only informs the consumer that there may be circumstances in which the consumer will not be eligible to receive any credit. This statement does not enable consumers to evaluate whether they will be eligible for the lowest annual percentage rate and highest credit limit if they respond to the firm offer.

[69] See FTC v. U.S. Sales Corp., 785 F. Supp. 737, 751 (N.D. Ill. 1992) (concluding that express representations that consumers would not be turned down for a secured credit card were misleading because applicants could be denied a card if they had a poor credit history).

[70] See 15 U.S.C. 1681m(d)(1)(C).

Materiality. Statements in firm offers of credit that the consumer has been selected for the offer based on certain criteria for creditworthiness or that the consumer has been "pre-selected" for credit are material because they are likely to affect a consumer's decision about whether to respond to the offer of credit. [71] Furthermore, statements in firm offers of credit regarding credit terms are presumptively material because they relate to the cost of a product or service.[72]

Proposal

__.28(a) Disclosure of criteria bearing on creditworthiness

Proposed § __.28(a) provides that, if an institution offers a range or multiple annual percentage rates or credit limits when making a solicitation for a firm offer of credit for a consumer credit card account, and the annual percentage rate or credit limit that consumers approved for credit will receive depends on specific criteria bearing on creditworthiness, the institution must disclose the types of criteria in the solicitation. The disclosure must be provided in a manner that is reasonably understandable to consumers and designed to call attention to the nature and significance of the information regarding the eligibility criteria for the lowest annual percentage rate or highest credit limit offered.

Under the proposal, an institution may use the following disclosure to meet these requirements, if it is presented in a manner that calls attention to the nature and significance of the eligibility information: "If you are approved for credit, your annual percentage rate and credit limit will depend on your credit history, income, and debts." Proposed comment .28(a)(1)-1 explains that whether a disclosure has been provided in a

[71] FTC Policy Statement on Deception at 6-7 ("A 'material' misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers." (footnotes omitted)).

[72] See id. at 6.

manner that is designed to call attention to the nature and significance of required information depends on where the disclosure is placed in the solicitation and how it is presented, including whether the disclosure uses a typeface and type size that are easy to read and uses boldface or italics. Placing the disclosure in a footnote would not satisfy this requirement. Proposed comment 28(a)-2 clarifies that, to the extent that disclosures required by proposed § __.28(a) are provided electronically, the institution must comply with the requirements in 12 CFR 226.5a(a)(2)-8 and -9.

Proposed comment 28(a)-3 clarifies that a firm offer of credit solicitation that states an annual percentage rate or credit limit for a credit card feature and a different annual percentage rate or credit limit for a different credit card feature does not offer multiple annual percentage rates or credit limits. For example, if a firm offer of credit solicitation offers a 15% annual percentage rate for purchases and a 20% annual percentage rate for cash advances, the solicitation does not offer multiple annual percentage rates for purposes of proposed § __.28(a). Proposed comment 28(a)-4 provides an example of the operation of proposed § __.28(a).

Proposed comment 28(a)-5 clarifies that, when making a disclosure under proposed § __.28, an institution may only disclose the criteria it uses in evaluating whether consumers who are approved for credit will receive the lowest annual percentage rate or the highest credit limit. For example, if an institution does not consider the consumer's debts when determining whether the consumer should receive the lowest annual percentage rate or highest credit limit, the disclosure must not refer to "debts."

__.28(b) Firm offer of credit defined

Proposed § __.28(c) provides that, for purposes of this section, for purposes of this section, "firm offer of credit" has the same meaning as that term has under the definition of "firm offer of credit or insurance" in section 603(l) of the Fair Credit Reporting Act (15 U.S.C. 1681a(l)).

Request for Comment

The Agencies are concerned that the disclosure in proposed § __.28(a) may not be effective unless it is provided in close proximity to the annual percentage rate and/or credit limit in the firm offer of credit. However, the Agencies also recognize that the annual percentage rate and/or credit limit may be stated multiple times in the offer. Accordingly, the Agencies request comment on whether proposed § __.28 should contain a proximity requirement. If a proximity requirement were to be adopted, the Agencies request comment on whether the disclosure should be proximate to the first statement of the annual percentage rate or credit limit or the most prominent statement of the annual percentage rate or credit limit.

The Agencies also request comment on:

- Whether consumers who receive firm offers of credit offering a range of or multiple annual percentage rates or credit limits understand that there may be no possibility that they will be eligible for the lowest annual percentage rate and the highest credit limit stated in the offer.
- Whether the proposed disclosure would be effective in informing consumers that they may not receive the best terms advertised.

Other Credit Card Practices

The Agencies are also concerned about the potentially deceptive use of the term "interest free" in connection with deferred interest plans for credit cards. While consumers may benefit from making payments over a period of time, the Agencies are concerned that some consumers may not be adequately informed that accrued interest charges will be added to the principal owed if they fail to make payment in full by the end of the deferred interest term or otherwise default on the agreement. Because the Board is addressing this concern in a separate proposal under Regulation Z in today's **Federal Register**, the Agencies are not proposing to address the issue in this rulemaking. Under the Board's Regulation Z proposal, creditors that describe deferred interest plans by using "no interest" or similar terms in regard to interest during the deferred interest period would be required to disclose in close proximity to the first listing of such terms: (1) a statement that interest will be charged from the date of purchase if the balance is not paid in full by the end of the deferred interest period; and (2) if applicable, a statement that making only the minimum payment will not pay off the balance or transaction in time to avoid interest charges.

VI. Section-By-Section Analysis of Overdraft Services Subpart

Introduction

Historically, if a consumer engaged in a transaction that overdrew his or her account, depository institutions used their discretion on an ad hoc basis to pay the overdraft, usually imposing a fee. The Board recognized this longstanding practice when it initially adopted Regulation Z in 1969 to implement TILA. The regulation provided that these transactions are generally not covered under Regulation Z where there is no

written agreement between the consumer and institution to pay an overdraft and impose a fee. See 12 CFR § 226.4(c)(3). The treatment of overdrafts in Regulation Z was designed to facilitate depository institutions' ability to accommodate consumers' transactions on an ad hoc basis.

Over the years, most institutions have largely automated the overdraft payment process, including setting specific criteria for determining whether to honor overdrafts and limits on the amount of the coverage provided. From the industry's perspective, the benefits of overdraft, or bounced check, services include a reduction in the costs of manually reviewing individual items, as well as the consistent treatment for all customers with respect to overdraft payment decisions. Moreover, industry representatives assert that overdraft services are valued by consumers, particularly for check transactions, as they allow consumers to avoid additional fees that would be charged by the merchant if the item was returned unpaid, and other adverse consequences, such as the furnishing of negative information to a consumer reporting agency.[73]

In contrast, consumer advocates believe overdraft transactions are a high-cost form of lending that traps low- and moderate-income consumers (particularly students and the elderly) into paying high fees. They also note that consumers are enrolled in overdraft services automatically, often with no chance to opt out. In addition, consumer advocates believe that by honoring check and other types of overdrafts, institutions encourage consumers to rely on this service and thereby consumers incur greater costs. Consumer advocates also express concerns about debit card overdrafts where the dollar

[73] See, e.g., Overdraft Protection: Fair Practices for Consumers: Hearing before the House Subcomm. on Financial Institutions and Consumer Credit, House Comm. on Financial Services, 110th Cong. (2007) (Overdraft Protection Hearing) (available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr0705072.shtml).

amount of the fee may far exceed the dollar amount of the overdraft, and multiple fees may be assessed in a single day for a series of small-dollar transactions.[74]

According to a recent report from the GAO, the average cost of overdraft and insufficient funds fees has increased roughly 11 percent between 2000 and 2007 to just over $26 per item.[75] The GAO also reported that large institutions charged between $4 and $5 more for overdraft and insufficient fund fees compared to smaller institutions. In addition, the GAO Bank Fees Report noted that a small number of institutions (primarily large banks) apply tiered fees to overdrafts, charging higher fees as the number of overdrafts in the account increases.[76]

Overdraft services vary among institutions but typically share certain characteristics. Coverage is "automatic" for consumers who meet the institution's criteria (e.g., the account has been open a certain number of days, the account is in "good standing," deposits are made regularly). While institutions generally do not underwrite on an individual account basis in determining whether to enroll the consumer in the service initially, most institutions will review individual accounts periodically to determine whether the consumer continues to qualify for the service, and the amounts that may be covered.

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[74] See, e.g., Overdraft Protection Hearing at n.42; Jacqueline Duby, Eric Halperin & Lisa James, High Cost and Hidden From View: The $10 Billion Overdraft Loan Market, Ctr. for Responsible Lending (May 26, 2005) (noting that the bulk of overdraft fees are incurred by repeat users) (available at www.responsiblelending.org).

[75] See Bank Fees: Federal Banking Regulators Could Better Insure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts, GAO Report 08-281 (January 2008) (GAO Bank Fees Report); see also Bankrate 2007 Checking Account Study, posted Sep. 26, 2007 (reporting an average overdraft fee of over $28.00 per item) (available at: www.bankrate.com/brm/news/chk/chkstudy/20070924_bounced_check_fee_a1.asp?caret=2e).

[76] According to the GAO, of the financial institutions that applied up to three tiers of fees in 2006, the average overdraft fees were $26.74, $32.53 and $34.74, respectively. See GAO Bank Fees Report at 14.

Most overdraft program disclosures state that payment of an overdraft is discretionary on the part of the institution, and disclaim any legal obligation of the institution to pay any overdraft. Typically, the service is extended to also cover non-check transactions, including withdrawals at ATMs, automated clearinghouse (ACH) transactions, debit card transactions at point-of-sale, pre-authorized automatic debits from a consumer's account, telephone-initiated funds transfers, and on-line banking transactions. A flat fee is charged each time an overdraft is paid and, commonly, institutions charge the same amount for paying the overdraft as they would if they returned the item unpaid. A daily fee also may apply for each day the account remains overdrawn.

Where institutions vary most in their provision of overdraft services is the extent to which institutions inform consumers about the existence of the service or otherwise promote the use of the service. For those institutions that choose to promote the existence and availability of the service, they may also disclose to consumers, typically in a brochure or welcome letter, the aggregate dollar limit of overdrafts that may be paid under the service.

Notwithstanding the Agencies' issuance in February 2005 of guidance on overdraft protection programs, the Board's May 2005 final rule under Regulation DD, and NCUA's 2006 final rule under part 707,[77] the Agencies remain concerned about certain aspects of the marketing, disclosure, and implementation of some overdraft services. For example, many consumers may be automatically enrolled in their institution's overdraft service, without being given an adequate opportunity to opt out of

[77] See **Background** section of the **Supplementary Information** for discussion of February 2005 Joint Guidance and OTS Guidance, the 2005 final amendments under Regulation DD, and the 2006 final amendments to part 707.

the service and avoid the costs associated with the service. While the February 2005 overdraft guidance recommended that consumers be given an opportunity to opt out, this practice may not be uniform across institutions and the opt-out right may not be adequately disclosed to consumers. In addition, the Agencies remain concerned about the adequacy of disclosures provided to consumers regarding the costs of overdraft services.

Thus, pursuant to their authority under 15 U.S.C. 57a(f)(1), the Agencies are proposing to adopt rules prohibiting specific unfair acts or practices with respect to overdraft services. The Agencies would locate these rules in a new Subpart D to their respective regulations under the FTC Act. These proposals should not be construed as a definitive conclusion by the Agencies that a particular act or practice is unfair. The Board is also publishing a separate proposal addressing overdraft services in today's **Federal Register** using its authority under TISA and Regulation DD.

Section __.31 Definitions

Proposed § __.31 sets forth certain key definitions to clarify the scope and intent of the provisions addressing unfair acts or practices involving overdraft services.

Account

The Agencies would limit the scope of the overdraft services provisions to "accounts" as defined in TISA, Regulation DD, and part 707. Thus, the proposal uses a definition of "account" that is limited to "a deposit account at a depository institution that is held by or offered to a consumer." See proposed § __.31(a); 12 CFR 230.2(a) and 707.2(a). Although the Agencies are aware that overdraft services are sometimes provided for prepaid cards, such card products are beyond the scope of this rulemaking.

Consumer

The term "consumer" refers to a person who holds an account primarily for personal, family, or household purposes.[78] Thus, the proposal would not cover overdraft services that are provided for business accounts, including sole proprietorships. See proposed § __.31(b).

Overdraft service

Proposed § __.31(c) defines "overdraft service" to mean a service under which an institution charges a fee for paying a transaction (including a check, point-of-sale debit card transaction, ATM withdrawal and other electronic transaction, such as a preauthorized electronic fund transfer or an ACH debit) that overdraws an account. The term covers circumstances when an institution pays an overdraft pursuant to a promoted program or service or under an undisclosed policy or practice and charges a fee for that service. The term does not, however, include services in which an institution pays an overdraft pursuant to a line of credit subject to the Board's Regulation Z, including transfers from a credit card account, a home equity line of credit or an overdraft line of credit. The term also excludes any overdrafts paid through a service that transfers funds from another account of the consumer held at the institution.

Section __.32 Unfair acts or practices regarding overdraft services

__.32(a) Consumer right to opt out

In the February 2005 overdraft guidance, the FDIC, Board, OCC, OTS, and NCUA recommended as a best practice that institutions should obtain a consumer's affirmative consent to receive overdraft protection. Alternatively, where the consumer is

[78] For purposes of this rulemaking, as it relates to federal credit unions, the term "consumer" refers to natural person members.

automatically enrolled in overdraft protection, these agencies stated that institutions should provide consumers the opportunity to "opt out" of the overdraft program and provide a clear consumer disclosure of this option. 70 FR at 9132; 70 FR at 8431.

While many institutions voluntarily provide consumers the right to opt out of overdraft services,[79] this may not be a uniform practice across all institutions. Moreover, institutions vary significantly in the manner in which they provide notice of the opt-out, leading to the Agencies' concern that the opt-out may not be adequately disclosed to consumers. For instance, some institutions may disclose the opt-out in a clause in their deposit agreement, which many consumers are unlikely to read, or the clause may not be written in clearly understandable language. Others may disclose a consumer's right to opt out in a welcome letter or brochure that highlights the potential benefits of the overdraft service, while minimizing or obscuring either the fees associated with the service or that there may be less costly alternatives to the service.

In addition, opt-out notices may not be provided to consumers at a time when the consumer is most likely to act. For example, institutions may provide notice of a consumer's right to opt out solely at account opening or when the service is initially added to the consumer's account. Subsequently, however, after experiencing an overdraft and incurring the associated fees, the consumer will typically not receive additional notice of the opt-out right, even though it may be the time at which the consumer is most likely to focus on the merits and cost of the service.

[79] See, e.g., American Bankers Association, "Overdraft Protection: A Guide for Bankers" at 18.

In light of these concerns, the Agencies are proposing to create a new substantive right for consumers to opt out of an institution's overdraft service to ensure that they have a meaningful opportunity to decline the service.

Legal Analysis

Assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt out of the institution's overdraft service appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC.

Substantial consumer injury. Consumers incur substantial monetary injury due to the fees assessed in connection with the payment of overdrafts. These fees may include per item fees as well as additional fees that may be imposed for each day the account remains overdrawn. As noted above, the GAO Bank Fees Report indicates that the cost to consumers resulting from overdraft loans has grown over the past few years to just over $26 per item.[80] While the payment of overdrafts may allow consumers to avoid merchant fees for a returned check or ACH transaction, there are no similar consumer benefits for ACH withdrawals and point-of-sale debit card transactions. Moreover, consumers relying on overdraft services may be more likely to overdraw their accounts, thereby incurring more overdraft fees in the long run.

[80] See GAO Bank Fees Report at 13-14; see also Marc Fusaro, Hidden Consumer Loans: An Analysis of Implicit Interest Rates on Bounced Checks, J. of Fam. & Econ. Issues (forthcoming June 2008) (Hidden Consumer Loans) (citing a Moebs $ervices estimate that 60% of service charge income comes from insufficient funds fees) (available at: http://personal.ecu.edu/fusarom/fusarobpinterestrates.pdf); Eric Halperin and Peter Smith, Out of Balance: Consumers Pay $17.5 Billion Per Year in Fees for Abusive Overdraft Loans, Center for Responsible Lending (July 11, 2007) (available at: http://www.responsiblelending.org/pdfs/out-of-balance-report-7-10-final.pdf) (estimating that consumers paid over $17 billion in fees for overdraft loans in 2006); Howard Mason, The Criminal Risk of Actively-Marketed Bounce Protection Programs, Bernstein Research Call (Feb. 18, 2005) (suggesting that bounce protection programs account for 2/3 or more of industry NSF fees of an estimated $12-14 billion); Howard Mason, Impact of Regulatory Best Practices on Bounce Protection Services and NSF Fees, Bernstein Research Call (Feb. 17, 2005) (estimating that overdraft and NSF fees make up approximately half of service charge income).

Injury is not reasonably avoidable. It appears that consumers cannot reasonably avoid this injury if they are automatically enrolled in an institution's overdraft service without having an opportunity to opt out. Although consumers can reduce the risk of overdrawing their accounts by carefully tracking their credits and debits, consumers often lack sufficient information about key aspects of their account. For example, a consumer cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available.

Injury is not outweighed by countervailing benefits. The benefits to consumers and competition from not providing an opt-out do not appear to outweigh the injury. This is particularly the case for ATM withdrawals and POS debit card transactions where, but for the overdraft service, the transaction would typically be denied and the consumer would be given the opportunity to provide other forms of payment without incurring any fees.[81]

Moreover, for many POS debit card transactions, the amount of the fee assessed may substantially exceed the amount of the overdraft loan.[82] This injury to consumers is further aggravated when multiple fees are charged in a single day due to multiple small-dollar overdrafts. Even in the case of check and ACH transactions, where payment of the check or ACH overdraft may allow the consumer to avoid a second fee assessed by the merchant for a returned item as well as possible negative reporting consequences,

[81] According to one consumer group survey, most respondents preferred that their debit card be declined for insufficient funds at the checkout rather than having the overdraft paid and being assessed a fee. Eric Halperin, Lisa James and Peter Smith, Debit Card Danger, Center for Responsible Lending at 9 (Jan. 25, 2007) (available at: http://responsiblelending.org/pdfs/Debit-Card-Danger-report.pdf).

[82] See Eric Halperin, Testimony on Overdraft Protection: Fair Practices for Consumers Before the House Comm. on Financial Services, Subcomm. on Fin. Instits. & Consumer Credit at 6 (July 11, 2007) (stating that consumers pay $1.94 in fees for every one dollar borrowed to cover a debit card POS overdraft) (available at: http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr0705072.shtml).

consumers may prefer instead not to have the overdraft paid to avoid additional daily fees. Furthermore, consumers who have overdraft services may be more likely to rely on the existence of the service and overdraw their accounts and thereby incur substantial fees.[83]

Thus, while many consumers may derive some benefit from having overdraft transactions paid, the proposed rule would allow each consumer to decide whether this benefit sufficiently compensates for the cost of the overdraft fees that will be assessed against his or her account.

Proposal

__.32(a)(1) General rule

Under § __.32(a)(1), institutions would be prohibited from assessing any fees on a consumer's account in connection with an overdraft service unless the consumer is given notice and a reasonable opportunity to opt out of the service, and the consumer does not opt out. The consumer's right to opt out of an institution's overdraft service would apply to all methods of payment, including check, ACH and other electronic methods of payment, such as ATM withdrawals and POS debit card transactions. Institutions would also be required to provide consumers with the option of opting out only of overdrafts at

[83] Some economic research suggests that when a bank pays overdrafts through an overdraft program, consumers overdraw their accounts more often. See Fusaro, Hidden Consumer Loans at 6. This finding is consistent with assertions by some third-party vendors of overdraft protection services that implementation of overdraft protection can result in a substantial increase in fee income from overdraft and insufficient funds fees. See, e.g., http://www.banccommercegroup.com/aarp.html ("guaranteeing" that use of overdraft protection can increase revenue from insufficient funds income by at least 50%) (visited Mar. 21, 2008); http://www.cetoandassociates.com/index.php?option=com_content&task=view&id=147&Itemid=102 (representing that overdraft protection can increase insufficient funds revenue by 200%) (visited Mar. 21, 2008); http://www.jmfa.com/pageContent.aspx?id=126 (reporting an increase of 50-300% in insufficient funds revenue for clients) (visited Mar. 21, 2008).

ATMs and for POS debit card transactions under proposed §__.32(a)(2), discussed below.

The proposal would require notice of the opt-out to be provided both before the institution's assessment of any fee or charge for paying an overdraft to allow consumers to avoid overdraft fees altogether, and subsequently at least once during or for each periodic statement cycle in which any overdraft fee or charge is assessed to the consumer's account. The subsequent notice requirement is intended to ensure that consumers are given notice of their right to opt out at a time that may be most relevant to them, that is, after they have been assessed fees or other charges for the service. The institution would have flexibility with respect to the means by which it provides notice of the consumer's opt-out right following the payment of the overdraft.

For example, the consumer may be given notice on a periodic statement that reflects the imposition of fees associated with payment of an overdraft. Alternatively, the opt-out right may be disclosed on a notice that the institution may send promptly after the payment of an overdraft to alert the consumer of the overdraft, as is the practice of many institutions. (Under the latter option, institutions need only provide the opt-out notice once during a statement period, even if multiple fees are charged in a single period.) The requirement to provide subsequent notice of the opt-out would terminate if the consumer has exercised this right. See proposed § __.32(a)(1). Of course, if the consumer opts out after having incurred an overdraft fee, the opt-out would apply only to subsequent transactions and the consumer would remain responsible for the fee.

The Agencies are nevertheless aware that an opt-out will not provide a meaningful consumer protection if the notice of the opt-out right is not presented in a

clear and conspicuous manner to a consumer, or if the notice does not contain sufficient information for the consumer to make an informed choice. Thus, in a separate proposal under TISA and Regulation DD in today's **Federal Register**, the Board is proposing additional amendments regarding the form, content and timing requirements for the opt-out notice. See proposed comment 32(a)(1)-1.[84] As part of the rulemaking process, the Board intends to conduct consumer testing on the proposed opt-out form to ensure that the notice is presented effectively to consumers in a format they can easily understand and use. The Agencies anticipate issuing any final rules simultaneously after reviewing comments received on both proposals.

__.32(a)(2) Partial opt-out

Some consumers may want their institution to pay overdrafts by check and ACH, but do not want overdrafts paid in other circumstances, such as for ATM withdrawals and debit card transactions at a point-of-sale.[85] Thus, the proposed rule requires institutions to provide consumers with the option of opting out only of the payment of overdrafts at ATMs and for debit card transactions at the point-of-sale. See § __.32(a)(2). As previously stated, the Agencies note that a consumer that opts out of an overdraft protection service typically also incurs a cost when the check is returned and an insufficient funds fee is charged by the institution (and possibly also by the merchant). Accordingly, the partial opt-out requirement in § __.32(a)(2) is intended to allow consumers the ability to determine for themselves whether they prefer that their institution deny the payment of all overdrafts, or to have overdrafts paid for check and

[84] While NCUA is not proposing amendments to its 12 CFR part 707 in today's **Federal Register**, TISA requires NCUA to promulgate regulations substantially similar to Regulation DD. Accordingly, NCUA will issue amendments to part 707 following the Board's adoption of final rules under Regulation DD.

[85] See Halperin, et al., Debit Card Danger at 3 (concluding that debit card POS overdraft loans are more costly than overdraft loans from other sources, such as overdrafts by check).

ACH transactions in order to avoid potential merchant fees for returned items or other adverse consequences. While the Agencies understand that some processors do not currently have systems capable of paying overdrafts for some, but not all, payment channels, it appears that the benefits of providing consumers a choice regarding the transaction types for which they want to have overdrafts paid outweighs the potential programming costs associated with this requirement.

As further discussed below, in light of the potential benefits to consumers if overdrafts for check and ACH transactions are paid, the Agencies seek comment on whether the consumer's right to opt out should be limited to overdrafts caused by ATM withdrawals and debit card transactions at a point-of-sale. Under this alternative approach, institutions would be permitted, but not required, to provide consumers the option of opting out of the payment of overdrafts for check and ACH transactions.

__.32(a)(3) Exceptions

In some cases, an institution may not be able to avoid paying a transaction that overdraws an account. Under the proposal, if the institution does pay an overdraft, the consumer's decision to opt out of the institution's overdraft service would not prohibit institutions from paying overdrafts in all cases. Rather, if the institution does pay an overdraft, the consumer's decision to opt out would generally prohibit the institution from assessing a fee for the service. The Agencies recognize, however, that, in certain narrow circumstances, it may be appropriate to allow institutions to assess a fee or charge for paying an overdraft even where the consumer has elected to opt out.

Section __.32(a)(3)(i) would permit an institution to charge an overdraft fee for a debit card transaction if the purchase amount presented at settlement by a merchant

exceeds the amount that was originally requested for pre-authorization.[86] This exception is intended to cover circumstances in which the settlement amount exceeds the authorization amount because the precise transaction amount is not known to the consumer at the time of the transaction. (This situation is distinct from the circumstances discussed below with respect to the proposed prohibition of assessing an overdraft fee in connection with debit holds in which the authorization amount exceeds the actual purchase amount presented at settlement.)

For example, for some fuel purchases, the consumer may swipe his or her debit card and the merchant may seek a $1 pre-authorization that is primarily intended to verify whether the consumer's account is valid. After the consumer has completed the fuel purchase, the merchant will submit the actual amount of the purchase for settlement which may cause the consumer to incur an overdraft. Similarly, for restaurant meals, the settlement amount may not match the amount submitted for pre-authorization if the consumer elects to add a tip to the amount of the bill. Proposed comments 32(a)(3)(i)-1 and -2 illustrate this exception for fuel purchases and restaurant transactions.

The second exception is intended to address circumstances in which a merchant or other payee presents a debit card transaction for payment by paper-based means, rather than electronically using a card terminal, and in which the payee does not obtain authorization from the card issuer at the time of the transaction. For example, the merchant may use a card imprinter to take an imprint of the consumer's card and later submit the sales slip with the imprint to its acquirer for payment. In this circumstance,

[86] Pre-authorization describes the dollar amount of funds that are held on a consumer's account (or against a credit line) when a card is swiped to initiate a transaction. This typically occurs in connection with debit and credit card transactions in which the actual dollar amount of the transaction is not known until the end of the transaction.

the card issuer does not learn about the transaction, and thus cannot verify whether the consumer has sufficient funds, until it receives the sales slip presenting the transaction for payment. Section __.32(a)(3)(ii) would permit an institution to assess an overdraft fee or charge if the transaction causes the consumer to overdraw his or her account, despite the consumer's election to opt out. Proposed comment 32(a)(3)(ii)-1 illustrates this exception.

The Agencies considered, but are not proposing, an exception that would allow an institution to impose an overdraft fee despite a consumer's opt-out election as long as the institution did not "knowingly" authorize a transaction that resulted in an overdraft. The Agencies are concerned, however, that given the difficulty in determining a consumer's "real-time" account balance at any given time, such an exception would undercut the protections provided by a consumer's election to opt out. At the same time, the Agencies recognize that a rule that generally prohibits institutions from imposing an overdraft fee if the consumer has opted out could adversely impact small institutions that use a daily batch balance method for authorizing transactions. Because such institutions do not update the balance during the day to reflect other authorizations or settlements for transactions that occurred before the authorization request, their authorization decisions would be based upon the same dollar amount throughout the day. Accordingly, it would be infeasible for these institutions to determine at any given point in time whether the consumer in fact has a sufficient balance to cover the requested transaction. Similarly, institutions that use a stand-in processor because, for example, the ATM network is temporarily off-line, would also be unable to determine at the time of the transaction whether the consumer's balance is sufficient to cover a requested transaction. In both of

these cases, a transaction could result in an overdraft but the institution would not be able to assess a fee for that service. Thus, as discussed below in the request for comment, the Agencies seek comment on whether exceptions are necessary to address these circumstances, and if so, how such exceptions may be narrowly tailored so as not to undermine protections afforded by a consumer's election to opt out. Comment is also requested on whether there are additional circumstances in which an exception may be appropriate to allow an institution to impose a fee in connection with paying an overdraft, notwithstanding a consumer's election to opt out.

__.32(a)(4)-(6)

Section __.32(a)(4) provides that institutions must comply with a consumer's opt-out request as soon as reasonably practicable after the institution receives it. Proposed § __.32(a)(5) provides that a consumer may opt out of an institution's overdraft service at any time since consumers may decide later in the account relationship not to have overdrafts paid. Once exercised, the consumer's opt-out remains in effect unless subsequently revoked by the consumer in writing or, if the consumer agrees, electronically. See § __.32(a)(6).

Request for Comment

The Agencies request comment on:

- Whether the scope of the consumer's opt-out right under §__.32(a)(1) should be limited to ATM transactions and debit card transactions at the point-of-sale. Under this alternative approach, institutions would be permitted, but not required, to provide consumers the option of opting out of the payment of overdrafts for check and ACH transactions.

- The potential costs and consumer benefits for implementing a partial opt-out that applies only to ATM transactions and debit card transactions at the point-of-sale.
- Whether there are other circumstances in which an exception may be appropriate to allow an institution to impose a fee or charge for paying an overdraft even if the consumer has opted out of the institution's overdraft service, and if so how to narrowly craft such an exception so as not to undermine protections provided by a consumer's opt-out election.

Debit holds

__.32(b) Debit Holds

Debit holds occur when a consumer uses a debit card for a transaction in which the actual purchase amount is not known at the time the transaction is authorized, causing the merchant (and in some cases the card-issuing bank) to place a hold on the consumer's account for an amount that may be in excess of the actual purchase amount in order to protect against potential risk of loss. For example, this may occur at a pay-at-the pump fuel dispenser, restaurant, or hotel. For example, for fuel purchases, card network rules may allow the merchant to place a pre-authorization hold of up to $75 on the consumer's account in certain types of debit card transactions.[87] Similarly, a hotel may place a hold on the consumer's account in an amount sufficient to cover the length of the stay, plus an additional amount for incidentals, such as anticipated room service charges.

While the merchant generally determines the hold amount based on limits imposed by the card network, it is the card-issuing financial institution that determines how long the hold remains in place, also subject to any limits imposed by the card

[87] Other merchants may instead only place a pre-authorization hold of $1 in order to verify that the consumer's account is valid.

network rules. Typically, the hold is kept in place until the transaction amount is presented to the financial institution for payment and settled. While PIN-based debit card transactions typically settle on the same day the card is used by the consumer (assuming the transaction takes place before the processing cut-off time that day), settlement for signature-based transactions may take up to three days following authorization. During the time between authorization and settlement, the hold remains in place on the consumer's account. In some cases, where the merchant does not use the same transaction number for both the authorization and the settlement, both the authorization amount and the settlement amount are held on the consumer's account until the institution is able to reconcile the transactions.

The Agencies are concerned that consumers unfamiliar with debit hold practices may inadvertently incur considerable overdraft fees on the assumption that the available funds in their account will only be reduced by the actual purchase amount of the transaction. For example, a consumer who purchases $20 worth of gas, but has a debit hold of $75 placed on the funds in the consumer's account, may not realize that $55 has been made unavailable to the consumer to use until the merchant presents the transaction for payment. During that time, the consumer engaging in a subsequent transaction in the belief that they have only "spent" $20, may inadvertently spend more than the available amount in the consumer's account, incurring overdraft fees in the process.

Legal Analysis

Assessing an overdraft fee when the overdraft would not have occurred but for a hold placed on funds in the consumer's account that is in excess of the actual purchase or

transaction amount appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC.

Substantial consumer injury. There is substantial injury to consumers from incurring overdraft fees resulting from debit hold amounts that exceed the amount of the transaction. The effect can be compounded if the consumer conducts more than one transaction overdrawing his or her account, as a fee is generally charged each time the consumer overdraws the account.

Injury is not reasonably avoidable. It appears that consumers cannot reasonably avoid this injury as they are generally unaware of the practice of debit holds. Even if the consumer were to receive notice at point of sale that a hold, including the amount, will be placed on the consumer's funds, the consumer cannot know the length of time the hold will remain in place. As discussed above, the length of a hold will vary depending on how fast the transaction is processed and the procedures of the consumer's account-holding institution. A consumer cannot reasonably be expected to verify whether a hold remains in place before each and every subsequent transaction.

Injury is not outweighed by countervailing benefits. The benefits to consumers and competition from allowing fees for an overdraft to be charged when the overdraft was caused by a debit hold amount that exceeds the transaction amount do not appear to outweigh the injury. The Agencies understand that financial institutions charge overdraft fees in part to account for the potential risk the institution may assume if the consumer does not have sufficient funds for a requested transaction. Under card network rules generally, institutions guarantee merchants payment for debit card transactions that were properly authorized by the consumer. Accordingly, without the ability to assess overdraft

fees to protect against potential losses due to non-payment, account-holding institutions may be reluctant to issue debit cards to consumers.

The Agencies note, however, that the card issuing financial institution is not required to send payment for an authorized transaction until the transaction is presented for settlement by the merchant and is posted to the consumer's account. At this time, any potential loss for the financial institution is not for the amount of the debit hold, but rather for the actual purchase amount for the transaction. The proposed provision would not prohibit institutions from assessing an overdraft fee if the consumer's account has insufficient funds to cover the actual purchase amount when the transaction is presented for settlement (and the consumer has not opted out). Thus, because the provision would allow account-holding institutions to cover their risk of loss in the event consumers overdraw their accounts for the purchase amount of the transaction, it appears that the availability of debit cards for consumers will not be adversely impacted even if this proposal is adopted. The proposed provision, however, would allow consumers to avoid the injury of unwarranted overdraft fees caused by debit holds that exceed the purchase amount of the requested transaction.

Proposal

As discussed above, proposed § __.32(b) would provide that an institution must not assess a fee or charge on the consumer's account in connection with an overdraft service if an overdraft would not have occurred but for a hold placed on funds in the consumer's account that exceeds the actual purchase or transaction amount. The Agencies believe that a substantive ban on assessing fees to address problems with debit

holds is appropriate rather than disclosure of the existence of the hold in light of concerns that such disclosures may be ineffective for the reasons discussed above.

Comment 32(b)-1 as proposed clarifies that the prohibition against assessing an overdraft fee in connection with a debit hold applies only if the overdraft is caused solely by the existence of the hold. Thus, if there are other reasons or causes for the consumer's overdraft, the institution may assess an overdraft fee or charge. These reasons may include other transactions that may have been authorized but not yet presented for settlement, a deposited check in the consumer's account that is returned, or if the actual purchase or transaction amount for the transaction for which the hold was placed would have caused the consumer to overdraw his or her account.

Application of the rule is illustrated by four separate examples set forth in proposed commentary provisions. See comments 32(b)-2 through -5. The first example describes the circumstance where the amount of the hold for an authorized transaction exceeds the consumer's balance. For example, assume that a consumer with $50 in his deposited account purchases $20 worth of fuel. In authorizing the consumer to begin dispensing fuel after the consumer has swiped his or her debit card at the pump, the gas station imposes a hold for $75 on the consumer's account. The proposal would prohibit the consumer's financial institution from assessing an overdraft fee or charge because the purchase amount for the fuel would not have caused the consumer to overdraw his or her account. See proposed comment 32(b)-2. However, had the consumer purchased $60 of fuel, the institution would be permitted to assess an overdraft fee or charge (assuming the consumer had not opted out of the overdraft service) because the transaction exceeds the consumer's account balance.

The second example illustrates the prohibition when the hold is made in connection with another transaction that has been authorized by the institution but not yet been presented for settlement. To illustrate, assume the same consumer as in the prior example has $100 in his deposit account, and uses his or her debit card to purchase fuel. The gas station puts a hold for $75 on the consumer's account. The consumer purchases $20 worth of fuel. Later that day, and assuming no other transactions, the consumer withdraws $75 at an ATM. Under this example, the consumer's account-holding institution would be prohibited from assessing an overdraft fee or charge in connection with the $75 withdrawal because the overdraft would not have occurred but for the $75 hold. See proposed comment 32(b)-3.

The third example illustrates the prohibition when both the authorization amount and the settlement amount are held against the consumer's account, because the merchant did not use the same transaction code for both authorization and settlement, causing the institution to later reconcile the transaction. To illustrate, assume a consumer has $100 in his deposit account, and uses his debit card to purchase $50 worth of fuel. At the time the consumer swipes his debit card at the fuel pump, a hold of $75 is placed on the consumer's account. Because the merchant does not use the same transaction code for both the pre-authorization and for settlement, the consumer's account is temporarily overdrawn. Because the overdraft would not have occurred but for the existence of the $75 hold, the institution may not assess a fee or charge for paying an overdraft. See proposed comment 32(b)-4.

The fourth example illustrates a circumstance in which an institution may charge an overdraft fee despite the existence of a hold on funds in the consumer's account

because there are other reasons for the overdraft. Using the same facts as in the example in proposed comment 32(b)-3, the consumer makes a $35 purchase of fuel, instead of $20. Under the third example, the institution could permissibly charge an overdraft fee or charge for the subsequent $75 ATM withdrawal because the consumer would have incurred the overdraft even if the hold had been for the actual amount of the fuel purchase. See proposed comment 32(b)-5.

Request for Comment

The Agencies seek comment on the operational issues and costs of implementing the proposed prohibition on the imposition of overdraft fees if the overdraft occurs solely because of the existence of a hold.

Other Overdraft Practices

Balance disclosures

The Agencies are also concerned about balance disclosures that may be deceptive to consumers if they represent that the consumer has more funds in his or her account due to the inclusion of additional funds the institution may provide to cover an overdraft. The Board is addressing this issue in a Regulation DD proposal published contemporaneously with today's proposed rule.

Transaction clearing practices

The Agencies are also concerned about the impact of transaction clearing practices on the amount of overdraft fees that may be incurred by the consumer. The February 2005 overdraft guidance lists as a best practice explaining the impact of transaction clearing policies to consumers, including that transactions may not be processed in the order in which they occurred and that the order in which transactions are

received by the institution and processed can affect the total amount of overdraft fees incurred by the consumer.[88] In its Guidance on Overdraft Protection Programs, the OTS also recommended as best practices: (1) clearly disclosing rules for processing and clearing transactions; and (2) having transaction clearing rules that are not administered unfairly or manipulated to inflate fees.[89]

While today's proposal does not address transaction clearing practices, the Agencies solicit comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a consumer's account. Under such an approach, institutions could use an alternative clearing order, provided that it discloses this option to the consumer and the consumer affirmatively opts in. The Agencies solicit comment on how such a rule would impact an institution's ability to process transactions on a real-time basis.

VII. Effective Date

The Agencies solicit comment on when any final rules should be effective and whether a one-year time period is appropriate or whether the period should be longer or shorter.

VIII. Regulatory Analysis

A. Regulatory Flexibility Act

Board: The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities.

[88] 70 FR at 8431; 70 FR at 9132.

[89] 70 FR at 8431.

However, under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. Statement of the need for, and objectives of, the proposed rule. The Federal Trade Commission Act (15 U.S.C. 41 et seq.) (FTC Act) prohibits unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. 45(a)(1). The FTC Act provides that the Board (with respect to banks), OTS (with respect to savings associations), and the NCUA (with respect to federal credit unions) are responsible for prescribing regulations prohibiting such acts or practices. 15 U.S.C. 57a(f)(1). The Board, OTS, and NCUA are jointly proposing regulations under the FTC Act to protect consumers from specific unfair or deceptive acts or practices regarding consumer credit card accounts and overdraft services. The Board's proposed rule will revise Regulation AA.

Proposals regarding consumer credit card accounts

The proposed requirements would provide several substantive protections for consumers against unfair or deceptive acts or practices with respect to consumer credit card accounts. First, proposed § 227.22 ensures that consumers' credit card payments are not treated as late unless they have been provided a reasonable amount of time to make payment. Second, proposed § 227.23 would ensure that, when different annual

percentage rates apply to different balances on a credit card account, consumers' payments in excess of the required minimum payment are allocated among the balances, rather than exclusively to the balance with the lowest annual percentage rate. Third, under proposed § 227.24, an increase in the annual percentage rate could not be applied to the outstanding balance on a credit card account, except in certain circumstances. Fourth, proposed § 227.25 would protect consumers from being assessed a fee if the credit limit is exceeded solely due to a hold placed on the available credit. Fifth, proposed § 227.26 would prohibit institutions from reaching back to days in earlier billing cycles when calculating the amount of interest charged in the current cycle. Sixth, proposed § 227.27 would ensure that security deposits and fees for the issuance or availability of credit (such as account-opening fees or membership fees) do not consume the majority of the available credit on a credit card account during the twelve months after the account is opened. In addition, when such amounts exceed 25 percent of the credit limit, they must be spread equally among the eleven billing cycles following the first billing cycle. Seventh and last, proposed § 227.28 would require institutions to disclose in a firm offer of credit the criteria that will determine whether consumers receive the lowest annual percentage rate and highest credit limit.

Proposals regarding overdraft services

The proposed rule would also provide substantive protections against unfair or deceptive acts or practices with respect to overdraft services. Proposed § 227.32 is intended to ensure that consumers understand overdraft services and have the choice to avoid the associated costs where such services do not meet their needs. First, consumers could not be assessed a fee or charge for paying an overdraft unless the consumer is

provided with the right to opt out of the payment of overdrafts and a reasonable opportunity to exercise that right but does not do so. Second, the proposal would protect consumers from being assessed an overdraft fee if the overdraft is caused solely by a hold on funds.

2. Small entities affected by the proposed rule. The Board's proposed rule would apply to banks and their subsidiaries, except savings associations as defined in 12 U.S.C. 1813(b). Based on 2007 call report data, there are approximately 2,159 banks with assets of $165 million or less that would be required to comply with the Board's proposed rule.

3. Recordkeeping, reporting, and compliance requirements. The proposed rule does not impose any new recordkeeping or reporting requirements. The proposed rule would, however, impose new compliance requirements.

Proposals regarding consumer credit card accounts

Proposed § 227.22 may require some banks to extend the period of time provided to consumers to make payments on consumer credit card accounts. The Board notes, however, that some credit card issuers already send periodic statements 21 days in advance of the payment due date, which constitutes a reasonable amount of time under the proposed rule. Thus, small entities following this practice would not be required to alter their systems or procedures.

Proposed § 227.23 would require small entities that provide consumer credit card accounts with multiple balances at different rates to redesign their systems to allocate payments in excess of the minimum payment among the balances, consistent with the proposed rule. Compliance with this proposal may also reduce interest revenue for small

entities that currently allocate payments first to balances with the lowest annual percentage rate. Similarly, compliance with proposed § 227.24 will also reduce interest revenue because such entities would be prohibited from increasing the annual percentage rate on an outstanding balance, except in certain circumstances. However, small entities are likely to adjust other terms (such as increasing the annual percentage rates offered to consumers when the account is opened) to compensate for the loss of revenue. In addition, although proposed § 227.24 will limit the ability of small entities to impose higher rates on pre-existing balances, it would permit small entities to increase the rates applicable to new transactions. Furthermore, the use of variable rates that reflect market conditions could mitigate this effect because proposed § 227.24 does not apply to variable rates. Finally, proposed § 227.24 would also permit small entities to apply an increased rate to an outstanding balance when a promotional rate is lost or expires or when the consumer's payment has not been received within 30 days after the due date.

Proposed § 227.25 would require small entities that provide credit cards to redesign their systems to prevent the assessment of fees for exceeding the credit limit that are caused by holds on the available credit. Similarly, proposed § 227.26 could require some small entities that provide credit cards to change the way finance charges are calculated, although the Board understands that few institutions still use the prohibited method.

Proposed § 227.27 would require small entities that provide credit cards to modify their systems in order to track security deposits and fees for the issuance or availability of credit that are charged to the account during the first year. This proposal could also reduce revenue derived from security deposits and fees. These costs, however, would

likely be borne by the few entities offering cards with security deposits and fees that consume a majority of the credit limit.

Proposed § 227.28 would require small entities to disclose that, if the consumer is approved for credit, the annual percentage rate and the credit limit the consumer will receive will depend on specific criteria bearing on creditworthiness. Because similar disclosures are required by the FCRA, this proposal should not result in substantial compliance costs.

Proposals regarding overdraft services

Proposed § 227.32 would convert current Board guidance regarding provision of a notice and opportunity to opt out of overdraft services into a rule. Thus, this proposal should not have a significant impact on small entities if those entities are currently providing opt-out notices. Proposed § 227.32 would also require small entities to redesign their systems to prevent the assessment of overdraft fees that are caused by holds on the available credit.

4. Other federal rules. The Board has not identified any federal rules that duplicate, overlap, or conflict with the proposed revisions to Regulation AA.

5. Significant alternatives to the proposed revisions. One approach to minimizing the burden on small entities would be to provide a specific exemption for small institutions. However, the FTC Act's prohibition against unfair or deceptive acts or practices makes no provision for exempting small institutions and the Board has no specific authority under the FTC Act to grant an exception that would remove small institutions. Further, in considering rulemaking under the Act, the Board believes an act

or practice that is unfair or deceptive remains so despite the size of the institution engaging in such act or practice and, thus, should not be exempt from this rule.

In addition, the Board believes the proposed rule, where appropriate, provides for sufficient flexibility and choice for institutions, including small entities. As such, any institution, regardless of size, may tailor its operations to its individual needs and, thus, mitigate any incremental burden that may be created by the proposed rule. For instance, § 227.23, which addresses payment allocation, provides an institution a choice of payment allocation methods.

The Board solicits comment on any significant alternatives that would minimize the impact of the proposed rule on small entities.

OTS: The Regulatory Flexibility Act (5 U.S.C. 601-612) (RFA) requires an agency to either provide an Initial Regulatory Flexibility Analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA and OTS-regulated entities, a "small entity" is a savings association with assets of $165 million or less (small savings association). Based on its analysis and for the reason stated below, OTS certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

1. Reasons for Proposed Rule

This proposed rule is promulgated pursuant to section 18(f)(1) of the FTC Act (15 U.S.C. 57a(f)(1)), which makes OTS responsible for prescribing regulations that prevent savings associations from engaging in unfair or deceptive acts or practices in or affecting commerce within the meaning of section 5(a) of the FTC Act (15 U.S.C. 45(a)). OTS,

the Board, and the NCUA are jointly proposing this rule to protect consumers against unfair or deceptive acts or practices with respect to consumer credit card accounts and overdraft services for deposit accounts. The Agencies have identified a number of business practices that present a significant risk of harm to consumers of these products and services. As discussed in the **Supplementary Information**, the Agencies have acquired information about these practices from several sources, including consumer complaints, supervisory observations, and comments received on OTS's ANPR issued August 6, 2007 and the Board's Reg. Z open-end proposal issued June 14, 2007.

2. Statement of Objectives and Legal Basis

The **Supplementary Information** above contains this information. The legal basis for OTS's portion of the proposed rule is section 57(a) of the FTC Act and HOLA.

3. Description and Estimate of Small Entities to Which the Rule Applies

OTS's portion of the proposed rule would apply to savings associations and their subsidiaries. There are 407 thrifts with $165 million in assets or less. There are 26 thrifts with $165 million in assets or less that offer credit cards. Many of the thrifts with $165 million in assets or less offer overdraft services.

4. Projected Recordkeeping, Reporting, and Other Compliance Requirements

The proposed rule would not have a significant impact on a substantial number of small entities. It imposes no new record keeping requirements or new requirements to report information to the Agencies.

Some of the proposed requirements are not new. Section 535.13, which involves providing disclosures to consumers so that consumers will know their rights and responsibilities as cosigners on consumer loans, is merely a recodification of a long-

standing requirement currently codified in section 535.3. Section 535.32, which would require institutions to provide a notice and opportunity to consumers to opt out of overdraft services on deposit accounts, would turn current OTS guidance into a rule. Thus, these provisions of the proposed rule would not have a significant impact on small entities.

The proposal in section 535.28 is new, and would require savings associations that make a solicitation for a firm offer of credit for a consumer credit card account to include certain consumer disclosures in the solicitations. Since savings associations will have developed this information in preparing the firm offer, the burden would be limited to placing an appropriate disclosure in the solicitation and, therefore, would not have a significant impact on small entities

The professional skills necessary for preparation of the consumer disclosures under sections 535.13 and 535.28 are the same skills needed to prepare disclosures under many other consumer protection laws and regulations, such as the Truth in Lending Act/Reg. Z (12 CFR part 226) and the Truth in Savings Act/Reg. DD (12 CFR part 230). The professional skills necessary for preparation of the notice and opt-out notice under section 535.32 are the same skills needed to prepare opt-out notices under a variety of consumer protection laws and regulations, such as the Privacy Rule (12 CFR part 573) issued under the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act Rule (12 CFR part 571) . These professional skills could include attorneys and compliance specialists, as well as computer programmers.

In addition to disclosures and opt-out notices, the proposed rule would impose some additional compliance requirements. Under section 535.22, a savings association

may need to extend the period of time it gives consumers to make credit card account payments. Under section 535.23, a savings association may need to change the way it allocates credit card account payments among multiple account balances. Under section 535.24, a savings association may need to change the circumstances in which it can raise interest rates on outstanding credit card account balances. Under section 535.25, a savings association may need to change the circumstances in which it imposes over limit fees. Under section 535.26, a savings association may need to change the way it computes finance charges on outstanding credit card account balances. Under section 535.27, a savings association may need to change the way it collects security deposits and fees for a credit card's issuance or availability of credit. Each of these provisions could require some adjustments to a savings association's operations and require some additional training of staff as well as computer programming.

Many savings associations already employ the professionals that would be needed to meet the requirements that would be imposed by the rule as proposed rule, since they need these professionals to meet other existing consumer protection requirements. The others have pre-existing arrangements with third party service providers to perform the functions that would be affected by this rulemaking.

In addition, as discussed in the Executive Order 12866 analysis, most of the practices which the proposed provisions would impact are not common among savings associations.

Accordingly, the proposed provisions would not have a significant impact on small entities.

While OTS believes the proposed rule does not have a significant impact on a substantial number of small entities, OTS, nevertheless, requests comment and data on the size and incremental burden on small savings associations that would be created by the proposed rule.

5. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

OTS has not identified any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. As discussed in the **Supplementary Information**, the laws of only three states have been found by any of the Agencies to provide substantially equivalent rights as the existing Credit Practices rule. OTS seeks comment regarding any statutes or regulations, including state or local statutes or regulations, which would duplicate, overlap, or conflict with the proposed rule.

6. Discussion of Significant Alternatives

One approach to minimizing the burden on small entities would be to provide a specific exemption for small institutions. However, the FTC Act's prohibition against unfair or deceptive acts or practices makes no provision for exempting small institutions and OTS has no specific authority under the FTC Act to grant an exception that would remove small institutions. Further, in contemplating rulemaking under the Act, OTS believes an act or practice that is unfair or deceptive remains so despite the size of the institution engaging in such act or practice and, thus, should not be exempt from this rule.

In addition, OTS believes the proposed rule, where appropriate, provides for sufficient flexibility and choice for institutions, including small entities. As such, any savings association, regardless of size, may tailor its operations to its individual needs and, thus, mitigate any incremental burden that may be created by the proposed rule. For

instance, Section 535.23, unfair payment allocations, provides an institution a choice of payment allocation methods.

OTS welcomes comments on any significant alternatives that would minimize the impact of the proposed rule on small entities.

NCUA: Under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., NCUA must publish an initial regulatory flexibility analysis with its proposed rule, unless NCUA certifies the rule will not have a significant economic impact on a substantial number of small entities. For NCUA, these are federal credit unions with less than $10 million in assets. NCUA certifies this proposed rule would not have a significant economic impact on a substantial number of small entities.

1. Reasons for Proposed Rule

NCUA is exercising authority under section 18(f)(1) of the Federal Trade Commission Act, 15 U.S.C. 57a(f)(1), and proposing to prohibit certain unfair or deceptive acts or practices (UDAPs) that violate section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a). The proposed rule reorganizes and renames NCUA's longstanding Credit Practices Rule, 12 CFR part 706, and addresses UDAPs involving credit cards and overdraft protection services. NCUA, the Board of Governors of the Federal Reserve System, and the Office of Thrift Supervision are jointly proposing this rule to protect consumers against unfair or deceptive acts or practices with respect to consumer credit card accounts and overdraft services for deposit accounts.

2. Statement of Objectives and Legal Basis

The **Supplementary Information** above contains this information. The legal basis for the proposed rule is sections 45(a) and 57(a) of the FTC Act.

3. Description and Estimate of Small Entities to Which the Rule Applies

NCUA's portion of the proposed rule would apply to all federal credit unions. As of December 31, 2007, there are 5,036 federal credit unions, of which 2,374 have total assets less than $10 million. NCUA estimates 2,363 small credit unions offer loans to their members. NCUA does not believe the disclosure requirements for co-signors will significantly affect small credit unions because all credit unions have complied with this requirement since 1987, when the credit practices rule was initially promulgated. This proposed rule does not change the co-signor disclosure requirements, but renumbers the applicable sections of the rule.

The proposed rule contains new requirements regarding credit card accounts and overdraft protection services. Approximately 2,461 federal credit unions issue credit cards and have an aggregate portfolio of $18.92 billion. Of these, 425 small federal credit unions issue credit cards and have an aggregate credit card portfolio of approximately $124.73 million. Approximately 2,094 federal credit unions offer overdraft protection service, and 353 of these are small federal credit unions.

4. Projected Recordkeeping, Reporting, and Other Compliance Requirements

The proposed rule does not impose any new recordkeeping or reporting requirements. The proposed rule would, however, impose new compliance requirements.

Some of the proposed requirements are not new. Section 706.13, which involves providing disclosures to cosigners on consumer loans, is a recodification of a long-standing requirement currently in § 706.3. Section 703.32, which would require

institutions to provide a notice and opportunity to consumers to opt out of overdraft services on deposit accounts, would turn current interagency guidance into a rule. Thus, these provisions of the proposed rule would not have a significant impact on small entities.

The proposal in § 706.28 is new, and would require federal credit unions that make a solicitation for a firm offer of credit for a consumer credit card account to include certain consumer disclosures in the solicitations. Since federal credit unions will have developed this information in preparing the firm offer, the burden would be limited to placing an appropriate disclosure in the solicitation and, therefore, would not have a significant impact on small entities

The professional skills necessary for preparation of the consumer disclosures under §§ 706.13 and 706.28 are the same skills needed to prepare disclosures under many other consumer protection laws and regulations, such as the Truth in Lending Act, Regulation Z (12 CFR part 226), and the Truth in Savings Act and part 707 (12 CFR part 707). The professional skills necessary for preparation of the notice and opt-out notice under § 706.32 are the same skills needed to prepare opt-out notices under a variety of consumer protection laws and regulations, such as the Privacy Rule (12 CFR part 716) issued under the Gramm-Leach-Bliley Act and the Fair Credit Reporting Act Rule (12 CFR part 717) . These professional skills could include attorneys and compliance specialists, as well as computer programmers.

In addition to disclosures and opt-out notices, the proposed rule would impose some additional compliance requirements. Under § 706.22, a federal credit union may need to extend the period of time it gives consumers to make credit card account

payments. Under § 706.23, a federal credit union may need to change the way it allocates credit card account payments among multiple account balances. Under § 706.24, a federal credit union may need to change the circumstances in which it can raise interest rates on outstanding credit card account balances. Under § 706.25, a federal credit union may need to change the circumstances in which it imposes over limit fees. Under § 706.26, a federal credit union may need to change the way it computes finance charges on outstanding credit card account balances. Under § 706.27, a federal credit union may need to change the way it collects security deposits and fees for a credit card's issuance or availability of credit. Each of these provisions could require some adjustments to a federal credit union's operations and require additional computer programming and training of staff.

Many federal credit unions already employ the professionals that would be needed to meet the requirements that would be imposed by the rule as proposed rule, since they need these professionals to meet other existing consumer protection requirements. The others have pre-existing arrangements with third-party service providers to perform the functions that would be affected by this rulemaking.

Additionally, most of the practices that the proposed provisions would impact are not common among federal credit unions. Accordingly, the proposed provisions would not have a significant impact on small entities.

While NCUA believes the proposed rule does not have a significant impact on a substantial number of small entities, it requests comments on the size and incremental burden on small federal credit unions that would be created by the proposed rule.

5. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

NCUA has not identified any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed rule. NCUA seeks comment regarding any statutes or regulations, including state or local statutes or regulations, which would duplicate, overlap, or conflict with the proposed rule.

6. Discussion of Significant Alternatives

NCUA has not identified any significant alternatives to the prohibitions and requirements in the proposed rule. The Agencies explored requiring financial institutions provide disclosures regarding the credit card and overdraft practices to consumers. NCUA does not believe federal credit unions can provide clear or concise disclosures that members could easily understand and use to make an informed decision regarding their credit and saving needs.

Another approach to minimizing the burden on small entities would be to provide a specific exemption to small federal credit unions. However, the Federal Trade Commission Act's prohibition against unfair or deceptive acts or practices makes no provision for exempting small federal credit unions, and NCUA does not have authority to grant an exception. Further, NCUA believes an act or practices that is unfair or deceptive under the Federal Trade Commission Act remains unfair or deceptive despite the size of a federal credit union and should not be exempt from the proposed rule.

NCUA believes the proposed rule provides sufficient flexibility where appropriate for all federal credit unions. NCUA welcomes comments on any significant alternatives that would minimize the impact of the proposed rule on small entities.

B. Paperwork Reduction Act

Board:

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collections of information that are required by this proposed rule are found in 12 CFR 227.14 and 227.28.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 4301 et seq.). The respondents/recordkeepers are for-profit financial institutions, including small businesses.

Regulation AA establishes consumer complaint procedures and defines unfair or deceptive acts or practices in extending credit to consumers. As discussed above, the Federal Reserve is seeking comment on a proposed rule that would prohibit institutions from engaging in certain acts or practices in connection with consumer credit card accounts and overdraft services for deposit accounts. This proposal evolved from the Board's June 2007 Proposal and OTS's August 2007 ANPR. The proposed rule is coordinated with the Board's proposals under the Truth in Lending Act and the Truth in Savings Act published in separate notices in today's **Federal Register**.

Consumer credit card accounts

Under proposed § 227.28 (titled "Deceptive acts or practices regarding firm offers of credit"), banks would be prohibited from certain marketing practices in relation to prescreened firm offers for consumer credit card accounts unless a disclaimer sufficiently explains the limitations of the offers. The Board anticipates that banks would, with no additional burden, incorporate the proposed disclosure requirement under proposed § 227.28 with an existing disclosure requirement in Regulation Z regarding credit and

charge card applications and solicitations. See 12 CFR 226.5a. Thus, in order to avoid double-counting, the Board will account for the burden associated with proposed Regulation AA § 227.28 under Regulation Z (OMB No. 7100-0199) § 226.5a. Under Regulation AA § 227.14(b) (titled "Unfair and deceptive practices involving cosigners"), a clear and conspicuous disclosure statement shall be given in writing to the cosigner prior to being obligated. The disclosure statement must be substantively similar to the example provided in § 227.14(b). The Board will also account for the burden associated with Regulation AA § 227.14(b) under Regulation Z. The title of the Regulation Z information collection will be updated to account for these sections of Regulation AA.

Overdraft services

The proposed rule would also provide substantive protections against unfair and deceptive acts or practices with respect to overdraft services. Proposed § 227.32 is intended to ensure that consumers understand overdraft services and have the choice to avoid the associated costs where such services do not meet their needs. Under this proposal, consumers could not be assessed a fee or charge for paying an overdraft unless the consumer is provided with the right to opt out of the payment of overdrafts and a reasonable opportunity to exercise that right but does not do so.

The burden associated with Regulation AA § 227.28 will be accounted for under Regulation DD (OMB No. 7100-0271) §§ 230.10 (opt-out disclosures for overdraft services), 230.11(a) (disclosure of total fees on periodic statements), and 230.11(c) (disclosure of account balances). The title of the Regulation DD information collection will be updated to account for this section of Regulation AA.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility; (b) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 151-A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (Regulation AA), Washington, DC 20503.

OTS and NCUA:

In accordance with section 3512 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3521 ("PRA"), the Agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number. The information collection requirements contained in this joint notice of proposed rulemaking have been submitted by the OTS and NCUA to OMB for review and approval under section 3507 of the PRA and section 1320.11 of OMB's implementing regulations (5 CFR part 1320)**.** The review and authorization information for the Board is provided later in this section along with the Board's burden estimates. The proposed rule contains

requirements subject to the PRA. The requirements are found in 12 CFR ___.13, and ___.32. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record.

Comments should be addressed to:

OTS: Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552; send a facsimile transmission to (202) 906-6518; or send an e-mail to infocollection.comments@ots.treas.gov. OTS will post comments and the related index on the OTS Internet site at http://www.ots.treas.gov. In addition, interested persons may inspect the comments at the Public Reading Room, 1700 G Street, NW, by appointment. To make an appointment, call (202) 906-5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906-7755.

NCUA: Jeryl Fish, Paperwork Clearance Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428; send a facsimile to (703) 518-6319; or send an e-mail to regcomments@ncua.gov. Please submit information collection comments by one method. NCUA will post comments on its website at http://www.ncua.gov/RegulationsOpinionsLaws/proposedregs/proposedregs.html. Also, interested persons may inspect the comments at NCUA, 1775 Duke Street, Alexandria, Virginia 22314, by appointment. To make an appointment, call (703) 518-6540, send an e-mail to OGCmail@ncua.gov, or send a facsimile transmission to (703) 518-6667.

OTS: Savings associations and their subsidiaries.

NCUA: Federally-chartered credit unions.

Abstract: Under section 18(f) of the FTC Act, the Agencies are responsible for prescribing rules to prevent unfair or deceptive acts or practices in or affecting commerce, including acts or practices that are unfair or deceptive to consumers. Under this proposed rulemaking, the Agencies would incorporate their existing Credit Practices Rules, which govern unfair or deceptive acts or practices involving consumer credit, into new, more comprehensive rules that would also address unfair or deceptive acts or practices involving credit cards and overdraft protection services.

Estimated Burden: The burden associated with this collection of information may be summarized as follows.

OTS:

Estimated number of respondents: 826

Estimated time developing opt outs: 10 hours

Estimated time developing disclaimer: 10 hours

Estimated time for training: 4 hours

Total estimated time per respondent: 24 hours

Total estimated annual burden: 19,824 hours

NCUA:

Estimated number of respondents: 5036

Estimated time developing opt outs: 10 hours

Estimated time developing disclaimer: 10 hours

Estimated time for training: 4 hours

Total estimated time per respondent: 24 hours

Total estimated annual burden: 120,864 hours

C. OTS Executive Order 12866 Determination

OTS has determined that its portion of the proposed rulemaking is not a significant regulatory action under Executive Order 12866. However, OTS solicits comment on the economic impact of the rule as proposed.

Summary

The proposed rulemaking is not a significant regulatory action under Executive Order 12866 for a number of reasons. First, the OTS proposal applies only to savings associations and their subsidiaries. As explained in more detail below, these OTS-supervised institutions account for only a small portion of the affected market. Second, these OTS-supervised institutions already refrain from engaging in many of the proposed prohibited practices. Issuing a rule to prevent institutions from taking up these practices will help ensure that market conduct standards remain high, but it will not cause significant economic impact.

The prohibitions that relate to annual percentage rate (APR) increases on outstanding balances and payment allocation practices will, to some extent, limit fees and interest income currently generated by these practices. However, to the extent income to savings associations is affected, the corresponding offset provided by the limitations is an equally sized consumer benefit of lower fees and interest payments. As a result, most economic effects of the proposed rulemaking would result in small transfers from institutions to consumers, with an overall limited net effect.

Moreover, if such fee and interest income is economically justified in a competitive environment for the allocation of credit, then a likely longer-term outcome would be that institutions would reflect such economic factors in the initial terms of a credit card contract. If that occurs, then consumers will have clearer initial information about potential costs with which to compare credit card offerings than they do currently. Consequently, any shorter term disruptions to institutions caused by the proposed rulemaking will likely be addressed in the longer term by changes in disclosed credit card account APRs and fees, thus making consumer costs and benefits more easily considered and compared.

In-depth analysis

1. Limited economic effect: limited scope of the proposal

OTS's portion of the proposed rulemaking would apply only to OTS-supervised savings associations and their subsidiaries. OTS is the primary federal regulator for 826 federally- and state-chartered savings associations. The proposed rulemaking primarily addresses certain credit card practices. Of the 826 savings associations, only 124 report any credit card assets. Among those 124 savings associations, only 19 have more than

1% of their total assets in credit card receivables. Moreover, credit card assets comprise only 3% of all assets held by savings associations. In sum, OTS-supervised institutions potentially engaged in the practices prohibited by the proposed rulemaking are not representative of the overall industry that OTS supervises. Most provisions of the proposed rulemaking would have little economic effect on the vast majority of the institutions under OTS jurisdiction.

The Board of Governors of the Federal Reserve System and the National Credit Union Administration are simultaneously proposing a similar set of rules governing credit card practices for other types of federally insured financial institutions. As a consequence, the rulemaking should have little or no intra-industry competitive effects.

2. Limited economic effect: most affected practices are not common

Most of the practices covered by this rulemaking have been included as a prophylactic measure to ensure that institutions do not begin to use or expand the use of activities deemed unfair or deceptive. Since most OTS-supervised institutions do not currently engage in these practices, the costs of complying with the provisions of the proposed rule are likely to be minimal.

§ 535.22 Unfair time to make payments . This section would prohibit treating a payment on a consumer credit card account as late for any purpose unless consumers have been provided a reasonable amount of time to make payment. The proposed rule would create a safe harbor for institutions that adopt reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date. Based on our supervisory observations and experience, OTS-supervised institutions, in general, mail or deliver

periodic statements to their customers at least 21 days before the due date. Therefore, a rule that requires institutions to provide a reasonable amount of time to make payment, such as by mailing or delivering periodic statements to customers at least 21 days in advance of the payment due date, would have insignificant or no economic impact.

§ 535.25 Unfair fees for exceeding the credit limit due to credit holds. This section would prohibit assessing a fee for exceeding the credit limit on a consumer credit card account if the credit limit would not have been exceeded but for a hold on any portion of the available credit on the account that is in excess of the actual purchase or transaction amount. Based on our supervisory observations and experience, OTS-supervised institutions do not, in general, charge overlimit fees in this manner. Therefore, prohibiting this practice would have insignificant or no economic impact.

§ 535.26 Unfair balance computation method. This section would prohibit imposing finance charges on outstanding balances on a consumer credit card account based on balances in billing cycles preceding the most recent billing cycle, subject to certain exceptions.

Very few institutions compute balances using any method other than a single-cycle method. This conclusion was reached by the GAO as part of its recent credit card study.[90] According to the GAO, of the six largest card issuers, only two used the double-cycle billing method between 2003 and 2005.[91] GAO's finding conforms to OTS's own supervisory observations with respect to the prevalence of use of balance computation

[90] See GAO Credit Card Report.

[91] GAO Credit Card Report at 28 ("In our review of 28 popular cards from the six largest issuers, we found that two of the six issuers used the double-cycle billing method on one or more popular cards between 2003 and 2005. The other four issuers indicated they would only go back one cycle to impose finance charges.").

methods other than single-cycle methods by institutions OTS supervises. Use of a balance computation method other than a single-cycle method is the exception, rather than the norm, for OTS-supervised institutions.

Moreover, the economic impact of this practice arises only in instances where a card holder converts from a convenience user, i.e., one who pays off his/her card balance in full at the end of the billing cycle, to a revolver, i.e., one who carries a balance beyond the end of the billing cycle. Accounts that routinely stay in a "convenience" or nonrevolving status would not be impacted by this prohibition. The same would be true of accounts that routinely stay in a revolving status. Only when an account would convert from a nonrevolving status to a revolving status would the prohibition have an impact.

§ 535.27 Unfair charging to the account of security deposits and fees for the issuance or availability of credit. During the period beginning with the date on which a consumer credit card account is opened and ending 12 months from that date, this section would prohibit institutions from charging the account security deposits or fees for the issuance or availability of credit if the total amount of such security deposits and fees constituted a majority of the initial credit limit for the account. During this same period, this rule would require institutions that charge security deposits or fees against the account for the issuance or availability of credit constituting more than 25 percent of the initial credit limit for the account, to apply these charges in the following manner: during the first billing cycle, an institution could charge no more than 25% of the initial credit limit offered for the account; in each of 11 months following the first billing cycle, an institution could charge no more than one eleventh of the total security deposit or fees for

the issuance of availability of credit in excess of 25 percent of the initial credit limit for the account.

Credit cards to which security deposits and high account opening related fees are charged against the credit line are found predominately in the subprime credit card market. Subprime credit cards represent just 5% of all credit cards issued.[92] Cards of this type are rare among OTS-supervised institutions. Therefore, a rule prohibiting this practice would have insignificant economic impact.

§ 535.28 Deceptive firm offers of credit. This section would prohibit the practice of offering a range of or multiple annual percentage rates or credit limits in a solicitation for a firm offer of credit for a consumer credit card unless it is disclosed to the consumer that, if approved, the consumer's annual percentage rate and the credit limit will depend on specific criteria bearing on creditworthiness.

While the rule would affect how institutions advertise credit, it would not limit the terms of credit offered nor impact any underwriting strategy. Once the rule became effective, institutions would likely adjust their marketing so as not to be misleading under the rule. Operational costs to do so should be minimal and the economic impact, overall, insignificant.

§ 535.32 Unfair overdraft service practices. This section contains two main requirements. First, with certain exceptions, it would prohibit assessing a fee or charge on a consumer's account in connection with an overdraft service, unless an institution provides the consumer with notice and reasonable opportunity to opt out of the payment of all overdrafts and the consumer has not opted out. The consumer would also have to

[92] Outstanding credit card balances as of February 2008 as reported by Fitch Ratings, Know Your Risk; Asset Backed Securities Prime Credit Card Index and Subprime Credit Card Index available at http://www.fitchresearch.com/creditdesk/sectors/surveilance/asset_backed/credit_card.

be provided the more limited option of opting out only for the payment of overdrafts for ATM and point-of-sale transactions initiated by a debit card.

OTS Guidance on Overdraft Protection Programs suggests that, as a best practice, institutions that have overdraft protection programs should provide an election or opt-out of the service and obtain affirmative consent from consumers to receive overdraft protection.[93] Therefore, some OTS-supervised institutions may already be carrying out the requirements proposed in this rule. For those institutions, the effect of the opt out provisions of this notice would be minimal. For the institutions that do not currently offer an opt-out, the rule would trigger some operational costs, but those costs are not likely to materially reduce the revenue generated by overdraft fees. This is because institutions often charge the same fee to pay an overdraft as they do to return it.

Second, this section would prohibit assessing a fee or charge on a consumer's account in connection with an overdraft service if the overdraft would not have occurred but for a hold placed on funds in the consumer's account that is in excess of the actual purchase or transaction amount. Based on our supervisory observations and experience, OTS-supervised institutions do not, in general, charge overdraft fees in this manner. Therefore, prohibiting this practice would have insignificant or no economic impact.

3. Limited economic effect: small transfers from institutions to consumers

The proposed rulemaking contains two other sections. One affects the way in which payments received by the institution are allocated among the customer's outstanding balances. The other specifies the conditions under which the institution could raise the APRs on outstanding balances.

[93] See 70 FR 8428 (Feb. 18, 2005).

§ 535.23 Unfair payment allocations. A consumer may have multiple balances on a consumer credit card account. Currently, most institutions allocate any payment received from a consumer by first covering any fees and finance charges, then allocating any remaining amounts from the lowest APR balance to the highest. This section of the proposed rulemaking would require allocation in a manner that is no less beneficial to the consumer than one of the following methods: (1) applying the entire amount first to the balance with the highest annual percentage rate, (2) splitting the amount equally among balances, or (3) allocating pro rata among the balances. Any allocation method that would be less beneficial to the consumer than these three methods would be impermissible. For instance, applying the entire amount first to the balance with the lowest annual percentage rate is an example of an allocation method that would be less beneficial to the consumer. The rule leaves open the door to the possibility of other reasonable payment allocation methods.

The costs of the proposed rule are mitigated to some extent by providing institutions with operational flexibility as to which of the allocation methods they choose. To the extent there are economic costs imposed by the payment allocation restrictions included in the proposal, institutions are likely to adjust initial credit card terms to reflect those costs. If this occurs, consumers will likely have a clearer initial disclosure of potential costs with which to compare credit card offerings than they do now. Their actual cost of credit will not be increased by low- to- high balance payment allocation strategies implemented by institutions after charges have been incurred.

§ 535.24 Unfair annual percentage rate increases on outstanding balances. This section would generally prohibit institutions from increasing the annual percentage rate

on an outstanding balance. This prohibition would not apply, however, where a variable rate increases due to the operation of an index that is not under the institution's control and is available to the general public, where a promotional rate has expired or is lost (provided the APR is not increased to a rate greater than the APR that would have applied after expiration of the promotional rate), or where the minimum payment has not been received within 30 days after the due date.

The proposed rulemaking would not permit the institution to increase the APR on the outstanding balances simply because the consumer pays late or defaults on other debt obligations. This practice is sometimes referred to as "universal default." However, the section would permit APR increases on new purchases or transactions.

Based on our supervisory observations and experience, most larger OTS-supervised institutions do not practice universal default. However, some institutions do raise APR on outstanding balances based on external factors such as a decline in a consumer's credit score. Institutions that make use of this approach would likely adjust to the rule in the longer term by adjusting their initial interest rate pricing schedule.

A potential small negative effect might be that the prohibition on APR increases on outstanding balances would result in higher initial average APRs across all consumers, if the increases on outstanding balances acted as an effective screen for initially weaker credits. However, the fact that most institutions do not use a universal default trigger to increase APRs suggests that this effect may be limited.

D. OTS Executive Order 13132 Determination

OTS has determined that its portion of the proposed rulemaking does not have any federalism implications for purposes of Executive Order 13132.

E. NCUA Executive Order 13132 Determination

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5) voluntarily complies with the Executive Order. The proposed rule apply only to federally chartered credit unions and would not have substantial direct effects on the States, on the connection between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that the proposed rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

F. OTS Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

G. NCUA: The Treasury and General Government Appropriations Act, 1999-Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

IX. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Board and OTS to use plain language in all proposed and final rules published after January 1, 2000. Additionally, NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burdens. Therefore, the Agencies specifically invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulations clearly stated? If not, how could the regulations be more clearly stated?
- Do the proposed regulations contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulations easier to understand? If so, what changes to the format would make them easier to understand?
- What else could we do to make the regulations easier to understand?

List of Subjects

12 CFR Part 227

Banks, Banking, Credit, Intergovernmental relations, Trade practices

12 CFR Part 535

Consumer credit, Consumer protection, Credit, Credit cards, Deception, Intergovernmental relations, Savings associations, Trade practices, Overdrafts, Unfairness

12 CFR Part 706

Credit, Credit unions, Deception, Intergovernmental relations, Overdrafts, Trade practices, Unfairness

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside arrows while language that would be deleted is set off with brackets.

Authority and Issuance

For the reasons discussed in the joint preamble, the Board proposes to amend 12 CFR part 227 as set forth below:

PART 227 – UNFAIR OR DECEPTIVE ACTS OR PRACTICES (REGULATION AA)

1. The authority citation for part 227 continues to read as follows:

Authority: 15 U.S.C. 57a(f).

2. The heading for Subpart A is revised to read as follows:

Subpart A – GENERAL PROVISIONS

3. Section 227.1 is removed and § 227.11 is designated as § 227.1 and revised to read as follows:

§ 227.1 Authority, Purpose, and Scope.

(a) Authority. This [subpart] ►part◄ is issued by the Board under section 18(f) of the Federal Trade Commission Act, 15 [USC] ►U.S.C.◄ 57a(f) (§ 202(a) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637).

(b) Purpose. ►The purpose of this part is to prohibit unfair◄ [Unfair] or deceptive acts or practices ►in violation of◄ [in or affecting commerce are unlawful under] section 5(a)(1) of the Federal Trade Commission Act, 15 [USC] ►U.S.C.◄ 45(a)(1). [This subpart defines] ►Subparts B, C, and D define and contain requirements prescribed for the purpose of preventing specific◄ unfair or deceptive acts or practices of banks [in connection with extensions of credit to consumers]. ►The prohibitions in subparts B, C, and D do not limit the Board's authority to enforce the FTC Act with respect to any other unfair or deceptive acts or practices.◄

(c) Scope. [This subpart applies] ►Subparts B, C, and D apply◄ to all banks and their subsidiaries, except [Federal savings banks] ►savings associations as defined in 12 U.S.C. 1813(b).◄ Compliance is to be enforced by:

(1) The Comptroller of the Currency, in the case of national banks[, banks operating under the code of laws for the District of Columbia,] and federal branches and federal agencies of foreign banks;

(2) The Board of Governors of the Federal Reserve System, in the case of banks that are members of the Federal Reserve System (other than banks referred to in paragraph (c)(1) of this section), branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(3) The Federal Deposit Insurance Corporation, in the case of banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in paragraphs (c)(1) and (c)(2) of this section), and insured state branches of foreign banks.

(d) ►Unless otherwise noted,◄ [T]►t◄he terms used in paragraph (c) of this section that are not defined in the Federal Trade Commission Act or in section 3(s) of the Federal Deposit Insurance Act (12 [USC] ►U.S.C.◄ 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 [USC] ►U.S.C.◄ 3101).

4. Section 227.2 is revised by redesignating paragraphs (a) through (c) as paragraphs (b) through (d), respectively, and adding a new paragraph (a) to read as follows:

§ 227.2 Consumer-Complaint Procedure.

►(a) Definitions. For purposes of this section, unless the context indicates otherwise, the following definitions apply:

(1) "Board" means the Board of Governors of the Federal Reserve System.

(2) "Consumer complaint" means an allegation by or on behalf of an individual, group of individuals, or other entity that a particular act or practice of a State member

bank is unfair or deceptive, or in violation of a regulation issued by the Board pursuant to a Federal statute, or in violation of any other act or regulation under which the bank must operate.

(3) "State member bank" means a bank that is chartered by a State and is a member of the Federal Reserve System.

(4) Unless the context indicates otherwise, "bank" shall be construed to mean a "State member bank," and "complaint" to mean a "consumer complaint."◄

(b) Submission of complaints. (1) Any consumer having a complaint regarding a State member bank is invited to submit it to the Federal Reserve System. The complaint should be submitted in writing, if possible, and should include the following information:

(i) A description of the act or practice that is thought to be unfair or deceptive, or in violation of existing law or regulation, including all relevant facts;

(ii) The name and address of the bank that is the subject of the complaint; and

(iii) The name and address of the complainant.

(2) Consumer complaints should be made to—Federal Reserve Consumer Help Center, P.O. Box 1200, Minneapolis, MN 55480, Toll-free number: (888) 851–1920, Fax number: (877) 888–2520, TDD number: (877) 766–8533.

(c) Response to complaints. Within 15 business days of receipt of a written complaint by the Board or a Federal Reserve Bank, a substantive response or an acknowledgment setting a reasonable time for a substantive response will be sent to the individual making the complaint.

(d) Referrals to other agencies. Complaints received by the Board or a Federal Reserve Bank regarding an act or practice of an institution other than a State member bank will be forwarded to the Federal agency having jurisdiction over that institution.

5. In Subpart B, Section 227.11 is removed and reserved.

6. A new Subpart C is added to part 227 to read as follows:

SUBPART C – CONSUMER CREDIT CARD ACCOUNT PRACTICES RULE

Section

Subpart C – Consumer Credit Card Account Practices Rule

§ 227.21 Definitions.

For purposes of this subpart, the following definitions apply:

(a) "Annual percentage rate" means the product of multiplying each periodic rate for a balance or transaction on a consumer credit card account by the number of periods in a year. The term "periodic rate" has the same meaning as in 12 CFR 226.2.

(b) "Consumer" means a natural person to whom credit is extended under a consumer credit card account or a natural person who is a co-obligor or guarantor of a consumer credit card account.

(c) "Consumer credit card account" means an account provided to a consumer primarily for personal, family, or household purposes under an open-end credit plan that is accessed by a credit card or charge card. The terms "open-end credit," "credit card," and "charge card" have the same meanings as in 12 CFR 226.2. The following are not consumer credit card accounts for purposes of this subpart:

(1) Home equity plans subject to the requirements of 12 CFR 226.5b that are accessible by a credit or charge card;

(2) Overdraft lines of credit tied to asset accounts accessed by check-guarantee cards or by debit cards;

(3) Lines of credit accessed by check-guarantee cards or by debit cards that can be used only at automated teller machines; and

(4) Lines of credit accessed solely by account numbers.

(d) "Promotional rate" means:

(1) Any annual percentage rate applicable to one or more balances or transactions on a consumer credit card account for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period; or

(2) Any annual percentage rate applicable to one or more transactions on a consumer credit card account that is lower than the annual percentage rate that applies to other transactions of the same type.

§ 227.22 Unfair acts or practices regarding time to make payment.

(a) General rule. Except as provided in paragraph (c) of this section, a bank must not treat a payment on a consumer credit card account as late for any purpose unless the consumer has been provided a reasonable amount of time to make the payment.

(b) Safe harbor. A bank satisfies the requirements of paragraph (a) of this section if it has adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date.

(c) Exception for grace periods. Paragraph (a) of this section does not apply to any time period provided by the bank within which the consumer may repay any portion of the credit extended without incurring an additional finance charge.

§ 227.23 Unfair acts or practices regarding allocation of payments.

(a) General rule for accounts with different annual percentage rates on different balances. Except as provided in paragraph (b) of this section, when different annual percentage rates apply to different balances on a consumer credit card account, the bank must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances in a manner that is no less beneficial to the consumer than one of the following methods:

(1) The amount is allocated first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate;

(2) Equal portions of the amount are allocated to each balance; or

(3) The amount is allocated among the balances in the same proportion as each balance bears to the total balance.

(b) Special rules for accounts with promotional rate balances or deferred interest balances.

(1) Rule regarding payment allocation.

(i) In general. When a consumer credit card account has one or more balances at a promotional rate or balances on which interest is deferred, the bank must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the other balances on the account consistent with paragraph (a) of this section. If any amount remains after such allocation, the bank must allocate that amount among the promotional rate balances or the deferred interest balances consistent with paragraph (a) of this section.

(ii) Exception for deferred interest balances. Notwithstanding paragraph (b)(1)(i) of this section, the bank may allocate the entire amount paid by the consumer in excess of the required minimum periodic payment to a balance on which interest is deferred during the two billing cycles immediately preceding expiration of the period during which interest is deferred.

(2) Rule regarding grace periods. A bank must not require a consumer to repay any portion of a promotional rate balance or deferred interest balance on a consumer

credit card account in order to receive any time period offered by the bank in which to repay other credit extended without incurring finance charges, provided that the consumer is otherwise eligible for such a time period.

§ 227.24 Unfair acts or practices regarding application of increased annual percentage rates to outstanding balances.

(a) Prohibition on increasing annual percentage rates on outstanding balances.

(1) General rule. Except as provided in paragraph (b) of this section, a bank must not increase the annual percentage rate applicable to any outstanding balance on a consumer credit card account.

(2) Outstanding balance. For purposes of this section, "outstanding balance" means the amount owed on a consumer credit card account at the end of the fourteenth day after the bank provides a notice required by 12 CFR 226.9(c) or (g).

(b) Exceptions. Paragraph (a) of this section does not apply where the annual percentage rate is increased due to:

(1) The operation of an index that is not under the bank's control and is available to the general public;

(2) The expiration or loss of a promotional rate, provided that, if a promotional rate is lost, the bank does not increase the annual percentage rate to a rate that is greater than the annual percentage rate that would have applied after expiration of the promotional rate; or

(3) The bank not receiving the consumer's required minimum periodic payment within 30 days after the due date for that payment.

(c) Treatment of outstanding balances following rate increase.

(1) Payment of outstanding balances. When a bank increases the annual percentage rate applicable to a category of transactions on a consumer credit card account and the bank is prohibited by this section from applying the increased rate to outstanding balances in that category, the bank must provide the consumer with a method of paying that outstanding balance that is no less beneficial to the consumer than one of the following methods:

(i) An amortization period for the outstanding balance of no less than five years, starting from the date on which the increased annual percentage rate went into effect; or

(ii) A required minimum periodic payment on the outstanding balance that includes a percentage of that balance that is no more than twice the percentage included before the date on which the increased annual percentage rate went into effect.

(2) Fees and charges on outstanding balance. When a bank increases the annual percentage rate applicable to a category of transactions on a consumer credit card account and the bank is prohibited by this section from applying the increased rate to outstanding balances in that category, the bank must not assess any fee or charge based solely on the outstanding balance.

§ 227.25 Unfair acts or practices regarding fees for exceeding the credit limit caused by credit holds.

A bank must not assess a fee or charge for exceeding the credit limit on a consumer credit card account if the credit limit would not have been exceeded but for a hold placed on any portion of the available credit on the account that is in excess of the actual purchase or transaction amount.

§ 227.26 Unfair balance computation method.

(a) General rule. Except as provided in paragraph (b) of this section, a bank must not impose finance charges on balances on a consumer credit card account based on balances for days in billing cycles that precede the most recent billing cycle.

(b) Exceptions. Paragraph (a) of this section does not apply to:

(1) The assessment of deferred interest; or

(2) Adjustments to finance charges following the resolution of a billing error dispute under 12 CFR 226.12(b) or 12 CFR 226.13.

§ 227.27 Unfair acts or practices regarding security deposits and fees for the issuance or availability of credit.

(a) Annual rule. During the period beginning with the date on which a consumer credit card account is opened and ending twelve months from that date, a bank must not charge to the account security deposits or fees for the issuance or availability of credit if the total amount of such security deposits and fees constitutes a majority of the initial credit limit for the account.

(b) Monthly rule. If the total amount of security deposits and fees for the issuance or availability of credit charged to a consumer credit card account during the period beginning with the date on which a consumer credit card account is opened and ending twelve months from that date constitutes more than 25 percent of the initial credit limit for the account:

(1) During the first billing cycle after the account is opened, the bank must not charge to the account security deposits and fees for the issuance or availability of credit that total more than 25 percent of the initial credit limit for the account; and

(2) In each of the eleven billing cycles following the first billing cycle, the bank must not charge to the account more than one eleventh of the total amount of any security deposits and fees for the issuance or availability of credit in excess of 25 percent of the initial credit limit for the account.

(c) Fees for the issuance or availability of credit. For purposes of paragraphs (a) and (b) of this section, fees for the issuance or availability of credit include:

(1) Any annual or other periodic fee that may be imposed for the issuance or availability of a consumer credit card account, including any fee based on account activity or inactivity; and

(2) Any non-periodic fee that relates to opening an account.

§ 227.28 Deceptive acts or practices regarding firm offers of credit.

(a) Disclosure of criteria bearing on creditworthiness. If a bank offers a range or multiple annual percentage rates or credit limits when making a solicitation for a firm offer of credit for a consumer credit card account, and the annual percentage rate or credit limit that consumers approved for credit will receive depends on specific criteria bearing on creditworthiness, the bank must disclose the types of criteria in the solicitation. The disclosure must be provided in a manner that is reasonably understandable to consumers and designed to call attention to the nature and significance of the information regarding the eligibility criteria for the lowest annual percentage rate or highest credit limit stated in the solicitation. If presented in a manner that calls attention to the nature and significance of the information, the following disclosure may be used to satisfy the requirements of this section (as applicable): “If you are approved for credit, your annual percentage rate and/or credit limit will depend on your credit history, income, and debts.”

(b) Firm offer of credit defined. For purposes of this section, "firm offer of credit" has the same meaning as that term has under the definition of "firm offer of credit or insurance" in section 603(l) of the Fair Credit Reporting Act (15 U.S.C. 1681a(l)).

7. A new Subpart D is added to part 227 to read as follows:

SUBPART D – OVERDRAFT SERVICES RULE

Section

Subpart D – Overdraft Services Rule

§ 227.31 Definitions.

For purposes of this subpart, the following definitions apply:

(a) "Account" means a deposit account at a bank that is held by or offered to a consumer, and has the same meaning as in § 230.2(a) of the Board's Regulation DD, Truth in Savings (12 CFR 230).

(b) "Consumer" means a person who holds an account primarily for personal, family, or household purposes.

(c) "Overdraft service" means a service under which a bank charges a fee for paying a transaction (including a check or other item) that overdraws an account. The term "overdraft service" does not include any payment of overdrafts pursuant to –

(1) A line of credit subject to the Federal Reserve Board's Regulation Z (12 CFR part 226), including transfers from a credit card account, home equity line of credit or overdraft line of credit; or

(2) A service that transfers funds from another account of the consumer.

§ 227.32 Unfair acts or practices regarding overdraft services.

(a) Opt-out requirement.

(1) General rule. A bank must not assess a fee or charge on a consumer's account in connection with an overdraft service, unless the bank provides the consumer with the right to opt out of the bank's payment of overdrafts and a reasonable opportunity to exercise that opt-out and the consumer has not opted out. The consumer must be given notice and an opportunity to opt out before the bank's assessment of any fee or charge for an overdraft, and subsequently at least once during or for any periodic statement cycle in which any fee or charge for paying an overdraft is assessed. The notice requirements in paragraphs (a)(1) and (a)(2) do not apply if the consumer has opted out, unless the consumer subsequently revokes the opt-out.

(2) Partial opt-out. A bank must provide a consumer the option of opting out only for the payment of overdrafts at automated teller machines and for point-of-sale transactions initiated by a debit card, in addition to the choice of opting out of the payment of overdrafts for all transactions.

(3) Exceptions. Notwithstanding a consumer's election to opt out under paragraphs (a)(1) or (a)(2) of this section, a bank may assess a fee or charge on a consumer's account for paying a debit card transaction that overdraws an account if:

(i) There were sufficient funds in the consumer's account at the time the authorization request was received, but the actual purchase amount for that transaction exceeds the amount that had been authorized; or

(ii) The transaction is presented for payment by paper-based means, rather than electronically through a card terminal, and the bank has not previously authorized the transaction.

(4) Time to comply with opt-out. A bank must comply with a consumer's opt-out request as soon as reasonably practicable after the bank receives it.

(5) Continuing right to opt-out. A consumer may opt out of the bank's future payment of overdrafts at any time.

(6) Duration of opt-out. A consumer's opt-out is effective unless subsequently revoked by the consumer.

(b) Debit holds. A bank must not assess a fee or charge on a consumer's account for an overdraft service if the consumer's overdraft would not have occurred but for a hold placed on funds in the consumer's account that is in excess of the actual purchase or transaction amount.

8. A new Supplement I is added to part 227 as follows:

SUPPLEMENT I TO PART 227 – OFFICIAL STAFF COMMENTARY

SUBPART A – GENERAL PROVISIONS FOR CONSUMER PROTECTION RULES

Section 227.1 – Authority, Purpose, and Scope

1(c) Scope

1. Penalties for noncompliance. Administrative enforcement of the rule for banks may involve actions under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), including cease-and-desist orders requiring that actions be taken to remedy violations and civil money penalties.

2. Industrial loan companies. Industrial loan companies that are insured by the Federal Deposit Insurance Corporation are covered by the Board's rule.

SUBPART C – CONSUMER CREDIT CARD ACCOUNT PRACTICES RULE

Section 227.21 – Definitions

(d) Promotional rate

Paragraph (d)(1)

1. Rate in effect at the end of the promotional period. If the annual percentage rate that will be in effect at the end of the specified period of time is a variable rate, the rate in effect at the end of that period for purposes of § 227.21(d)(1) is the rate that would otherwise apply if the promotional rate was not offered, consistent with any applicable accuracy requirements under 12 CFR part 226.

Paragraph (d)(2)

1. Example. A bank generally offers a 15% annual percentage rate for purchases on a consumer credit card account. For purchases made during a particular month, however, the creditor offers a rate of 5% that will apply until the consumer pays those purchases in full. Under § 227.21(d)(2), the 5% rate is a "promotional rate" because it is lower than the 15% rate that applies to other purchases.

Section 227.22 – Unfair Acts or Practices Regarding Time to Make Payment

(a) General rule

1. Treating a payment as late for any purpose. Treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, or assessing a late fee or any other

fee based on the consumer's failure to make a payment within the amount of time provided to make that payment under this section.

2. Reasonable amount of time to make payment. Whether an amount of time is reasonable for purposes of making a payment is determined from the perspective of the consumer, not the bank. Under § 227.22(b), a bank provides a reasonable amount of time to make a payment if it has adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date.

(b) Safe harbor

1. Reasonable procedures. A bank is not required to determine the specific date on which periodic statements are mailed or delivered to each individual consumer. A bank provides a reasonable amount of time to make a payment if it has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than, for example, three days after the closing date of the billing cycle and the payment due date on the periodic statement is no less than 24 days after the closing date of the billing cycle.

2. Payment due date. For purposes of § 227.22(b), "payment due date" means the date by which the bank requires the consumer to make payment to avoid being treated as late for any purpose, except as provided in § 227.22(c).

Section 227.23 Unfair Acts or Practices Regarding Allocation of Payments

1. Minimum periodic payment. This section addresses the allocation of amounts paid by the consumer in excess of the minimum periodic payment required by the bank.

This section does not limit or otherwise address the bank's ability to determine the amount of the minimum periodic payment or how that payment is allocated.

2. Adjustments of one dollar or less permitted. When allocating payments, the bank may adjust amounts by one dollar or less. For example, if a bank is allocating $100 equally among three balances, the bank may apply $34 to one balance and $33 to the others. Similarly, if a bank is splitting $100.50 between two balances, the bank may apply $50 to one balance and $50.50 to another.

(a) General rule for accounts with different annual percentage rates on different balances

1. No less beneficial to the consumer. A bank may allocate payments using a method that is different from the methods listed in § 227.23(a) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer than a listed method if it results in the assessment of the same or a lesser amount of interest charges than would be assessed under any of the listed methods. For example, a bank may not allocate the entire amount paid by the consumer in excess of the required minimum periodic payment to the balance with the lowest annual percentage rate because this method would result in a higher assessment of interest charges than any of the methods listed in § 227.23(a).

2. Example of payment allocation method that is no less beneficial to consumers than a method listed in § 227.23(a). Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $555 in excess of the required minimum periodic payment. A bank could allocate one-third of this amount ($185) to the cash advance balance and two-thirds ($370) to the purchase balance even

though this is not a method listed in § 227.23(a) because the bank is applying more of the amount to the balance with the highest annual percentage rate (with the result that the consumer will be assessed less in interest charges) than would be the case under the pro rata allocation method in § 227.23(a)(3). See comment 23(a)(3)-1.

Paragraph (a)(1)

1. Examples of allocating first to the balance with the highest annual percentage rate.

(A) Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $800 in excess of the required minimum periodic payment. None of the minimum periodic payment is allocated to the cash advance balance. A bank using this method would allocate $500 to pay off the cash advance balance and then allocate the remaining $300 to the purchase balance.

(B) Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $400 in excess of the required minimum periodic payment. A bank using this method would allocate the entire $400 to the cash advance balance.

Paragraph (a)(2)

1. Example of equal portion method. Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $555 in excess of the required minimum periodic payment. A bank using this method would

allocate $278 to the cash advance balance and $277 to the purchase balance (or vice versa).

Paragraph (a)(3)

1. Example of pro rata method. Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $555 in excess of the required minimum periodic payment. A bank using this method would allocate 25% of the amount ($139) to the cash advance balance and 75% of the amount ($416) to the purchase balance.

(b) Special rules for accounts with promotional rate balances or deferred interest balances

Paragraph (b)(1)(i)

1. Examples of special rule regarding payment allocation for accounts with promotional rate balances or deferred interest balances.

(A) A consumer credit card account has a cash advance balance of $500 at an annual percentage rate of 20%, a purchase balance of $1,500 at an annual percentage rate of 15%, and a transferred balance of $3,000 at a promotional rate of 5%. The consumer pays $800 in excess of the required minimum periodic payment. The bank must allocate the $800 between the cash advance and purchase balances (consistent with § 227.23(a)) and apply nothing to the transferred balance.

(B) A consumer credit card account has a cash advance balance of $500 at an annual percentage rate of 20%, a balance of $1,500 on which interest is deferred, and a transferred balance of $3,000 at a promotional rate of 5%. The consumer pays $800 in excess of the required minimum periodic payment. None of the minimum periodic

payment is allocated to the cash advance balance. The bank must allocate $500 to pay off the cash advance balance before allocating the remaining $300 between the deferred interest balance and the transferred balance (consistent with § 227.23(a)).

Paragraph (b)(1)(ii)

1. Examples of exception for deferred interest balances. Assume that on January 1 a consumer uses a credit card to make a $1,000 purchase on which interest is deferred until June 30. If this amount is not paid in full by June 30, all interest accrued during the six-month period will be charged to the account. The billing cycle for this credit card begins on the first day of the month and ends on the last day of the month. Each month from January through June the consumer uses the credit card to make $200 in purchases on which interest is not deferred.

(A) The consumer pays $300 in excess of the minimum periodic payment each month from January through June. None of the minimum periodic payment is applied to the deferred interest balance or the purchase balance. For the January, February, March, and April billing cycles, the bank must allocate $200 to the purchase balance and $100 to the deferred interest balance. For the May and June billing cycles, however, the bank has the option of allocating the entire $300 to the deferred interest balance, which will result in that balance being paid in full before the deferred interest period expires on June 30. In this example, the interest that accrued between January 1 and June 30 will not be assessed to the consumer's account.

(B) The consumer pays $200 in excess of the minimum periodic payment each month from January through June. None of the minimum periodic payment is applied to the deferred interest balance or the purchase balance. For the January, February, March,

and April billing cycles, the bank must allocate the entire $200 to the purchase balance. For the May and June billing cycles, however, the bank has the option to allocate the entire $200 to the deferred interest balance, which will result in that balance being reduced to $600 before the deferred interest period expires on June 30. In this example, the interest that accrued between January 1 and June 30 will be assessed to the consumer's account.

Paragraph (b)(2)

1. Example of special rule regarding grace periods for accounts with promotional rate balances or deferred interest balances. A bank offers a promotional rate on balance transfers and a higher rate on purchases. The bank also offers a grace period under which consumers who pay their balances in full by the due date are not charged interest on purchases. A consumer who has paid the balance for the prior billing cycle in full by the due date transfers a balance of $2,000 and makes a purchase of $500. Because the bank offers a grace period, it must provide a grace period on the $500 purchase if the consumer pays that amount in full by the due date, even though the $2,000 balance at the promotional rate remains outstanding.

Section 227.24 Unfair Acts or Practices Regarding Application of Increased Annual Percentage Rates to Outstanding Balances

(a) Prohibition against increasing annual percentage rates on outstanding balances

1. Example. Assume that on December 30 a consumer credit card account has a balance of $1,000 at an annual percentage rate of 15%. On December 31, the bank mails or delivers a notice required by 12 CFR 226.9(c) informing the consumer that the annual percentage rate will increase to 20% on February 15. The consumer uses the account to

make $2,000 in purchases on January 10 and $1,000 in purchases on January 20. Assuming no other transactions, the outstanding balance for purposes of § 227.24 is the $3,000 balance as of the end of the day on January 14. Therefore, under § 227.24(a), the bank cannot increase the annual percentage rate applicable to that balance. The bank can apply the 20% rate to the $1,000 in purchases made on January 20 but, consistent with 12 CFR 226.9(c), the bank cannot do so until February 15.

2. Reasonable procedures. A bank is not required to determine the specific date on which a notice required by 12 CFR 226.9(c) or (g) was provided. For purposes of § 227.24(a)(2), if the bank has adopted reasonable procedures designed to ensure that notices required by 12 CFR 226.9(c) or (g) are provided to consumers no later than, for example, three days after the event giving rise to the notice, the outstanding balance is the balance at the end of the seventeenth day after such event.

(b) Exceptions

Paragraph (b)(1)

1. External index. A bank may increase the annual percentage rate on an outstanding balance if the increase is based on an index outside the bank's control. A bank may not increase the rate on an outstanding balance based on its own prime rate or cost of funds and may not reserve a contractual right to change rates on outstanding balances at its discretion. In addition, a bank may not increase the rate on an outstanding balance by changing the method used to determine that rate. A bank is permitted, however, to use a published prime rate, such as that in the Wall Street Journal, even if the bank's own prime rate is one of several rates used to establish the published rate.

2. Publicly available. The index must be available to the public. A publicly available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the rate applied to the outstanding balance.

Paragraph (b)(2)

1. Example. Assume that a consumer credit card account has a balance of $1,000 at a 5% promotional rate and that the bank also charges an annual percentage rate of 15% for purchases and a penalty rate of 25%. If the consumer does not make payment by the due date and the account agreement specifies that event as a trigger for applying the penalty rate, the bank may increase the annual percentage rate on the $1,000 from the 5% promotional rate to the 15% annual percentage rate for purchases. The bank may not, however, increase the rate on the $1,000 from the 5% promotional rate to the 25% penalty rate, except as otherwise permitted under § 227.24(b)(3).

Paragraph (b)(3)

1. Example. Assume that the annual percentage rate applicable to purchases on a consumer credit card account is increased from 15% to 20% and that the account has an outstanding balance of $1,000 at the 15% rate. The payment due date on the account is the twenty-fifth of the month. If the bank has not received the required minimum periodic payment due on March 15 on or before April 14, the bank may increase the rate applicable to the $1,000 balance once the bank has complied with the notice requirements in 12 CFR 226.9(g).

(c) Treatment of outstanding balances following rate increase

1. Scope. This provision does not apply if the consumer credit card account does not have an outstanding balance. This provision also does not apply if a rate is increased pursuant to any of the exceptions in § 227.24(b).

2. Category of transactions. This provision does not apply to balances in categories of transactions other than the category for which the bank has increased the annual percentage rate. For example, if a bank increases the annual percentage rate that applies to purchases but not the rate that applies to cash advances, § 227.24(c)(1) and (2) apply to an outstanding balance consisting of purchases but not an outstanding balance consisting of cash advances.

Paragraph (c)(1)

1. No less beneficial to the consumer. A bank may provide a method of paying the outstanding balance that is different from the methods listed in § 227.24(c)(1) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer if the method amortizes the outstanding balance in five years or longer or if the method results in a required minimum periodic payment on the outstanding balance that is equal to or less than a minimum payment calculated consistent with § 227.24(c)(1)(ii). For example, a bank could more than double the percentage of amounts owed included in the minimum payment so long as the minimum payment does not result in amortization of the outstanding balance in less than five years. Alternatively, a bank could require a consumer to make a minimum payment on the outstanding balance that amortizes that balance in less than five years so long as the payment does not include a percentage of the outstanding balance that is more than

twice the percentage included in the minimum payment before the effective date of the increased rate.

Paragraph (c)(1)(ii)

1. Required minimum periodic payment on other balances. This paragraph addresses the required minimum periodic payment on the outstanding balance. This paragraph does not limit or otherwise address the bank's ability to determine the amount of the minimum periodic payment for other balances.

2. Example. Assume that the method used by a bank to calculate the required minimum periodic payment for a consumer credit card account requires the consumer to pay either the total of fees and interest charges plus 1% of the total amount owed or $20, whichever is greater. Assume also that the bank increases the annual percentage rate applicable to purchases on a consumer credit card account from 15% to 20% and that the account has an outstanding balance of $1,000 at the 15% rate. Section 227.24(c)(1)(ii) would permit the bank to calculate the required minimum periodic payment on the outstanding balance by adding fees and interest charges to 2% of the outstanding balance.

Paragraph (c)(2)

1. Fee or charge based solely on the outstanding balance. A bank is prohibited from assessing a fee or charge based solely on an outstanding balance. For example, a bank is prohibited from assessing a maintenance or similar fee based on an outstanding balance. A bank is not, however, prohibited from assessing fees such as late payment fees or fees for exceeding the credit limit even if such fees are based in part on an outstanding balance.

Section 227.25 – Unfair Acts or Practices Regarding Fees for Exceeding the Credit Limit Caused By Credit Holds

1. General. Under § 227.25, a bank may not assess a fee for exceeding the credit limit if the credit limit would not have been exceeded but for a hold placed on the available credit for a consumer credit card account for a transaction that has been authorized but has not yet been presented for settlement, if the amount of the hold is in excess of the actual purchase or transaction amount when the transaction is settled. Section 227.25 does not limit a bank from charging a fee for exceeding the credit limit in connection with a particular transaction if the consumer would have exceeded the credit limit due to other reasons, such as other transactions that may have been authorized but not yet presented for settlement, a payment that is returned, or if the purchase or transaction amount for the transaction for which the hold was placed would have also caused the consumer to exceed the credit limit.

2. Example of prohibition in connection with hold placed for same transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,500. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the bank for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming that there is no other activity on the account, the bank is prohibited from assessing a fee for exceeding the credit limit with respect to the $750 hold. If, however,

the total cost of the stay charged to the account had been more than $500, the bank would not be prohibited from assessing a fee for exceeding the credit limit.

3. Example of prohibition in connection with hold placed for another transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,400. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the bank for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. While the hold remains in place, the consumer uses the credit card to make a $150 purchase. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming that there is no other activity on the account, the bank is prohibited from assessing a fee for exceeding the credit limit with respect to either the $750 hold or the $150 purchase. If, however, the total cost of the stay charged to the account had been more than $450, the bank would not be prohibited from assessing a fee for exceeding the credit limit.

4. Example of prohibition when authorization and settlement amounts are held for the same transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,400. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the bank for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. When the hotel presents the $450 transaction for

settlement, it uses a different transaction code to identify the transaction than it had used for the pre-authorization, causing both the $750 hold and the $450 purchase amount to be temporarily posted to the consumer's account at the same time, and the consumer's balance to exceed the credit limit. Under these circumstances, and assuming no other transactions, the bank is prohibited from assessing a fee for exceeding the credit limit because the credit limit was exceeded solely due to the $750 hold.

5. Example of permissible fee for exceeding the credit limit in connection with a hold. Assume that a consumer has a credit limit of $2,000 and a balance of $1,400 on a consumer credit card account. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the bank for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. While the hold remains in place, the consumer uses the credit card to make a $650 purchase. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Notwithstanding the existence of the hold and assuming that there is no other activity on the account, the bank may charge the consumer a fee for exceeding the credit limit with respect to the $650 purchase because the consumer would have exceeded the credit limit even if the hold had been for the actual amount of the hotel transaction.

Section 227.26 – Unfair Balance Computation Method

(a) General rule

1. Two-cycle method prohibited. A bank is prohibited from computing the finance charge using the so-called two-cycle average daily balance computation method. This method calculates the finance charge using a balance that is the sum of the average daily balances for two billing cycles. The first balance is for the current billing cycle, and is calculated by adding the total balance (including or excluding new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. The second balance is for the preceding billing cycle.

2. Example. Assume that the billing cycle on a consumer credit card account starts on the first day of the month and ends on the last day of the month. A consumer has a zero balance on March 1. The consumer uses the credit card to make a $500 purchase on March 15. The consumer makes no other purchases and pays $400 on the due date (April 25), leaving a $100 balance. The bank may charge interest on the $500 purchase from the start of the billing cycle (April 1) through April 24 and interest on the remaining $100 from April 25 through the end of the April billing cycle (April 30). The bank is prohibited, however, from reaching back and charging interest on the $500 purchase from the date of purchase (March 15) to the end of the March billing cycle (March 31).

Section 227.27 – Unfair Acts or Practices Regarding Security Deposits and Fees for the Issuance or Availability of Credit

1. Initial credit limit for the account. For purposes of this section, the initial credit limit is the limit in effect when the account is opened.

(a) Annual rule

1. Majority of the credit limit. The total amount of security deposits and fees for the issuance or availability of credit constitutes a majority of the initial credit limit if that total is greater than half of the limit. For example, assume that a consumer credit card account has an initial credit limit of $500. Under § 227.27(a), a bank may only charge to the account security deposits and fees for the issuance or availability of credit totaling no more than $250 during the twelve months after the date on which the account is opened (consistent with § 227.27(b)).

(b) Monthly rule

1. Adjustments of one dollar or less permitted. When dividing amounts pursuant to § 227.27(b)(2), the bank may adjust amounts by one dollar or less. For example, if a bank is dividing $125 over eleven billing cycles, the bank may charge $12 for four months and $11 for the remaining seven months.

2. Example. Assume that a consumer credit card account opened on January 1 has an initial credit limit of $500 and that a bank charges to the account security deposits and fees for the issuance or availability of credit that total $250 during the twelve months after the date on which the account is opened. Assume also that the billing cycles for this account begin on the first day of the month and end on the last day of the month. Under § 227.27(b), the bank may charge to the account no more than $250 in security deposits and fees for the issuance or availability of credit. If it charges $250, the bank may charge as much as $125 during the first billing cycle. If it charges $125 during the first billing

cycle, it may then charge $12 in any four billing cycles and $11 in any seven billing cycles during the year.

(c) Fees for the issuance or availability of credit

1. Membership fees. Membership fees for opening an account are fees for the issuance or availability of credit. A membership fee to join an organization that provides a credit or charge card as a privilege of membership is a fee for the issuance or availability of credit only if the card is issued automatically upon membership. If membership results merely in eligibility to apply for an account, then such a fee is not a fee for the issuance or availability of credit.

2. Enhancements. Fees for optional services in addition to basic membership privileges in a credit or charge card account (for example, travel insurance or card-registration services) are not fees for the issuance or availability of credit if the basic account may be opened without paying such fees.

3. One-time fees. Only non-periodic fees related to opening an account (such as one-time membership or participation fees) are fees for the issuance or availability of credit. Fees for reissuing a lost or stolen card and statement reproduction fees are examples of fees that are not fees for the issuance or availability of credit.

Section 227.28 – Deceptive Acts or Practices Regarding Firm Offers of Credit

(a) Disclosure of criteria bearing on creditworthiness

1. Designed to call attention. Whether a disclosure has been provided in a manner that is designed to call attention to the nature and significance of required information depends on where the disclosure is placed in the solicitation and how it is presented, including whether the disclosure uses a typeface and type size that are easy to

read and uses boldface or italics. Placing the disclosure in a footnote would not satisfy this requirement.

2. Form of electronic disclosures. Electronic disclosures must be provided consistent with 12 CFR 226.5a(a)(2)-8 and -9.

3. Multiple annual percentage rates or credit limits. For purposes of this section, a firm offer of credit solicitation that states an annual percentage rate or credit limit for a credit card feature and a different annual percentage rate or credit limit for a different credit card feature does not offer multiple annual percentage rates or credit limits. For example, if a firm offer of credit solicitation offers a 15% annual percentage rate for purchases and a 20% annual percentage rate for cash advances, the solicitation does not offer multiple annual percentage rates for purposes of this section.

4. Example. Assume that a bank requests from a consumer reporting agency a list of consumers with credit scores of 650 or higher so that the bank can send those consumers a firm offer of credit solicitation. The bank sends a solicitation to those consumers for a consumer credit card account advertising "rates from 8.99% to 19.99%" and "credit limits from $1,000 to $10,000." Before selection of the consumers for the offer, however, the bank determines that it will provide an interest rate of 8.99% and a credit limit of $10,000 only to those consumers responding to the solicitation who are verified to have a credit score of 650 or higher, who have a debt-to-income ratio below a certain amount, and who meet other specific criteria bearing on creditworthiness. Under § 227.28, this solicitation is deceptive unless the bank discloses, in a manner that is reasonably understandable to the consumer and designed to call attention to the nature and significance of the information, that, if the consumer is approved for credit, the

annual percentage rate and credit limit the consumer will receive will depend on specific criteria bearing on the consumer's creditworthiness. The bank may satisfy this requirement by using a typeface and type size that are easy to read and stating in boldface in a manner that otherwise calls attention to the nature and significance of the information: "**If you are approved for credit, your annual percentage rate and/or credit limit will depend on your credit history, income, and debts.**"

5. Applicability of criteria in disclosure. When making a disclosure under this section, a bank may only disclose the criteria it uses in evaluating whether consumers who are approved for credit will receive the lowest annual percentage rate or the highest credit limit. For example, if a bank does not consider the consumer's debts when determining whether the consumer should receive the lowest annual percentage rate or highest credit limit, the disclosure must not refer to "debts."

SUBPART D – OVERDRAFT SERVICES RULE

Section 227.32 – Unfair Acts or Practices Regarding Overdraft Services

(a) Opt-out requirement

(a)(1) General rule

1. Form, content and timing of disclosure. The form, content and timing of the opt-out notice required to be provided under paragraph (a) of this section are addressed under § 230.10 of the Board's Regulation DD, Truth in Savings (12 CFR 230).

(a)(3) Exceptions

Paragraph (a)(3)(i)

1. Example of transaction amount exceeding authorization amount (fuel purchase). A consumer has $30 in a deposit account. The consumer uses a debit card to

purchase fuel. Before permitting the consumer to use the fuel pump, the merchant verifies the validity of the card by obtaining authorization from the bank for a $1 transaction. The consumer purchases $50 of fuel. If the bank pays the transaction, it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

2. Example of transaction amount exceeding authorization amount (restaurant). A consumer has $50 in a deposit account. The consumer pays for a $45 meal at a restaurant using a debit card. While the restaurant may obtain authorization for the $45 cost of the meal, the consumer may add $10 for a tip. If the bank pays the $55 transaction (including the tip amount), it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

Paragraph (a)(3)(ii)

1. Example of transaction presented by paper-based means. A consumer has $50 in a deposit account. The consumer makes a $60 purchase and presents his or her debit card for payment. The merchant takes an imprint of the card. Later that day, the merchant submits a sales slip with the card imprint to its processor for payment. If the consumer's bank pays the transaction, it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

(b) Debit holds

1. General. Under § 227.32(b), a bank may not assess an overdraft fee if the overdraft would not have occurred but for a hold placed on funds in the consumer's account for a transaction that has been authorized but has not yet been presented for settlement, if the amount of the hold is in excess of the actual purchase or transaction

amount when the transaction is settled. Section 227.32(b) does not limit a bank from charging an overdraft fee in connection with a particular transaction if the consumer would have incurred an overdraft due to other reasons, such as other transactions that may have been authorized but not yet presented for settlement, a deposited check that is returned, or if the purchase or transaction amount for the transaction for which the hold was placed would have also caused the consumer to overdraw his or her account.

2. Example of prohibition in connection with hold placed for same transaction. A consumer has $50 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's bank for a $75 "hold" on the account which exceeds the consumer's funds. The consumer purchases $20 of fuel. Under these circumstances, § 227.32(b) prohibits the bank from assessing a fee or charge in connection with the debit hold because the actual amount of the fuel purchase did not exceed the funds in the consumer's account. However, if the consumer had purchased $60 of fuel, the bank could assess a fee or charge for an overdraft because the transaction exceeds the funds in the consumer's account, unless the consumer has opted out of the payment of overdrafts under § 227.32(a).

3. Example of prohibition in connection with hold placed for another transaction. A consumer has $100 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's bank for a $75 "hold" on the account. The consumer purchases $20 of fuel, but the transaction is not presented for settlement until the next day. Later on the first day, and assuming no other transactions, the consumer

withdraws $75 at an ATM. Under these circumstances, § 227.32(b) prohibits the bank from assessing a fee or charge for paying an overdraft with respect to the $75 withdrawal because the overdraft was caused solely by the $75 hold.

4. Example of prohibition when authorization and settlement amounts are held for the same transaction. A consumer has $100 in his deposit account, and uses his debit card to purchase $50 worth of fuel. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's bank for a $75 "hold" on the account. The consumer purchases $50 of fuel. When the merchant presents the $50 transaction for settlement, it uses a different transaction code to identify the transaction than it had used for the pre-authorization, causing both the $75 hold and the $50 purchase amount to be temporarily posted to the consumer's account at the same time, and the consumer's account to be overdrawn. Under these circumstances, and assuming no other transactions, § 227.32(b) prohibits the bank from assessing a fee or charge for paying an overdraft because the overdraft was caused solely by the $75 hold.

5. Example of permissible overdraft fees in connection with a hold. A consumer has $100 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's bank for a $75 "hold" on the account. The consumer purchases $35 of fuel, but the transaction is not presented for settlement until the next day. Later on the first day, and assuming no other transactions, the consumer withdraws $75 at an ATM. Notwithstanding the existence of the hold, and assuming the consumer has not opted out of the payment of overdrafts under § 227.32(a), the consumer's bank may charge the consumer an overdraft fee for the $75 ATM withdrawal, because the

consumer would have incurred the overdraft even if the hold had been for the actual amount of the fuel purchase.

9. The Federal Reserve System Board of Governors' Staff Guidelines on the Credit Practices Rule, published August 3, 1988 at 51 FR 29225, is amended as follows:

Staff Guidelines on the Credit Practices Rule

Effective January 1, 1986; as amended effective [August 1, 1988] ►**Insert effective date of new amendments**◄

Introduction

* * * * *

3. Scope; enforcement. ►As stated in subpart A of Regulation AA,◄ [The Board's]►this◄ rule applies to all banks and their subsidiaries►, except savings associations as defined in 12 U.S.C. 1813(b).◄ [Institutions that are members of the Federal Home Loan Bank System and nonbank subsidiaries of bank holding companies are covered by the rules of the Federal Home Loan Bank Board and the FTC, respectively.] The Board has enforcement responsibility for state-chartered banks that are members of the Federal Reserve System. The Office of the Comptroller of the Currency has enforcement responsibility for national banks. The Federal Deposit Insurance Corporation has enforcement responsibility for insured state-chartered banks that are not members of the Federal Reserve System.

* * * * *

[Section 227.11 **Authority, purpose, and scope**

Q11(c)-1: Penalties for noncompliance. What are the penalties for noncompliance with the rule?

A: Administrative enforcement of the rule for banks may involve actions under section 8 of the Federal Deposit Insurance Act (12 USC 1818), including cease-and-desist orders requiring that actions be taken to remedy violations. If the terms of the order are violated, the federal supervisory agency may impose penalties of up to $1,000 per day for every day that the bank is in violation of the order.

Q11(c)-2: Industrial loan companies. Are industrial loan companies subject to the Board's rule?

A: Industrial loan companies that are insured by the Federal Deposit Insurance Corporation are covered by the Board's rule.]

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By order of the Board of Governors of the Federal Reserve System,

May xx, 2008

Jennifer J. Johnson
Secretary of the Board
BILLING CODE 6210-01-P

* * * * *

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V

For the reasons discussed in the joint preamble, the Office of Thrift Supervision proposes to amend chapter V of title 12 of the Code of Federal Regulations by amending 12 CFR part 535 as follows:

PART 535 – UNFAIR OR DECEPTIVE ACTS OR PRACTICES

1. The authority citation for part 535 is revised to read as follows:

Authority: 15 U.S.C. 57a; 12 U.S.C. 1462a, 1463, 1464.

2. Revise the part heading for part 535 to read as shown above.

3. Revise part 535 to read as follows:

Subpart A–General Provisions

Sec.

Subpart B–Consumer Credit Practices

Subpart C–Consumer Credit Card Account Practices

Subpart A–General Provisions

§ 535.1 Authority, purpose and scope.

(a) Authority. This part is issued by OTS under section 18(f) of the Federal Trade Commission Act, 15 U.S.C. 57a(f).

(b) Purpose. The purpose of this part is to prohibit unfair or deceptive acts or practices in violation of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). This part defines and contains requirements prescribed for the purpose of preventing specific unfair or deceptive acts or practices of savings associations. The prohibitions in this part do not limit OTS's authority to enforce the FTC Act with respect to any other unfair or deceptive acts or practices.

(c) Scope. This part applies to savings associations and subsidiaries owned in whole or in part by a savings association.

Subpart B–Consumer Credit Practices

§ 535.11 Definitions.

For purposes of this subpart, the following definitions apply:

(a) Consumer means a natural person who seeks or acquires goods, services, or money for personal, family, or household purposes, other than for the purchase of real property, and who applies for or is extended consumer credit.

(b) Consumer credit means credit extended to a natural person for personal, family, or household purposes. It includes consumer loans; educational loans; unsecured loans for real property alteration, repair or improvement, or for the equipping of real property; overdraft loans; and credit cards. It also includes loans secured by liens on real estate and chattel liens secured by mobile homes and leases of personal property to consumers that may be considered the functional equivalent of loans on personal security but only if the savings association relies substantially upon other factors, such as the general credit standing of the borrower, guaranties, or security other than the real estate or mobile home, as the primary security for the loan.

(c) Earnings means compensation paid or payable to an individual or for the individual's account for personal services rendered or to be rendered by the individual, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.

(d) Obligation means an agreement between a consumer and a creditor.

(e) Person means an individual, corporation, or other business organization.

§ 535.12 Unfair credit contract provisions.

It is an unfair act or practice for you, directly or indirectly, to enter into a consumer credit obligation that constitutes or contains, or to enforce in a consumer credit obligation you purchased, any of the following provisions:

(a) Confession of judgment. A cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other

waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon.

(b) Waiver of exemption. An executory waiver or a limitation of exemption from attachment, execution, or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest executed in connection with the obligation.

(c) Assignment of wages. An assignment of wages or other earnings unless:

(1) The assignment by its terms is revocable at the will of the debtor;

(2) The assignment is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or

(3) The assignment applies only to wages or other earnings already earned at the time of the assignment.

(d) Security interest in household goods. A nonpossessory security interest in household goods other than a purchase-money security interest. For purposes of this paragraph, household goods:

(1) Means clothing, furniture, appliances, linens, china, crockery, kitchenware, and personal effects of the consumer and the consumer's dependents.

(2) Does not include:

(i) Works of art;

(ii) Electronic entertainment equipment (except one television and one radio);

(iii) Antiques (any item over one hundred years of age, including such items that have been repaired or renovated without changing their original form or character); or

(iv) Jewelry (other than wedding rings).

§ 535.13 Unfair or deceptive cosigner practices.

(a) Prohibited deception. It is a deceptive act or practice for you, directly or indirectly in connection with the extension of credit to consumers, to misrepresent the nature or extent of cosigner liability to any person.

(b) Prohibited unfairness. It is an unfair act or practice for you, directly or indirectly in connection with the extension of credit to consumers, to obligate a cosigner unless the cosigner is informed, before becoming obligated, of the nature of the cosigner's liability.

(c) Disclosure requirement. (1) Disclosure statement. A clear and conspicuous statement must be given in writing to the cosigner before becoming obligated. In the case of open-end credit, the disclosure statement must be given to the cosigner before the time that the cosigner becomes obligated for any fees or transactions on the account. The disclosure statement must contain the following statement or one that is substantially similar:

NOTICE OF COSIGNER

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record.

(2) Compliance. Compliance with paragraph (d)(1) of this section constitutes compliance with the consumer disclosure requirement in paragraph (b) of this section.

(3) Additional content limitations. If the notice is a separate document, nothing other than the following items may appear with the notice:

(i) Your name and address;

(ii) An identification of the debt to be cosigned (e.g., a loan identification number);

(iii) The date (of the transaction); and

(iv) The statement, "This notice is not the contract that makes you liable for the debt."

(d) Cosigner defined. (1) Cosigner means a natural person who assumes liability for the obligation of a consumer without receiving goods, services, or money in return for the obligation, or, in the case of an open-end credit obligation, without receiving the contractual right to obtain extensions of credit under the account.

(2) Cosigner includes any person whose signature is requested as a condition to granting credit to a consumer, or as a condition for forbearance on collection of a consumer's obligation that is in default. The term does not include a spouse or other person whose signature is required on a credit obligation to perfect a security interest pursuant to state law.

(3) A person who meets the definition in this paragraph is a cosigner, whether or not the person is designated as such on a credit obligation.

§ 535.14 Unfair late charges.

(a) Prohibition. In connection with collecting a debt arising out of an extension of credit to a consumer, it is an unfair act or practice for you, directly or indirectly, to levy or collect any delinquency charge on a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments and the payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period.

(b) Collecting a debt defined. Collecting a debt means, for the purposes of this section, any activity, other than the use of judicial process, that is intended to bring about or does bring about repayment of all or part of money due (or alleged to be due) from a consumer.

§ 535.15 State exemptions.

(a) Applications. An appropriate state agency may apply to OTS for a determination that:

(1) There is a state requirement or prohibition in effect that applies to any transaction to which a provision of this subpart applies; and

(2) The state requirement or prohibition affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded by this subpart.

(b) Determinations. If OTS makes a determination under paragraph (a) of this section, then the provision of this subpart will not be in effect in that state to the extent specified by OTS in its determination, for as long as the state administers and enforces the state requirement or prohibition effectively, as determined by OTS.

(c) Delegated authority. The Managing Director, Compliance and Consumer Protection in consultation with the Chief Counsel has delegated authority to make such determinations as are required under this subpart.

Subpart C–Consumer Credit Card Account Practices

§ 535.21 Definitions.

For purposes of this subpart, the following definitions apply:

(a) Annual percentage rate means the product of multiplying each periodic rate for a balance or transaction on a consumer credit card account by the number of periods in a year. The term periodic rate has the same meaning as in § 226.2 of this title.

(b) Consumer means a natural person to whom credit is extended under a consumer credit card account or a natural person who is a co-obligor or guarantor of a consumer credit card account.

(c) Consumer credit card account means an account provided to a consumer primarily for personal, family, or household purposes under an open-end credit plan that is accessed by a credit card or charge card. The terms open-end credit, credit card, and

charge card have the same meanings as in § 226.2 of this title. The following are not consumer credit card accounts for purposes of this subpart:

(1) Home equity plans subject to the requirements of § 226.5b of this title that are accessible by a credit or charge card;

(2) Overdraft lines of credit tied to asset accounts accessed by check-guarantee cards or by debit cards;

(3) Lines of credit accessed by check-guarantee cards or by debit cards that can be used only at automated teller machines; and

(4) Lines of credit accessed solely by account numbers.

(d) Promotional rate means:

(1) Any annual percentage rate applicable to one or more balances or transactions on a consumer credit card account for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period; or

(2) Any annual percentage rate applicable to one or more transactions on a consumer credit card account that is lower than the annual percentage rate that applies to other transactions of the same type.

§ 535.22 Unfair time to make payment.

(a) General rule. Except as provided in paragraph (c) of this section, you must not treat a payment on a consumer credit card account as late for any purpose unless you have provided the consumer a reasonable amount of time to make the payment.

(b) Safe harbor. You satisfy the requirements of paragraph (a) of this section if you have adopted reasonable procedures designed to ensure that periodic statements

specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date.

(c) Exception for grace periods. Paragraph (a) of this section does not apply to any time period you provide within which the consumer may repay any portion of the credit extended without incurring an additional finance charge.

§ 535.23 Unfair payment allocations.

(a) General rule for accounts with different annual percentage rates on different balances. Except as provided in paragraph (b) of this section, when different annual percentage rates apply to different balances on a consumer credit card account, you must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances in a manner that is no less beneficial to the consumer than one of the following methods:

(1) You allocate the amount first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate;

(2) You allocate equal portions of the amount to each balance; or

(3) You allocate the amount among the balances in the same proportion as each balance bears to the total balance.

(b) Special rules for accounts with promotional rate balances or deferred interest balances.

(1) Rule regarding payment allocation. (i) In general. When a consumer credit card account has one or more balances at a promotional rate or balances on which interest is deferred, you must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the other balances on the account consistent with paragraph (a) of this section. If any amount remains after such allocation, you must allocate that amount among the promotional rate balances or the deferred interest balances consistent with paragraph (a) of this section.

(ii) Exception for deferred interest balances. Notwithstanding paragraph (b)(1)(i) of this section, you may allocate the entire amount paid by the consumer in excess of the required minimum periodic payment to a balance on which interest is deferred during the two billing cycles immediately preceding expiration of the period during which interest is deferred.

(2) Rule regarding grace period. You must not require a consumer to repay any portion of a promotional rate balance or deferred interest balance on a consumer credit card account in order to receive any time period you offer in which to repay other credit extended without incurring finance charges, provided that the consumer is otherwise eligible for such a time period.

§ 535.24 Unfair annual percentage rate increases on outstanding balances.

(a) Prohibition against increasing annual percentage rates on outstanding balances. (1) General rule. Except as provided in paragraph (b) of this section, you must not increase the annual percentage rate applicable to any outstanding balance on a consumer credit card account.

(2) Outstanding balance defined. For purposes of this section, outstanding balance means the amount owed on a consumer credit card account at the end of the fourteenth day after you provide a notice required by §§ 226.9(c) or 226.9(g) of this title.

(b) Exceptions. Paragraph (a) of this section does not apply where the annual percentage rate is increased due to:

(1) The operation of an index that is not under your control and is available to the general public;

(2) The expiration or loss of a promotional rate provided that, if a promotional rate is lost, you do not increase the annual percentage rate to a rate that is greater than the annual percentage rate that would have applied after expiration of the promotional rate; or

(3) You not receiving the consumer's required minimum payment within 30 days after the due date for that payment.

(c) Treatment of outstanding balances following rate increase. (1) Payment of outstanding balances. When you increase the annual percentage rate applicable to a category of transaction on a consumer credit card account and this section prohibits you from applying the increased rate to outstanding balances in that category, you must provide the consumer with a method of paying that outstanding balance that is no less beneficial to the consumer than one of the following methods:

(i) An amortization period for the outstanding balance of no less than five years, starting from the date on which the increased annual percentage rate went into effect; or

(ii) A required minimum periodic payment on the outstanding balance that includes a percentage of that balance that is no more than twice the percentage included before the date on which the increased annual percentage rate went into effect.

(2) Fees and charges on outstanding balance. When you increase the annual percentage rate applicable to a category of transactions on a consumer credit card account and this section prohibits you from applying the increased rate to outstanding balances in that category, you must not assess any fee or charge based solely on the outstanding balance.

§ 535.25 Unfair fees from for exceeding the credit limit due to credit holds.

You must not assess a fee or charge for exceeding the credit limit on a consumer credit card account if the credit limit would not have been exceeded but for a hold placed on any portion of the available credit on the account that is in excess of the actual purchase or transaction amount.

§ 535.26 Unfair balance computation method.

(a) General rule. Except as provided in paragraph (b) of this section, you must not impose finance charges on balances on a consumer credit card account based on balances for days in billing cycles that precede the most recent billing cycle.

(b) Exceptions. Paragraph (a) of this section does not apply to:

(1) The assessment of deferred interest; or

(2) Adjustments to finance charges following the resolution of a billing error dispute under §§ 226.12(b) or 226.13 of this title.

§ 535.27 Unfair charging to the account of security deposits and fees for the issuance or availability of credit.

(a) Annual rule. During the period beginning with the date on which a consumer credit card account is opened and ending twelve months from that date, you must not charge to the account security deposits or fees for the issuance or availability of credit if the total amount of such security deposits and fees constitutes a majority of the initial credit limit for the account.

(b) Monthly rule. If the total amount of security deposits and fees for the issuance or availability of credit charged to a consumer credit card account during the period beginning with the date on which a consumer credit card account is opened and ending twelve months from that date constitutes more than 25 percent of the initial credit limit for the account:

(1) During the first billing cycle after the account is opened, you must not charge to the account security deposits and fees for the issuance or availability of credit that total more than 25 percent of the initial credit limit for the account; and

(2) In each of the eleven billing cycles following the first billing cycle, you must not charge to the account more than one eleventh of the total amount of any security deposits and fees for the issuance or availability of credit in excess of 25 percent of the initial credit limit for the account.

(c) Fees for the issuance or availability of credit. For purposes of paragraphs (a) and (b) of this section, fees for the issuance or availability of credit include:

(1) Any annual or other periodic fee that may be imposed for the issuance or availability of a consumer credit card account, including any fee based on account activity or inactivity; and

(2) Any non-periodic fee that relates to opening an account.

§ 535.28 Deceptive firm offers of credit.

(a) Disclosure of criteria bearing on creditworthiness. If you offer a range or multiple annual percentage rates or credit limits when you make a solicitation for a firm offer of credit for a consumer credit card account, and the annual percentage rate or credit limit that consumers approved for credit will receive depends on specific criteria bearing on creditworthiness, you must disclose the types of criteria in the solicitation. You must provide the disclosure in a manner that is reasonably understandable to consumers and designed to call attention to the nature and significance of the eligibility criteria for the lowest annual percentage rate or highest credit limit stated in the solicitation. If presented in a manner that calls attention to the nature and significance of the information, the following disclosure may be used to satisfy the requirements of this section (as applicable): "If you are approved for credit, your annual percentage rate and/or credit limit will depend on your credit history, income, and debts."

(b) Firm offer of credit defined. For purposes of this section, firm offer of credit has the same meaning as that term has under the definition of firm offer of credit or insurance in section 603(l) of the Fair Credit Reporting Act (15 U.S.C. 1681a(l)).

Subpart D–Overdraft Service Practices

§ 535.31 Definitions.

For purposes of this subpart, the following definitions apply:

(a) Account means a deposit account at a ~~s~~savings association that is held by or offered to a consumer. The term account has the same meaning as in § 230.2(a) of this title.

(b) Consumer means a person who holds an account primarily for personal, family, or household purposes.

(c) Overdraft service means a service under which a savings association charges a fee for paying a transaction (including a check or other item) that overdraws an account. The term overdraft service does not include any payment of overdrafts pursuant to:

(1) A line of credit subject to part 226 of this title, including transfers from a credit card account, home equity line of credit, or overdraft line of credit; or

(2) A service that transfers funds from another account of the consumer.

§ 535.32 Unfair overdraft service practices.

(a) Opt-out requirement. (1) General rule. You must not assess a fee or charge on a consumer's account in connection with an overdraft service, unless you provide the consumer with the right to opt out of your payment of overdrafts and a reasonable opportunity to exercise that opt out and the consumer has not opted out. The consumer must be given notice and an opportunity to opt out before you assess any fee or charge for an overdraft, and subsequently at least once during or for any periodic statement cycle in which any fee or charge for paying an overdraft is assessed. The notice requirements in paragraphs (a)(1) and (a)(2) of this section do not apply if the consumer has opted out, unless the consumer subsequently revokes the opt-out.

(2) Partial opt-out. You must provide a consumer the option of opting out only for the payment of overdrafts at automated teller machines and for point-of-sale

transactions initiated by a debit card, in addition to the choice of opting out of the payment of overdrafts for all transactions.

(3) Exceptions. Notwithstanding a consumer's election to opt out under paragraphs (a)(1) or (a)(2) of this section, you may assess a fee or charge on a consumer's account for paying a debit card transaction that overdraws an account if:

(i) There were sufficient funds in the consumer's account at the time the authorization request was received, but the actual purchase amount for that transaction exceeds the amount that had been authorized; or

(ii) The transaction is presented for payment by paper-based means, rather than electronically through a card terminal, and you have not previously authorized the transaction.

(4) Time to comply with opt-out. You must comply with a consumer's opt-out request as soon as reasonably practicable after you receive it.

(5) Continuing right to opt-out. A consumer may opt out of your future payment of overdrafts at any time.

(6) Duration of opt-out. A consumer's opt-out is effective unless the consumer subsequently revokes it.

(b) Debit holds. You must not assess a fee or charge on a consumer's account in for an overdraft service if the consumer's overdraft would not have occurred but for a hold placed on funds in the consumer's account that is in excess of the actual purchase or transaction amount.

APPENDIX A TO PART 535 – OFFICIAL STAFF COMMENTARY

Subpart A – General Provisions

Section 535.1 – Authority, purpose, and scope

1(c) Scope

1. Penalties for noncompliance. Administrative enforcement of the rule for savings associations may involve actions under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), including cease-and-desist orders requiring that action be taken to remedy violations and civil money penalties.

Subpart C – Consumer Credit Card Account Practices

Section 535.21 – Definitions

(d) Promotional rate

Paragraph (d)(1)

1. Rate in effect at the end of the promotional period. If the annual percentage rate that will be in effect at the end of the specified period of time is a variable rate, the rate in effect at the end of that period for purposes of § 535.21(d)(1) is the rate that would otherwise apply if the promotional rate were not offered, consistent with any applicable accuracy requirements under part 226 of this title.

Paragraph (d)(2)

2. Example. A savings association generally offers a 15% annual percentage rate for purchases on a consumer credit card account. For purchases made during a particular month, however, the creditor offers a rate of 5% that will apply until the consumer pays those purchases in full. Under § 535.21(d)(2), the 5% rate is a "promotional rate" because it is lower than the 15% rate that applies to other purchases.

Section 535.22 – Unfair time to make payment

(a) General rule

1. Treating a payment as late for any purpose. Treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, or assessing a late fee or any other fee based on the consumer's failure to make a payment within the amount of time provided to make that payment under this section.

2. Reasonable amount of time to make payment. Whether an amount of time is reasonable for purposes of making a payment is determined from the perspective of the consumer, not the savings association. Under § 535.22(b), a savings association provides a reasonable amount of time to make a payment if it has adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date.

(b) Safe harbor

1. Reasonable procedures. A savings association is not required to determine the specific date on which periodic statements are mailed or delivered to each individual consumer. A savings association provides a reasonable amount of time to make a payment if it has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than, for example, three days after the closing date of the billing cycle and the payment due date on the periodic statement is no less than 24 days after the closing date of the billing cycle.

2. Payment due date. For purposes of § 535.22(b), "payment due date" means the date by which the savings association requires the consumer to make payment to avoid being treated as late for any purpose, except as provided in § 535.22(c).

Section 535.23 – Unfair payment allocations

1. Minimum periodic payment. This section addresses the allocation of amounts paid by the consumer in excess of the minimum periodic payment required by the savings association. This section does not limit or otherwise address the savings association's ability to determine the amount of the minimum periodic payment or how that payment is allocated.

2. Adjustments of one dollar or less permitted. When allocating payments, the savings association may adjust amounts by one dollar or less. For example, if a savings association is allocating $100 equally among three balances, the savings association may apply $34 to one balance and $33 to the others. Similarly, if a savings association is splitting $100.50 between two balances, the savings association may apply $50 to one balance and $50.50 to another.

(a) General rule for accounts with different annual percentage rates on different balances

1. No less beneficial to the consumer. A savings association may allocate payments using a method that is different from the methods listed in § 535.23(a) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer than a listed method if it results in the assessment of the same or a lesser amount of interest charges than would be assessed under any of the listed methods. For example, a savings association may not allocate the entire amount paid by the consumer in excess of the required minimum periodic payment

to the balance with the lowest annual percentage rate because this method would result in a higher assessment of interest charges than any of the methods listed in § 535.23(a).

2. Example of payment allocation method that is no less beneficial to consumers than a method listed in § 535.23(a). Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $555 in excess of the required minimum periodic payment. A savings association could allocate one-third of this amount ($185) to the cash advance balance and two-thirds ($370) to the purchase balance even though this is not a method listed in § 535.23(a) because the savings association is applying more of the amount to the balance with the highest annual percentage rate (with the result that the consumer will be assessed less in interest charges) than would be the case under the pro rata allocation method in § 535.23(a)(3). See comment 23(a)(3)-1.

Paragraph (a)(1)

1. Examples of allocating first to the balance with the highest annual percentage rate.

(A) Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $800 in excess of the required minimum periodic payment. None of the minimum periodic payment is allocated to the cash advance balance. A savings association using this method would allocate $500 to pay off the cash advance balance and then allocate the remaining $300 to the purchase balance.

(B) Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $400 in excess of the required minimum periodic payment. A savings association using this method would allocate the entire $400 to the cash advance balance.

Paragraph (a)(2))

1. Example of equal portion method. Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $555 in excess of the required minimum periodic payment. A savings association using this method would allocate $278 to the cash advance balance and $277 to the purchase balance (or vice versa).

Paragraph (a)(3)

1. Example of pro rata method. Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $555 in excess of the required minimum periodic payment. A savings association using this method would allocate 25% of the amount ($139) to the cash advance balance and 75% of the amount ($416) to the purchase balance.

(b) Special rules for accounts with promotional rate balances or deferred interest balances

Paragraph (b)(1)(i)

1. Examples of special rule regarding payment allocation for accounts with promotional rate balances or deferred interest balances.

(A) A consumer credit card account has a cash advance balance of $500 at an annual percentage rate of 20%, a purchase balance of $1,500 at an annual percentage rate of 15%, and a transferred balance of $3,000 at a promotional rate of 5%. The consumer pays $800 in excess of the required minimum periodic payment. The savings association must allocate the $800 between the cash advance and purchase balances (consistent with § 535.23(a)) and apply nothing to the transferred balance.

(B) A consumer credit card account has a cash advance balance of $500 at an annual percentage rate of 20%, a balance of $1,500 on which interest is deferred, and a transferred balance of $3,000 at a promotional rate of 5%. The consumer pays $800 in excess of the required minimum periodic payment. None of the minimum periodic payment is allocated to the cash advance balance. The savings association must allocate $500 to pay off the cash advance balance before allocating the remaining $300 between the deferred interest balance and the transferred balance (consistent with § 535.23(a)).

Paragraph (b)(1)(ii)

1. Examples of exception for deferred interest balances. Assume that on January 1 a consumer uses a credit card to make a $1,000 purchase on which interest is deferred until June 30. If this amount is not paid in full by June 30, all interest accrued during the six-month period will be charged to the account. The billing cycle for this credit card begins on the first day of the month and ends on the last day of the month. Each month

from January through June the consumer uses the credit card to make $200 in purchases on which interest is not deferred.

(A) The consumer pays $300 in excess of the minimum periodic payment each month from January through June. None of the minimum periodic payment is applied to the deferred interest balance or the purchase balance. For the January, February, March, and April billing cycles, the savings association must allocate $200 to the purchase balance and $100 to the deferred interest balance. For the May and June billing cycles, however, the savings association has the option of allocating the entire $300 to the deferred interest balance, which will result in that balance being paid in full before the deferred interest period expires on June 30. In this example, the interest that accrued between January 1 and June 30 will not be assessed to the consumer's account.

(B) The consumer pays $200 in excess of the minimum periodic payment each month from January through June. None of the minimum periodic payment is applied to the deferred interest balance or the purchase balance. For the January, February, March, and April billing cycles, the savings association must allocate the entire $200 to the purchase balance. For the May and June billing cycles, however, the savings association has the option to allocate the entire $200 to the deferred interest balance, which will result in that balance being reduced to $600 before the deferred interest period expires on June 30. In this example, the interest that accrued between January 1 and June 30 will be assessed to the consumer's account.

Paragraph (b)(2)

1. Example of special rule regarding grace periods for accounts with promotional rate balances or deferred interest balances. A savings association offers a promotional rate on balance transfers and a higher rate on purchases. The savings association also offers a grace period under which consumers who pay their balances in full by the due date are not charged interest on purchases. A consumer who has paid the balance for the prior billing cycle in full by the due date transfers a balance of $2,000 and makes a purchase of $500. Because the savings association offers a grace period, it must provide a grace period on the $500 purchase if the consumer pays that amount in full by the due date, even though the $2,000 balance at the promotional rate remains outstanding.

Section 535.24 – Unfair annual percentage rate increases on outstanding balances

(a) Prohibition against increasing annual percentage rates on outstanding balances

1. Example. Assume that on December 30 a consumer credit card account has a balance of $1,000 at an annual percentage rate of 15%. On December 31, the savings association mails or delivers a notice required by § 226.9(c) of this title informing the consumer that the annual percentage rate will increase to 20% on February 15. The consumer uses the account to make $2,000 in purchases on January 10 and $1,000 in purchases on January 20. Assuming no other transactions, the outstanding balance for purposes of § 535.24 is the $3,000 balance as of the end of the day on January 14. Therefore, under § 535.24(a), the savings association cannot increase the annual percentage rate applicable to that balance. The savings association can apply the 20% rate to the $1,000 in purchases made on January 20 but, consistent with § 226.9(c) of this title, the savings association cannot do so until February 15.

2. Reasonable procedures. A savings association is not required to determine the specific date on which a notice required by §§ 226.9(c) or 226.9(g) of this title was provided. For purposes of § 535.24(a)(2), if the savings association has adopted reasonable procedures designed to ensure that notices required by §§ 226.9(c) or 229.9(g) of this title are provided to consumers no later than, for example, three days after the event giving rise to the notice, the outstanding balance is the balance at the end of the seventeenth day after such event.

(b) Exceptions

Paragraph (b)(1)

1. External index. A savings association may increase the annual percentage rate on an outstanding balance if the increase is based on an index outside the savings association's control. A savings association may not increase the rate on an outstanding balance based on its own prime rate or cost of funds and may not reserve a contractual right to change rates on outstanding balances at its discretion. In addition, a savings association may not increase the rate on an outstanding balance by changing the method used to determine that rate. A savings association is permitted, however, to use a published prime rate, such as that in the Wall Street Journal, even if the savings association's own prime rate is one of several rates used to establish the published rate.

2. Publicly available. The index must be available to the public. A publicly available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the rate applied to the outstanding balance.

Paragraph (b)(2)

1. Example. Assume that a consumer credit card account has a balance of $1,000 at a 5% promotional rate and that the savings association also charges an annual percentage rate of 15% for purchases and a penalty rate of 25%. If the consumer does not make payment by the due date and the account agreement specifies that event as a trigger for applying the penalty rate, the savings association may increase the annual percentage rate on the $1,000 from the 5% promotional rate to the 15% annual percentage rate for purchases. The savings association may not, however, increase the rate on the $1,000 from the 5% promotional rate to the 25% penalty rate, except as otherwise permitted under § 535.24(b)(3).

Paragraph (b)(3)

1. Example. Assume that the annual percentage rate applicable to purchases on a consumer credit card account is increased from 15% to 20% and that the account has an outstanding balance of $1,000 at the 15% rate. The payment due date on the account is the twenty-fifth of the month. If the savings association has not received the required minimum periodic payment due on March 15 on or before April 14, the savings association may increase the rate applicable to the $1,000 balance once the savings association has complied with the notice requirements § 226.9(g) of this title.

(c) Treatment of outstanding balances following rate increase

1. Scope. This provision does not apply if the consumer credit card account does not have an outstanding balance. This provision also does not apply if a rate is increased pursuant to any of the exceptions in § 535.24(b).

2. Category of transactions. This provision does not apply to balances in categories of transactions other than the category for which the savings association has increased the annual percentage rate. For example, if a savings association increases the annual percentage rate that applies to purchases but not the rate that applies to cash advances, §§ 535.24(c)(1) and 535.(c)(2) apply to an outstanding balance consisting of purchases but not an outstanding balance consisting of cash advances.

Paragraph (c)(1)

1. No less beneficial to the consumer. A savings association may provide a method of paying the outstanding balance that is different from the methods listed in § 535.24(c)(1) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer if the method amortizes the outstanding balance in five years or longer or if the method results in a required minimum periodic payment on the outstanding balance that is equal to or less than a minimum payment calculated consistent with § 535.24(c)(1)(ii). For example, a savings association could more than double the percentage of amounts owed included in the minimum payment so long as the minimum payment does not result in amortization of the outstanding balance in less than five years. Alternatively, a savings association could require a consumer to make a minimum payment on the outstanding balance that amortizes that balance in less than five years so long as the payment does not include a percentage of the outstanding balance that is more than twice the percentage included in the minimum payment before the effective date of the increased rate.

Paragraph (c)(1)(ii)

1. Required minimum periodic payment on other balances. This paragraph addresses the required minimum periodic payment on the outstanding balance. This paragraph does not limit or otherwise address the savings association's ability to determine the amount of the minimum periodic payment for other balances.

2. Example. Assume that the method used by a savings association to calculate the required minimum periodic payment for a consumer credit card account requires the consumer to pay either the total of fees and interest charges plus 1% of the total amount owed or $20, whichever is greater. Assume also that the savings association increases the annual percentage rate applicable to purchases on a consumer credit card account from 15% to 20% and that the account has an outstanding balance of $1,000 at the 15% rate. Section 535.24(c)(1)(ii) would permit the savings association to calculate the required minimum periodic payment on the outstanding balance by adding fees and interest charges to 2% of the outstanding balance.

Paragraph (c)(2)

1. Fee or charge based solely on the outstanding balance. You are prohibited from assessing a fee or charge based solely on an outstanding balance. For example, a savings association is prohibited from assessing a maintenance or similar fee based on an outstanding balance. A savings association is not, however, prohibited from assessing fees such as late payment fees or fees for exceeding the credit limit even if such fees are based in part on an outstanding balance.

Section 535.25 – Unfair fees for exceeding the credit limit due to credit holds

1. General. Under § 535.25, a savings association may not assess a fee for exceeding the credit limit if the credit limit would not have been exceeded but for a hold placed on the available credit for a consumer credit card account for a transaction that has been authorized but has not yet been presented for settlement, if the amount of the hold is in excess of the actual purchase or transaction amount when the transaction is settled. Section 535.25 does not limit a savings association from charging a fee for exceeding the credit limit in connection with a particular transaction if the consumer would have exceeded the credit limit due to other reasons, such as other transactions that may have been authorized but not yet presented for settlement, a payment that is returned, or if the purchase or transaction amount for the transaction for which the hold was placed would have also caused the consumer to exceed the credit limit.

2. Example of prohibition in connection with hold placed for same transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,500. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the savings association for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming that there is no other activity on the account, the savings association is prohibited from assessing a fee for exceeding the credit limit with respect to the $750 hold. If, however, the total cost of the stay charged to the account had been more than

$500, the savings association would not be prohibited from assessing a fee for exceeding the credit limit.

3. Example of prohibition in connection with hold placed for another transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,400. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the savings association for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. While the hold remains in place, the consumer uses the credit card to make a $150 purchase. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming that there is no other activity on the account, the savings association is prohibited from assessing a fee for exceeding the credit limit with respect to either the $750 hold or the $150 purchase. If, however, the total cost of the stay charged to the account had been more than $450, the savings association would not be prohibited from assessing a fee for exceeding the credit limit.

4. Example of prohibition when authorization and settlement amounts are held for the same transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,400. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the savings association for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. When the hotel presents the $450

transaction for settlement, it uses a different transaction code to identify the transaction than it had used for the pre-authorization, causing both the $750 hold and the $450 purchase amount to be temporarily posted to the consumer's account at the same time, and the consumer's balance to exceed the credit limit. Under these circumstances, and assuming no other transactions, the savings association is prohibited from assessing a fee for exceeding the credit limit because the credit limit was exceeded solely due to the $750 hold.

5. Example of permissible fee for exceeding the credit limit in connection with a hold. Assume that a consumer has a credit limit of $2,000 and a balance of $1,400 on a consumer credit card account. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the savings association for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. While the hold remains in place, the consumer uses the credit card to make a $650 purchase. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Notwithstanding the existence of the hold and assuming that there is no other activity on the account, the savings association may charge the consumer a fee for exceeding the credit limit with respect to the $650 purchase because the consumer would have exceeded the credit limit even if the hold had been for the actual amount of the hotel transaction.

Section 535.26 – Unfair balance computation method

(a) General rule

1. Two-cycle method prohibited. A savings association is prohibited from computing the finance charge using the so-called two-cycle average daily balance computation method. This method calculates the finance charge using a balance that is the sum of the average daily balances for two billing cycles. The first balance is for the current billing cycle, and is calculated by adding the total balance (including or excluding new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. The second balance is for the preceding billing cycle.

2. Example. Assume that the billing cycle on a consumer credit card account starts on the first day of the month and ends on the last day of the month. A consumer has a zero balance on March 1. The consumer uses the credit card to make a $500 purchase on March 15. The consumer makes no other purchases and pays $400 on the due date (April 25), leaving a $100 balance. The savings association may charge interest on the $500 purchase from the start of the billing cycle (April 1) through April 24 and interest on the remaining $100 from April 25 through the end of the April billing cycle (April 30). The savings association is prohibited, however, from reaching back and charging interest on the $500 purchase from the date of purchase (March 15) to the end of the March billing cycle (March 31).

Section 535.27 – Unfair charging to the account of security deposits and fees for the issuance or availability of credit

1. Initial credit limit for the account. For purposes of this section, the initial credit limit is the limit in effect when the account is opened.

(a) Annual rule

1. Majority of the credit limit. The total amount of security deposits and fees for the issuance or availability of credit constitutes a majority of the initial credit limit if that total is greater than half of the limit. For example, assume that a consumer credit card account has an initial credit limit of $500. Under § 535.27(a), a savings association may charge to the account security deposits and fees for the issuance or availability of credit totaling no more than $250 during the twelve months after the date on which the account is opened (consistent with § 535.27(b)).

(b) Monthly rule

1. Adjustments of one dollar or less permitted. When dividing amounts pursuant to § 535.27(b)(2), the savings association may adjust amounts by one dollar or less. For example, if a savings association is dividing $125 over eleven billing cycles, the savings association may charge $12 for four months and $11 for the remaining seven months.

2. Example. Assume that a consumer credit card account opened on January 1 has an initial credit limit of $500 and that a savings association charges to the account security deposits and fees for the issuance or availability of credit that total $250 during the twelve months after the date on which the account is opened. Assume also that the billing cycles for this account begin on the first day of the month and end on the last day of the month. Under § 535.27(b), the savings association may charge to the account no

more than $250 in security deposits and fees for the issuance or availability of credit. If it charges $250, the savings association may charge as much as $125 during the first billing cycle. If it charges $125 during the first billing cycle, it may then charge $12 in any four billing cycles and $11 in any seven billing cycles during the year.

(c) Fees for the issuance or availability of credit

1. Membership fees. Membership fees for opening an account are fees for the issuance or availability of credit. A membership fee to join an organization that provides a credit or charge card as a privilege of membership is a fee for the issuance or availability of credit only if the card is issued automatically upon membership. If membership results merely in eligibility to apply for an account, then such a fee is not a fee for the issuance or availability of credit.

2. Enhancements. Fees for optional services in addition to basic membership privileges in a credit or charge card account (for example, travel insurance or card-registration services) are not fees for the issuance or availability of credit if the basic account may be opened without paying such fees.

3. One-time fees. Only non-periodic fees related to opening an account (such as one-time membership or participation fees) are fees for the issuance or availability of credit. Fees for reissuing a lost or stolen card and statement reproduction fees are examples of fees that are not fees for the issuance or availability of credit.

Section 535.28 – Deceptive firm offers of credit

(a) Disclosure of criteria bearing on creditworthiness

1. Designed to call attention. Whether a disclosure has been provided in a manner that is designed to call attention to the nature and significance of required

information depends on where the disclosure is placed in the solicitation and how it is presented, including whether the disclosure uses a typeface and type size that are easy to read and uses boldface or italics. Placing the disclosure in a footnote would not satisfy this requirement.

2. Form of electronic disclosures. Electronic disclosures must be provided consistent with §§ 226.5a(a)(2)-8 and 226.5a(a)(2)-9 of this title.

3. Multiple annual percentage rates or credit limits. For purposes of this section, a firm offer of credit solicitation that states an annual percentage rate or credit limit for a credit card feature and a different annual percentage rate or credit limit for a different credit card feature does not offer multiple annual percentage rates or credit limits. For example, if a firm offer of credit solicitation offers a 15% annual percentage rate for purchases and a 20% annual percentage rate for cash advances, the solicitation does not offer multiple annual percentage rates for purposes of this section.

4. Example. Assume that a savings association requests from a consumer reporting agency a list of consumers with credit scores of 650 or higher, so that the savings association can send those consumers a firm offer of credit solicitation. The savings association sends a solicitation to those consumers for a consumer credit card account advertising "rates from 8.99% to 19.99%" and "credit limits from $1,000 to $10,000." Before selection of the consumers for the offer, however, the savings association determines that it will provide an interest rate of 8.99% and a credit limit of $10,000 only to those consumers responding to the solicitation who are verified to have a credit score of 650 or higher, who have a debt-to-income ratio below a certain amount, and who meet other specific criteria bearing on creditworthiness. Under § 535.28, this

solicitation is deceptive unless the savings association discloses, in a manner that is reasonably understandable to the consumer and designed to call attention to the nature and significance of the information, that, if the consumer is approved for credit, the annual percentage rate and credit limit the consumer will receive will depend on specific criteria bearing on the consumer's creditworthiness. The savings association may satisfy this requirement by using a typeface and type size that are easy to read and stating in boldface in a manner that otherwise calls attention to the nature and significance of the information: "**If you are approved for credit, your annual percentage rate and/or credit limit will depend on your credit history, income, and debts.**"

5. Applicability of criteria in disclosure. When making a disclosure under this section, a savings association may only disclose the criteria it uses in evaluating whether consumers who are approved for credit will receive the lowest annual percentage rate or the highest credit limit. For example, if a savings association does not consider the consumer's debts when determining whether the consumer should receive the lowest annual percentage rate or highest credit limit, the disclosure must not refer to "debts."

Subpart D – Overdraft Service Practices

Section 535.32 – Unfair overdraft service practices

(a) Opt-out requirement

(a)(1) General rule

1. Form, content and timing of disclosure. The form, content and timing of the opt-out notice required to be provided under paragraph (a) of this section are addressed under § 230.10 of this title.

(a)(3) Exceptions

Paragraph (a)(3)(i)

1. Example of transaction amount exceeding authorization amount (fuel purchase). A consumer has $30 in a deposit account. The consumer uses a debit card to purchase fuel. Before permitting the consumer to use the fuel pump, the merchant verifies the validity of the card by obtaining authorization from the savings association for a $1 transaction. The consumer purchases $50 of fuel. If the savings association pays the transaction, it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

2. Example of transaction amount exceeding authorization amount (restaurant). A consumer has $50 in a deposit account. The consumer pays for a $45 meal at a restaurant using a debit card. While the restaurant may obtain authorization for the $45 cost of the meal, the consumer may add $10 for a tip. If the savings association pays the $55 transaction (including the tip amount), it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

Paragraph (a)(3)(ii)

1. Example of transaction presented by paper-based means. A consumer has $50 in a deposit account. The consumer makes a $60 purchase and presents his or her debit card for payment. The merchant takes an imprint of the card. Later that day, the merchant submits a sales slip with the card imprint to its processor for payment. If the consumer's savings association pays the transaction, it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

(b) Debit holds

1. General. Under § 535.32(b), a savings association may not assess an overdraft fee if the overdraft would not have occurred but for a hold placed on funds in the consumer's account for a transaction that has been authorized but has not yet been presented for settlement, if the amount of the hold is in excess of the actual purchase or transaction amount when the transaction is settled. Section 535.32(b) does not limit a savings association from charging an overdraft fee in connection with a particular transaction if the consumer would have incurred an overdraft due to other reasons, such as other transactions that may have been authorized but not yet presented for settlement, a deposited check that is returned, or if the purchase or transaction amount for the transaction for which the hold was placed would have also caused the consumer to overdraw his or her account.

2. Example of prohibition in connection with hold placed for same transaction. A consumer has $50 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's savings association for a $75 "hold" on the account which exceeds the consumer's funds. The consumer purchases $20 of fuel. Under these circumstances, § 535.32(b) prohibits the savings association from assessing a fee or charge in connection with the debit hold because the actual amount of the fuel purchase did not exceed the funds in the consumer's account. However, if the consumer had purchased $60 of fuel, the savings association could assess a fee or charge for an overdraft because the transaction exceeds the funds in the consumer's account, unless the consumer has opted out of the payment of overdrafts under § 535.32(a).

3. Example of prohibition in connection with hold placed for another transaction. A consumer has $100 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's savings association for a $75 "hold" on the account. The consumer purchases $20 of fuel, but the transaction is not presented for settlement until the next day. Later on the first day, and assuming no other transactions, the consumer withdraws $75 at an ATM. Under these circumstances, § 535.32(b) prohibits the savings association from assessing a fee or charge for paying an overdraft with respect to the $75 withdrawal because the overdraft was caused solely by the $75 hold.

4. Example of prohibition when authorization and settlement amounts are held for the same transaction. A consumer has $100 in his deposit account, and uses his debit card to purchase $50 worth of fuel. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's savings association for a $75 "hold" on the account. The consumer purchases $50 of fuel. When the merchant presents the $50 transaction for settlement, it uses a different transaction code to identify the transaction than it had used for the pre-authorization, causing both the $75 hold and the $50 purchase amount to be temporarily posted to the consumer's account at the same time, and the consumer's account to be overdrawn. Under these circumstances, and assuming no other transactions, § 535.32(b) prohibits the savings association from assessing a fee or charge for paying an overdraft because the overdraft was caused solely by the $75 hold.

5. Example of permissible overdraft fees in connection with a hold. A consumer has $100 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's savings association for a $75 "hold" on the account. The consumer purchases $35 of fuel, but the transaction is not presented for settlement until the next day. Later on the first day, and assuming no other transactions, the consumer withdraws $75 at an ATM. Notwithstanding the existence of the hold, and assuming the consumer has not opted out of the payment of overdrafts under § 535.32(a), the consumer's savings association may charge the consumer an overdraft fee for the $75 ATM withdrawal, because the consumer would have incurred the overdraft even if the hold had been for the actual amount of the fuel purchase.

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Dated: May xx, 2008.

By the Office of Thrift Supervision

John M. Reich,
Director.
BILLING CODE 6720-01-P

* * * * *

National Credit Union Administration

12 CFR Part 706

For the reasons discussed in the joint preamble, the National Credit Union Administration proposes to amend part 706 of title 12 of the Code of Federal Regulations as follows:

PART 706 – UNFAIR OR DECEPTIVE ACTS OR PRACTICES

1. The authority citation for part 706 continues to read as follows:

Authority: 15 U.S.C. 57a(f).

2. Revise the part heading for part 706 to read as shown above.

3. Revise part 706 to read as follows:

Subpart A–General Provisions

Sec.

Subpart B–Consumer Credit Practices

Subpart C–Consumer Credit Card Account Practices

Subpart A–General Provisions

§ 706.1 Authority, purpose and scope.

(a) Authority. This part is issued by NCUA under section 18(f) of the Federal Trade Commission Act, 15 U.S.C. 57a(f).

(b) Purpose. The purpose of this part is to prohibit unfair or deceptive acts or practices in violation of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). This part defines and contains requirements prescribed for the purpose of preventing specific unfair or deceptive acts or practices of federal credit unions. The prohibitions in this part do not limit NCUA's authority to enforce the FTC Act with respect to any other unfair or deceptive acts or practices.

(c) Scope. This part applies to federal credit unions.

§§ 706.2-706.10 [Reserved]

Subpart B–Consumer Credit Practices

§ 706.11 Definitions.

For purposes of this subpart, the following definitions apply:

Antique means any item over one hundred years of age, including items that have been repaired or renovated without changing their original form or character.

Consumer means a natural person member who seeks or acquires goods, services, or money for personal, family, or household purposes, other than for the purchase of real property.

Cosigner means a natural person who renders himself or herself liable for the obligation of another person without receiving goods, services, or money in return for the credit obligation, or, in the case of an open-end credit obligation, without receiving the contractual right to obtain extensions of credit under the obligation. The term includes any person whose signature is requested as a condition to granting credit to a consumer, or as a condition for forbearance on collection of a consumer's obligation that is in default. The term does not include a spouse whose signature is required on a credit obligation to perfect a security interest pursuant to state law. A person is a cosigner within the meaning of this definition whether or not he or she is designated as such on a credit obligation.

Debt means money that is due or alleged to be due from one person to another.

Earnings mean compensation paid or payable to an individual or for his or her account for personal services rendered or to be rendered by him or her, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.

Household goods mean clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects, including wedding

rings of the consumer and his or her dependents, provided that the following are not included within the scope of the term "household goods:"

(1) Works of art;

(2) Electronic entertainment equipment, except one television and one radio;

(3) Items acquired as antiques; and

(4) Jewelry, except wedding rings.

Obligation means an agreement between a consumer and a federal credit union.

Person means an individual, corporation, or other business organization.

§ 706.12 Unfair credit practices.

(a) In connection with the extension of credit to consumers, it is an unfair act or practice for a federal credit union, directly or indirectly, to take or receive from a consumer an obligation that:

(1) Constitutes or contains a cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right to notice and the opportunity to be heard in the event of suit or process.

(2) Constitutes or contains an executory waiver or a limitation of exemption from attachment, execution, or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest executed in connection with the obligation.

(3) Constitutes or contains an assignment of wages or other earnings unless:

(i) The assignment by its terms is revocable at the will of the debtor, or

(ii) The assignment is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment, or

(iii) The assignment applies only to wages or other earnings already earned at the time of the assignment.

(4) Constitutes or contains a nonpossessory security interest in household goods other than a purchase money security interest.

§ 706.13 Unfair or deceptive cosigner practices.

(a) Prohibited practices. In connection with the extension of credit to consumers, it is:

(1) A deceptive act or practice for a federal credit union, directly or indirectly, to misrepresent the nature or extent of cosigner liability to any person.

(2) An unfair act or practice for a federal credit union, directly or indirectly, to obligate a cosigner unless the cosigner is informed prior to becoming obligated, which in the case of open-end credit means prior to the time that the agreement creating the cosigner's liability for future charges is executed, of the nature of his or her liability as cosigner.

(b) Disclosure requirement.

(1) To comply with the cosigner information requirement of paragraph (a)(2), a clear and conspicuous disclosure statement shall be given in writing to the cosigner prior to becoming obligated. The disclosure statement must contain only the following statement, or one which is substantially similar, and shall either be a separate document or included in the documents evidencing the consumer credit obligation.

NOTICE TO COSIGNER

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record.

This notice is not the contract that makes you liable for the debt.

(2) If the notice to cosigner is a separate document, nothing other than the following items may appear with the notice. Items (i) through (v) may not be part of the narrative portion of the notice to cosigner.

(i) The name and address of the federal credit union;

(ii) An identification of the debt to be cosigned, e.g., a loan identification number;

(iii) The amount of the loan;

(iv) The date of the loan;

(v) A signature line for a cosigner to acknowledge receipt of the notice; and

(vi) To the extent permitted by state law, a cosigner notice required by state law may be included in the paragraph (b)(1) notice.

(3) To the extent the notice to cosigner specified in paragraph (b)(1) refers to an action against a cosigner that is not permitted by state law, the notice to cosigner may be modified.

§ 706.14 Late charges.

(a) In connection with collecting a debt arising out of an extension of credit to a consumer, it is an unfair act or practice for a federal credit union, directly or indirectly, to levy or collect any delinquency charge on a payment, which payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period, when the only delinquency is attributable to late fee(s) or delinquency charge(s) assessed on earlier installment(s).

(b) For purposes of this section, "collecting a debt" means any activity other than the use of judicial process that is intended to bring about or does bring about repayment of all or part of a consumer debt.

§ 706.15 State exemptions.

(a) If, upon application to the NCUA by an appropriate state agency, the NCUA determines that:

(1) there is a state requirement or prohibition in effect that applies to any transaction to which a provision of this rule applies; and

(2) the state requirement or prohibition affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded by this rule; then that provision of this rule will not be in effect in the state to the extent specified by

the NCUA in its determination, for as long as the state administers and enforces the state requirement or prohibition effectively.

(b) States that received an exemption from the Federal Trade Commission's Credit Practices Rule prior to September 17, 1987, are not required to reapply to NCUA for an exemption under subparagraph (a) of this section provided that the state forwards a copy of its exemption determination to the appropriate Regional Office. NCUA will honor the exemption for as long as the state administers and enforces the state requirement or prohibition effectively. Any state seeking a greater exemption than that granted to it by the Federal Trade Commission must apply to NCUA for the exemption.

§§ 706.16-706.20 [Reserved]

Subpart C – Consumer Credit Card Account Practices

§ 706.21 Definitions.

For purposes of this subpart, the following definitions apply:

Annual percentage rate means the product of multiplying each periodic rate for a balance or transaction on a consumer credit card account by the number of periods in a year. The term "periodic rate" has the same meaning as in 12 CFR 226.2.

Consumer means a natural person member to whom credit is extended under a consumer credit card account or a natural person who is a co-obligor or guarantor of a consumer credit card account.

Consumer credit card account means an account provided to a consumer primarily for personal, family, or household purposes under an open-end credit plan that is accessed by a credit card or charge card. The terms "open-end credit," "credit card," and

"charge card" have the same meanings as in 12 CFR 226.2. The following are not consumer credit card accounts for purposes of this subpart:

(1) Home equity plans subject to the requirements of 12 CFR 226.5b that are accessible by a credit or charge card;

(2) Overdraft lines of credit tied to asset accounts accessed by check-guarantee cards or by debit cards;

(3) Lines of credit accessed by check-guarantee cards or by debit cards that can be used only at automated teller machines; and

(4) Lines of credit accessed solely by account numbers.

Promotional rate means:

(1) Any annual percentage rate applicable to one or more balances or transactions on a consumer credit card account for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period; or

(2) Any annual percentage rate applicable to one or more transactions on a consumer credit card account that is lower than the annual percentage rate that applies to other transactions of the same type.

§ 706.22 Unfair time to make payments.

(a) General rule. Except as provided in paragraph (c) of this section, a federal credit union must not treat a payment on a consumer credit card account as late for any purpose unless the consumer has been provided a reasonable amount of time to make the payment.

(b) Safe harbor. A federal credit union provides a reasonable amount of time to make a payment if it has adopted reasonable procedures to ensure that periodic

statements specifying the payment due date are mailed or delivered to consumers at least 21 days prior to the payment due date.

(c) Exception for grace periods. Paragraph (a) of this section does not apply to any time period provided by the federal credit union within which the consumer may repay any portion of the credit extended without incurring an additional finance charge.

§ 706.23 Unfair allocation of payments.

(a) General rule for accounts with different annual percentage rates on different balances. Except as provided in paragraph (b) of this section, when different annual percentage rates apply to different balances on a consumer credit card account, the federal credit union must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances in a manner that is no less beneficial to the consumer than one of the following methods:

(1) The amount is allocated first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate;

(2) Equal portions of the amount are allocated to each balance; or

(3) The amount is allocated among the balances in the same proportion as each balance bears to the total outstanding balance.

(b) Special rules for accounts with promotional rate balances or deferred interest balances.

(1) Rule regarding payment allocation.

(i) In general, when a consumer credit card account has one or more balances at a promotional rate or balances on which interest is deferred, the federal credit union must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the other balances on the account consistent with paragraph (a) of this section. If any amount remains after such allocation, the federal credit union must allocate that amount among the promotional rate balances or the deferred interest balances consistent with paragraph (a) of this section.

(ii) Exception for deferred interest balances. Notwithstanding paragraph (b)(1)(i) of this section, the federal credit union may allocate the entire amount paid by the consumer in excess of the required minimum periodic payment to a balance on which interest is deferred during the two billing cycles immediately preceding expiration of the period during which interest is deferred.

(2) Rule regarding grace periods. A federal credit union must not require a consumer to repay any portion of a promotional rate balance or deferred interest balance on a consumer credit card account in order to receive any time period offered by the federal credit union in which to repay other credit extended without incurring finance charges, provided that the consumer is otherwise eligible for such a time period.

§ 706.24 Unfair application of increased annual percentage rates to outstanding balances.

(a) Prohibition on increasing annual percentage rates on outstanding balances.

(1) General rule. Except as provided in paragraph (b) of this section, a federal credit union must not increase the annual percentage rate applicable to any outstanding balance on a consumer credit card account.

(2) Outstanding balance. For purposes of this section, "outstanding balance" means the amount owed on a consumer credit card account at the end of the fourteenth day after the federal credit union provides a notice required by 12 CFR 226.9(c) or (g).

(b) Exceptions. Paragraph (a) of this section does not apply where the annual percentage rate is increased due to:

(1) The operation of an index or formula that is not under the federal credit union's control and is available to the general public;

(2) The expiration or loss of a promotional rate, provided that, if a promotional rate is lost, the federal credit union does not increase the annual percentage rate to a rate that is greater than the annual percentage rate that would have applied after expiration of the promotional rate; or

(3) The federal credit union not receiving the consumer's required minimum periodic payment within 30 days after the due date for that payment.

(c) Treatment of outstanding balances following rate increase.

(1) Payment of outstanding balances. When a federal credit union increases the annual percentage rate applicable to a category of transactions on a consumer credit card account, and the federal credit union is prohibited by this section from applying the

increased rate to outstanding balances in that category, the federal credit union must provide the consumer with a method of paying the outstanding balance that is no less beneficial to the consumer than one of the following methods:

(i) An amortization period for the outstanding balance of no less than five years, starting from the date on which the increased annual percentage rate went into effect; or

(ii) A required minimum periodic payment on the outstanding balance that includes a percentage of that balance that is no more than twice the percentage included before the date on which the increased annual percentage rate went into effect.

(2) Fees and charges on outstanding balance. When a federal credit union increases the annual percentage rate applicable to a category of transactions on a consumer credit card account, and the federal credit union is prohibited by this section from applying the increased rate to outstanding balances in that category, the federal credit union must not assess any fee or charge based solely on the outstanding balance.

§ 706.25 Unfair fees for exceeding the credit limit caused by credit holds.

A federal credit union must not assess a fee or charge for exceeding the credit limit on a consumer credit card account if the credit limit would not have been exceeded but for a hold on any portion of the available credit on the account that is in excess of the actual purchase or transaction amount.

§ 706.26 Unfair balance computation method.

(a) General rule. Except as provided in paragraph (b) of this section, a federal credit union must not impose finance charges on outstanding balances on a consumer credit card account based on balances for days in billing cycles that precede the most recent billing cycle.

(b) Exceptions. Paragraph (a) of this section does not apply to:

(1) The assessment of deferred interest; or

(2) Adjustments to finance charges following the resolution of a billing error dispute under 12 CFR 226.12(b) or 12 CFR 226.13.

§ 706.27 Unfair financing of security deposits and fees for the issuance or availability of credit.

(a) Annual rule. During the period beginning with the date on which a consumer credit card account is opened and ending twelve months from that date, a federal credit union must not charge to the account security deposits or fees for the issuance or availability of credit if the total amount of such security deposits and fees constitutes a majority of the credit limit for the account.

(b) Monthly rule. If the total amount of security deposits and fees for the issuance or availability of credit charged to a consumer credit card account during the period beginning with the date on which a consumer credit card account is opened and ending twelve months from that date constitutes more than 25 percent of the initial credit limit for the account:

(1) During the first billing cycle after the account is opened, the federal credit union must not charge security deposits and fees for the issuance or availability of credit that total more than 25 percent of the initial credit limit for the account; and

(2) In each of the eleven billing cycles following the first billing cycle, the federal credit union must not charge to the account more than one eleventh of the total amount of any additional security deposits and fees for the issuance of availability of credit in excess of 25 percent of the initial credit limit for the account.

(c) Fees for the issuance or availability of credit. For purposes of paragraphs (a) and (b) of this section, fees for the issuance or availability of credit include:

(1) Any annual or other periodic fee that may be imposed for the issuance or availability of a consumer credit card account, including any fee based on account activity or inactivity; and

(2) Any non-periodic fee that relates to opening an account.

§ 706.28 Deceptive firm offers of credit.

(a) Disclosure of criteria bearing on creditworthiness. If a federal credit union offers a range or multiple annual percentage rates or credit limits when making a solicitation for a firm offer of credit for a consumer credit card account, and the annual percentage rate or credit limit that consumers approved for credit will receive depends on specific criteria bearing on creditworthiness, the federal credit union must disclose the types of criteria in the solicitation. The disclosure must be provided in a manner that is reasonably understandable to consumers and is designed to call attention to the nature and significance of the information regarding the eligibility criteria for the lowest annual percentage rate or highest credit limit stated in the solicitation. If presented in a manner that calls attention to the nature and significance of the information, the following disclosure may be used to satisfy the requirements of this section, as applicable: "If you are approved for credit , your annual percentage rate and/or credit limit will depend on your credit history, income, and debts."

(b) Firm offer of credit defined. For purposes of this section, "firm offer of credit" has the same meaning as "firm offer of credit or insurance" in section 603(l) of the Fair Credit Reporting Act (15 U.S.C. 1681a(l)).

§§ 706.29-706.30 [Reserved]

Subpart D – Overdraft Services

§ 706.31 Definitions.

For purposes of this subpart, the following definitions apply:

Account means a share account at a federal credit union that is held by or offered to a consumer, and has the same meaning as in § 707.2(a) of this chapter.

Consumer means a member who holds an account primarily for personal, family, or household purposes.

Overdraft service means a service under which a federal credit union charges a fee for paying a transaction, including a check or other item, that overdraws an account. The term "overdraft service" does not include any payment of overdrafts pursuant to –

(1) A line of credit subject to the Federal Reserve Board's Regulation Z, 12 CFR part 226, including transfers from a credit card account, home equity line of credit, or overdraft line of credit; or

(2) A service that transfers funds from another account of the consumer.

§ 706.32 Unfair practices involving overdraft services.

(a) Opt-out requirement.

(1) General rule. A federal credit union must not assess a fee or charge on a consumer's account in connection with an overdraft service, unless the federal credit union provides the consumer the right to opt out of the federal credit union's payment of overdrafts and a reasonable opportunity to exercise that opt-out, and the consumer has not opted out. The consumer must be given notice and an opportunity to opt out before the federal credit union's assessment of any fee or charge for an overdraft, and subsequently

at least once during or for any periodic statement cycle in which any fee or charge for paying an overdraft is assessed. The notice requirements in this paragraph (a)(1) and (a)(2) do not apply if the consumer has opted out, unless the consumer subsequently revokes the opt-out.

(2) Partial opt-out. A federal credit union must provide a consumer the option of opting out only for the payment of overdrafts at automated teller machines and for point-of-sale transactions initiated by a debit card, in addition to the choice of opting out of the payment of overdrafts for all transaction.

(3) Exceptions. Notwithstanding a consumer's election to opt out under paragraphs (a)(1) or (a)(2) of this section, a federal credit union may assess a fee or charge on a consumer's account for paying a debit card transaction that overdraws an account if:

(i) There were sufficient funds in the consumer's account at the time the authorization request was received, but the actual purchase amount for that transaction exceeds the amount that had been authorized; or

(ii) The transaction is presented for payment by paper-based means, rather than electronically through a card terminal, and the federal credit union has not previously authorized the transaction.

(4) Time to comply with opt-out. A federal credit union must comply with a consumer's opt-out request as soon as reasonably practicable after the federal credit union receives it.

(5) Continuing right to opt-out. A consumer may opt out of the federal credit union's future payment of overdrafts at any time.

(6) Duration of opt-out. A consumer's opt-out is effective unless subsequently revoked by the consumer.

(b) Debit holds. A federal credit union shall not assess a fee or charge on a consumer's account for an overdraft service if the consumer's overdraft would not have occurred but for a hold placed on funds in the consumer's account that is in excess of the actual purchase or transaction amount.

APPENDIX A TO PART 706 – OFFICIAL STAFF INTERPRETATIONS

SUBPART C – CONSUMER CREDIT CARD ACCOUNT PRACTICES

Section 706.21 – Definitions

(d) Promotional rate

Paragraph (d)(1)

1. Rate in effect at the end of the promotional period. If the annual percentage rate that will be in effect at the end of the specified period of time is a variable rate, the rate in effect at the end of that period for purposes of § 706.21(d)(1) is the rate that would otherwise apply if the promotional rate was not offered, consistent with any applicable accuracy requirements under 12 CFR part 226.

Paragraph (d)(2)

1. Example. A federal credit union generally offers a 15% annual percentage rate for purchases on a consumer credit card account. For purchases made during a particular month, however, the creditor offers a rate of 5% that will apply until the consumer pays those purchases in full. Under § 706.21(d)(2), the 5% rate is a "promotional rate" because it is lower than the 15% rate that applies to other purchases.

Section 706.22 – Unfair Time to Make Payment

(a) General rule

1. Treating a payment as late for any purpose. Treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, or assessing a late fee or any other fee based on the consumer's failure to make a payment within the amount of time provided under this section.

2. Reasonable amount of time to make payment. Whether an amount of time is reasonable for purposes of making a payment is determined from the perspective of the consumer, not the federal credit union. Under § 706.22(b), a federal credit union provides a reasonable amount of time to make a payment if it has adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days prior to the payment due date.

(b) Safe Harbor

1. Reasonable procedures. A federal credit union is not required to determine the specific date on which periodic statements are mailed or delivered to each individual consumer. A federal credit union provides a reasonable amount of time to make a payment if the federal credit union has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than, for example, three days after the closing date of the billing cycle and the payment due date on the periodic statement is no less than 24 days after the closing date of the billing cycle.

2 Payment due date. For purposes of § 706.22(b), "payment due date" means the date by which the federal credit union requires the consumer to make payment to avoid being treated as late for any purpose, except as provided in § 706.22(c).

Section 706.23 Unfair Allocation of Payments

1. Minimum periodic payment. This section addresses the allocation of amounts paid by the consumer in excess of the minimum periodic payment required by the federal credit union. This section does not limit or otherwise address the federal credit union's ability to determine the amount of the minimum periodic payment or how that payment is allocated.

2. Adjustments of one dollar or less permitted. When allocating payments, the federal credit union may adjust amounts by one dollar or less. For example, if a federal credit union is allocating $100 equally among three balances, the federal credit union may apply $34 to one balance and $33 to the others. Similarly, if a federal credit union is splitting $100.50 between two balances, the federal credit union may apply $50 to one balance and $50.50 to another.

(a) General rule for accounts with different annual percentage rates on different balances

1. No less beneficial to the consumer. A federal credit union may allocate payments using a method that is different from the methods listed in § 706.23(a) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer than a listed method if it results in the assessment of the same or a lesser amount of interest charges than would be assessed under any of the listed methods. For example, a federal credit union may not allocate the entire amount paid by the consumer in excess of the required minimum periodic payment

to the balance with the lowest annual percentage rate because this method would result in a higher assessment of interest charges than any of the methods listed in § 706.23(a).

2. Example of payment allocation method that is no less beneficial to consumers than a method listed in § 706.23(a). Assume that a consumer's account has a cash advance balance of $500 at annual percentage rate of 15% and a purchase balance of $1,500 at an annual percentage rate of 10% and that the consumer pays $555 in excess of the required minimum periodic payment. A federal credit union could allocate one-third of this amount ($185) to the cash advance balance and two-thirds ($370) to the purchase balance even though this is not a method listed in § 706.23(a) because the federal credit union is applying more of the amount to the balance with the highest annual percentage rate, with the result that the consumer will be assessed less in interest charges, than would be the case under the pro rata allocation method in § 706.23(a)(3). See comment 23(a)(3)-1.

Paragraph (a)(1)

1. Examples of allocating first to the balance with the highest annual percentage rate.

(A) Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 15% and a purchase balance of $1,500 at an annual percentage rate of 10% and that the consumer pays $800 in excess of the required minimum periodic payment. None of the minimum periodic payment is allocated to the cash advance balance. A federal credit union using this method would allocate $500 to pay off the cash advance balance and then allocate the remaining $300 to the purchase balance.

(B) Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 15% and a purchase balance of $1,500 at an annual percentage rate of 10% and that the consumer pays $400 in excess of the required minimum periodic payment. A federal credit union using this method would allocate the entire $400 to the cash advance balance.

Paragraph (a)(2)

1. Example of equal portion method. Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 15% and a purchase balance of $1,500 at an annual percentage rate of 10% and that the consumer pays $555 in excess of the required minimum periodic payment. A federal credit union using this method would allocate $278 to the cash advance balance and $277 to the purchase balance, or vice versa.

Paragraph (a)(3)

1. Example of pro rata method. Assume that a consumer's account has a cash advance balance of $500 at an annual percentage rate of 15% and a purchase balance of $1,500 at an annual percentage rate of 10% and that the consumer pays $555 in excess of the required minimum periodic payment. A federal credit union using this method would allocate 25% of the amount ($139) to the cash advance balance and 75% of the amount ($416) to the purchase balance.

(b) Special rules for accounts with promotional rate balances or deferred interest balances

Paragraph (b)(1)(i)

1. Examples of special rule regarding payment allocation for accounts with promotional rate balances or deferred interest balances.

(A) A consumer credit card account has a cash advance balance of $500 at an annual percentage rate of 15%, a purchase balance of $1,500 at an annual percentage rate of 10%, and a transferred balance of $3,000 at a promotional rate of 5%. The consumer pays $800 in excess of the required minimum periodic payment. The federal credit union must allocate the $800 between the cash advance and purchase balances, consistent with § 706.23(a), and apply nothing to the transferred balance.

(B) A consumer credit card account has a cash advance balance of $500 at an annual percentage rate of 15%, a balance of $1,500 on which interest is deferred, and transferred balance of $3,000 at a promotional rate of 5%. The consumer pays $800 in excess of the required minimum periodic payment. None of the minimum periodic payment is allocated to the cash advance balance. The federal credit union must allocate $500 to pay off the cash advance balance before allocating the remaining $300 among the balance on which interest is deferred and the transferred balance, consistent with § 706.23(a).

Paragraph (b)(1)(ii)

1. Examples of exception for deferred interest balances. Assume that on January 1, a consumer uses a credit card to make a $1,000 purchase on which interest is deferred until June 30. If this amount is not paid in full by June 30, all interest accrued during the six-month period will be charged to the account. The billing cycle for this credit card

begins on the first day of the month and ends on the last day of the month. Each month from January through June, the consumer uses the credit card to make $200 in purchases on which interest is not deferred.

(A) The consumer pays $300 in excess of the minimum periodic payment each month from January through June. None of the minimum periodic payment is applied to the deferred interest balance or the purchase balance. For the January, February, March, and April billing cycles, the federal credit union must allocate $200 to the purchase balance and $100 to the deferred interest balance. For the May and June billing cycles, however, the federal credit union has the option of allocating the entire $300 to the deferred interest balance, which will result in that balance being paid in full before the deferred interest period expires on June 30. In this example, the interest that accrued between January 1 and June 30 will not be assessed to the consumer's account.

(B) The consumer pays $200 in excess of the minimum periodic payment each month from January through June. None of the minimum periodic payment is applied to the deferred interest balance or the purchase balance. For the January, February, March, and April billing cycles, the federal credit union must allocate the entire $200 to the purchase balance. For the May and June billing cycles, however, the federal credit union has the option to allocate the entire $200 to the deferred interest balance, which will result in that balance being reduced to $600 before the deferred interest period expires on June 30. In this example, the interest that accrued between January 1 and June 30 will be assessed to the consumer's account.

Paragraph (b)(2)

1. Example of special rule regarding grace periods for accounts with promotional rate balances or deferred interest balances. A federal credit union offers a promotional rate on balance transfers and a higher rate on purchases. The federal credit union also offers a grace period under which consumers who pay their balances in full by the due date are not charged interest on purchases. A consumer who has paid the balance for the prior billing cycle in full by the due date transfers a balance of $2,000 and makes a purchase of $500. Because the federal credit union offers a grace period, the federal credit union must provide a grace period on the $500 purchase if the consumer pays that amount in full by the due date, even though the $2,000 balance at the promotional rate remains outstanding.

Section 706.24 Unfair Application of Increased Annual Percentage Rates to Outstanding Balances

(a) Prohibition against increasing annual percentage rates on outstanding balances

1. Example. Assume that on December 30 a consumer credit card account has a balance of $1,000 at an annual percentage rate of 10%. On December 31, the federal credit union mails or delivers a notice required by 12 CFR 226.9(c) informing the consumer that the annual percentage rate will increase to 15% on February 15. The consumer uses the account to make $2,000 in purchases on January 10 and $1,000 in purchases on January 20. Assuming no other transactions, the outstanding balance for purposes of § 706.24 is the $3,000 balance as of the end of the day on January 14. Therefore, under § 706.24(a), the federal credit union cannot increase the annual percentage rate applicable to that balance. The federal credit union can apply the 15%

rate to the $1,000 in purchases made on January 20 but, consistent with 12 CFR 226.9(c), the federal credit union cannot do so until February 15.

2. Reasonable procedures. A federal credit union is not required to determine the specific date on which a notice required by 12 CFR 226.9(c) or (g) was provided. For purposes of § 706.24(a)(2), if the federal credit union has adopted reasonable procedures designed to ensure that notices required by 12 CFR 226.9(c) or (g) are provided to consumers no later than, for example, three days after the event giving rise to the notice, the outstanding balance is the balance at the end of the seventeenth day after such event.

(b) Exceptions

Paragraph (b)(1)

1. External index. A federal credit union may increase the annual percentage rate on an outstanding balance if the increase is based on an index outside the federal credit union's control. A federal credit union may not increase the rate on an outstanding balance based on its own prime rate or cost of funds and may not reserve a contractual right to change rates on outstanding balances at its discretion. In addition, a federal credit union may not increase the rate on an outstanding balance by changing the method used to determine that rate. A federal credit union is permitted, however, to use a published prime rate, such as that in the Wall Street Journal, even if the federal credit union's own prime rate is one of several rates used to establish the published rate.

2. Publicly available. The index must be available to the public. A publicly available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the rate applied to the outstanding balance.

Paragraph (b)(2)

1. Example. Assume that a consumer credit card account has a balance of $1,000 at a 5% promotional rate and that the federal credit union also charges an annual percentage rate of 15% for purchases and a penalty rate of 25%. If the consumer does not make payment by the due date and the account agreement specifies that event as a trigger for applying the penalty rate, the federal credit union may increase the annual percentage rate on the $1,000 from the 5% promotional rate to the 15% annual percentage rate for purchases. The federal credit union may not, however, increase the rate on the $1,000 from the 5% promotional rate to the 25% penalty rate, except as otherwise permitted under § 706.24(b)(3).

Paragraph (b)(3)

1. Example. Assume that the annual percentage rate applicable to purchases on a consumer credit card account is increased from 10% to 15% and that the account has an outstanding balance of $1,000 at the 10% rate. The payment due date on the account is the twenty-fifth of the month. If the federal credit union has not received the required minimum periodic payment due on March 15 on or before April 14, the federal credit union may increase the rate applicable to the $1,000 balance once the federal credit union has complied with the notice requirements in 12 CFR 226.9(g).

(c) Treatment of outstanding balances following rate increase

1. Scope. This provision does not apply if the consumer credit card account does not have an outstanding balance. This provision also does not apply if a rate is increased pursuant to any of the exceptions in § 706.24(b).

2. Category of transactions. This provision does not apply to balances in categories of transactions other than the category for which the federal credit union has increased the annual percentage rate. For example, if a federal credit union increases the annual percentage rate that applies to purchases but not the rate that applies to cash advances, § 706.24(c)(1) and (2) apply to an outstanding balance consisting of purchases but not an outstanding balance consisting of cash advances.

Paragraph (c)(1)

1. No less beneficial to the consumer. A federal credit union may provide a method of paying the outstanding balance that is different from the methods listed in § 706.24(c)(1) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer if the method amortizes the outstanding balance in five years or longer or if the method results in a required minimum periodic payment on the outstanding balance that is equal to or less than a minimum payment calculated consistent with § 706.24(c)(1)(ii). For example, a federal credit union could more than double the percentage of amounts owed included in the minimum payment so long as the minimum payment does not result in amortization of the outstanding balance in less than five years. Alternatively, a federal credit union could require a consumer to make a minimum payment on the outstanding balance that amortizes that balance in less than five years so long as the payment does not include a percentage of the outstanding balance that is more than twice the percentage included in the minimum payment before the effective date of the increased rate.

Paragraph (c)(1)(ii)

1. Required minimum periodic payment on other balances. This paragraph addresses the required minimum periodic payment on the outstanding balance. This paragraph does not limit or otherwise address the federal credit union's ability to determine the amount of the minimum periodic payment for other balances.

2. Example. Assume that the method used by a federal credit union to calculate the required minimum periodic payment for a consumer credit card account requires the consumer to pay either the total of fees and interest charges plus 1% of the total amount owed or $20, whichever is greater. Assume also that the federal credit union increases the annual percentage rate applicable to purchases on a consumer credit card account from 10% to 15% and that the account has an outstanding balance of $1,000 at the 10% rate. Section 706.24(c)(1)(ii) would permit the federal credit union to calculate the required minimum periodic payment on the outstanding balance by adding fees and interest charges to 2% of the outstanding balance.

Paragraph (c)(2)

1. Fee or charge based solely on the outstanding balance. A federal credit union is prohibited from assessing a fee or charge based solely on an outstanding balance. For example, a federal credit union is prohibited from assessing a maintenance or similar fee based on an outstanding balance. A federal credit union is not, however, prohibited from assessing fees such as late payment fees or fees for exceeding the credit limit even if such fees are based in part on an outstanding balance.

Section 706.25 – Unfair Fees for Exceeding the Credit Limit Caused By Credit Holds

1. General. Under § 706.25, a federal credit union may not assess a fee for exceeding the credit limit if the credit limit would not have been exceeded but for a hold placed on the available credit for a consumer credit card account for a transaction that has been authorized but has not yet been presented for settlement, if the amount of the hold is in excess of the actual purchase or transaction amount when the transaction is settled. Section 706.25 does not limit a federal credit union from charging a fee for exceeding the credit limit in connection with a particular transaction if the consumer would have exceeded the credit limit due to other reasons, such as other transactions that may have been authorized but not yet presented for settlement, a payment that is returned, or if the purchase or transaction amount for the transaction for which the hold was placed would have also caused the consumer to exceed the credit limit.

2. Example of prohibition in connection with hold placed for same transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,500. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the federal credit union for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming that there is no other activity on the account, the federal credit union is prohibited from assessing a fee for exceeding the credit limit with respect to the $750 hold. If, however, the total cost of the stay charged to the account had been more than

$500, the federal credit union would not be prohibited from assessing a fee for exceeding the credit limit.

3. Example of prohibition in connection with hold placed for another transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,400. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the federal credit union for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. While the hold remains in place, the consumer uses the credit card to make a $150 purchase. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Assuming there is no other activity on the account, the federal credit union is prohibited from assessing a fee for exceeding the credit limit with respect to either the $750 hold or the $150 purchase. If, however, the total cost of the stay charged to the account had been more than $450, the federal credit union would not be prohibited from assessing a fee for exceeding the credit limit.

4. Example of prohibition when authorization and settlement amounts are held for the same transaction. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,400. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the federal credit union for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. When the hotel presents the $450

transaction for settlement, it uses a different transaction code to identify the transaction than it had used for the pre-authorization, causing both the $750 hold and the $450 purchase amount to be temporarily posted to the consumer's account at the same time, and the consumer's balance to exceed the credit limit. Under these circumstances, and assuming no other transactions, the federal credit union is prohibited from assessing a fee for exceeding the credit limit because the credit limit was exceeded solely due to the $750 hold.

5. Example of permissible fee for exceeding the credit limit in connection with a hold. Assume that a consumer credit card account has a credit limit of $2,000 and a balance of $1,400. The consumer uses the credit card to check into a hotel for an anticipated stay of five days. When the consumer checks in, the hotel obtains authorization from the federal credit union for a $750 hold on the account to ensure there is adequate available credit to cover the cost of the anticipated stay. While the hold remains in place, the consumer uses the credit card to make a $650 purchase. The consumer checks out of the hotel after three days, and the total cost of the stay is $450, which is charged to the consumer's credit card account. Notwithstanding the existence of the hold and assuming there is no other activity on the account, the federal credit union may charge the consumer a fee for exceeding the credit limit with respect to the $650 purchase because the consumer would have exceeded the credit limit even if the hold had been for the actual amount of the hotel transaction.

Section 706.26 – Unfair Balance Computation Method

(a) General Rule

1. Two-cycle method prohibited. A federal credit union is prohibited from computing the finance charge using the so-called two-cycle average daily balance computation method. This method calculates the finance charge using a balance that is the sum of the average daily balances for two billing cycles. The first balance is for the current billing cycle, and is calculated by adding the outstanding balance, including or excluding new purchases and deducting payments and credits, for each day in the billing cycle, and then dividing by the number of days in the billing cycle. The second balance is for the preceding billing cycle.

2. Example. Assume that the billing cycle on a consumer credit card account starts on the first day of the month and ends on the last day of the month. A consumer has a zero balance on March 1. The consumer uses the credit card to make a $500 purchase on March 15. The consumer makes no other purchases and pays $400 on the due date, April 25, leaving a $100 balance. The federal credit union may charge interest on the $500 purchase from the start of the billing cycle April 1 through April 24, and interest on the remaining $100 from April 25 through the end of the April billing cycle, April 30. The federal credit union is prohibited, however, from reaching back and charging interest on the $500 purchase from the date of purchase, March 15, to the end of the March billing cycle, March 31.

Section 706.27 – Unfair Financing of Security Deposits and Fees for the Issuance or Availability of Credit

1. Initial credit limit for the account. For purposes of this section the credit limit is the limit in effect when the account is opened.

(a) Annual rule

1. Majority of the credit limit. The total amount of security deposits and fees for the issuance or availability of credit constitutes a majority of the credit limit if that total is greater than half of the credit limit. For example, assume that a consumer credit card account has a credit limit of $500. Under § 706.27(a), a federal credit union may charge to the account security deposits and fees for the issuance or availability of credit totaling no more than $250 during the twelve months after the date on which the account is opened, consistent with § 706.27(b), but may not charge any more than that amount.

(b) Monthly rule

1. Adjustments of one dollar or less permitted. When dividing amounts pursuant to § 706.27(b)(2), the federal credit union may adjust amounts by one dollar or less. For example, if a federal credit union is dividing $125 over eleven billing cycles, the federal credit union may charge $12 for four months and $11 for the remaining seven months.

2. Example. Assume that a consumer credit card account opened on January 1 has a credit limit of $500 and that a federal credit union charges to the account security deposits and fees for the issuance or availability of credit that total $250 during the twelve months after the date on which the account is opened. Assume also that the billing cycles for this account begin on the first day of the month and end on the last day of the month. Under § 706.27(b), the federal credit union may charge to the account no

more than $250 in security deposits and fees for the issuance or availability of credit. If it charges $250, the federal credit union may charge as much as $125 during the first billing cycle. If it charges $125 during the first billing cycle, it may then charge $12 in any four billing cycles and $11 in any seven billing cycles during the year.

(c) Fees for the issuance or availability of credit

1. Membership fees. Membership fees for opening an account are fees for the issuance or availability of credit. A membership fee to join an organization that provides a credit or charge card as a privilege of membership is a fee for the issuance or availability of credit only if the card is issued automatically upon membership. If membership results merely in eligibility to apply for an account, then such a fee is not a fee for the issuance or availability of credit.

2. Enhancements. Fees for optional services in addition to basic membership privileges in a credit or charge card account, for example, travel insurance or card-registration services, are not fees for the issuance or availability of credit if the basic account may be opened without paying such fees.

3. One-time fees. Only non-periodic fees related to opening an account, such as one-time membership or participation fees, are fees for the issuance or availability of credit. Fees for reissuing a lost or stolen card and statement reproduction fees are examples of fees that are not fees for the issuance or availability of credit.

Section 706.28 – Deceptive firm offers of credit

(a) Disclosure of criteria bearing on creditworthiness

1. Designed to call attention. Whether a disclosure has been provided in a manner that is designed to call attention to the nature and significance of required

information depends on where the disclosure is placed in the solicitation and how it is presented, including whether the disclosure uses a typeface and type size that are easy to read and uses boldface or italics. Placing the disclosure in a footnote would not satisfy this requirement.

2. Form of electronic disclosures. Electronic disclosures must be provided consistent with 12 CFR 226.5a(a)(2)-8 and -9.

3. Multiple annual percentage rates or credit limits. For purposes of this section, a firm offer of credit solicitation that states an annual percentage rate or credit limit for a credit card feature and a different annual percentage rate or credit limit for a different credit card feature does not offer multiple annual percentage rates or credit limits. For example, if a firm offer of credit solicitation offers a 10% annual percentage rate for purchases and a 15% annual percentage rate for cash advances, the solicitation does not offer multiple annual percentage rates for purposes of this section.

4. Example. Assume that a federal credit union requests from a consumer reporting agency a list of consumers with credit scores of 650 or higher so that the federal credit union can send those consumers a firm offer of credit solicitation. The federal credit union sends a solicitation to those consumers for a consumer credit card account advertising "rates from 8.99% to 14.99%" and "credit limits from $1,000 to $10,000." Before selection of the consumers for the offer, however, the federal credit union determines that it will offer an interest rate of 8.99% only to those consumers responding to the solicitation who are verified to have a credit score of 650 or higher, who have a debt-to-income ratio below a certain amount, and who meet other specific criteria bearing on creditworthiness. Under § 706.28, this solicitation is deceptive unless the federal

credit union discloses, in a manner that is reasonably understandable to the consumer and designed to call attention to the nature and significance of the information, that, if the consumer is approved for credit, the annual percentage rate and credit limit the consumer will receive will depend specific criteria bearing on the consumer's creditworthiness. The federal credit union may satisfy this requirement by using a typeface and type size that are easy to read and stating in boldface in a manner that otherwise calls attention to the nature and significance of the information: "**If you are approved for credit, your annual percentage rate and/or credit limit will depend on your credit history, debt-to-income ratio, and debts.**"

5. Applicability of criteria in disclosure. When making a disclosure under this section, a federal credit union may only disclose the criteria it uses in evaluating whether consumers who are approved for credit will receive the lowest annual percentage rate or the highest credit limit. For example, if a federal credit union does not consider the consumer's debts when determining whether the consumer should receive the lowest annual percentage rate or highest credit limit, the disclosure must not refer to "debts."

SUBPART D – OVERDRAFT SERVICES

Section 706.32 – Unfair Practices Involving Overdraft Services

(a) Opt-out Requirement

(a)(1) General Rule

1. Form, content, and timing of disclosure. The form, content, and timing of the opt-out notice required to be provided under paragraph (a) of this section are addressed under § 707.10 of this chapter.

(a)(3) Exceptions

Paragraph (a)(3)(i)

1. Example of transaction amount exceeding authorization amount (fuel purchase). A consumer has $30 in a deposit account. The consumer uses a debit card to purchase fuel. Before permitting the consumer to use the fuel pump, the merchant verifies the validity of the card by obtaining authorization from the federal credit union for a $1 transaction. The consumer purchases $50 of fuel. If the federal credit union pays the transaction, it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

2. Example of transaction amount exceeding authorization amount (restaurant). A consumer has $50 in a deposit account. The consumer pays for a $45 meal at a restaurant using a debit card. While the restaurant may obtain authorization for the $45 cost of the meal, the consumer may add $10 for a tip. If the federal credit union pays the $55 transaction, including the tip amount, it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

Paragraph (a)(3)(ii)

1. Example of transaction presented by paper-based means. A consumer has $50 in a deposit account. The consumer makes a $60 purchase and presents his or her debit card for payment. The merchant takes an imprint of the card. Later that day, the merchant submits a sales slip with the card imprint to its processor for payment. If the consumer's federal credit union pays the transaction, it would be permitted to assess a fee or charge for paying the overdraft, even if the consumer has opted out of the payment of overdrafts.

(b) Debit holds

1. General. Under § 706.32(b), a federal credit union may not assess an overdraft fee if the overdraft would not have occurred but for a hold placed on funds in the consumer's account for a transaction that has been authorized but has not yet been presented for settlement, if the amount of the hold is in excess of the actual purchase or transaction amount when the transaction is settled. Section 706.32(b) does not limit a federal credit union from charging an overdraft fee in connection with a particular transaction if the consumer would have incurred an overdraft due to other reasons, such as other transactions that may have been authorized but not yet presented for settlement, a deposited check that is returned, or if the purchase or transaction amount for the transaction for which the hold was placed would have also caused the consumer to overdraw his or her account.

2. Example of prohibition in connection with hold placed for same transaction. A consumer has $50 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's federal credit union for a $75 "hold" on the account which exceeds the consumer's funds. The consumer purchases $20 of fuel. Under these circumstances, § 706.32(b) prohibits the federal credit union from assessing a fee or charge in connection with the debit hold because the actual amount of the fuel purchase did not exceed the funds in the consumer's account. However, if the consumer had purchased $60 of fuel, the federal credit union could assess a fee or charge for an overdraft because the transaction exceeds the funds in the consumer's account, unless the consumer has opted out of the payment of overdrafts under § 706.32(a).

3. Example of prohibition in connection with hold placed for another transaction. A consumer has $100 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's federal credit union for a $75 "hold" on the account. The consumer purchases $20 of fuel, but the transaction is not presented for settlement until the next day. Later on the first day, and assuming no other transactions, the consumer withdraws $75 at an ATM. Under these circumstances, § 706.32(b) prohibits the federal credit union from assessing a fee or charge for paying an overdraft with respect to the $75 withdrawal because the overdraft was caused solely by the $75 hold.

4. Example of prohibition when authorization and settlement amounts are held for the same transaction. A consumer has $100 in his deposit account, and uses his debit card to purchase $50 worth of fuel. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's federal credit union for a $75 "hold" on the account. The consumer purchases $50 of fuel. When the merchant presents the $50 transaction for settlement, it uses a different transaction code to identify the transaction than it had used for the pre-authorization, causing both the $75 hold and the $50 purchase amount to be temporarily posted to the consumer's account at the same time, and the consumer's account to be overdrawn. Under these circumstances, and assuming no other transactions, § 706.32(b) prohibits the federal credit union from assessing a fee or charge for paying an overdraft because the overdraft was caused solely by the $75 hold.

5. Example of permissible overdraft fees in connection with a hold. A consumer has $100 in a deposit account. The consumer makes a fuel purchase using his or her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains authorization from the consumer's federal credit union for a $75 "hold" on the account. The consumer purchases $35 of fuel, but the transaction is not presented for settlement until the next day. Later on the first day, and assuming no other transactions, the consumer withdraws $75 at an ATM. Notwithstanding the existence of the hold, and assuming the consumer has not opted out of the payment of overdrafts under § 706.32(a), the consumer's federal credit union may charge the consumer an overdraft fee for the $75 ATM withdrawal, because the consumer would have incurred the overdraft even if the hold had been for the actual amount of the fuel purchase.

* * * * *

By the National Credit Union Administration Board, on May xx, 2008.

Mary F. Rupp
Secretary of the Board
BILLING CODE 7535-01-U

FEDERAL RESERVE SYSTEM

12 CFR Part 226

Regulation Z; Docket No. R-1286

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for public comment.

SUMMARY: On June 14, 2007, the Board published proposed amendments to Regulation Z, which implements the Truth in Lending Act (TILA), and to the staff commentary to the regulation, following a comprehensive review of TILA's rules for open-end (revolving) credit that is not home-secured. The proposed revisions addressed disclosures provided with credit card applications and solicitations, at account-opening, on periodic statements, when terms are changed on an account, and in advertisements.

The Board is seeking comment on a limited number of additional revisions to the regulation and commentary. New proposed amendments address creditors' responsibilities to establish reasonable instructions for receiving timely payments and when a due date falls on a weekend or holiday. Creditors' responsibilities when investigating a claim of unauthorized transactions or an allegation of a billing error are also addressed. Advertisements for deferred interest plans would be required to provide additional information about how interest could be imposed. Comments submitted to the Board in response to the June 2007 proposed revisions remain under consideration by the Board and need not be submitted a second time.

DATES: Comments must be received on or before [**insert date that is 60 days after the date of publication in the Federal Register**].

ADDRESSES: You may submit comments, identified by Docket No. R-1286, by any of the following methods:

- Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.
- FAX: (202) 452-3819 or (202) 452-3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments are available from the Board's web site at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Benjamin K. Olson, Attorney, Amy Burke or Vivian Wong, Senior Attorneys, Krista Ayoub, Ky Tran-Trong, or John C. Wood, Counsels, or Jane Ahrens, Senior Counsel, Division of Consumer and Community

Affairs, Board of Governors of the Federal Reserve System, at (202) 452-3667 or 452-2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background on TILA and Regulation Z

Congress enacted the Truth in Lending Act (TILA) based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthened by the informed use of credit resulting from consumers' awareness of the cost of credit. The purposes of TILA are (1) to provide a meaningful disclosure of credit terms to enable consumers to compare credit terms available in the marketplace more readily and avoid the uninformed use of credit; and (2) to protect consumers against inaccurate and unfair credit billing and credit card practices.

TILA's disclosures differ depending on whether consumer credit is an open-end (revolving) plan or a closed-end (installment) loan. TILA also contains procedural and substantive protections for consumers. TILA is implemented by the Board's Regulation Z. An Official Staff Commentary interprets the requirements of Regulation Z. By statute, creditors that follow in good faith Board or official staff interpretations are insulated from civil liability, criminal penalties, or administrative sanction.

II. Review of Regulation Z's Rules for Open-end (not Home-secured) Plans

The Board published proposed amendments to Regulation Z's rules for open-end plans that are not home-secured in June 2007 (June 2007 Proposal). 72 FR 32948, June 14, 2007. The goal of the amendments is to improve the effectiveness of the disclosures that creditors provide to consumers at application and throughout the life of

an open-end (not home-secured) account. The proposed changes affect the format, timing, and content requirements for the five main types of open-end credit disclosures governed by Regulation Z: (1) credit and charge card application and solicitation disclosures; (2) account-opening disclosures; (3) periodic statement disclosures; (4) change-in-term notices; and (5) advertisements.

The June 2007 Proposal was preceded by two advance notices of proposed rulemaking (ANPR). In December 2004, the Board announced its intent to conduct a review of Regulation Z in stages, starting with the rules for open-end (revolving) credit accounts that are not home-secured, chiefly general-purpose credit cards and retail credit card plans (December 2004 ANPR). 69 FR 70925, December 8, 2004. The December 2004 ANPR sought public comment on a variety of specific issues relating to three broad categories: the format of open-end credit disclosures, the content of those disclosures, and the substantive protections provided for open-end credit under the regulation.

In October 2005, the Board published a second ANPR (October 2005 ANPR). 70 FR 60235, October 17, 2005. The October 2005 ANPR solicited comment on implementing amendments to TILA contained in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Act"). Public Law 109-8, 119 Stat. 23. The Bankruptcy Act's TILA amendments principally affect open-end credit accounts and require new disclosures on periodic statements, on credit card applications and solicitations, and in advertisements. In the October 2005 ANPR, the Board stated its intent to implement the Bankruptcy Act amendments as part of the Board's ongoing review of Regulation Z's open-end credit rules.

In developing the June 2007 Proposal, the Board conducted consumer research, in addition to considering comments received on the two ANPRs. Specifically, the Board retained a research and consulting firm (Macro International) to assist the Board in using consumer testing to develop proposed model forms for the summary table disclosures provided in direct-mail solicitations and applications; disclosures provided at account opening; periodic statement disclosures; and subsequent disclosures, such as notices provided when key account terms are changed, and notices on checks provided to access credit card accounts. A report summarizing the results of the Board's testing efforts is available on the Board's web site: http://www.federalreserve.gov.

The Board received over 2,500 comments on the June 2007 Proposal. About 85% of these were from consumers and consumer groups, and of those, nearly all (99%) were from individuals. Regarding comments from industry representatives, about 10% were from financial institutions or their trade associations. The vast majority (90%) of the industry letters were from credit unions and their trade associations. Those latter comments were mainly about a proposed revision to the definition of open-end credit that could affect how many credit unions currently structure their consumer loan products.

A summary of comments received in response to the June 2007 Proposal and this rulemaking (May 2008 Proposal) will be included in the Board's final revisions to Regulation Z's open-end credit rules. In general, commenters generally supported the June 2007 Proposal and the Board's use of consumer testing to develop revisions to disclosure requirements. There was opposition to some aspects of the proposal. For example, industry representatives opposed many of the format requirements for periodic statements, as being overly prescriptive. They also opposed the Board's proposal to

require creditors to provide at least 45 days' advance notice before certain key terms change or interest rates are increased due to default or delinquency. Consumer groups opposed the Board's proposed alternative that would eliminate the effective annual percentage rate (APR) as a periodic statement disclosure. Consumers and consumer groups also believe the Board's proposal was too limited in scope and urged the Board to provide more substantive protections and prohibit certain card issuer practices.

In early 2008, the Board worked with its testing consultant, Macro International, to revise model disclosures in response to comments received, and in March 2008, the Board conducted an additional round of one-on-one cognitive interviews on revised disclosures provided with applications and solicitations, on periodic statements, and with checks that access a credit card account. The results of these interviews are discussed throughout the section-by-section analysis below, to the extent the March 2008 testing influenced the matters being proposed in this May 2008 Proposal.

The Board will continue to work with its consultant to revise the model disclosures, based on comments received on the June 2007 and May 2008 Proposals. Macro International then will conduct additional rounds of cognitive interviews to test the revised disclosures. After the cognitive interviews, quantitative testing will be conducted. The goal of the quantitative testing is to measure consumers' comprehension and the usability of the newly-developed disclosures relative to existing disclosures and formats.

III. Effect of Additional Rulemaking on June 2007 Proposal

The Board is publishing additional proposed revisions to a limited number of provisions affecting Regulation Z's rules for open-end credit (May 2008 Proposal).

Proposed amendments to Regulation Z that were published in June 2007 and are not addressed in **VI. Section-by-section Analysis** below remain under the Board's consideration as proposed. Comments submitted to the Board in response to those June 2007 proposed revisions to Regulation Z need not be submitted a second time.

The Board, along with the Office of Thrift Supervision and the National Credit Union Administration, is also publishing elsewhere in today's **Federal Register** a proposal to adopt rules prohibiting specific unfair acts or practices with respect to consumer credit card accounts under their authority under the Federal Trade Commission Act (FTC Act).[1] See 15 U.S.C. 57a(f)(1). The Board's proposal would add a new Subpart C to the Board's Regulation AA, Unfair or Deceptive Acts or Practices (2008 Regulation AA Proposal). 12 CFR Part 227. The proposal would, among others, (1) prohibit banks from treating payments on a consumer credit card account as late unless the consumer is provided with a reasonable amount of time to make a payment, (2) establish rules governing the allocation of payments on outstanding balances, (3) limit banks' ability to increase the rate of interest applicable to any outstanding balance, and (4) prohibit banks from computing finance charges based on balances for days in billing cycles preceding the most recent billing cycle.

At the end of the period for public comment for the May 2008 Proposal and the 2008 Regulation AA Proposal, the Board will review the comments received and continue to conduct additional consumer tests on revised disclosures to consider any appropriate changes. The comment period for this May 2008 Proposal is 60 days (rather than 75 days, as provided in the Regulation AA Proposal) after this notice is published in the **Federal Register**, to facilitate a timely resumption and completion of the Board's

[1] For simplicity, this notice will refer only to the Board's proposal.

consumer testing efforts. Following the Board's analysis of the comments (including comments from the June 2007 Proposal) and the results of consumer testing, the Board anticipates adopting at the same time final rules for these related proposals. The Board will provide creditors and processors with an adequate time to implement the necessary changes.

IV. Summary of Proposed Revisions

Applications and Solicitations. The June 2007 Proposal contained changes to the format and content of credit and charge card application and solicitation disclosures to make them more meaningful and easier for consumers to use. The May 2008 Proposal would revise the content requirements on several disclosures, as follows:

- Grace period labels. The June 2007 proposed requirement to use the term "grace period" as a heading in the summary table provided at application (and elsewhere such as at account opening or with checks that access credit card accounts) would be eliminated. The phrase "how to avoid interest" (or "paying interest" if no grace period exists) or substantially similar terminology would be required instead.
- Minimum interest charge. The May 2008 Proposal would add a de minimis dollar amount trigger of $1.00 for disclosing minimum interest or finance charges. Currently, card issuers must disclose in the summary table at application and account opening any minimum interest or finance charge. The $1.00 trigger would be adjusted when cumulative percentage changes to the Consumer Price Index added to the $1.00 trigger equals or exceeds the next whole dollar.

- Foreign transaction fees. The May 2008 Proposal would require issuers to disclose fees for purchase transactions in a foreign currency or conducted outside the United States in the table provided at application or solicitation. The June 2007 Proposal required creditors to disclose these fees in the summary table provided at account-opening but not in the table provided at application or solicitation.
- Penalty rate when credit privileges are terminated. Currently, card issuers are not required to disclose in the application summary table increased rates that apply when credit privileges are terminated. The May 2008 Proposal would eliminate the exception.
- Oral disclosures. Card issuers generally must provide cost disclosures in oral applications or solicitations initiated by the issuer. The May 2008 Proposal would require additional oral disclosures for issuers that require fees or a security deposit to issue the card that are 25 percent or more of the minimum credit limit offered for the account. These issuers would be required to orally provide the amount of available credit the consumer would have after paying the fees or security deposit, assuming the consumer receives the minimum credit limit.

Account-opening Disclosures. The May 2008 Proposal would require creditors assessing fees at account opening that are 25 % or more of the minimum credit limit to provide a notice of the consumer's right to reject the plan after receiving disclosures if the consumer has not used the account or paid a fee (other than certain application fees). Changes regarding "grace period" terminology and minimum interest charge disclosure requirements are proposed to conform the disclosure requirements for the account-

opening table to the requirements for the table required with applications or solicitations. Model forms are proposed to ease compliance for creditors offering open-end (not home-secured) plans that are not accessed by credit cards, such as lines of credit or overdraft plans.

Checks that Access Credit Card Accounts. The June 2007 Proposal required creditors to disclose on the front of the page containing the checks that access credit card accounts information such as the rates that will apply if the checks are used, any transaction fees, and whether or not a grace period exists. The May 2008 Proposal would add a requirement to disclose any date by which consumers must use the check to receive the disclosed rates.

Changes in Consumer's Interest Rate and Other Account Terms. The June 2007 Proposal required that when a change-in-terms notice accompanies a periodic statement, creditors provide a tabular disclosure on the front of the periodic statement of the key terms being changed. Consistent with the 2008 Regulation AA Proposal that restricts creditors' ability to apply increased rates to certain existing balances, creditors would be required to clarify how existing or new balances would be affected by any rate increase.

Crediting Payments. Currently, creditors may require consumers to comply with reasonable payment instructions, including a cut-off hour for receiving payments. The May 2008 Proposal deems a cut-off hour for mailed payments before 5 p.m. on the due date to be an unreasonable instruction. Creditors that set due dates on a weekend or holiday but do not accept mailed payments on those days would not be able to consider a payment received on the next business day as late for any reason.

Investigating Claims of Unauthorized Transactions or Allegations of Billing Errors. Currently, creditors must conduct a reasonable investigation before imposing liability for an unauthorized transaction, and may reasonably request a consumer's cooperation. The May 2008 Proposal clarifies that a creditor may not, however, deny a claim solely if the consumer does not comply with a request to sign a written affidavit or file a police report, and for consistency extends guidance for reasonably investigating claims of unauthorized transactions to allegations of billing errors.

Advertising Provisions. For deferred interest plans that advertise "no interest" or similar terms, the May 2008 Proposal would add notice and proximity requirements to require advertisements to state the circumstances under which interest is charged from the date of purchase and, if applicable, that the minimum payments required will not pay off the balance in full by the end of the deferral period. Model clauses are proposed to ease compliance.

V. The Board's Rulemaking Authority

TILA mandates that the Board prescribe regulations to carry out the purposes of the act. TILA also specifically authorizes the Board, among other things, to do the following:

- Issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with the act, or prevent circumvention or evasion. 15 U.S.C. 1604(a).

- Exempt from all or part of TILA any class of transactions if the Board determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. The Board must consider factors identified in the act and publish its rationale at the time it proposes an exemption for comment. 15 U.S.C. 1604(f).

- Add or modify information required to be disclosed with credit and charge card applications or solicitations if the Board determines the action is necessary to carry out the purposes of, or prevent evasions of, the application and solicitation disclosure rules. 15 U.S.C. 1637(c)(5).

- Require disclosures in advertisements of open-end plans. 15 U.S.C. 1663.

For the reasons discussed in this notice, the Board is using its specific authority under TILA, in concurrence with other TILA provisions, to effectuate the purposes of TILA, to prevent the circumvention or evasion of TILA, and to facilitate compliance with the act.

VI. Section-by-section Analysis

Section 226.5 General Disclosure Requirements

5(a) Form of Disclosures

5(a)(1) General

Paragraph 5(a)(1)(ii)(A)

Under § 226.5(a)(1)(ii)(A) in the June 2007 Proposal, certain disclosures need not be written, including disclosures under § 226.6(b)(1) of charges that are imposed as part of the plan and may be provided at any time before the consumer agrees to pay or becomes obligated to pay for the charge, pursuant to the disclosure timing requirements of § 226.5(b)(1)(ii). 72 FR 32948, 33043, June 14, 2007. Under proposed § 226.5(b)(1)(ii), these charges are charges that are imposed as part of the plan but that are not required to be disclosed in a tabular format under § 226.6(b)(4). 72 FR 32948, 33044, June 14, 2007. Such charges would include, for example, a charge to make an on-line payment on the account. In addition, under proposed § 226.5(a)(1)(ii)(A), change-in-terms disclosures, under § 226.9(c)(2)(ii)(B), related to the disclosures discussed above

(for example, an increase in the amount of an on-line payment charge) also need not be provided in writing.

Commenters on the June 2007 Proposal suggested that creditors should be permitted to provide disclosures in electronic form, without having to comply with the consumer notice and consent procedures of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. 7001 et seq., at the time an on-line or other electronic service is used. For example, commenters suggested, if a consumer wishes to make an on-line payment on the account, for which the creditor imposes a fee (which has not previously been disclosed), the creditor should be allowed to disclose the fee electronically, without E-Sign notice and consent, at the time the on-line payment service is requested. Commenters contended that such a provision would not harm consumers and would expedite transactions, and also that it would be consistent with the Board's proposal to permit oral disclosure of such fees.

Under section 101(c) of the E-Sign Act, if a statute or regulation requires that consumer disclosures be provided in writing, certain notice and consent procedures must be followed in order to provide the disclosures in electronic form. Since, under the Board's June 2007 Proposal, the disclosures discussed above are not required to be provided in writing, the Board believes that the E-Sign notice and consent requirements do not apply when the consumer requests the service in electronic form. The Board proposes to add comment 5(a)(1)(ii)(A)-1 to clarify this matter.

Paragraph 5(a)(1)(iii)

Under § 226.5(a)(1)(iii) in the June 2007 Proposal, certain disclosures may be provided in electronic form without regard to the consumer notice and consent provisions

of the E-Sign Act. The Board proposes to add comment 5(a)(1)(iii)-1 to clarify that the disclosures specified in § 226.5(a)(1)(ii)(A) also may be provided in electronic form without regard to the E-Sign Act when the consumer requests the service in electronic form, such as on a creditor's web site.

5(a)(2) Terminology

Use of the term "grace period". Under § 226.5(a)(2)(iii) in the June 2007 Proposal, the term "grace period" would be required to be used, as applicable, in any disclosure that must be in tabular format under proposed § 226.5(a)(3). 72 FR 32948, 33044, June 14, 2007. TILA Section 122(c)(2)(C), which is implemented currently in § 226.5a(a)(2)(ii), requires credit card applications and solicitations under § 226.5a to use the term "grace period" to describe the date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge. 15 U.S.C. 1632(c)(2)(C). The Board's proposal was meant to promote uniformity in the use of this term across other disclosures and thereby improve consumer understanding of the concept.

Some industry commenters argued, however, that the Board should reconsider requiring use of the term "grace period." One industry commenter noted that research conducted by the Board and by the United States Government Accountability Office (GAO), as well as the commenter's own research, demonstrated that the term is confusing as a descriptor of the interest-free period between the purchase and the due date for customers who pay their balances in full.[2] This commenter suggested that the

[2] United States Government Accountability Office, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, 06-929 (September 2006) (GAO Report on Credit Card Rates and Fees).

Board revise the disclosure of the grace period in the credit card application and solicitation table to use the heading "interest-free period" instead of "grace period."

The Board further tested alternative disclosures for the grace period in March 2008. Based on the results from consumer testing, as discussed in greater detail in the section-by-section analysis to § 226.5a(b)(5) below, the Board is using its authority under TILA Sections 105(a) and (f), and TILA Section 127(c)(5) to delete the requirement to use the term "grace period" in the table required by § 226.5a. 15 U.S.C. 1604(a) and (f), 1637(c)(5). To maintain consistent terminology across other disclosures, the Board is also withdrawing its proposal under § 226.5(a)(2)(iii) to require the term "grace period" to be used, as applicable, in any disclosure that must be in tabular format under proposed § 226.5(a)(3). If this approach is adopted as proposed, conforming changes will also be made to remove the term "grace period" from all model forms and associated commentary when the Board adopts revisions to the Regulation Z rules for open-end (not home-secured) plans.

The Board also notes that with the removal of the term "grace period" from the table required by § 226.5a, use of the term "grace period" in subsequent disclosures to the consumer would not be appropriate pursuant to the proposed requirement that creditors use consistent terminology under proposed § 226.5(a)(2)(i). While the use of identical language is not required under proposed comment 5(a)(2)-4, creditors are still required to use terms close enough in meaning to enable the consumer to relate the different disclosures. As discussed further below with respect to the proposed revisions to § 226.5a(b)(5), the Board proposes to require using language focused on the terms "how

to avoid paying interest" or "paying interest." Consequently, subsequent disclosures to consumers should also use similar terms.

5(b) Time of Disclosures

5(b)(1) Account-opening Disclosures

5(b)(1)(ii) Charges Imposed as Part of an Open-end (not Home-secured) Plan

Comment 5(b)(1)(ii)-1, under the June 2007 Proposal, states that charges that are imposed as part of an open-end (not home-secured) plan, other than those specified in § 226.6(b)(4), may be disclosed orally or in writing at any time before a consumer agrees to pay the charge or becomes obligated for the charge. 72 FR 32948, 33104, June 14, 2007. The Board proposes to revise the comment to clarify that electronic disclosure of these charges, without regard to the E-Sign Act notice and consent requirements, is also permissible as an alternative to oral or written disclosure, when a consumer requests a service in electronic form, such as on a creditor's web site.

5(b)(1)(iv) Membership Fees

TILA Section 127(a) requires creditors to provide specified disclosures "before opening any account." 15 U.S.C. 1637(a). Section 226.5(b)(1) requires these disclosures (identified in § 226.6) to be furnished before the first transaction is made under the plan. In the June 2007 Proposal, guidance currently in comment 5(b)(1)-1 about creditors' ability to assess certain membership fees before consumers receive the account-opening disclosures was moved to § 226.5(b)(1)(iv). Currently and under the June 2007 Proposal, creditors may collect or obtain the consumer's promise to pay, a membership fee before the disclosures are provided, if the consumer can reject the plan after receiving the disclosures. If a consumer rejects the plan, the creditor must promptly refund the fee if it

has been paid or take other action necessary to ensure the consumer is not obligated to pay the fee. 72 FR 32948, 33044, June 14, 2007.

Comment 5(b)(1)-1 currently provides that if after receiving the account-opening disclosures, the consumer uses the account, pays a fee or negotiates a cash advance check, the creditor may consider the account not rejected. The comment, renumbered as comment 5(b)(1)(i)-1 in the June 2007 Proposal, was amended to clarify that if the only activity on account is the creditor's assessment of fees (such as start-up fees), the consumer is not considered to have accepted the account until the consumer is provided with a billing statement and makes a payment. 72 FR 32948, 33103, June 14, 2007. The June 2007 proposed clarification was intended to address concerns about some subprime card accounts that assess a large number of fees at account opening. Consumers who have not made purchases or otherwise obtained credit on the account would have an opportunity to review their account-opening disclosures and decide whether to reject the account and decline to pay the fees.

Few comments were received on the June 2007 proposed interpretation regarding when a consumer is considered to have accepted an account. Consumer groups supported the proposal but urged the Board to require a disclosure on periodic statements that would inform consumers about their right to reject the plan and not pay fees agreed to prior to receiving account-opening disclosures. An industry commenter also supported the proposal but suggested the Board provide a safe harbor for considering the account as accepted, such as 30 days after a consumer received a new credit card and account-opening disclosures.

The Board proposes additional clarifications to ease compliance and to address further the concerns raised in the June 2007 Proposal. Comment 5(b)(1)-1, renumbered as comment 5(b)(1)(i)-1 in the June 2007 Proposal, addresses a creditor's general duty to provide account-opening disclosures "before the first transaction." The comment is reorganized for clarity to provide existing examples of "first transactions."

The Board further clarifies consumers' right not to pay fees that were assessed or agreed to be paid before the consumer received account-opening disclosures, if a consumer rejects a plan after receiving the disclosures, as stated in § 226.5(b)(1)(iv) of the June 2007 Proposal. Currently and under the June 2007 Proposal, creditors may collect or obtain the consumer's agreement to pay "membership fees" before providing account-opening disclosures if the consumer may reject the plan after receiving the disclosures, but the term "membership fee" is not defined. The Board proposes in revised § 226.5(b)(1)(iv) and new comment 5(b)(1)(iv)-1 that "membership fee" has the same meaning as fees for issuance or availability of a credit or charge card under § 226.5a(b)(2), for consistency and ease of compliance. Such fees include annual or other periodic fees, or "start-up" fees such as account-opening fees. 72 FR 32948, 33046, 33108, June 14, 2007.

Comment 5(b)(1)-1, renumbered as comment 5(b)(1)(i)-1 in the June 2007 Proposal, currently provides that home equity lines of credit (HELOCs) are not subject to the prohibition on the payment of fees other than application or refundable membership fees before account-opening disclosures are provided. See § 226.5b(h) regarding limitations on the collection of fees. This existing guidance is moved to revised § 226.5(b)(1)(iv) and a new comment 5(b)(1)(iv)-4 for clarity.

Also, under revised § 226.5(b)(1)(iv), the Board proposes to clarify that if a consumer rejects an open-end (not home-secured) plan as permitted under that provision (i.e., if the creditor collects or obtains the consumer's agreement to pay "membership fees" before providing account-opening disclosures), consumers are not obligated to pay any membership fee, or any other fee or charge (other than an application fee that is charged to all applicants whether or not they receive the credit). The revision is intended to remove ambiguity that if a consumer rejects a plan under § 226.5(b)(1)(iv), the consumer could nevertheless be obligated for fees or charges (including interest on unpaid fee balances) other than a "membership fee" or certain application fees.

Comments 5(b)(1)(iv)-2 and -3 are proposed to provide guidance on when a consumer is considered to have rejected the plan. Comment 5(b)(1)(iv)-2 provides guidance currently in comment 5(b)(1)-1, renumbered as comment 5(b)(1)(i)-1 in the June 2007 Proposal, that a consumer who has received account-opening disclosures and uses the account or makes a payment on the account after receiving a billing statement is deemed not to have rejected the plan. The Board proposes to provide a safe harbor: A creditor may deem the plan to be rejected if, 60 days after the creditor mailed the account-opening disclosures, the consumer has not used the account or made a payment on the account. The Board requests comment on whether another time period would be more appropriate.

New comment 5(b)(1)(iv)-3 provides guidance currently in comment 5(b)(1)-1, renumbered as comment 5(b)(1)(i)-1 in the June 2007 Proposal, regarding when a consumer is considered to have "used" the account. The Board proposes to add that a consumer is not considered to use an account when, for example, a consumer receives a

credit card in the mail and calls to activate the card for security purposes. This is added in response to requests for Board staff to provide guidance on the issue. The Board also proposes additional guidance about the assessment of creditors' fees, as a further response to concerns raised in the June 2007 Proposal. The comment would clarify that a consumer does not "use" an account when the creditor assesses fees (such as start-up fees or fees associated with credit insurance or debt cancellation or suspension programs agreed to as a part of the application and before the consumer receives account-opening disclosures) to the account. Similarly, the consumer does not "use" an account when, for example, a creditor sends a billing statement with start-up fees, there is no other activity on the account, the consumer does not pay the fees, and the creditor subsequently assesses a late fee or interest on the unpaid fee balances.

As discussed in the section-by-section analysis to § 226.6(b)(4)(vii), the Board also proposes a disclosure requirement for creditors that require substantial fees at account opening and leave consumers with a limited amount of available credit. Those creditors would be required to provide a notice of the consumer's right to reject the plan and not pay fees unless the consumer uses the account or pays the fees. The proposed revision to the timing rules in § 226.5(b)(1)(iv) regarding the collection of fees prior to the delivery of account-opening disclosures would apply to all open-end (not home-secured) plans, although the Board believes the impact of the proposal would primarily affect some subprime credit card issuers. The Board solicits comment on the appropriate scope.

Section 226.5a Credit and Charge Card Applications and Solicitations.

TILA Section 127(c), implemented by § 226.5a, requires card issuers to provide certain cost disclosures on or with an application or solicitation to open a credit or charge card account.[3] 15 U.S.C. 1637(c). The format and content requirements differ for cost disclosures in card applications or solicitations, depending on whether the applications or solicitations are given through direct mail, provided electronically, provided orally, or made available to the general public such as in "take-one" applications and in catalogs or magazines. Disclosures in applications and solicitations provided by direct mail or electronically must be presented in a table. For oral applications and solicitations, certain cost disclosures must be provided orally, except that issuers in some cases are allowed to provide the disclosures later in a written form. Applications and solicitations made available to the general public, such as in a take-one application, must contain one of the following: (1) The same disclosures as for direct mail presented in a table; (2) a narrative description of how finance charges and other charges are assessed, or (3) a statement that costs are involved, along with a toll-free telephone number to call for further information.[4]

5a(b) Required Disclosures

5a(b)(1) Annual Percentage Rate

Currently, § 226.5a(b)(1), which implements TILA Section 127(c)(1)(A)(i)(I), require issuers to disclose each APR that may be used to compute the finance charge on an outstanding balance for purchases, a cash advance, or a balance transfer. Comment

[3] Charge cards are a type of credit card for which full payment is typically expected upon receipt of the billing statement. To ease discussion, this memorandum will refer simply to "credit cards."

[4] In the June 2007 Proposal, the Board proposed revising the rule applicable to take-ones to delete the option to satisfy the provisions of § 226.5a by including a narrative description of how finance charge and other charges are assessed. See proposed § 226.5a(e), 72 FR 32948, 33048, June 14, 2007.

5a(b)(1)-7 requires that if a rate may increase upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose the increased penalty rate that may apply and the specific event or events that may result in the increased rate. The specific event or events must be described outside the table with an asterisk or other means to direct the consumer to the additional information. Comment 5a(b)(1)-7 also specifies that an issuer need not disclose an increased rate that would be imposed if credit privileges are permanently terminated.

In the June 2007 Proposal, the Board proposed a number of changes to how penalty rates are disclosed in the table to enhance consumers' awareness of these rates and the specific event or events that may result in the increase of rates. See proposed § 226.5a(b)(1)(iv) and new comment 5a(b)(1)-4 (previously comment 5a(b)(1)-7). 72 FR 32948, 33046, June 14, 2007. For example, the Board proposed to require card issuers to briefly disclose in the table the specific event or events that may result in the penalty rate. In addition, the Board proposed that the penalty rate and the specific events that cause the penalty rate to be imposed must be disclosed in the same row of the table. See proposed Model Form G-10(A), 72 FR 32948, 33069, June 14, 2007. The Board proposed to retain the current provision that an issuer need not disclose an increased rate that would be imposed if credit privileges are permanently terminated, but proposed to move this provision from current comment 5a(b)(1)-7 to proposed § 226.5a(b)(1)(iv).

In response to the June 2007 Proposal, some consumer groups requested that the Board delete the statement that the card issuer need not disclose the increased rate that would be imposed if credit privileges are permanently terminated. They viewed this

provision as inconsistent with the Board's other efforts to ensure that consumers are aware of penalty rates. They believed card issuers should be required to disclose this information in the table if the rate is different than the penalty rate that otherwise applies.

The Board proposes to delete the current provision that an issuer need not disclose an increased rate that would be imposed if credit privileges are permanently terminated. The provision may be unnecessary. The Board is not aware of any issuers that are imposing an increased rate when credit privileges are permanently terminated that is different from the penalty rate. Moreover, the Board agrees that to the extent an issuer is charging a different rate when credit is permanently terminated than the penalty rate, this different rate should be disclosed along with the penalty rate.

Elsewhere in today's **Federal Register** the Board proposes under Regulation AA that card issuers making firm offers of credit and offering a range of APRs or credit limits must also disclose clearly and conspicuously that if the consumer is approved for the credit, the APR and credit limit on the account will depend on the specific criteria bearing on creditworthiness. Model language is proposed that issuers may use to comply with the requirements. Under the June 2007 Proposal, card issuers offering APRs that will depend on a later determination of the consumer's creditworthiness must disclose in the table provided with applications or solicitations, within prescribed format requirements, either specific rates or a range of rates, and a statement that the rate for which the consumer may qualify at account opening depends on the creditor's creditworthiness.
72 FR 32948, 33045, 33046, June 14, 2007. If the approach under Regulation AA is adopted as proposed, appropriate conforming changes will be made to ensure consistency

among the regulatory requirements and to facilitate compliance when the Board adopts revisions to the Regulation Z rules for open-end (not home-secured) credit.

5a(b)(3) Minimum Finance Charge

Currently, § 226.5a(b)(3), which implements TILA Section 127(c)(1)(A)(ii)(II), requires that card issuers must disclose any minimum or fixed finance charge that could be imposed during a billing cycle. Card issuers typically impose a minimum charge (e.g., $.50) in lieu of interest in those months where a consumer would otherwise incur an interest charge that is less than the minimum charge (a so-called "minimum interest charge"). In response to the December 2004 ANPR, one industry commenter suggested that the Board no longer require that the minimum finance charge be disclosed in the table because these fees are typically small and consumers do not shop on them. Another industry commenter suggested that the Board only require that the minimum finance charge be included in the table if the charge is a significant amount. On the other hand, some consumer groups urged the Board to continue to include the minimum finance charge in the table because this charge can have a significant effect on the cost of credit.

In the June 2007 Proposal, the Board proposed to retain the minimum finance charge disclosure in the table. Although minimum charges currently may be small, the Board was concerned that card issuers may increase these charges in the future. Also, the Board noted that it was aware of at least one credit card product for which no APR is charged, but each month a fixed charge is imposed based on the outstanding balance (for example, $6 charge per $1,000 balance). If the minimum finance charge disclosure was eliminated from the table, card issuers that offer this type of pricing would no longer be required to disclose the fixed charge in the table. The Board also did not propose to

require the minimum finance charge only if it is a significant amount. The Board was concerned that this approach could undercut the uniformity of the table, and could be misleading to consumers. The Board also proposed to amend § 226.5a(b)(3) to require card issuers to disclose in the table a brief description of the minimum finance charge, to give consumers context for when this charge will be imposed. 72 FR 32948, 33046, June 14, 2007.

In response to the June 2007 Proposal, several industry commenters again recommended that the Board delete this disclosure from the table unless the minimum finance charge is over a certain nominal amount. They indicated that in most cases, the minimum interest charge is so small as to be irrelevant to consumers. They believed that it should only be in the table if the minimum finance charge is a significant amount. Also, they believed that the purpose of the summary table is to highlight the most relevant terms that consumers use in evaluating credit card applications. They suggested that it is unlikely that consumers would choose a card based on a minimal charge. Also, they believed that the retention of an irrelevant fee clutters the summary table, detracting from other more important terms. One commenter recommended that minimum interest charges under $2.00 should be excluded from disclosure in the table, and another commenter recommended a cut off of $1.00. Consumer groups agreed with the Board's proposal to require the disclosure of the minimum interest charge in all cases and not to allow issuers to exclude the minimum interest charge from the table if the charge was under a certain specific amount.

The Board proposes to revise proposed § 226.5a(b)(3) to provide that an issuer must disclose in the table any minimum or fixed finance charge in excess of $1.00 that

could be imposed during a billing cycle and a brief description of the charge, pursuant to its authority under TILA Section 127(c)(5). 15 U.S.C. 1637(c)(5). The $1.00 amount would be adjusted to the next whole dollar amount when the sum of annual percentage changes in the Consumer Price Index in effect on the June 1 of previous years equals or exceeds $1.00. See proposed comment 5a(b)(3)-2. This approach in adjusting the dollar amount that triggers the disclosure of a minimum or fixed finance charge is similar to TILA's rules for adjusting a dollar amount of fees that trigger additional protections for certain home-secured loans. TILA 103(aa), 15 U.S.C. 1602(aa). At the issuer's option, the issuer may disclose in the table any minimum or fixed finance charge below the threshold. This flexibility is intended to facilitate compliance when adjustments are made to the dollar threshold. For example, if an issuer has disclosed a $1.50 minimum finance charge in its application and solicitation table at the time the threshold is increased to $2.00, the issuer could continue to use forms with the minimum finance charge disclosed, even though the issuer would no longer be required to do so.

The Board recognizes that most issuers currently charge a minimum interest charge of $1.00 or less. In consumer testing conducted by the Board in March 2008, participants were asked to compare disclosure tables for two credit card accounts and decide which account they would choose. In one of the disclosure tables, a small minimum interest charge was disclosed. In the other disclosure table, no minimum interest charge was disclosed. None of the participants indicated that they would choose the account where no minimum interest charge was disclosed because of this fact. Thus, the Board agrees that when the minimum interest charge is a de minimis amount (i.e., $1.00 or less, as adjusted for inflation), disclosure of the minimum interest charge is not

information that consumers will use to shop for a card. The rule would continue to require disclosure in the table if the minimum interest charge is over this de minimis amount to ensure that consumers are aware of significant minimum interest charges that might impact them. The Board requests comment on whether $1.00 is the appropriate initial threshold amount.

5a(b)(4) Transaction Charges

Section 226.5a(b)(4), which implements TILA Section 127(c)(1)(A)(ii)(III), requires that card issuers disclose any transaction charge imposed on purchases. In the June 2007 Proposal, the Board proposed to amend § 226.5a(b)(4) to explicitly exclude from the table fees charged for transactions in a foreign currency or that take place in a foreign country. 72 FR 32948, 33046, June 14, 2007. In an effort to streamline the contents of the table, the Board proposed to highlight only those fees that may be important for a significant number of consumers. In consumer testing for the Board, participants did not tend to mention foreign transaction fees as important fees they use to shop. In addition, there are few consumers who may pay these fees with any frequency. Thus, the Board proposed to except foreign transaction fees from disclosure of transaction fees. The Board proposed to include foreign transaction fees in the account-opening summary table that is required under proposed § 226.6(b)(4), so that interested consumers can learn of the fees before using the card.

In response to the June 2007 Proposal, some consumer groups recommended that the Board require foreign transaction fees in the table required under § 226.5a. They questioned the utility of the Board requiring foreign transaction fees in the account-opening table required under § 226.6, but prohibiting those fees to be disclosed in the

table under § 226.5a. They believed that consumers as well as the industry would be better served by eliminating the few differences between the disclosures required at the two stages. In addition, one industry commenter recommended that the table required under § 226.5a include foreign transaction fees. This commenter believed that the foreign transaction fee is relevant to any consumer who travels in other countries, and the ability to choose a credit card based on the presence of the fee is important. In addition, the commenter noted that the large amount of press attention that the issue has received suggests that the presence or absence of the fee is now of interest to a significant number of consumers.

The Board proposes to require that foreign transaction fees must be disclosed in the table required under § 226.5a. Specifically, the Board proposes to withdraw proposed § 226.5a(b)(4)(ii) that would have prevented a card issuer from disclosing a foreign transaction fee in the table required by § 226.5a. In addition, the Board proposes to add comment 5a(b)(4)-2 to indicate that foreign transaction fees charged by the card issuer are considered transaction charges for the use of a card for purchases, and thus must be disclosed in the table required under § 226.5a. The Board is concerned about the inconsistency in requiring foreign transaction fees in the account-opening table required by § 226.6, but prohibiting that fee in the table required by § 226.5a. In the June 2007 Proposal, the Board proposed that issuers may substitute the account-opening table for the table required by § 226.5a. See proposed comment 5a-2, 72 FR 32948, 33105, June 14, 2007. The Board is concerned about those cases where one issuer substitutes the account-opening table for the table required under § 226.5a (and thus is required to disclose the foreign transaction fee) but another issuer provides the table

required under § 226.5a (and thus is prohibited from disclosing the foreign transaction fee). If a consumer was comparing the disclosures for these two offers, it may appear to the consumer that the issuer providing the account-opening table charges a foreign transaction fee and the issuer providing the table required under § 226.5a does not, even though the second issuer may charge the same or higher foreign transaction fee than the first issuer. Thus, to promote uniformity, the Board proposes to require issuers to disclose the foreign transaction fee in both the account-opening table required by § 226.6 and the table required by § 226.5a. See proposed comment 5a(b)(4)-2. The Board also proposes that foreign transaction fees would be disclosed in the table required by § 226.5a similar to how those fees are disclosed in the proposed account-opening tables published in the June 2007 Proposal. See Model Forms and Samples G-17(A), (B) and (C) 72 FR 32948, 33074, 33075, 33076, June 14, 2007.

5a(b)(5) Grace Period

Currently, § 226.5a(b)(5), which implements TILA Section 127(c)(A)(iii)(I), requires that card issuers disclose in the table required by § 226.5a, the date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge. Section 226.5a(a)(2)(ii), which implements TILA Section 122(c)(2)(C), requires credit card applications and solicitation under § 226.5a to use the term "grace period" to describe the date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge. 15 U.S.C. 1632(c)(2)(C). In the June 2007 Proposal, the Board proposed new § 226.5(a)(2)(iii) to extend this requirement to use the term "grace period" to all

references to such a term for the disclosures required to be in the form of a table, such as the account-opening table. 72 FR 32948, 33044, June 14, 2007.

In response to the June 2007 Proposal, one industry commenter recommended that the Board no longer mandate the use of the term "grace period" in the table. Although TILA specifically requires use of the term "grace period," this commenter urged the Board to use its exception authority to choose a term that is more understandable to consumers. This commenter pointed out that research conducted by the Board, by the GAO and by that commenter demonstrated that the term is confusing as a descriptor of the interest-free period between the purchase and the due date for customers who pay their balances in full. This commenter suggested that the Board revise the disclosure of the grace period in the table to use the heading "interest-free period" instead of "grace period."

As discussed in the section-by-section analysis to § 226.5(a)(2), the Board proposes to use its exemption authority to delete the requirement to use the term "grace period" in the table required by § 226.5a. 15 U.S.C. §§ 1604(a) and (f) and 1637(c)(5). As the Board discussed in the June 2007 Proposal, consumer testing conducted for the Board prior to that proposal indicated that some participants misunderstood the word "grace period" to mean the time after the payment due date that an issuer may give the consumer to pay the bill without charging a late-payment fee. The GAO in its Report on Credit Card Rates and Fees found similar misunderstandings by consumers in its consumer testing. Furthermore, many participants in the GAO testing incorrectly indicated that the grace period was the period of time promotional interest rates applied. Nonetheless, in consumer testing conducted for the Board prior to the June 2007

Proposal, the Board found that participants tended to understand the term grace period more clearly when additional context was added, such as describing that if the consumer paid the bill in full each month, the consumer would have some period of time (e.g., 25 days) to pay the new purchase balance in full to avoid interest. Thus, the Board proposed to retain the term "grace period."

As discussed above, in response to the June 2007 Proposal, one commenter performed its own testing with consumers on the grace period disclosure proposed by the Board. This commenter found that the term "grace period" was still confusing to the consumers it tested, even with the additional context given in the grace period disclosure proposed by the Board. The commenter found that consumers understood the term "interest-free period" to more accurately describe the interest-free period between the purchase and the due date for customers who pay their balances in full.

In consumer testing conducted by the Board prior to issuing the June 2007 Proposal, the Board tested the phrase "interest-free period." The Board found that some consumers believed the phase "interest-free period" referred to the period of time that a 0% introductory rate would be in effect, instead of the grace period. In consumer testing conducted by the Board in March 2008, the Board tested disclosure tables for a credit card solicitation that used the phrase "How to Avoid Paying Interest on Purchases" as the heading for the row containing the information on the grace period. Participants in this testing generally seemed to understand this phrase to describe the grace period. In addition, in the March 2008 consumer testing, the Board also tested the phrase "Paying Interest" in the context of a disclosure relating to a check that accesses a credit card account, where a grace period was not offered on this access check. Specifically, the

phrase "Paying Interest" was used as the heading for the row containing information that no grace period was offered on the access check. Likewise, participants seemed to understand this phrase to mean that no grace period was being offered on the use of the access check. Thus, the Board proposes to revise proposed § 226.5a(b)(5) to require that issuers use the phrase "How to Avoid Paying Interest on Purchases," or a substantially similar phrase, as the heading for the row describing the grace period. If no grace period on purchases is offered, when an issuer is disclosing this fact in the table, the issuer must use the phrase "Paying Interest," or a substantially similar phrase, as the heading for the row describing that no grace period is offered.

As discussed above, §226.5a(b)(5) requires that card issuers disclose in the table required by § 226.5a, the date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge. Comment 5a(b)(5)-1 provides that a card issuer may, but need not, refer to the beginning or ending point of any grace period and briefly state any conditions on the applicability of the grace period. For example, the grace period disclosure might read "30 days" or "30 days from the date of the periodic statement (provided you have paid your previous balance in full by the due date)."

In the June 2007 Proposal, the Board proposed to amend § 226.5a(b)(5) to require card issuers to disclose briefly any conditions on the applicability of the grace period. 15 U.S.C. 1637(c)(5). 72 FR 32948, 33046, June 14, 2007. The Board also proposed to amend comment 5a(b)(5)-1 to provide guidance for how issuers may meet the requirements in proposed § 226.5a(b)(5). Specifically, proposed comment 5a(b)(5)-1 provided that an issuer that conditions the grace period on the consumer paying his or her

balance in full by the due date each month, or on the consumer paying the previous balance in full by the due date the prior month will be deemed to meet requirements in disclosing the grace period by providing the following disclosure: "If you pay your entire balance in full each month, you have [at least] ____ days after the close of each period to pay your balance on purchases without being charged interest." 72 FR 32948, 33109, June 14, 2007.

In response to the June 2007 Proposal, several commenters suggested that the Board revise the model language provided in proposed comment 5a(b)(5)-1 to describe the grace period. One commenter suggested the following language: "Your due date is [at least] 25 days after your bill is totaled each month. If you don't pay your bill in full by your due date, you will be charged interest on the remaining balance." Other commenters also recommended that the Board revise the disclosure of the grace period to make clearer that the consumer must pay the total balance in full each month by the due date to avoid paying interest on purchases. In addition, some consumer groups commented that if the issuer does not provide a grace period, the Board should mandate specific language that draws the consumer's attention to this fact.

In the March 2008 consumer testing, the Board tested the following language to describe a grace period: "Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you interest on purchases if you pay your entire balance (excluding promotional balances) by the due date each month." Participants that read this language appeared to understand it correctly. Thus, the Board proposes to amend comment 5a(b)(5)-1 to provide this language as guidance to issuers on how to disclose a grace period. The Board notes that currently issuers typically require consumers to pay

their entire balance in full each month to qualify for a grace period on purchases. Nonetheless, the Board proposes elsewhere in today's **Federal Register** to prohibit most issuers from requiring consumers to pay off promotional balances in order to receive any grace period offered on purchases. Thus, consistent with this proposed prohibition, the language in proposed comment 5a(b)(5)-1 indicates that the entire balance (excluding promotional balances) must be paid each month to avoid interest charges on purchases.

Also, in the March 2008 consumer testing, the Board tested language to describe that no grace period was being offered. Specifically, in the context of testing a disclosure related to an access check where a grace period was not offered on this access check, the Board tested the following language: "We will begin charging interest on these check transactions on the transaction date." Most participants that read this language understood there was no way to avoid paying interest on this check transaction, and therefore, that no grace period was being offered on this check transaction. Thus, the Board proposes to add comment 5a(b)(5)-2 to provide guidance on how to disclose the fact that no grace period on purchases is offered on the account. Specifically, proposed comment 5a(b)(5)-2 would provide that issuers may use the following language to describe that no grace period on purchases is offered, as applicable: "We will begin charging interest on purchases on the transaction date."

5a(b)(6) Balance Computation Method

TILA Section 127(c)(1)(A)(iv) calls for the Board to name not more than five of the most common balance computation methods used by credit card issuers to calculate the balance on which finance charges are computed. 15 U.S.C. 1637(c)(1)(A)(iv). If issuers use one of the balance computation methods named by the Board, § 226.5a(b)(6)

requires that issuers must disclose the name of that balance computation method in the table as part of the disclosures required by § 226.5a, and issuers are not required to provide a description of the balance computation method. If the issuer uses a balance computation method that is not named by the Board, the issuer must disclose a detailed explanation of the balance computation method. See current § 226.5a(b)(6); § 226.5a(a)(2)(i). In the June 2007 Proposal, the Board proposed to retain a brief reference to the balance computation method, but move the disclosure from the table to directly below the table. See June 2007 proposed § 226.5a(a)(2)(iii), 72 FR 32948, 33045, June 14, 2007.

Currently, the Board in § 226.5a(g) has named four balance computation methods: (1) average daily balance (including new purchases) or (excluding new purchases); (2) two-cycle average daily balance (including new purchases) or (excluding new purchases); (3) adjusted balance; and (4) previous balance. In the June 2007 Proposal, the Board proposed to retain these four balance computation methods.

Elsewhere in today's **Federal Register**, the Board proposes to prohibit some issuers from using a balance computation method commonly referred to as the "two-cycle" balance method. Nonetheless, the Board does not propose deleting the two-cycle average daily balance method from the list in § 226.5(g) because the prohibition, if adopted, would not apply to all issuers, such as state chartered credit unions that are not subject to National Credit Union Association rules.

5a(b)(15) Payment Allocation

Some credit card issuers will allocate payments in excess of the minimum payment first to balances that are subject to the lowest APR. For example, if a cardholder

made purchases using a credit card account and then initiated a balance transfer, the card issuer might allocate a payment (less than the amount of the balances) to the transferred balance portion of the account if that balance was subject to a lower APR than the purchases. Card issuers often will offer a discounted initial rate on balance transfers (such as 0 percent for an introductory period) with a credit card solicitation, but not offer the same discounted rate for purchases. In addition, the Board is aware of at least one issuer that offers the same discounted initial rate for balance transfers and purchases for a specified period of time, where the discounted rate for balance transfers (but not the discounted rate for purchases) may be extended until the balance transfer is paid off if the consumer makes a certain number of purchases each billing cycle. At the same time, issuers typically offer a grace period for purchases if a consumer pays his or her bill in full each month. Card issuers, however, do not typically offer a grace period on balance transfers or cash advances. Thus, on the offers described above, a consumer cannot take advantage of both the grace period on purchases and the discounted rate on balance transfers. The only way for a consumer to avoid paying interest on purchases--and thus have the benefit of the grace period-- is to pay off the entire balance, including the balance transfer subject to the discounted rate.

In the consumer testing conducted for the Board prior to the June 2007 Proposal, many participants did not understand that they could not take advantage of the grace period on purchases and the discounted rate on balance transfers at the same time. Model forms were tested that included a disclosure notice attempting to explain this to consumers. Nonetheless, testing showed that a significant percentage of participants still did not fully understand how payment allocation can affect their interest charges, even

after reading the disclosure tested. In the supplementary information accompanying the June 2007 Proposal, the Board indicated its plans to conduct further testing of the disclosure to determine whether the disclosure can be improved to be more effectively communicate to consumers how payment allocation can affect their interest charges.

In the June 2007 Proposal, the Board proposed to add § 226.5a(b)(15) to require card issuers to explain payment allocation to consumers. Specifically, the Board proposed that issuers explain how payment allocation would affect consumers, if an initial discounted rate was offered on balances transfers or cash advances but not purchases. The Board proposed that issuers must disclose to consumers that (1) the initial discounted rate applies only to balance transfers or cash advances, as applicable, and not to purchases; (2) that payments will be allocated to the balance transfer or cash advance balance, as applicable, before being allocated to any purchase balance during the time the discounted initial rate is in effect; and (3) that the consumer will incur interest on the purchase balance until the entire balance is paid, including the transferred balance or cash advance balance, as applicable. 72 FR 32948, 33047, June 14, 2007.

In response to the June 2007 Proposal, several commenters recommended the Board test a simplified payment allocation disclosure that covers cases other than low rate balance transfers offered with a credit card. In consumer testing conducted for the Board in March 2008, the Board tested the following payment allocation disclosure: "Payments may be applied to balances with lower APRs first. If you have balances at higher APRs, you may pay more in interest because these balances cannot be paid off until all lower-APR balances are paid in full (including balance transfers you make at the introductory rate)." Some participants understood from prior experience that issuers

typically will apply payments to lower APR balances first and the fact that this method causes them to incur higher interest charges. For those participants that did not know about payment allocation methods from prior experience, the disclosure tested was not effective in explaining payment allocation to them.

Elsewhere in today's **Federal Register**, the Board proposes substantive provisions on how issuers may allocate payments. To the extent these substantive provisions are adopted, the Board would withdraw its proposal to require a card issuer to explain payment allocation to consumers in the table.

5a(b)(16) Available Credit

Elsewhere in today's **Federal Register**, the Board proposes under Regulation AA to address concerns regarding subprime credit cards by prohibiting institutions from financing security deposits and fees for credit availability (such as account-opening fees or membership fees) if those charges would exceed 50 percent of the credit limit during the first twelve months and from collecting at account opening fees that are 25 percent or more of the credit limit. Under the June 2007 Proposal, card issuers that require fees or a security deposit to issue a card that are 25 percent or more of the minimum credit limit offered on the account must offer an example in the table provided with applications and solicitations of the amount of available credit the consumer would have after paying the fees or security deposit, assuming the creditor receives the minimum credit limit. 72 FR 32948, 33047, June 14, 2007. If the approach under Regulation AA is adopted as proposed, appropriate revisions will be made to ensure consistency among the regulatory requirements and to facilitate compliance when the Board adopts revisions to the Regulation Z rules for open-end (not home-secured) credit.

5a(d) Telephone Applications and Solicitations

5a(d)(1) Oral Disclosure

Section 226.5a(d) specifies rules for providing cost disclosures in oral applications and solicitations initiated by a card issuer. Pursuant to TILA 127(c)(2), card issuers generally must provide certain cost disclosures during the oral conversation in which the application or solicitation is given. Alternatively, an issuer is not required to give the oral disclosures if the card issuer either does not impose a fee for the issuance or availability of a credit card (as described in § 226.5a(b)(2)) or does not impose such a fee unless the consumer uses the card, provided that the card issuer provides the disclosures later in a written form. 15 U.S.C. 1637(c)(2).

Currently, under § 226.5a(d)(1), if the issuer provides the oral disclosures, the issuer must provide information required to be disclosed under § 226.5a(b)(1) through § 226.5a(b)(7). This includes information about (1) APRs; (2) fees for issuance or availability of credit; (3) minimum interest charges; (4) transaction charges for purchases; (5) grace period on purchases; (6) balance computation method; and (7) as applicable, a statement that charges incurred by use of the charge card are due when the periodic statement is received.

In the June 2007 Proposal, the Board did not propose to revise § 226.5a(d)(1). In response to the June 2007 Proposal, some consumer groups suggested that the Board revise § 226.5a(d)(1) to require issuers that are marketing credit cards by telephone, to disclose additional information to consumers at the time of the phone call, such as the cash advance fee, the late payment fee, the over-limit fee, the balance transfer fee,

information about penalty rates, any fees for required insurance, or the disclosure about available credit in proposed § 226.5a(b)(16). 72 FR 32948, 33047, June 14, 2007.

The Board proposes to amend § 226.5a(d)(1) to require that if an issuer provides the oral disclosures, the issuer must also disclose orally the information about available credit in proposed § 226.5a(b)(16) if required to do so, pursuant to its authority under TILA Section 127(c)(5). 15 U.S.C. 1637(c)(5). Proposed § 226.5a(b)(16) provides that if (1) a card issuer imposes required fees for the issuance or availability of credit, or a security deposit, that will be charged against the card when the account is opened, and (2) the total of those fees and/or security deposit equal 25 percent or more of the minimum credit limit applicable to the card, the card issuer must disclose in the table an example of the amount of the available credit that a consumer would have remaining after these required fees or security deposit are debited to the account, assuming that the consumer receives the minimum credit limit offered on the relevant account. The issuer also must disclose the available credit remaining after including any optional fees for issuance or availability of credit that may be debited to the account.

Currently, issuers that provide the oral disclosures must inform consumers about the fees for issuance and availability of credit that are applicable to the card. The Board believes that the information about available credit would complement this disclosure, by disclosing to consumers the impact of these fees on the available credit. The Board does not propose to require issuers to provide orally other fees applicable to the account, such as the cash advance fee, the late payment fee, the over-limit fee, the balance transfer fee or fees for required insurance. The Board is concerned that providing this information in oral conversations about credit cards would lead to information overload for consumers.

The Board notes that issuers providing oral disclosures currently would be required to provide information about the penalty rate to consumers because this information is required to be disclosed pursuant to § 226.5a(b)(1).

Section 226.6 Account-opening Disclosures

TILA Section 127(a), implemented in § 226.6, requires creditors to provide information about key credit terms before an open-end plan is opened, such as rates and fees that may be assessed on the account. Consumers' rights and responsibilities in the case of unauthorized use or billing disputes are also explained. 15 U.S.C. 1637(a). See also Model Forms G-2 and G-3 in Appendix G.

Descriptions of balance computation methods. Creditors are required, under § 226.6(a)(1)(iii) and § 226.6(b)(2)(i)(D) of the June 2007 Proposal, to explain the method used to determine the balance upon which rates are applied. 72 FR 32948, 33049, June 14, 2007. Model Clauses that explain commonly used methods, such as the average daily balance method, are at Appendix G-1.

The Model Clauses at Appendix G-1 were republished without change in the June 2007 Proposal. 72 FR 32948, 33066, June 14, 2007. The Board requested comment on whether model clauses for methods such as the "previous balance" or "adjusted balance" method should be eliminated because they are no longer used. Few commenters addressed the issue. Commenters recommended retaining the existing clauses, and two commenters asked the Board to add a model clause explaining the daily balance method. The Board proposes to add a new paragraph (f) to describe a daily balance method in G-1 and in a new G-1A. In addition, a new Appendix G-1A is proposed for open-end (not home-secured) plans. The clauses in G-1A refer to "interest charges" rather than

"finance charges" to explain balance computation methods. The Board's consumer testing prior to the June 2007 Proposal indicated that consumers generally had a better understanding of "interest charge" than "finance charge," which is reflected in the Board's use of "interest" (rather than "finance charge") in proposed Account-opening Samples and to describe costs other than fees on periodic statements. See proposed Samples G-17(B) and G-17(C) and § 226.7(b)(6)(iii). 72 FR 32948, 33075, 33076, and 33052, June 14, 2007. Comment App. G-1 is revised to clarify that for HELOCs subject to § 226.5b, creditors may properly use the model clauses in either Appendix G-1 or G-1A. References throughout the regulation and commentary to Model Clauses in G-1 will be updated to reflect the addition of G-1A when the Board adopts revisions to the rules for open-end credit (not home-secured) plans.

6(b)(2) Rules Relating to Rates for Open-end (not Home-secured) Plans

The June 2007 Proposal sets forth in § 226.6(b)(2) rules related to disclosing rates for open-end (not home-secured) plans. 72 FR 32948, 33049, June 14, 2007. Creditors must disclose information about any rates that initially apply, and about rates that may apply after the initial rate ends. Under current rules, comment 6(a)(2)-11 provides that creditors need not disclose increased rates that may apply if credit privileges are permanently terminated. That rule was retained in the June 2007 Proposal, but was moved to § 226.6(b)(4)(ii)(C) and comment 6(b)(2)(iii)-2.iii., to be consistent with § 226.5a(b)(1)(iv) in the June 2007 Proposal. 72 FR 32948, 33050, 33115, June 14, 2007. As discussed in the section-by-section analysis to § 226.5a(b)(1), the Board proposes to eliminate that exception; accordingly, the references to increased rates

upon permanently terminated credit privileges in § 226.6(b)(4)(ii)(C) and in paragraph iii. to comment 6(b)(2)(iii)-2 are removed in this May 2008 Proposal.

6(b)(4) Tabular Format Requirements for Open-end (not Home-secured) Plans

In June 2007, the Board proposed in § 226.6(b)(4) to introduce format requirements for account-opening disclosures for open-end (not home-secured) plans. The proposed summary of account-opening disclosures is based on the format and content requirements for the tabular disclosures provided with direct mail applications for credit and charge cards under § 226.5a, as it would be revised under the June 2007 Proposal. Proposed forms under G-17 in Appendix G illustrate the account-opening tables. 72 FR 32948, 33049, 33074, 33075, 33076, June 14, 2007.

Lines of credit without credit cards. The June 2007 Proposal to require a tabular summary of key terms to be provided before an account is opened applies to all open-end loan products, except HELOCs. This would include products such as credit card accounts, traditional overdraft credit plans, personal lines of credit, and revolving plans offered by retailers without a credit card.

Some industry commenters asked the Board to limit any new disclosure rules to credit card accounts. They acknowledged that credit card accounts typically have complex terms, and a tabular summary is an effective way to present key disclosures. In contrast, these commenters noted that other open-end (not home-secured) products such as personal lines of credit or overdraft plans have very few of the cost terms required to be disclosed. Alternatively, if the Board continued to apply the new requirements to open-end plans other than HELOCs, commenters asked that the Board consider publishing model forms to ease compliance.

The Board continues to believe that even for non-credit card accounts the benefit to consumers from receiving a concise summary of rates and important fees appears to outweigh the costs, such as developing the new disclosures and revising them as needed. To ease compliance and address commenters' concerns, the Board is publishing proposed Sample G-17(D) for open-end plans such as lines of credit or overdraft plans.

6(b)(4)(iii) Fees

6(b)(4)(iii)(D) Minimum Finance Charge

TILA Section 127(a)(3), which is currently implemented in § 226.6(a)(4), requires creditors to disclose in account-opening disclosures the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge. 15 U.S.C. 1637(a)(3). In the June 2007 Proposal, the Board required creditors to disclose in account-opening disclosures the amount of any finance charges in § 226.6(b)(1)(A), and further required creditors to disclose any minimum finance charge in the account-opening table in § 226.6(b)(4)(iii)(D). 72 FR 32948, 33049, 33050, June 14, 2007.

In this May 2008 Proposal, the Board would require card issuers to disclose in the table provided with applications or solicitations minimum or fixed finance charges in excess of $1.00 that could be imposed during a billing cycle (along with a formula for adjusting the threshold over time) and a brief description of the charge, for the reasons discussed in the section-by-section analysis to § 226.5a(b)(3). At the card issuer's option, the card issuer may disclose in the table any minimum or fixed finance charge below the threshold. The Board proposes the same disclosure requirements to apply to the account-opening table for the same reasons. Section 226.6(b)(4)(iii)(D) would be revised and new comments 6(b)(4)(iii)-1 and -2 would be added, accordingly. As noted in the

section-by-section analysis to § 226.5a(b)(4), under the June 2007 Proposal, card issuers may substitute the account-opening table for the table required by § 226.5a. Conforming the minimum finance charge disclosure requirement for the two tables promotes consistency and uniformity.

Under proposed § 226.5(b)(1)(ii) of the June 2007 Proposal, charges that are imposed as part of the plan may be provided at any time before the consumer agrees to pay or becomes obligated to pay for the charge, pursuant to the disclosure timing requirements of § 226.5(b)(1)(ii). 72 FR 32948, 33044, June 14, 2007. Creditors may provide disclosures of these charges in writing but creditors are not required to do so. 72 FR 32948, 33043, June 14, 2007. See section-by-section analysis to § 226.5(a)(1) above. If creditors are required to disclose in the account-opening table minimum finance charges in excess of $1.00, minimum or fixed finance charges of $1.00 or less would no longer be required to be disclosed in writing at account-opening. The Board believes creditors will continue to do so, to meet the timing requirement to disclose the fee before the consumer becomes obligated for the charge. And creditors that choose to charge more than $1.00 would be required to include the cost in the account-opening table.

6(b)(4)(iv) Grace Period

Under TILA, creditors providing disclosures with applications and solicitations must discuss grace periods on purchases; at account opening, creditors must explain grace periods more generally. 15 U.S.C. 1637(c)(1)(A)(iii); 15 U.S.C. 1637(a)(1). Section 226.6(b)(4)(iv) in the June 2007 Proposal required creditors to state for all balances on the account, whether or not a period exists in which consumers may avoid

the imposition of finance charges, and if so, the length of the period. 72 FR 32948, 33050, June 14, 2007. As discussed in the section-by-section analysis to § 226.5(a)(2) and to § 226.5a(b)(5), the Board is revising provisions relating to the description of grace periods. Section § 226.6(b)(4)(iv) is revised and comment 6(b)(4)(iv)-1 is added, consistent with the proposed revisions to § 226.5a(b)(5) and commentary. A reference to required use of the phrase "grace period" in comment 6(b)(4)-3 of the June 2007 Proposal is withdrawn. 72 FR 32948, 33115, June 14, 2007.

6(b)(4)(vi) Payment Allocation

Section 226.6(b)(4)(vi) of the June 2007 Proposal required creditors to disclose in the account-opening tabular summary, if applicable, the information regarding how payments will be allocated if the consumer transfers balances at a low rate and then makes purchases on the account. 72 FR 32948, 33050, June 14, 2007. The payment allocation disclosure requirements proposed for the account-opening table mirror the proposed requirements in § 226.5a(b)(15) to be provided in the table given at application or solicitation. 72 FR 32948, 33047, June 14, 2007. Elsewhere in today's **Federal Register**, the Board proposes limitations on how creditors may allocate payments on outstanding credit card balances. For the reasons discussed in the section-by-section analysis to § 226.5a(b)(15), the Board would withdraw proposed § 226.6(b)(4)(vi) to the extent the substantive rule is adopted.

6(b)(4)(vii) Available Credit

The Board proposed in June 2007 a disclosure targeted at subprime card accounts that assess substantial fees at account opening and leave consumers with a limited amount of available credit. Proposed § 226.6(b)(4)(vii) applied to creditors that require

fees for the availability or issuance of credit, or a security deposit, that equals 25 percent or more of the minimum credit limit offered on the account. If that threshold is met, card issuers must disclose in the table an example of the amount of available credit the consumer would have after the fees or security deposit are debited to the account, assuming the consumer receives the minimum credit limit. 72 FR 32948, 33050, June 14, 2007. The account-opening disclosures regarding available credit are also required for credit and charge card applications or solicitations. See proposed § 226.5a(b)(16), 72 FR 32948, 33047, June 14, 2007.

The Board proposes an additional disclosure to inform consumers about their right to reject a plan when fees have been charged and the consumer receives account-opening disclosures but has not used the account or paid a fee after receiving a billing statement (other than an application fee that is charged to all consumers who apply for the account whether or not they are accepted for the credit). Creditors must provide consumers with notice about the right to reject the plan in such circumstances. The Board believes that tailoring the disclosure to impact creditors offering subprime credit card accounts is appropriately narrow, but seeks comment on the scope of the proposed disclosure. The Board proposes a new comment 6(b)(4)(vii)-1 to provide creditors with model language to comply with the disclosure requirement, and conforming changes would be made to account-opening model forms and samples, if the revision to § 226.6(b)(4)(vii) is adopted.

As discussed in the section-by-section analysis to § 226.5a(b)(16), elsewhere in today's **Federal Register**, the Board proposes rules under Regulation AA regarding card issuers' ability to finance certain fee amounts, and when start-up fees may be collected

during the first twelve months after the account is opened. If the approach under Regulation AA is adopted as proposed, appropriate revisions will be made to ensure consistency among the regulatory requirements and to facilitate compliance when the Board adopts revisions to the Regulation Z rules for open-end (not home-secured) credit.

Section 226.7 Periodic Statements

7(b) Rules Affecting Open-end (not Home-secured) Plans

7(b)(11) Due Date; Late Payment Costs

In the June 2007 Proposal, the Board added § 226.7(b)(11) to implement TILA amendments in the Bankruptcy Act that require creditors that charge a late-payment fee to disclose on the periodic statement (1) the payment due date or, if different, the earliest date on which the late-payment fee may be charged, and (2) the amount of the late-payment fee. 15 U.S.C. 1637(b)(12). The Board also proposed to require that creditors disclose on the periodic statement any cut-off hour for receiving payments closely proximate to each reference of the due date, if the cut-off hour is before 5 p.m. on the due date. If the cut-off hours prior to 5 p.m. differ depending on the method of payment (such as by check or via the Internet), creditors would have been required to state the earliest time without specifying the method to which the cut-off hour applies, to avoid information overload. See proposed § 226.7(b)(11)(i)(B), § 226.7(b)(13). Under the June 2007 Proposal, cut-off hours of 5 p.m. or later could continue to be disclosed under the existing rule (including on the reverse side of periodic statements). 72 FR 32948, 33053, June 14, 2007.

Comments were divided on the proposed cut-off hour disclosure for periodic statements. Industry representatives that have a cut-off hour earlier than 5 p.m. for an

infrequently used payment means expressed concern about consumer confusion if the more commonly used payment method is later than 5 p.m. Consumer groups urged the Board also to adopt a "postmark" date on which consumers could rely to demonstrate their payment was mailed sufficiently in advance for the payment to be timely received, or to eliminate cut-off hours altogether. Both consumer groups and industry representatives asked the Board to clarify what time zone by which the cut-off hour should be measured.

As discussed in the section-by-section analysis to § 226.10(b), the Board proposes that to comply with the requirement in § 226.10 to provide reasonable payment instructions, a creditor's cut-off hour for receiving payments by mail can be no earlier than 5 p.m. in the location where the creditor has designated the payment to be sent. Comment is requested on whether there continues to be a need for creditors to disclose cut-off hours before 5 p.m. for payments made by telephone or electronically.

Section 226.9 Subsequent Disclosure Requirements

9(b) Disclosures for Supplemental Credit Access Devices and Additional Features

Section 226.9(b) currently requires certain disclosures when a creditor adds a credit device or feature to an existing open-end plan. When a creditor adds a credit feature or delivers a credit device to the consumer within 30 days of mailing or delivering the account-opening disclosures under current § 226.6(a), and the device or feature is subject to the same finance charge terms previously disclosed, the creditor is not required to provide additional disclosures. If the credit feature or credit device is added more than 30 days after mailing or delivering the account-opening disclosures, and is subject to the same finance charge terms previously disclosed in the account-opening agreement, the

creditor must disclose that the feature or device is for use in obtaining credit under the terms previously disclosed. However, if the added credit device or feature has finance charge terms that differ from the disclosures previously given at account opening, then disclosure of the differing terms must be given before the consumer uses the new feature or device.

The June 2007 Proposal addressed disclosures that must be provided with checks that access credit card accounts (that are not home-secured). A new § 226.9(b)(3) would require certain information to be disclosed each time that such checks are mailed to a consumer, for checks mailed more than 30 days following the delivery of the account-opening disclosures. Specifically, the June 2007 Proposal would require that the following key terms be disclosed on the front of the page containing the checks: (1) any discounted initial rate, and when that rate will expire, if applicable; (2) the type of rate that will apply to the checks after expiration of any discounted initial rate (such as whether the purchase or cash advance rate applies) and the applicable APR; (3) any transaction fees applicable to the checks; and (4) whether a grace period applies to the checks, and if one does not apply, a statement that interest will be charged immediately. Proposed § 226.9(b)(3) would require that these key terms be disclosed in a tabular format substantially similar to Sample G-19 in Appendix G. 72 FR 32948, 33056, 33082, June 14, 2007.

The Board proposes to add a disclosure to the summary table required by § 226.9(b)(3) in the June 2007 Proposal, pursuant to its authority under TILA Section 105(a). 15 U.S.C. 1604(a). The additional disclosure is set forth in proposed § 226.9(b)(3)(C) and would require additional information regarding the expiration date

of any offer of a discounted initial rate. If a discounted initial rate applies to the checks, the creditor would be required to disclose any date by which the consumer must use the checks in order to receive the discounted initial rate. If the creditor will honor the checks if they are used after the disclosed date but will apply to the advance an APR other than the discounted initial rate, the creditor must disclose that fact and the type of APR that will apply under those circumstances.

The Board believes that it is important that consumers receive clear disclosures regarding the expiration date of any offer of a promotional rate that would be applicable to checks that access a credit card account. This disclosure is particularly important if the creditor will honor the checks, but at a higher interest rate, after the expiration date of the promotional rate offer. A consumer who is unaware of the expiration date for the offer of a promotional rate may use the check with the expectation of receiving the promotional rate, only to later discover, after he or she is contractually bound on the advance, that the check was subject to a higher interest rate than expected. This disclosure is designed to enable a consumer to better evaluate what the cost of using the check will be, and to make an informed decision whether to use the check or an alternative source of credit.

In consumer testing conducted for the Board in March 2008, the Board tested a disclosure of the date by which a consumer must use checks that access a credit card account in order to qualify for a discounted initial rate offer. This disclosure was labeled "Use by Date" and stated "You must use this check by 4/1/08 for the promotional APR to apply. If you use the check after that date, we may still honor the check but you will not receive the promotional APR. Instead, the standard APR for Cash Advances will apply." The responses given by testing participants indicated that they generally did not

understand prior to the testing that there may be a use-by date applicable to an offer of a promotional rate for a check that accesses a credit card account. However, the participants that read the tested language understood that the standard cash advance rate, not the promotional rate, would apply if the check was used after April 1, 2008. Thus, the Board believes that this disclosure may improve consumer understanding of the terms applicable to these checks. In addition to proposed § 226.9(b)(3)(C), the Board also proposes a corresponding change to Sample G-19 to include the language that was tested in March 2008.

Paragraph 9(b)(3)(E)

Section 226.9(b)(3)(D) in the June 2007 Proposal required creditors offering access checks to disclose, among other information, whether or not a period exists in which consumers may avoid the imposition of finance charges and, if so, the length of the period. 72 FR 32948, 33056, June 14, 2007. As discussed in the section-by-section analysis to § 226.5(a)(2), § 226.5a(b)(5) and § 226.6(b)(4)(iv), the Board is revising provisions relating to the description of grace periods. Section § 226.9(b)(3)(E), as renumbered in the May 2008 Proposal, is revised and comment 9(b)(3)(E)-1 is added, consistent with the proposed revisions to § 226.5a(b)(5) and § 226.6(b)(4)(iv) and related commentary. The Board also proposes to revise Sample G-19 for conformity with the proposed revisions.

Finally, the Board also is deleting from § 226.9(b)(3)(A), as proposed in June 2007, the requirement that a creditor use the term "introductory" or "intro" in immediate proximity to the listing of the discounted initial rate for checks that access a credit card account. This change is proposed for consistency with proposed revisions to

§ 226.16(e)(2), which is discussed in more detail in the section-by-section analysis below and creates a new definition of "promotional rate" to be used to describe offers of discounted initial interest rates that are made in connection with existing accounts. The Board is aware that checks that access a credit card account are provided to consumers that already have an existing credit card account, so the term "promotional rate" may be a more appropriate term than " introductory rate" for describing any discounted initial rate applicable to such checks. Sample G-19 is revised accordingly.

9(c) Change in Terms

9(c)(2) Rules Affecting Open-end (not Home-secured) Plans

9(c)(2)(ii) Charges not Covered by § 226.6(b)(4)

In the June 2007 Proposal, the Board proposed § 226.9(c)(2)(ii), which stated that if a creditor increases a charge, or introduces a new charge, required to be disclosed under § 226.6(b)(1) but not covered by § 226.6(b)(4), the creditor may provide notice to the consumer at a relevant time before the consumer agrees to or becomes obligated to pay the charge, and may provide the notice orally or in writing. 72 FR 32948, 33056, June 14, 2007. The Board proposes to amend comment 9(c)(2)(ii)-1 to reflect the permissibility of electronic notice and to clarify (by a cross-reference to comment 5(a)(1)(ii)(A)-1) that electronic notice may be provided without regard to the notice and consent requirements of the E-Sign Act when a consumer requests a service in electronic form.

9(c)(2)(iii) Disclosure Requirements

As discussed elsewhere in today's **Federal Register**, subject to certain exceptions, the Board proposes to prohibit increasing the APR applicable to balances

outstanding at the end of the fourteenth day after a notice disclosing the change in the APR is provided to the consumer. A creditor would, however, be permitted to apply a rate increase to such outstanding balances when the rate increase is due to: the operation of an index or formula; the expiration of a promotional rate; the loss of a promotional rate due to one or more events specified in the account agreement, provided that the bank increases the rate to the rate that would have applied after expiration of the promotional rate; or the consumer's failure to make the required minimum periodic payment within 30 days from the due date for that payment.

For consistency with the proposed substantive restrictions regarding the application of increased APRs to pre-existing balances, the Board proposes a new § 226.9(c)(2)(iii)(A)(7) to clarify that a creditor that provides a change in terms notice in connection with an increase in an APR must disclose the balances to which the increased rate will be applied, pursuant to its authority under TILA Section 105(a). 15 U.S.C. 1604(a). If the creditor is subject to restrictions on rate increases to existing balances proposed elsewhere in today's **Federal Register** or other applicable law, the creditor would also identify the balances to which the current rate will continue to apply.

The Board believes that it is important for consumers to be clearly notified when the current rate, rather than the increased rate, will continue to apply to balances already outstanding on their accounts. This disclosure could assist consumers to make better-informed decisions regarding usage of their accounts. For example, if a consumer erroneously believed that a rate increase would be applicable to the outstanding balance on the account, that consumer might seek an alternative source of credit with which to

pay off the outstanding balance, even if the cost of such alternative credit may be higher than the rate that is in fact applicable to such balance.

The Board proposes to revise Sample G-20 in Appendix G in order to include a disclosure that would comply with the new proposed requirement. Comment 9(c)(2)(iii)(A)-8, which discusses the content of Sample G-20, is revised accordingly.

9(g) Increase in Rates Due to Delinquency or Default as a Penalty

In the June 2007 Proposal, the Board proposed to add a new section 226.9(g), which would require that a creditor provide a consumer with 45 days' advance notice when a rate is increased due to the consumer's delinquency or default, or if a rate is increased as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit. 72 FR 32948, 33058, June 14, 2007. As discussed elsewhere in today's **Federal Register**, the Board also proposes to prohibit the application of a penalty rate to balances that are outstanding at the end of the fourteenth day after a notice disclosing the change in the APR is provided to the consumer, except in the event that a consumer fails to make the required minimum periodic payment within 30 days from the due date for that payment.

The Board proposes to add new illustrations to comment 9(g)-1, to provide guidance on the impact of substantive protections regarding the application of increased APRs to pre-existing balances on the timing requirements of 45 days' advance notice before delinquency or default rates or penalty rates may be imposed.

The Board also proposes to revise § 226.9(g)(3)(i)(D) of the June 2007 Proposal, which required creditors to disclose the balances to which a delinquency or default rate or penalty rate would be applied, and a new § 226.9(g)(3)(i)(E), for conformity with the

proposed substantive restriction regarding increased APRs on pre-existing balances. Section 9(g)(3)(i)(D) would be revised to require creditors subject to the proposed substantive restrictions to disclose how balances may be affected if the consumer fails make the required minimum periodic payment within 30 days from the due date for that payment. New § 226.9(g)(3)(i)(E) would require a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless the consumer fails to make a required minimum periodic payment within 30 days from the due date for that payment. Conforming changes are also made to Sample G-21 in Appendix G.

Section 226.10 Prompt Crediting of Payments

Section 226.10, which implements TILA Section 164, generally requires a creditor to credit to a consumer's account a payment that conforms to the creditor's instructions (also known as a conforming payment) as of the date of receipt, except when a delay in crediting the account will not result in a finance or other charge. 15 U.S.C. 1666c; § 226.10(a). Section 226.10 also requires a creditor that accepts a non-conforming payment to credit the payment within five days of receipt. See § 226.10(b). The Board has previously interpreted § 226.10 to permit creditors to specify cut-off times indicating the time when a payment is due, provided that the requirements for making payments are reasonable, to allow most consumers to make conforming payments without difficulty. See comments 10(b)-1 and -2. Pursuant to § 226.10(b) and comment 10(b)-1, if a creditor imposes a cut-off time, it currently must be disclosed on the periodic statement; many creditors put the cut-off time on the back of statements.

10(b) Specific Requirements for Payments

Reasonable requirements for cut-off times. In the June 2007 Proposal, the Board sought to address concerns that cut-off times may effectively result in a due date that is one day earlier in practice than the due date disclosed. The Board did not propose to require a minimum cut-off time. Rather, the Board proposed a disclosure-based approach, which would have created a new § 226.7(b)(11) to require that for open-end (not home-secured) plans, creditors must disclose the earliest of their cut-off times for payments in close proximity to the due date on the front page of the periodic statement, if that earliest cut-off time is before 5 p.m. on the due date. In recognition of the fact that creditors may have different cut-off times depending on the type of payment (e.g., mail, Internet, or telephone), the Board's proposal would have required that creditors disclose only the earliest cut-off time, if earlier than 5 p.m. on the due date. 72 FR 32948, 33053, 33054, June 14, 2007.

Although some consumers supported the proposed cut-off time disclosure, other consumers and consumer groups thought that the proposed disclosure would provide only a minimal benefit to consumers. These commenters recommended that the Board consider other approaches to more effectively address cut-off times. Consumer groups recommended that the Board adopt a postmark rule, under which the timeliness of a consumer's payment would be evaluated based on the date on which the payment was postmarked. Some consumers commented that cut-off times are unfair and should be abolished, while other consumers suggested that the Board establish minimum cut-off times, for example, 4:00 p.m. in the time zone in which the billing center is located.

Industry commenters expressed concern that the proposed disclosure would prove confusing to consumers. They noted that many creditors vary their cut-off times by payment channel and that disclosure of only the earliest cut-off hour would be inaccurate and misleading. They suggested that, if the Board retains this requirement, a creditor should be permitted to identify to which payment method the cut-off time relates, disclose the cut-off hours for all payment channels, or to disclose the cut-off hour for the payment method used by the consumer, if known. Industry commenters also asked that the Board relax the location requirement for the cut-off time disclosure on the periodic statement.

Both consumer groups and industry commenters urged the Board to clarify which time zone should be considered when determining if the cut-off time is prior to 5:00 p.m.

In light of feedback received on the June 2007 Proposal, the Board proposes to address cut-off times for mailed payments by providing guidance as to the types of requirements that would be reasonable for creditors to impose for payment received by mail. In part, the Board proposed to move guidance currently contained in the commentary to the regulation. Currently, comment 10(b)-1 provides examples of specific payment requirements creditors may impose, and comment 10(b)-2 states that payment requirements must be reasonable, in particular that it should not be difficult for most consumers to make conforming payments. The Board proposes to move the substance of comments 10(b)-1 and 10(b)-2 to §§ 226.10(b)(1) and (2) of the regulation. Under the May 2008 Proposal, § 226.10(b)(1) would state the general rule, namely that a creditor may specify reasonable requirements that enable most consumers to make conforming payments. The Board would expand upon the example in current comment

10(b)-1(i)(B) in new § 226.10(b)(2)(ii), which would state that it would not be reasonable for a creditor to set a cut-off time for payments by mail that is earlier than 5:00 p.m. at the location specified by the creditor for receipt of such payments.

The language in current comment 10(b)-2 stating that it should not be difficult for most consumers to make conforming payments would not be included in the proposed regulatory text. The Board believes that this language is unnecessary and that in substance is duplicative of the requirement that any payment requirements be reasonable and enable most consumers to make conforming payments.

The Board believes that it is important that the requirements that a creditor sets for payments be reasonable, so that most consumers will be able to make payments that conform with those requirements. If the creditor's requirements make it unduly burdensome for a consumer to make a conforming payment, then a consumer may become subject to the fees and other penalties associated with late payments, without having a reasonable opportunity to avoid those adverse consequences. With regard to cut-off times, any cut-off time specified by a creditor on the due date for payments should afford consumers a reasonable opportunity to make payment on that date.

At the same time, the Board is mindful of the burden that specifying a particular cut-off time or times by regulation could have on creditors. Each creditor may have different internal processes and systems, and may work with different vendors and service providers, so a one-size-fits-all approach may not be feasible. As a result, while the proposed regulation would contain one example of an unreasonable cut-off time for payments made by mail, it would not impose a single cut-off time on all creditors for all

methods of payment. Board requests comment on the operational burden that the proposed rule would impose on creditors.

The Board has not proposed a postmark rule as suggested by consumer group commenters. In part, this is because the Board proposes elsewhere in today's **Federal Register** a rule that would require a creditor to provide consumers with a reasonable time to make payments. The Board believes this substantive protection effectively addresses the concerns expressed by consumer groups regarding insufficient time to make payments. The Board also believes that it would be difficult for consumers to retain proof of when their payments were postmarked, in order to challenge the prompt crediting of payments under such a rule. A consumer generally is not given proof of the postmark date at the time that he or she mails a payment; to effectively retain evidence of the postmark date, a consumer would in many cases need to pay extra postage charges in order to receive a proof of mailing. In addition, a mailed payment may not have a legible postmark date when it reaches the creditor or creditor's service provider. Finally, the Board believes there would be significant operational costs and burdens associated with capturing and recording the postmark dates for payments.

Under the June 2007 Proposal, § 226.10(b) contained a cross-reference to § 226.7(b)(11), regarding the disclosure of cut-off hours on periodic statements. In the section-by-section analysis to § 226.7(b)(11), the Board solicits comment on whether disclosure of cut-off hours near the due date for payment methods other than mail (e.g., telephone or internet) should be retained. If the Board adopts revisions to § 226.7 that do not require disclosure of any cut-off hour closely proximate to the due date, the proposed cross-reference would be withdrawn.

June 2007 proposed revisions to comment 10(b)-2, regarding payments made via a creditor's website, remain unchanged.

10(d) Crediting of Payments When Creditor Does Not Receive or Accept Payments on Due Date

Holiday and weekend due dates. The Board's June 2007 Proposal did not address the practice of setting due dates on dates on which a creditor does not accept payments, such as weekends or holidays. A weekend or holiday due date might occur, for example, if a creditor sets its payment due date on the same day (the 25th, for example) of each month. While in most months the 25th would fall on a business day, in other months the 25th might be a weekend day or holiday, due to fluctuations in the calendar. However, the Board received a number of comments from consumer groups, individual consumers, and a United States Senator criticizing weekend or holiday due dates. The comment letters expressed concern that a consumer whose due date falls on a date on which the creditor does not accept payments must pay one or several days early in order to avoid the imposition of fees or other penalties that are associated with a late payment. Comment letters from consumers indicated that, for many consumers, weekend and holiday due dates are a common occurrence. Some of these commenters suggested that the Board mandate an automatic grace period until the next business day for any such weekend or holiday due dates. Other commenters recommended that the Board prohibit weekend or holiday due dates.

In response to these comments, the Board proposes a new § 226.10(d) that would require a creditor to treat a payment received by mail the next business day as timely, if the due date for the payment is a day on which the creditor does not receive or accept

payment by mail, such a day on which the U.S. Postal Service does not deliver mail. Thus, a consumer whose due date falls on a Sunday on which a creditor does not accept payment by mail would not be subject to late payment fees or increases in the interest rate applicable to the account due to late payment if the consumer's payment were received by mail on the next day that the creditor does accept payment by mail. The Board proposes this rule using its authority to regulate the prompt posting of payments under TILA section 164, which states that "[p]ayments received from an obligor under an open end consumer credit plan by the creditor shall be posted promptly to the obligor's account as specified in regulations of the Board." 15 U.S.C. 1666c.

The Board acknowledges that this proposal may require creditors to modify their systems to ensure that payment due dates do not fall on dates when they do not receive mail or to backdate payments or waive fees and interest, which would impose some degree of burden on creditors. The Board solicits comment on the extent of the burden associated with any system modification that would be required to comply with the proposed rule.

The proposed rule in § 226.10(d) would be limited to payments made by mail. The Board is particularly concerned about payments by mail because the consumer's time to pay, as a practical matter, is the most limited for those payments, since a consumer paying by mail must account for the time that it takes the payment to reach the creditor. The Board solicits comment as to whether this rule also should address payments made by other means, such as telephone payments or payments made via the internet.

The Board notes that it also received a large number of comment letters from consumers who expressed concern more generally that the amount of time consumers are

given to pay their bills is continually decreasing. The Board believes that its proposal under Regulation Z regarding weekend or holiday due dates will complement the Board's proposal to require banks to provide a consumer with a reasonable amount of time to make payments.

Section 226.12 Special Credit Card Provisions

12(a) Issuance of Credit Card

TILA Section 132, which is implemented by § 226.12(a) of Regulation Z, generally prohibits creditors from issuing credit cards except in response to a request or application. Section 132 explicitly exempts from this prohibition credit cards issued as renewals of or substitutes for previously accepted credit cards. 15 U.S.C. 1642.

The Board has been asked over the years to provide guidance on actions card issuers may take to "substitute" on an unsolicited basis a new card for an accepted credit card. See Comment 12(a)(2)-2. For example, the Board has provided guidance that card issuers may, on an unsolicited basis, substitute a new card that reflects a change in the card issuer's name, or that can be used to access new account features such as when the card originally accepted could be used only for purchases and the creditor substitutes a new card that can also be used to obtain cash advances.

The Board has also provided guidance on limitations on an issuer's ability to issue a new card as a substitute for an accepted card. For example, if the originally accepted card is honored only at Merchant A, the issuer cannot substitute a new card that is honored only at Merchant B. To be a permissible substitution in this example, the new card must continue to be honored by Merchant A, even though the card may also be used at Merchant B or other merchants. Card issuers rely on this interpretation to substitute on

an unsolicited basis a general-purpose bank card that is honored at many merchants for a card originally honored by a single merchant.

Over the years, consumers have expressed their confusion, and in some cases frustration, when they receive on an unsolicited basis a new general-purpose card (which may be honored at multiple merchants) that is sent in substitution for a card originally honored by a single merchant. They express concern about potential identity theft when cards are sent out without warning or notice, and frustration about the issuer's unilateral decision to change fundamentally the potential uses of the card from that originally requested.

The June 2007 Proposal did not propose changes to the Board's current guidance on issuing credit cards in renewal of or substitution for an accepted credit card. Consumer groups urged the Board to limit the ability of card issuers to issue on an unsolicited basis a new card for an accepted card, for example, if the credit features differ greatly or if the accepted card has not been used for an extended period of time. Industry commenters, on the other hand, generally supported the Board's proposal to retain the existing guidance on permissible renewals and substitutions.

The Board has become aware of issuances in which general-purpose cards were sent on an unsolicited basis as a substitute for the merchant card where the accounts for the originally accepted card had not been active with the merchant for a long period of time. This practice is permitted under current rules. Some consumers who responded to the June 2007 Proposal urged the Board to limit issuers' ability to send cards without consent or warning in these circumstances, due to concerns of cardholder security and identity theft.

The Board proposes a narrow response to address concerns about the unsolicited issuance of new cards for accepted cards on accounts that have been inactive for a long period of time. Under the proposed revision to comment 12(a)(2)-2.v., a card issuer that proposes to change the merchant base that will honor the card, such as from a card that is honored by a single merchant to a general-purpose card, may not properly substitute the new card for the accepted card without a specific request or application if the account has been inactive for a 24 month period preceding the issuance of the substitute card. Changing the merchant base to enable the card holder to use an accepted card at a new affiliate of the merchant is not affected by the proposal. Under the proposal, an account is considered inactive if no credit has been extended and the account has no outstanding balance. See proposed § 226.11(b)(2), which implements TILA amendments in the Bankruptcy Act affecting accounts that are "inactive" for three consecutive months. 72 FR 32948, 33058, June 14, 2007. The Board requests comment on whether a longer time period, such as 36 months, would be more appropriate.

The proposal would not affect the renewal or substitution of cards by the original card issuer when, for example, a consumer opens a credit card account with a merchant to take advantage of a discounted purchase price or a low introductory rate, and does not use the card for a number of years. In that case, the issuer could send a new card on an unsolicited basis in renewal of or substitution for the originally accepted card, even if the new card could be used to obtain additional credit features with the retailer. Nor does the proposal limit creditors' ability to send a general-purpose card in place of an inactive retail card if the consumer specifically requests or applies for the general-purpose card. The proposal would, however, address consumers' confusion when a card issued by a

creditor with whom the consumer may have no previous relationship arrives in the mail on an unsolicited basis, as a substitute for a retail card account the consumer has not used in some time.

12(b) Liability of Cardholder for Unauthorized Use

TILA and Regulation Z provide protections to consumers against losses due to unauthorized transactions on open-end plans. See TILA Section 133; 15 U.S.C. 1643, § 226.12(b); TILA Section 161(b)(1); 15 U.S.C. 1666(b)(1), § 226.13(a)(1). Comment 12(b)-2 and -3 address a card issuer's rights and responsibilities in responding to a claim of unauthorized use under § 226.12. Comment 12(b)-2 clarifies that a card issuer is not required to impose any liability. Comment 12(b)-3 clarifies that the card issuer wishing to impose liability must investigate claims in a reasonable manner and provides guidance on conducting an investigation of a claim. As discussed in the section-by-section analysis to § 226.13(f), which requires creditors to conduct a reasonable investigation of an allegation of a billing error, the Board proposes to include guidance currently provided in the context of a claim of unauthorized transactions under § 226.12(b) in proposed comment 13(f)-3.

Comment 12(b)-3 provides that a card issuer may reasonably request the consumer's cooperation. A card issuer may not, however, automatically deny a claim based solely on the consumer's failure or refusal to comply with a particular request. The Board proposes to add, by way of example, that such requests would include any card issuer requirement that the consumer submit a signed statement or affidavit or file a police report. See 59 FR 64351, 64352, December 14, 1994; 60 FR 16771, 16774, April 3, 1995. The Board is concerned that such card issuer requests could cause a

chilling effect on a consumer's ability to assert his or her right to avoid liability for an unauthorized transaction. However, if the card issuer otherwise has no knowledge of facts confirming the billing error, comment 12(b)-3 states that the lack of information resulting from the consumer's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation.

Section 226.13 Billing Error Resolution

13(f) Procedures if Different Billing Error or No Billing Error Occurred

Section 226.13(f) sets forth procedures for resolving billing error claims if the creditor determines that no error or a different error occurred. A creditor must first conduct a reasonable investigation before the creditor may deny a consumer's claim or conclude that the billing error occurred differently than as asserted by the consumer. See TILA Section 161(a)(3)(B)(ii); 15 U.S.C. 1666(a)(3)(B)(ii). Footnote 31 was proposed to be deleted as unnecessary, in light of the general obligation under § 226.13(f). The footnote provides that to resolve allegations of nondelivery of property or services, creditors must determine whether property or services were actually delivered, mailed, or sent as agreed. To resolve allegations of incorrect information on a periodic statement due to an incorrect report, creditors must determine that the information was correct. See § 226.13(f), footnote 31.

Consumer advocates urged the Board to retain the substance of footnote 31. They noted that the current guidance in footnote 31 requires issuers to take concrete steps for resolving claims of nondelivery such as obtaining delivery records or contacting merchants, to consumers' detriment. Without this guidance, advocates expressed concern that issuers would conduct more perfunctory investigations as, in their view, has been the

case by some creditors applying the same "reasonable investigation" standard for investigations into allegations of errors on credit reports under the Fair Credit Reporting Act. 15 U.S.C. 1681 et seq. In light of the commenters' concerns, the Board proposes to reinstate the substance of footnote 31 in a new comment 13(f)-3.

TILA and Regulation Z provide protections to consumers against losses due to unauthorized transactions on open-end plans. See TILA Section 133; 15 U.S.C. 1643, § 226.12(b); TILA Section 161(b)(1); 15 U.S.C. 1666(b)(1), § 226.13(a)(1). In reviewing its guidance on conducting a reasonable investigation under § 226.13(f), the Board notes that card issuers have express guidance on conducting a reasonable investigation of a claim of unauthorized transaction under § 226.12(b) but there is no similar guidance for creditors under § 226.13. See comment 12(b)-3. To harmonize the standards under the two provisions and address inquiries Board staff has received over the years on this issue, the Board proposes to include applicable guidance currently provided in the context of a claim of unauthorized transactions under § 226.12(b) in proposed comment 13(f)-3.

In contrast to comment 12(b)-3, which applies to the unauthorized use of a credit card, the corresponding guidance in comment 13(f)-3 would apply to all creditors offering an open-end plan. The comment would provide that in conducting an investigation of an allegation of a billing error, a creditor may reasonably request the consumer's cooperation. A creditor may not automatically deny a claim based solely on the consumer's failure or refusal to comply with a particular request. Consistent with the proposed revision to comment 12(b)-3, discussed in the section-by-section analysis to § 226.12(b), the proposed comment further states, by way of example, that such requests include any creditor requirement that the consumer submit a signed statement or affidavit

or file a police report. See 59 FR 64351, 64352, December 14, 1994; 60 FR 16771, 16774, April 3, 1995. The Board is concerned that such creditor requests could cause a chilling effect on a consumer's ability to assert his or her billing error rights. However, consistent with the guidance in comment 12(b)-3, if the creditor otherwise has no knowledge of facts confirming the billing error, comment 13(f)-3 would provide that the lack of information resulting from the consumer's failure or refusal to comply with a particular request may lead the creditor reasonably to terminate the investigation. The procedures involved in investigating alleged billing errors may differ, as illustrated in the proposed comment.

Section 226.14 Determination of Annual Percentage Rate

TILA Section 127(b)(6) requires disclosure of an APR calculated as the quotient of the total finance charge for the period to which the charge relates divided by the amount on which the finance charge is based, multiplied by the number of periods in the year. 15 U.S.C. 1637(b)(6). This rate has come to be known as the "historical APR" or "effective APR." Section 226.14(c) contains the rules for determining the effective APR. Comment 14(c)-10 provides guidance on how to determine the effective APR when the finance charges imposed during the billing cycle relate to activity in a prior cycle, such as for adjustments relating to error resolution, when transactions occur late in a billing cycle and are impracticable to post until the following billing cycle, or when a consumer fails to pay a purchase balance under a deferred interest feature by the payment due date and interest is imposed from the date of purchase.

In the June 2007 Proposal, the Board proposed two alternative approaches for disclosing an effective APR. 72 FR 32948, 33052, June 14, 2007. In discussing the

proposal, the Board noted that there has been a longstanding controversy about the extent to which the effective APR disclosure requirement advances TILA's purposes to provide consumer with information about the cost of credit that helps consumers compare credit costs and make informed credit decisions, and to strengthen competition in the consumer credit markets, or undermines them. 15 U.S.C. 1601(a). The first alternative was designed to improve the disclosure and consumer understanding and reduce creditor uncertainty about the effective APR computation. The second approach would eliminate the requirement to disclose the effective APR. 72 FR 32948, 32998, 32999, June 14, 2007. Comments to the June 2007 were sharply divided on the matter.

Elsewhere in today's **Federal Register**, the Board proposes to prohibit banks from computing finance charges based on balances for days in billing cycles that precede the most recent billing cycle (so called two-cycle billing method). Interest adjustments due to error resolutions or in connection with deferred interest plans are not intended to be affected by the substantive ban. If, after additional consumer testing and analysis of the comments received, the Board determines to retain the effective APR disclosure requirement and the substantive prohibition on computing finance charges based on previous billing cycles is adopted, the Board will conform comment 14(c)-10 to the extent appropriate.

Section 226.16 Advertising

16(e) Promotional Rates

In the June 2007 Proposal, the Board proposed to implement TILA Section 127(c)(6), as added by Section 1303(a) of the Bankruptcy Act, and TILA Section 127(c)(7), as added by Section 1304(a) of the Bankruptcy Act, in § 226.16(e). TILA

Section 127(c)(6) requires that if a credit card issuer states an introductory rate in applications, solicitations, and all accompanying promotional materials, the issuer must use the term "introductory" clearly and conspicuously in immediate proximity to each mention of the introductory rate. 15 U.S.C. 1637(c)(6). In addition, TILA Section 127(c)(6) requires credit card issuers to disclose, in a prominent location closely proximate to the first mention of the introductory rate, other than the listing of the rate in the table required for credit card applications and solicitations, the time period when the introductory rate expires and the rate that will apply after the introductory rate expires. TILA Section 127(c)(7) further applies these requirements to "any solicitation to open a credit card account for any person under an open end consumer credit plan using the Internet or other interactive computer service." 15 U.S.C. 1637(c)(7).

In implementing these sections of the Bankruptcy Act, the Board proposed in the June 2007 Proposal to expand the types of disclosures to which these rules would apply. See proposed § 226.5a(a)(2)(v), 72 FR 32948, 33045, June 14, 2007. The Board also proposed to extend these requirements for the presentation of introductory rates to other written or electronic advertisements for open-end credit plans that may not accompany an application or solicitation (other than advertisements of HELOCs subject to § 226.5b, which were addressed in the Board's proposed rule regarding new regulatory protections for consumers in the residential mortgage market, 73 FR 1672, 1721, January 9, 2008). 72 FR 32948, 33064, June 14, 2007.

Several industry commenters stated that the Board's proposed use of the term "introductory rate" and required use of the word "introductory" or "intro" was overly broad in some cases. In particular, industry commenters were critical of the use of these

terms as applied to special rates offered to consumers with an existing account. These commenters noted that in the marketplace, the phrase "introductory rates" refers to promotional rates offered in connection with the opening of a new account. In contrast, special rates offered by card issuers to consumers with existing accounts are typically called "promotional rates." These commenters believed that consumers would be confused by the word "introductory" or "intro" associated with a special rate offered on a consumer's already-opened account.

In light of these concerns, the Board proposes to revise § 226.16(e)(2) as proposed in June 2007, to define separately "promotional" and "introductory" rates. For consistency, the Board proposes the same definition of promotional rates in connection with proposed substantive protections under the FTC Act, published elsewhere in today's **Federal Register**. As a result of these revisions, the requirement to state the term "introductory" under § 226.16(e)(3) of the June 2007 Proposal will be limited to promotional rates that are considered "introductory rates" under the revised § 226.16(e)(2). Conforming revisions to § 226.16(e)(4) and to commentary provisions to § 226.16(e) are also proposed. If revisions to § 226.16(e)(2) are adopted as proposed, conforming changes will also be made throughout Regulation Z and associated commentary to be consistent with these new definitions when the Board adopts revisions to the Regulation Z rules for open-end (not home-secured) plans.

16(e)(1) Scope

As discussed in the June 2007 Proposal, the Bankruptcy Act amendments regarding "introductory rates" apply to direct-mail applications and solicitations, and accompanying promotional materials, as well as Internet-based credit card solicitations.

The Board proposed to extend these requirements not only to publicly available applications and solicitations to open a credit card account, and all accompanying materials, but also to electronic applications. See proposed § 226.5a(a)(2)(v), 72 FR 32948, 33045, June 14, 2007. In addition, in the interest of consistency and to promote the informed use of credit, the Board proposed to extend the requirements of § 226.16(e) to other written and electronic advertisements for open-end credit plans that may not accompany an application or solicitation, other than advertisements of HELOCs subject to §226.5(b). 72 FR 32948, 33064, June 14, 2007.

The Board solicits comment on whether all or any of the information required under § 226.16(e) to be provided with the disclosure of a promotional rate would be helpful in advertisements that are not in written or electronic form such as in telephone, radio, or television advertisements. Furthermore, the current proposed guidance on complying with § 226.16(e) is directed towards written and electronic advertisements. If these requirements are extended to advertisements that are not in written or electronic form, additional guidance regarding how advertisers may comply with the requirements may be needed, for example, to apply proximity requirements in an oral context. Therefore, the Board also solicits comment on appropriate additional guidance if the requirements are extended to advertisements that are not in written or electronic form.

16(e)(2) Definitions

In the June 2007 Proposal, the Board proposed to define the term "introductory rate" as any rate of interest applicable to an open-end plan for an introductory period if that rate is less than the advertised APR that will apply at the end of the introductory period. 72 FR 32948, 33064, June 14, 2007. As discussed above, since this proposed

definition for "introductory rate" would have encompassed special rates that may be offered to consumers with existing accounts, the Board proposes to modify the definition and to refer to these rates as "promotional rates." A new definition for "introductory rate" is also proposed, which would define them as promotional rates that are offered in connection with the opening of an account.

Specifically, the Board would modify the June 2007 proposed definition of "introductory rate" for the new definition of "promotional rate" to apply more generally to any APR applicable to one or more balances or transactions on a consumer credit card account for a specified period of time that is lower than the APR that will be in effect at the end of that period. In addition to removing the reference to "introductory period," the new proposed definition of "promotional rate" also recognizes that special rate offers may not apply to the entire account but may only apply to a specific balance or transaction. Furthermore, the new definition removes the term "advertised," which commenters asserted would imply that the APR in effect after the introductory period had to have been "advertised" before the requirements under proposed §§ 226.16(e)(3) and (4) would have applied. This was not the Board's intention. The Board's proposed use of the term "advertised" in the definition was intended to refer to the advertising requirements regarding variable rates and the accuracy requirements for such rates. The Board will instead address these requirements in a new comment 16(e)-1.

New proposed comment 16(e)-1 provides that if a variable rate will apply at the end of the promotional period, the promotional rate must be compared to the APR that would have been advertised had such rate applied instead of the promotional rate. In direct-mail credit card applications and solicitations (and accompanying promotional

materials), this rate is one that must have been in effect within 60 days before the date of mailing, as required under proposed § 226.5a(c)(2)(i) (and currently under § 226.5a(b)(1)(ii)). For variable-rate disclosures provided by electronic communication, this rate is one that was in effect within 30 days before mailing the disclosures to a consumer's electronic mail address, or within the last 30 days of making it available at another location such as a card issuer's web site, as required under proposed § 226.5a(c)(2)(ii) (and currently under § 226.5a(b)(1)(iii)).

Elsewhere in today's **Federal Register**, the Board proposes to establish rules regarding the allocation of payments on outstanding credit card balances, and proposes to define "promotional rate" as a part of the proposal. Consistent with the 2008 Regulation AA Proposal, the proposed definition under § 226.16(e) would also include any APR applicable to one or more transactions on a consumer credit card account that is lower than the APR that applies to other transactions of the same type. This definition is meant to capture "life of balance" offers where a special rate is offered on a particular balance for as long as any portion of that balance exists. A new proposed comment 16(e)-2 provides an illustrative example of a "life of balance" offer and is similar to a comment proposed in the 2008 Regulation AA Proposal. The new proposed comment 16(e)-2 will result in the renumbering of current proposed comments 16(e)-2 through 16(e)-5 under the June 2007 Proposal.

The Board also proposes a new definition for "introductory rate" to conform more closely to how the term is most commonly used. Proposed § 226.16(e)(2)(ii) would define "introductory rate" as a promotional rate that is offered in connection with the opening of an account.

Finally, the Board also proposes to define "promotional period" in § 226.16(e)(2)(iii). The definition is similar to one previously proposed for "introductory period" in the June 2007 Proposal, which in turn was consistent with the definition in TILA Section 127(c)(6)(D)(ii).

16(e)(3) Stating the Term "Introductory"

The Board proposed in the June 2007 Proposal to implement TILA Section 127(c)(6)(A), as added by section 1303(a) of the Bankruptcy Act, in § 226.16(e)(3). 72 FR 32948, 33064, June 14, 2007. TILA Section 127(c)(6)(A) requires the term "introductory" to be used in immediate proximity to each listing of the temporary APR in the application, solicitation, or promotional materials accompanying such application or solicitation. 15 U.S.C. 1637(c)(6)(A).

Section 226.16(e)(3) remains unchanged from the June 2007 Proposal. The Board notes, however, with the proposed revision to the definition of "introductory rate" in § 226.16(e)(2), as discussed above, § 226.16(e)(3) would not apply to all promotional rates. Instead, only promotional rates offered in connection with the opening of an account (i.e., introductory rates) would be covered under § 226.16(e)(3). Proposed comment 16(e)-1 under the June 2007 Proposal has been deleted as unnecessary since the clarification is already included in the regulation.

16(e)(4) Stating the Promotional Period and Post-Promotional Rate

The Board proposed § 226.16(e)(4) in the June 2007 Proposal to implement TILA Section 127(c)(6)(A), as added by Section 1303(a) of the Bankruptcy Act. 72 FR 32948, 33064, June 14, 2007. TILA Section 127(c)(6)(A) requires that the time period in which the introductory period will end and the APR that will apply after the end of the

introductory period be listed in a clear and conspicuous manner in a "prominent location closely proximate to the first listing" of the introductory APR (excluding disclosures in the application and solicitation table). 15 U.S.C. 1637(c)(6)(A).

As discussed above, the Board proposes changes to the definition of "introductory rate" in response to comments received on the June 2007 Proposal. In order to be consistent with the proposed changes to § 226.16(e)(2), the Board proposes to replace the term "introductory" with the term "promotional" in proposed § 226.16(e)(4). Furthermore, while the Board is broadening the types of rates covered under the term "promotional rates" to special life-of-balance-type offers under proposed § 226.16(e)(2)(i)(B), the Board recognizes that requiring disclosure of when the promotional rate will end and the post-promotional rate that will apply after the end of the promotional period would not make sense for these types of offers since the rate in effect for such offers last as long as the balance is in existence. Therefore, the Board proposes that the requirements of § 226.16(e)(4) apply only to promotional rates under § 226.16(e)(2)(i)(A). Similar changes are proposed for proposed comments 16(e)-4, 16(e)-5, and 16(e)-6 (previously proposed comments 16(e)-3, 16(e)-4, and 16(e)-5). 72 FR 32948, 33143, 33144, June 14, 2007.

16(h) Deferred Interest Offers

Many creditors offer deferred interest plans where consumers may avoid paying interest on purchases if the outstanding balance is paid in full by the end of the deferred interest period. If the outstanding balance is not paid in full when the deferred interest period ends, these deferred interest plans often require the consumer to pay interest that has accrued during the deferred interest period. Moreover, these plans typically begin

charging interest accrued from the date of purchase if the consumer defaults on the credit agreement. Some deferred interest plans define default under the card agreement to include failure to make a minimum payment during the deferred interest period while other plans do not. Advertisements often prominently disclose the possibility of financing the purchase of goods or services at no interest.

The Board proposes to use its authority under TILA Section 143(3) to add a new § 226.16(h) to address the Board's concern that the disclosures currently required under Regulation Z may not adequately inform consumers of the terms of deferred interest offers. 15 U.S.C. 1663(3). It is not clear that many of these types of offers would be covered under the requirements regarding promotional rates under proposed § 226.16(e), nor that such requirements would be particularly helpful to consumers in understanding deferred interest offers. Separately, the allocation of payments for deferred interest offers is addressed in the Board's Regulation AA Proposal published elsewhere in today's **Federal Register**.

The Board's proposed rules regarding deferred interest offers would incorporate many of the concepts currently proposed for promotional rates under § 226.16(e). Specifically, the Board proposes to require that the deferred interest period be disclosed in immediate proximity to each statement regarding interest or payments during the deferred interest period. The Board also proposes that certain information about the terms of the deferred interest offer be disclosed in close proximity to the first statement regarding interest or payments during the deferred interest period. These proposals are discussed in more detail below.

Conforming changes have been proposed for proposed comment 16(b)-4, which is current comment 16(b)-9. The Board also notes that guidance in comment 7(b)-1 as proposed in June 2007 (renumbered from current 7-3) refers to "deferred payment" transactions rather than "deferred interest" offers. 72 FR 32948, 33120, June 14, 2007. The Board will conform terminology when the revisions to the rules for open-end (not home-secured) plans are adopted.

16(h)(1) Scope

Similar to the rules applicable to promotional rates under proposed § 226.16(e), the Board proposes that the rules related to deferred interest offers under proposed § 226.16(h) be applicable to all written and electronic advertisements, including accompanying promotional materials for direct mail applications or solicitations and accompanying promotional materials for publicly available applications or solicitations.

As discussed above in the section-by-section analysis to § 226.16(e)(1), the Board solicits comment on whether the proposed requirements relating to promotional rates should be extended to advertisements that are not in written or electronic form, such as telephone, radio, and television advertisements, and if so, what additional guidance would be appropriate. Similarly, the Board requests comment on whether the proposed requirements for deferred interest offers under § 226.16(h) should be applicable to advertisements that are not in written or electronic form, and if so, what additional guidance would be appropriate to help advertisers comply with these requirements.

16(h)(2) Definitions

The Board proposes to define "deferred interest" in new § 226.16(h)(2) as finance charges on balances or transactions that a consumer is not obligated to pay if those

balances or transactions are paid in full by a specified date. The term does not, however, include finance charges the creditor allows a consumer to avoid in connection with a recurring grace period. Therefore, an advertisement including information on a recurring grace period that could potentially apply each billing period, would not be subject to the additional disclosure requirements under § 226.16(h). This definition is similar to the definition proposed in the 2008 Regulation AA Proposal, published elsewhere in today's **Federal Register**. In proposed comment 16(h)-1, the Board notes that deferred interest offers do not include offers that allow a consumer to defer payments during a specified time period, but where the consumer is not obligated under any circumstances for any interest or other finance charges that could be attributable to that period. Furthermore, deferred interest offers do not include 0% APR offers where a consumer is not obligated under any circumstances for interest attributable to the time period the 0% APR was in effect, though such offers may be considered promotional rates under proposed § 226.16(e)(2)(i).

Furthermore, the Board proposes to define the "deferred interest period" for purposes of proposed § 226.16(h) as the maximum period from the date the consumer becomes obligated for the balance or transaction until the specified date that the consumer must pay the balance or transaction in full in order to avoid finance charges on such balance or transaction.

16(h)(3) Stating the Deferred Interest Period

The Board proposes to add new § 226.16(h)(3) to require that the deferred interest period or the date by which the consumer must pay the balance or transaction in full to avoid finance charges on such balance or transaction be disclosed clearly and

conspicuously in immediate proximity to each statement of "no interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period. Proposed comment 16(h)-2 would provide guidance on the meaning of "immediate proximity" by providing a safe harbor similar to the one provided in comment 16(e)-3 of this May 2008 Proposal (renumbered from comment 16(e)-2 under the June 2007 Proposal). Therefore, under proposed comment 16(h)-2, if the deferred interest period is disclosed in the same phrase as each statement of "no interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period (for example, "no interest for 12 months," "no payments until December 2008", or "12 months of deferred interest"), the deferred interest period or date will be deemed to be in immediate proximity to the statement. Furthermore, the Board proposes that these terms must be equally prominent in order to be considered "clear and conspicuous" and proposes to amend comment 16-2 to reflect this.

The proposal will better ensure clear disclosure of the time period in which the consumer has to pay the balance or transaction amount in order to avoid being charged interest by requiring both a proximity and prominence requirement for the disclosure of the deferred interest period or date. This information combined with the information that the Board proposes to require in § 226.16(h)(4), as discussed below, will help consumers to understand these offers when statements of "no interest," "no payments," or other similar terms are used in advertisements.

16(h)(4) Stating the Terms of the Deferred Interest Offer

In order to ensure that consumers notice and fully understand certain terms related to a deferred interest offer, the Board proposes that certain disclosures be required in a

prominent location closely proximate to the first listing of a statement of "no interest," "no payments," "deferred interest," or a similar term regarding interest or payments during the deferred interest period. In particular, the Board proposes to require a statement that if the balance or transaction is not paid within the deferred interest period, interest will be charged from the date the consumer became obligated for the balance or transaction. The Board also proposes to require a statement that interest can also be charged from the date the consumer became obligated for the balance or transaction if the account is otherwise in default. If the minimum monthly payments on the account do not fully amortize the balance or transaction within the deferred interest period, the advertisement also must state that making only the minimum monthly payments will not pay off the balance or transaction in time to avoid interest charges. To facilitate compliance with this provision, the Board proposes model language in Sample G-22 in Appendix G.

While most advertisements of deferred interest offers describe the conditions required to take advantage of the offer, the conditions are often placed in a location that is not easily noticed or stated in terms that are not easily understood. The Board believes that by requiring this information to be in a prominent location closely proximate to the first listing of a statement of "no interest," "no payments," "deferred interest," or a similar term regarding interest and payments under the deferred interest period, and by providing model language for this information, disclosure of this information will be more noticeable and understandable to consumers.

Under proposed § 226.16(e)(4), the promotional period and post-promotional rate must be in a prominent location closely proximate to the first listing of the promotional

rate, in accordance with the requirements of TILA Section 127(c)(6), as added by Section 1303(a) of the Bankruptcy Act. In the June 2007 Proposal, the Board provided proposed guidance on the meaning of "prominent location closely proximate" and "first listing." See proposed comment 16(e)-3 and 16(e)-4, 72 FR 32948, 33143, 33144, June 14, 2007, renumbered as 16(e)-4 and 16(e)-5 in this May 2008 Proposal. To be consistent with the guidance proposed for these terms under § 226.16(e)(4), the Board also proposes similar guidance in comments 16(h)-3 and 16(h)-4. As a result, proposed comment 16(h)-3 would provide that the information required under proposed § 226.16(h)(4) that is in the same paragraph as the first listing of a statement of "no interest", "no payments, "deferred interest" or similar term regarding interest or payments during the deferred interest period would be deemed to be in a prominent location closely proximate to the statement. Similar to proposed comment 16(e)-4, information appearing in a footnote would not be deemed to be in a prominent location closely proximate to the statement.

Proposed comment 16(h)-4 further provides that the first listing of a statement of "no interest", "no payments" or deferred interest or similar term regarding interest or payments during the deferred interest period is the most prominent listing of one of these statements on the front side of the first page of the principal promotional document. Consistent with proposed comment 16(e)-5 in this May 2008 Proposal (renumbered from comment 16e-4 under the June 2007 TILA Proposal), the comment borrows the concept of "principal promotional document" from the Federal Trade Commission's definition of the term under the Fair Credit Reporting Act. 16 CFR Part 642.2(b). If one of these statements is not listed on the principal promotional document or there is no principal promotional document, the first listing of one of these statements is the most prominent

listing of the statement on the front side of the first page of each document containing one of these statements. The Board also proposes that the listing with the largest type size be a safe harbor for determining which listing is the most prominent. In the proposed comment, the Board also notes that consistent with comment 16(c)-1, a catalog or other multiple-page advertisement is considered one document for these purposes.

The Board also proposes comment 16(h)-5 to clarify that the information the Board proposes to require under § 226.16(h)(4) does not need to segregated from other information the advertisement discloses about the deferred interest offer. This may include triggered terms that the advertisement is required to disclose under § 226.16(b). The comment is consistent with the Board's approach on many other required disclosures under Regulation Z. See comment 5(a)-2. Moreover, the Board believes flexibility is warranted to allow advertisers to provide other information that may be essential for the consumer to evaluate the offer such as a minimum purchase amount to qualify for the deferred interest offer.

16(h)(5) Envelope Excluded

The Board proposed § 226.16(e)(5) to implement TILA Section 127(c)(6)(B), as added by Section 1303(a) of the Bankruptcy Act. 15 U.S.C. 1637(c)(6)(B). TILA Section 127(c)(6)(B) specifically excludes envelopes or other enclosures in which an application or solicitation to open a credit card account is mailed from the requirements of TILA Section 127(c)(6)(A)(ii) and (iii). Under the June 2007 Proposal, the Board also proposed to exclude banner advertisements and pop-up advertisements that are linked to an electronic application or solicitation. 72 FR 32948, 33064, June 14, 2007.

Similarly, the Board proposes to exclude envelopes or other enclosures in which an application or solicitation is mailed, or banner advertisements or pop-up advertisements linked to an electronic application or solicitation from the requirements of proposed § 226.16(h)(4). Interested consumers generally look at the contents of an envelope or click on the link in the banner advertisement or pop-up advertisement in order to learn more about an offer instead of relying solely on the information on an envelope, banner advertisement, or pop-up advertisement to become informed about an offer. Furthermore, given the limited space that envelopes, banner advertisements, and pop-up advertisements have to convey information, the Board believes there is little need to impose the burden of providing the information proposed under § 226.16(h)(4) on these types of communications.

APPENDIX G – Open-end Model Forms and Clauses; APPENDIX H – Closed-end Model Forms and Clauses

Appendices G and H set forth model forms, model clauses and sample forms that creditors may use to comply with the requirements of Regulation Z. Appendix G contains model forms, model clauses and sample forms applicable to open-end plans.

The Board proposes to add a sample form to illustrate, in the tabular format, the disclosures required under § 226.6(b)(4) for account-opening disclosures for open-end plans such as lines of credit or an overdraft plan. See proposed Sample G-17(D).

The Board also proposes to revise Sample G-19 that may be used when access checks are provided on a credit card account, as discussed in the section-by-section analysis to § 226.9(b)(3), and Samples G-20 and G-21 that may be used when terms

change or rates are increased, as discussed in the section-by-section analysis to § 226.9(c)(2) and § 226.9(g).

Finally, the Board proposes new model clauses G-22 that creditors offering deferred interest plans may use in advertisements.

VII. Initial Regulatory Flexibility Act Analysis

In accordance with Section 3(a) of the Regulatory Flexibility Act (5 U.S.C. §§ 601-612) (RFA), the Board is publishing an initial regulatory flexibility analysis for the proposed amendments to Regulation Z.

The Board believes that the amendments to Regulation Z in this May 2008 Proposal would not, standing alone, have a significant economic impact on a substantial number of small entities. However, based on its analysis and for the reasons stated in the June 2007 Proposal, the Board believes that, in the aggregate, the amendments to Regulation Z contained in the June 2007 Proposal and in this May 2008 Proposal would have a significant economic impact on a substantial number of small entities. 72 FR 32948, 33033, 33034, June 14, 2007. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period for this May 2008 Proposal and further consideration of comments received on the June 2007 Proposal. The Board requests public comment in the following areas.

1. Reasons, statement of objectives and legal basis for the proposed rule. The purpose of the Truth in Lending Act is to promote the informed use of consumer credit by providing for disclosures about its terms and cost. In this regard, the goal of the proposed amendments to Regulation Z in this May 2008 Proposal and the June 2007 Proposal is to improve the effectiveness of the disclosures that creditors provide to consumers at

application and throughout the life of an open-end account. Accordingly, the Board is proposing changes to format, timing, and content requirements for the five main types of disclosures governed by Regulation Z: (1) credit and charge card application and solicitation disclosures; (2) account-opening disclosures; (3) periodic statement disclosures; (4) change-in-terms notices; and (5) advertising provisions.

The Supplementary Information above and the Supplementary Information for the June 2007 Proposal describe in detail the reasons, objectives, and legal basis for each component of the proposed rules. 72 FR 32948 through 33036, June 14, 2007.

2. Description of small entities to which the proposed rule would apply. The total number of small entities likely to be affected by the proposal is unknown, because the open-end credit provisions of TILA and Regulation Z have broad applicability to individuals and businesses that extend even small amounts of consumer credit. See § 226.1(c)(1).[5] Based on December 31, 2007 call report data, there are approximately 12,479 depository institutions in the United States that have assets of $165 million or less and thus are considered small entities for purposes of the Regulatory Flexibility Act. Of them, there were 2,159 banks, 3,445 insured credit unions, and 26 other thrift institutions with credit card assets (or securitizations), and total assets of $165 million or less. The number of small non-depository institutions that are subject to Regulation Z's open-end credit provisions cannot be determined from information in call reports, but recent congressional testimony by an industry trade group indicated that 200 retailers, 40 oil companies, and 40 third-party private label credit card issuers of

[5] Regulation Z generally applies to "each individual or business that offers or extends credit when four conditions are met: (i) the credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly, (iii) the credit is subject to a finance charge or is payable by a written agreement in more than four installments, and (iv) the credit is primarily for personal, family, or household purposes." § 226.1(c)(1).

various sizes also issue credit cards.[6] There is no comprehensive listing of small consumer finance companies that may be affected by the proposed rules or of small merchants that offer their own credit plans for the purchase of goods or services. Furthermore, it is unknown how many of these small entities offer open-end credit plans as opposed to closed-end credit products, which would not be affected by the proposed rule.

The effect of the proposed revisions to Regulation Z on small entities also is unknown. Small entities would be required to, among other things, conform their open-end credit disclosures, including those in solicitations, account opening materials, periodic statements, and change-in-terms notices, and advertisements to the revised rules. The Board has sought to reduce the burden on small entities, where possible, by proposing model forms that can be used to ease compliance with the proposed rules. Small entities also would be required to update their systems to comply with the proposed rules regarding reasonable cut-off times for payments and weekend or holiday payment due dates.

The precise costs to small entities of updating their systems are difficult to predict. These costs will depend on a number of factors that are unknown to the Board, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and administer open-end accounts, the complexity of the terms of the open-end credit products that they offer, and the range of such product offerings. Nevertheless, the Board believes that these costs, in the aggregate for the June 2007 and May 2008 Proposals, will have a significant economic

[6] Testimony of Edward L. Yingling for the American Bankers' Association before the Subcommittee on Financial Institutions and Consumer Credit, Financial Services Committee, United States House of Representatives, April 26, 2007, fn. 1, p 3.

effect on small entities. The Board seeks information and comment on the effects of the proposed rules on small entities.

3. Projected reporting, recordkeeping and other compliance requirements of the proposed rule. The compliance requirements of the proposed revisions to Regulation Z included in this May 2008 Proposal are described above in **VI. Section-by-section Analysis**. The compliance requirements of the proposed revisions to Regulation Z in the June 2007 Proposal are described in the section-by-section analysis included with those proposals. 72 FR 32948, 32958 through 33033, June 14, 2007. The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small institutions.

4. Other federal rules. As noted in the section-by-section analysis in the June 2007 Proposal for § 226.13(i), there is a potential conflict between Regulation Z and Regulation E with respect to error resolution procedures when a transaction involves both an extension of credit and an electronic fund transfer. 72 FR 32948, 33019, June 14, 2007. The Board has not identified any federal rules that duplicate, overlap, or conflict with the proposed revisions to Regulation Z in this May 2008 Proposal. The Board seeks comment regarding any statutes or regulations, including state or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rule. The Board also seeks comment regarding any duplication, overlap, or conflict between the proposed revisions to Regulation Z in this May 2008 Proposal and the 2008 Regulation AA Proposal discussed elsewhere in today's **Federal Register**.

5. Significant alternatives to the proposed revisions. As previously noted, the June 2007 Proposal and the May 2008 Proposal implement the Board's mandate to prescribe regulations that carry out the purposes of TILA. In addition, portions of the June 2007 Proposal are intended to implement certain provisions of the Bankruptcy Act that require new disclosures on periodic statements, on credit card applications and solicitations, and in advertisements. The Board seeks with both the June 2007 Proposal and the May 2008 Proposal to balance the benefits to consumers arising out of more effective TILA disclosures against the additional burdens on creditors and other entities subject to TILA. To that end, and as discussed above in **VI. Section-by-section Analysis** and in the section-by-section analysis accompanying the June 2007 Proposal, consumer testing was conducted for the Board in order to assess the effectiveness of the proposed revisions to Regulation Z. 72 FR 32948, 32958 through 33033, June 14, 2007. In this manner, the Board has sought to avoid imposing additional regulatory requirements without evidence that these proposed revisions may be beneficial to consumer understanding regarding open-end credit products.

The Board welcomes comments on any significant alternatives, consistent with TILA and the Bankruptcy Act, that would minimize the impact of the proposed rule on small entities.

VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this proposed rule is found in 12 CFR part

226. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 et seq.). Since the Federal Reserve does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are creditors and other entities subject to Regulation Z, including for-profit financial institutions and small businesses.

TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For open-end credit, creditors are required to, among other things, disclose information about the initial costs and terms and to provide periodic statements of account activity, notices of changes in terms, and statements of rights concerning billing error procedures. Regulation Z requires specific types of disclosures for credit and charge card accounts and home equity plans. For closed-end loans, such as mortgage and installment loans, cost disclosures are required to be provided prior to consummation. Special disclosures are required in connection with certain products, such as reverse mortgages, certain variable-rate loans, and certain mortgages with rates and fees above specified thresholds. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance for twenty-four months (§ 226.25), but Regulation Z does not specify the types of records that must be retained.

Under the PRA, the Federal Reserve accounts for the paperwork burden associated with Regulation Z for the state member banks and other creditors supervised by the Federal Reserve that engage in lending covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the Federal Reserve-regulated institutions as: state member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden on other creditors. The current total annual burden to comply with the provisions of Regulation Z is estimated to be 552,398 hours for the 1,172 Federal Reserve-regulated institutions that are deemed to be respondents for the purposes of the PRA. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Federal Reserve provides model forms, which are appended to the regulation.

As mentioned in the preamble the Federal Reserve is seeking comment on additional revisions to the June 2007 Proposal. The Federal Reserve believes the proposed additional revisions would not increase the burden estimates published in the June 2007 Proposal. 72 FR 32948, 33034, 33035, June 14, 2007. However, at this time the Federal Reserve is restating a portion of its burden estimates published in the June 2007 Proposal to correct minor mathematical errors. In addition, the Federal Reserve will address respondent burden associated with a Regulation AA proposed rule and previously implemented notice to cosigners.

In June 2007 Proposal, the Federal Reserve estimated that the proposed revisions would increase the total annual burden on a one-time basis from 552,398 to 625,638 hours, an increase of 73,240 hours. 72 FR 32948, 33035, June 14, 2007. The Federal Reserve affirms its methodology; however, due to a mathematical error, the annual onetime burden for the proposed revisions to the rules governing periodic statements was understated by 4,000 hours. The correct annual onetime burden for this disclosure requirement is 46,880 hours (not 42,800); therefore, the total annual onetime burden for all requirements would increase by 77,240 hours. This one-time burden estimate does not include the burden addressing the Home Ownership and Equity Protection Act disclosures as announced in a separate proposed rulemaking (Docket No. R-1305, 73 FR 1672, January 9, 2008).

The Federal Reserve estimated in the June 2007 Proposal that the proposed total annual burden on a continuing basis would increase from 552,398 to 607,759 hours, an increase of 55,361 hours. However, the burden for revisions to the change-in-terms notices was incorrectly calculated as 55,361 hours. The correct annual burden for the proposed revision on a continuing basis would be 18,454 hours, a difference of 36,907 hours. Thus, the total burden on a continuing basis would increase from 552,398 to 570,852 hours.

Elsewhere in today's **Federal Register**, the Federal Reserve, along with the Office of Thrift Supervision (OTS) and the National Credit Union Association, are proposing to adopt substantive protections using their authority under the Federal Trade Commission Act (FTC Act) to address unfair and deceptive acts or practices. The proposed rule would prohibit institutions from engaging in certain acts or practices in

connection with credit cards. This proposal evolved from the Federal Reserve's June 2007 Proposal and the OTS August 2007 Advance Notice of Proposed Rulemaking under the FTC Act. 72 FR 43570, August 6, 2007. The Federal Reserve's proposed rule under Regulation AA is coordinated with its June 2007 Proposal amending Regulation Z's rules for open-end credit. Under Regulation AA's proposed § 227.28, creditors would be prohibited from certain marketing practices in relation to prescreened firm offers for consumer credit card accounts unless a disclaimer sufficiently explains the limitations of the offers. The Federal Reserve anticipates that creditors would, with no additional burden, incorporate the proposed disclosure requirement under § 227.28 with the existing disclosure requirements for credit and charge card applications and solicitations under § 226.5a. Thus in order to avoid double-counting the Federal Reserve will account for the PRA burden associated with proposed Regulation AA § 227.28 under Regulation Z § 226.5a.

Under current § 227.14(b), creditors must provide a clear and conspicuous disclosure statement shall be given in writing to a cosigner prior to being obligated on credit transactions subject to § 227.14(b). The disclosure statement shall be substantively similar to the example provided in § 227.14(b). This disclosure is standardized and does not change from one individual to another; thus, the cost and burden to the industry is low. The Federal Reserve proposes to account for the burden associated with Regulation AA's § 227.14(b) under Regulation Z. The proposed annual burden associated with § 227.14(b) is estimated to be 16,943 hours. The proposed total annual burden for the Regulation Z information collection, including the revisions in the June 2007 Proposal, in

this May 2008 Proposal, and the Regulation AA disclosure requirements is estimated to be 665,035 hours, an increase of 112,637 hours.

The title of the Regulation Z information collection will be updated to account for these sections of Regulation AA.

The other federal financial agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimates. Using the Federal Reserve's method, the total current estimated annual burden for all financial institutions subject to Regulation Z, including Federal Reserve-supervised institutions, would be approximately 12,324,037 hours. The proposed rule would impose a one-time increase in the estimated annual burden for all institutions subject to Regulation Z by 1,271,944 hours to 13,595,981 hours. On a continuing basis, the proposed revisions to the change-in-terms notices would increase the estimated annual frequency, thus increasing the total annual burden on a continuing basis from 12,324,037 to 13,230,534 hours. The inclusion of the Regulation AA requirements would increase the total annual burden from 12,324,037 to 16,679,157 hours. The above estimates represent an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. All covered institutions, including card issuers, retailers, and depository institutions (of which there are approximately 19,300) potentially are affected by this collection of information, and thus are respondents for purposes of the PRA.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including

whether the information has practical utility; (2) the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 151–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100– 0199)[7], Washington, DC 20503.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside bold-faced arrows while language that would be deleted is set off with bold-faced brackets. If a provision in the regulation or commentary was also proposed to be revised in the June 2007 Proposal, in addition to this rulemaking, bold-faced arrows or brackets, as appropriate, also reflect the June 2007 proposed revisions.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements, Truth in Lending.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 226, as proposed to be amended at 71 FR 32948, June 14, 2007, as follows:

[7] The Paperwork Reduction Project number (7100– 0200) published in the June 14, 2007, notice was incorrect.

PART 226—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604 and 1637(c)(5).

2. Section 226.5 is amended by revising paragraph (a)(2)(iii) and paragraph (b)(1)(iv) to read as follows:

Subpart B—Open-end Credit

§ 226.5 General disclosure requirements.

(a) Form of disclosures.

* * * * *

►(2) Terminology.◄

* * * * *

►(iii) If disclosures are required to be presented in a tabular format pursuant to paragraph (a)(3) of this section, the term penalty APR shall be used, as applicable. If credit insurance or debt cancellation or debt suspension coverage is required as part of the plan, the term required shall be used and the program shall be identified by its name. If an annual percentage rate is required to be presented in a tabular format pursuant to paragraph (a)(3)(i) or (a)(3)(iii) of this section, the term fixed, or a similar term, may not be used to describe such rate unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open.◄

* * * * *

(b) Time of disclosures.

(1) **[**Initial**]**►Account-opening◄ disclosures.

* * * * *

►(iv) Membership fees.

A. General. In general, a creditor may not collect any fee (other than application fees excludable from the finance charge under § 226.4(c)(1)) before account-opening disclosures are provided. However, a creditor may collect, or obtain the consumer's agreement to pay, a membership fee before providing account-opening disclosures if, after receiving the disclosures the consumer may reject the plan and have no obligation to pay any fee that was assessed or agreed to be paid before the consumer received account-opening disclosures, or any other fee or charge. A membership fee for purposes of this paragraph has the same meaning as a fee for the issuance or availability of credit described in § 226.5a(b)(2). If the consumer rejects the plan, the creditor must promptly refund the membership fee if it has been paid, or take other action necessary to ensure the consumer is not obligated to pay that fee or any other fee or charge. Application fees permitted by paragraph (b)(1)(v) of this section are not affected by this requirement.

B. Home-equity plans. Creditors offering home-equity plans subject to the requirements of § 226.5b, are not subject to the requirements of paragraph (b)(1)(iv)(A) of this section.◄

* * * * *

3. Section 226.5a is amended by revising paragraph (b)(1)(iv), paragraph (b)(3), paragraph (b)(4), paragraph (b)(5), and paragraph (d)(1) to read as follows:

§ 226.5a Credit and charge card applications and solicitations.

* * * * *

(b) Required disclosures. * * *

(1) * * *

►(iv) Penalty rates. If a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, pursuant to paragraph (b)(1) of this section the card issuer must disclose the increased rate that would apply, a description of the types of balances to which the increased rate will apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. Issuers must briefly disclose the circumstances under which any discounted initial rate may be revoked, and the rate that will apply after the revocation.◄

* * * * *

(3) Minimum finance charge. Any minimum or fixed finance charge ►if it exceeds $1.00◄ that could be imposed during a billing cycle►, and a brief description of the charge. The $1.00 threshold amount shall be adjusted to the next whole dollar amount when the sum of annual percentage changes in the Consumer Price Index in effect on the June 1 of previous years equals or exceeds $1.00. The card issuer may, at its option, disclose in the table minimum or fixed finance charges below the dollar threshold ◄.

(4) Transaction charges. Any transaction charge imposed ►by the card issuer◄ for the use of the card for purchases.

(5) Grace period. The date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge ►due to a periodic interest rate and any conditions on the availability of the grace period.◄ If no grace period is provided, that fact must be disclosed. If the length of the grace period

varies, the card issuer may disclose the range of days, the minimum number of days, or the average number of days in the grace period, if the disclosure is identified as a range, minimum, or average. ►When an issuer is disclosing a grace period in the tabular format, the phrase "How to Avoid Paying Interest on Purchases," or a substantially similar phrase, shall be used as the heading for the row describing the grace period. If no grace period on purchases is offered, when an issuer is disclosing this fact in the tabular format, the phrase "Paying Interest," or a substantially similar phrase, shall be used as the heading for the row describing that no grace period is offered. ◄

* * * * *

(d) Telephone applications and solicitations—(1) Oral disclosure. The card issuer shall disclose orally the information in paragraphs (b)(1) through (7) ►and (b)(16)◄ of this section, to the extent applicable, in a telephone application or solicitation initiated by the card issuer.

* * * * *

4. Section 226.6 is amended by revising paragraph (b)(4)(ii)(C), paragraph (b)(4)(iii)(D), paragraph (b)(4)(iv), and paragraph (b)(4)(vii), as follows:

§ 226.6 ►Account-opening disclosures◄[Initial disclosure statement].

* * * * *

►(b) Rules affecting open-end (not home-secured) plans.◄

* * * * *

►(4) Tabular format requirements for open-end (not home-secured) plans.◄

* * * * *

►(ii) Annual percentage rate.◄

* * * * *

►(C) Increased penalty rates. If a rate may increase upon the occurrence of one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose pursuant to paragraph (b)(4)(ii) of this section the increased penalty rate that may apply, a description of the types of balances to which the increased rate will apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. If a temporary initial rate is lower than the rate that will apply after the temporary rate expires, the creditor must briefly disclose the circumstances under which any initial discounted rates may be revoked, and the rate that will apply after the initial discounted rate is revoked.◄

* * * * *

►(iii) Fees.

* * * * *

(D) Minimum finance charge. Any minimum or fixed finance charge if it exceeds $1.00 that could be imposed during a billing cycle, and a brief description of the charge. The $1.00 threshold amount shall be adjusted to the next whole dollar amount when the sum of annual percentage changes in the Consumer Price Index in effect on the June 1 of previous years equals or exceeds $1.00. The creditor may, at its option, disclose in the table minimum or fixed finance charges below the dollar threshold

(iv) Grace period. An explanation of whether or not any time period exists within which any credit that has been extended may be repaid without incurring a finance charge. When disclosing in the tabular format whether or not there is a grace period, the

phrase "How to Avoid Paying Interest on [the applicable feature]" or a substantially similar phrase, shall be used as the row heading when a feature on the account has a grace period. When disclosing in the tabular format the fact that no grace period exists for any feature of the account, the phrase "Paying Interest" or a substantially similar phrase shall be used as the row heading.◄

* * * * *

►(vii) Available credit. If a creditor requires fees for the issuance or availability of an open-end plan described in paragraph (b)(4)(iii)(A) of this section, or a security deposit, and the total amount of those required fees or security deposit that will be imposed when the account is opened and charged to the account equal 25 percent or more of the minimum credit limit offered with the plan, a creditor must disclose the amount of the available credit that a consumer will have remaining after these fees or security deposit are debited to the account, assuming that the consumer receives the minimum credit limit. In determining whether the 25 percent threshold test is met, the creditor must only consider fees for issuance or availability of credit, or a security deposit, that is required. If fees for issuance or availability are optional, these fees should not be considered in determining whether the disclosure must be given. Nonetheless, if the 25 percent threshold test is met, the creditor in providing the disclosure must disclose the amount of available credit excluding those optional fees, and the available credit including those optional fees. The creditor shall also disclose that the consumer has the right to reject the plan and not be obligated to pay those fees or any other fee or charges until the consumer has used the account or made a payment on the account after receiving a billing statement.◄

* * * * *

5. Section 226.9 is amended by revising paragraph (b)(3), paragraph (c)(2)(iii), and paragraph (g)(3) to read as follows:

§ 226.9 Subsequent disclosure requirements.

* * * * *

(b) Disclosures for supplemental credit ►access◄ devices and additional features.

* * * * *

►(3) Checks that access a credit card account. (i) Disclosures. For open-end plans not subject to the requirements of § 226.5b, if checks that can be used to access a credit card account are provided more than 30 days after account-opening disclosures under § 226.6(b)(1) are given, or are provided within 30 days of the account-opening disclosures and the finance charge terms for the checks differ from disclosures previously given, the creditor shall disclose on the front of the page containing the checks the following terms in the form of a table with the headings, content, and form substantially similar to Sample G-19 in appendix G:

(A) If an initial rate that applies to the checks is temporary and is lower than the rate that will apply after the temporary rate expires, the discounted initial rate and the time period during which the discounted initial rate will remain in effect;

(B) The type of rate that will apply to the checks (such as whether the purchase or cash advance rate applies) and the applicable annual percentage rate. If a discounted initial rate applies, a creditor must disclose the type of rate that will apply after the discounted initial rate expires, and the annual percentage rate that will apply after the

discounted initial rate expires. In a variable-rate account, a creditor must disclose an annual percentage rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraph (b)(3)(ii) of this section;

(C) If a discounted initial rate applies to the checks, the date, if any, by which the consumer must use the checks in order to qualify for the discounted initial rate. If the creditor will honor checks used after such date but will apply an annual percentage rate other than the discounted initial rate, the creditor must disclose this fact and the type of annual percentage rate that will apply if the consumer uses the checks after such date;

(D) Any transaction fees applicable to the checks disclosed under § 226.6(b)(1); and

(E) Whether or not a grace period is given within which any credit extended by use of the checks may be repaid without incurring a finance charge due to a periodic interest rate. When disclosing whether there is a grace period, the phrase "How to Avoid Paying Interest on Check Transactions" or a substantially similar phrase, shall be used as the row heading when a grace period applies to credit extended by the use of the checks. When disclosing in the tabular format the fact that no grace period exists for credit extended by use of the checks, the phrase "Paying Interest" or a substantially similar phrase shall be used as the row heading.

(ii) Accuracy. The disclosures in paragraph (b)(3)(i) of this section must be accurate as of the time the disclosures are given. A variable annual percentage rate is accurate if it was in effect within 30 days of when the disclosures are given.◄

* * * * *

(c) Change in terms.

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►(2) Rules affecting open-end (not home-secured) plans.◄

* * * * *

►(iii) Disclosure requirements.

(A) Changes to terms described in account-opening table. If a creditor changes a term required to be disclosed pursuant under § 226.6(b)(4), the creditor must provide the following information on the notice provided pursuant to paragraph (c)(2)(i) of this section:

(1) A summary of the changes made to terms described in § 226.6(b)(4);

(2) A statement that changes are being made to the account;

(3) A statement indicating the consumer has the right to opt-out of these changes, if applicable, and a reference to additional information describing the opt out right provided in the notice, if applicable;

(4) The date the changes will become effective;

(5) If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice;

(6) If the creditor is changing a rate on the account, other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate described in the notice will not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate, and

(7) If the change in terms being disclosed is an increase in an annual percentage rate, the balances to which the increased rate will be applied. If applicable, a statement

identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms.◄

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►(g) Increase in rates due to delinquency or default or as a penalty.◄

* * * * *

►(3)(i) Disclosure requirements for rate increases. If a creditor is increasing the rate due to delinquency or default or as a penalty, the creditor must provide the following information on the notice sent pursuant to paragraph (g)(1) of this section:

(A) A statement that the consumer's actions have triggered the delinquency or default rate or penalty rate, as applicable;

(B) The date on which the delinquency or default rate or penalty rate will apply;

(C) The circumstances under which the delinquency or default rate or penalty rate, as applicable, will cease to apply to the consumer's account, or that the delinquency or default rate or penalty rate will remain in effect for a potentially indefinite time period;

(D) A statement indicating to which balances the delinquency or default rate or penalty rate will be applied, including if applicable, the balances that would be affected if a consumer fails to make a required minimum periodic payment within 30 days from the due date for that payment; and

(E) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless a consumer fails to make a required minimum periodic payment within 30 days from the due date for that payment.◄

* * * * *

6. Section 226.10 is amended by revising paragraph (b) and adding a new paragraph (d) to read as follows:

§ 226.10 Prompt crediting of payments.

* * * * *

(b) Specific requirements for payments.

►(1) General rule. A creditor may specify reasonable requirements for payments that enable most consumers to make conforming payments.

(2) Examples of reasonable requirements for payments. Reasonable requirements for making payment may include:

(i) Requiring that payments be accompanied by the account number or payment stub;

(ii) Setting reasonable cut-off times for payments to be received by mail, by electronic means, by telephone, and in person, provided that it would not be reasonable for a creditor to set a cut-off time for payments by mail that is earlier than 5 p.m. on the payment due date at the location specified by the creditor for the receipt of such payments;

(iii) Specifying that only checks or money orders should be sent by mail;

(iv) Specifying that payment is to be made in U.S. dollars;

(v) Specifying one particular address for receiving payments, such as a post office box.

(3) Nonconforming payments. ◄ If a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments, but accepts a

payment that does not conform to the requirements, the creditor shall credit the payment within five days of receipt.

* * * * *

►(d) Crediting of payments when creditor does not receive or accept payments on due date. If the due date for payments is a day on which the creditor does not receive or accept payments by mail, for example if the U.S. Postal Service does not deliver mail on that date, the creditor may not treat a payment received by mail the next business day as late for any purpose.◄

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7. Section 226.16 is amended by revising paragraph (e) and adding paragraph (h) to read as follows:

§ 226.16 Advertising.

* * * * *

►(e) Promotional rates.

(1) Scope. The requirements of this paragraph apply to any written or electronic advertisement of a consumer credit card account, including promotional materials accompanying applications or solicitations subject to § 226.5a(c) or accompanying applications or solicitations subject to § 226.5a(e).

(2) Definitions.

(i) Promotional rate means:

(A) Any annual percentage rate applicable to one or more balances or transactions on a consumer credit card account for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period; or

(B) Any annual percentage rate applicable to one or more transactions on a consumer credit card account that is lower than the annual percentage rate that applies to other transactions of the same type.

(ii) Introductory rate means a promotional rate offered in connection with the opening of an account.

(iii) Promotional period means the maximum time period for which the promotional rate may be applicable.

(3) Stating the term "introductory". If any annual percentage rate that may be applied to the account is an introductory rate, the term introductory or intro must be in immediate proximity to each listing of the introductory rate.

(4) Stating the promotional period and post-promotional rate. If any annual percentage rate that may be applied to the account is a promotional rate under paragraph (e)(2)(i)(A) of this section, the following must be stated in a clear and conspicuous manner in a prominent location closely proximate to the first listing of the promotional rate:

(i) The date the promotional rate will end or the promotional period; and

(ii) The annual percentage rate that will apply after the end of the promotional period. If such rate is variable, the annual percentage rate must comply with the accuracy standards in §§ 226.5a(c)(2), 226.5a(e)(4), or 226.16(b)**(**1)(ii**)** as applicable. If such rate cannot be determined at the time disclosures are given because the rate depends on a later determination of the consumer's creditworthiness, the advertisement must disclose the specific rates or the range of rates that might apply.

(5) Envelope excluded. The requirements in paragraph (e)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement, linked to an application or solicitation provided electronically.◄

* * * * *

►(h) Deferred interest offers.

(1) Scope. The requirements of this paragraph apply to any written or electronic advertisement of a consumer credit card account, including promotional materials accompanying applications or solicitations subject to § 226.5a(c) or accompanying applications or solicitations subject to § 226.5a(e).

(2) Definitions. i. "Deferred interest" means finance charges on balances or transactions that a consumer is not obligated to pay if those balances or transactions are paid in full by a specified date. "Deferred interest" does not mean any finance charges the creditor allows a consumer to avoid in connection with any recurring grace period.

ii. The maximum period from the date the consumer becomes obligated for the balance or transaction until the date that the consumer must pay the balance or transaction in full in order to avoid finance charges on such balance or transaction is the "deferred interest period."

(3) Stating the deferred interest period. If a deferred interest offer is advertised, the deferred interest period or the date by which the consumer must pay the balance or transaction in full to avoid finance charges on such balance or transaction must be stated in a clear and conspicuous manner in immediate proximity to each statement of "no

interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period.

(4) Stating the terms of the deferred interest offer. If any deferred interest offer is advertised, the following must be stated in a prominent location closely proximate to the first statement of "no interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period, in language similar to Sample G-22 in Appendix G:

(i) A statement that interest will be charged from the date the consumer becomes obligated for the balance or transaction subject to the deferred interest offer if the balance or transaction is not paid in full within the deferred interest period;

(ii) A statement that interest will be charged from the date the consumer becomes obligated for the balance or transaction subject to the deferred interest offer if the account is otherwise in default; and

(iii) If the minimum monthly payments do not fully amortize the balance or transaction during the deferred interest period, a statement that making only the minimum monthly payments will not pay off the balance or transaction in time to avoid interest charges.

(5) Envelope excluded. The requirements in paragraph (h)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement, linked to an application or solicitation provided electronically.◄

* * * * *

8. In Part 226, Appendix G is amended by:

A. Revising the table of contents at the beginning of the appendix;

B. Revising Forms G-1, G-19, G-20, and G-21; and

C. Adding new Forms G-1A, G-17(D), and G-22 in numerical order.

APPENDIX G TO PART 226—OPEN-END MODEL FORMS AND CLAUSES

G-1 Balance Computation Methods Model Clauses ►(Home Equity Plans)◄ (§§ 226.6 and 226.7)

►G-1A Balance Computation Methods Model Clauses (Plans other than Home Equity Plans) (§§ 226.6 and 226.7)◄

G-2 Liability for Unauthorized Use Model Clause ►(Home Equity Plans)◄ (§ 226.12)

►G-2(A) Liability for Unauthorized Use Model Clause ►(Plans Other Than Home Equity Plans) (§ 226.12)◄

G-3 Long-Form Billing-Error Rights Model Form ►(Home Equity Plans)◄ (§§ 226.6 and 226.9)

►G-3(A) Long-Form Billing-Error Rights Model Form ►(Plans Other Than Home Equity Plans)◄ (§§ 226.6 and 226.9)◄

G-4 Alternative Billing-Error Rights Model Form ►(Home equity Plans)◄ (§ 226.9)

►G-4(A) Alternative Billing-Error Rights Model Form (Plans Other Than Home Equity Plans) (§ 226.9)◄

G-5 Rescission Model Form (When Opening an Account) (§ 226.15)

G-6 Rescission Model Form (For Each Transaction) (§ 226.15)

G-7 Rescission Model Form (When Increasing the Credit Limit) (§ 226.15)

G-8 Rescission Model Form (When Adding a Security Interest) (§ 226.15)

G-9 Rescission Model Form (When Increasing the Security) (§ 226.15)

G-10(A) Applications and Solicitations Model Form (Credit Cards) (§ 226.5a(b))

G-10(B) Applications and Solicitations Sample (Credit Cards) (§ 226.5a(b))

G-10(C) Applications and Solicitations ►Sample (Credit Cards)◄[Model Form (Charge Cards)] (§ 226.5a(b))

►G-10(D) Applications and Solicitations Model Form (Charge Cards) (§ 226.5a(b))◄

►G-10(E) Applications and Solicitations Sample (Charge Cards) (§ 226.5a(b))◄

G-11 Applications and Solicitations Made Available to General Public Model Clauses (§ 226.5a(e))

G-12 ►Reserved◄[Charge Card Model Clause (When Access to Plan Offered by Another) (§ 226.5a(f))]

G-13(A) Change in Insurance Provider Model Form (Combined Notice) (§ 226.9(f))

G-13(B) Change in Insurance Provider Model Form (§ 226.9(f)(2))

G-14A Home Equity Sample

G-14B Home Equity Sample

G-15 Home Equity Model Clauses

►G-16(A) Debt Suspension Model Clause (§ 226.4(d)(3))◄

►G-16(B) Debt Suspension Sample (§ 226.4(d)(3))◄

►G-17(A) Account-opening Model Form (§ 226.6(b)(4))◄

►G-17(B) Account-opening Sample (§ 226.6(b)(4))◄

►G-17(C) Account-opening Sample (§ 226.6(b)(4))◄

►G-17(D) Account-opening Sample (§ 226.6(b)(4))◄

►G-18(A) Transactions; Interest Charges; Fees Sample (§ 226.7(b))◄

►G-18(B) Fee-inclusive APR Sample (§ 226.7(b))◄

►G-18(C) Late Payment Fee Sample (§ 226.7(b))◄

►G-18(D) Actual Repayment Period Sample Disclosure on Periodic Statement (§ 226.7(b))◄

►G-18(E) New Balance, Due Date, Late Payment and Minimum Payment Sample (Credit cards) (§ 226.7(b))◄

►G-18(F) New Balance, Due Date, and Late Payment Sample (Open-end Plans (Non-credit-card Accounts)) (§ 226.7(b))◄

►G-18(G) Periodic Statement Form◄

►G-18(H) Periodic Statement Form◄

►G-19 Checks Accessing a Credit Card Account Sample (§ 226.9(b)(3))◄

►G-20 Change-in-Terms Sample (§ 226.9(c)(2))◄

►G-21 Penalty Rate Increase Sample (§ 226.9(g)(3))◄

►G-22 Deferred Interest Offer Clauses (§ 226.16(h)◄

G-1 – Balance Computation Methods Model Clauses ►(Home equity Plans)◄

* * * * *

►(f) Daily balance method (including current transactions)

We figure [a portion of] the finance charge on your account by applying the periodic rate to the "daily balance" of your account for each day in the billing cycle. To get the "daily balance" we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid finance charges and] any payments or credits. This gives us the daily balance.◄

►G-1(A) – Balance Computation Methods Model Clauses (Plans Other Than Home equity Plans)

(a) Adjusted balance method

We figure the interest charge on your account by applying the periodic rate to the "adjusted balance" of your account. We get the "adjusted balance" by taking the balance you owed at the end of the previous billing cycle and subtracting [any unpaid interest or other finance charges and] any payments and credits received during the present billing cycle.

(b) Previous balance method

We figure the interest charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle. We do not subtract any payments or credits received during the billing cycle.

(c) Average daily balance method (excluding current transactions)

We figure the interest charge on your account by applying the periodic rate to the "average daily balance" of your account. To get the "average daily balance" we take the beginning balance of your account each day and subtract [any unpaid interest or other finance charges and] any payments or credits. We do not add in any new [purchases/advances/fees]. This gives us the daily balance. Then, we add all the daily balances for the billing cycle together and divide the total by the number of days in the billing cycle. This gives us the "average daily balance."

(d) Average daily balance method (including current transactions)

We figure the interest charge on your account by applying the periodic rate to the "average daily balance" of your account. To get the "average daily balance" we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid interest or other finance charges and] any payments or credits. This

gives us the daily balance. Then, we add up all the daily balances for the billing cycle and divide the total by the number of days in the billing cycle. This gives us the "average daily balance."

(e) Ending balance method

We figure the interest charge on your account by applying the periodic rate to the amount you owe at the end of each billing cycle (including new [purchases/advances/fees] and deducting payments and credits made during the billing cycle).

(f) Daily balance method (including current transactions)

We figure the interest charge on your account by applying the periodic rate to the "daily balance" of your account for each day in the billing cycle. To get the "daily balance" we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid interest or other finance charges and] any payments or credits. This gives us the daily balance. ◄

* * * * *

►G-17(D) Account-opening Sample (Line of Credit)◄

Interest Rate and Interest Charges	
APR for Cash Advances	**18.00%**
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
Paying Interest	We will begin charging interest on these checks on the transaction date.

Fees	
Annual Fee	**$20.00**
Penalty Fees • Late Payment • Over-the-Credit-Limit	 **$10** **$29**

* * * * *

G-19 Checks that Access a Credit Card Account Sample◄

Interest and Fee Information	
APR for Check Transactions	1.7% (Promotional APR through your November 2008 billing cycle) After November 2008, you will be charged the APR for Cash Advances, currently 21.99%.
Use by Date	You must use the check by 4/1/08 for the promotional APR to apply. If you use the check after that date, we may still honor the check but you will not receive the promotional APR. Instead, the standard APR for Cash Advances will apply.
Fee	Either $5 or 3% of the amount of each transfer, whichever is greater.
Paying Interest	We will begin charging interest on these checks on the transaction date.

►G-20 Change-in-Terms Sample◄

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms effective 2/15/08. You have the right to opt out of these changes. For more detailed information, please refer to the booklet enclosed with this statement.

Beginning 2/15/08, any rate increases described below will apply to transactions made on or after 1/15/08. Current rates will continue to apply to transactions made before 1/15/08.

Note: The change to your APR for purchases described below will not go into effect at this time if you are already being charged a higher Penalty APR on purchases. This change will go into effect when the Penalty APR no longer applies.

Revised Terms, as of 2/15/08	
APR for Purchases	16.99%
Late Payment Fee	$32 if your balance is less than or equal to $1,000; $39 if your balance is more than $1,000

►G-21 Penalty Rate Increase Sample◄

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99%. Beginning 2/15/08, we will apply this Penalty APR to any transactions made on or after 1/15/08 and may keep the APR at this level indefinitely. Current rates will continue to apply to transactions made before 1/15/08. However, if you become 30 days late on your account, the Penalty APR will apply to those balances as well.

If you have any low promotional APRs, you will lose them on 2/15/08. At that time, we will apply standard rates to any existing promotional balances.

►G-22 Deferred Interest Offer Clauses

Interest will be charged to your account from the purchase date if the purchase balance is not paid in full within the/by [deferred interest period/date] or if the account is otherwise in default. [Making only the minimum monthly payments on your account will not pay off the purchase in time to avoid interest.]◄

9. In Supplement I to Part 226:

A. Under Section 226.5–General Disclosure Requirements:

i. Under 5(a) Form of disclosures., under revised heading 5(a)(1)—General., under new heading 5(a)(1)(ii)A). paragraph 1.is added, and under new heading Paragraph 5(a)(1)(iii)., paragraphs 1 is added.

ii. Under 5(b) Time of disclosures., under revised heading 5(b)(1) Account-opening disclosures., under new heading 5(b)(1)(i) General rule., paragraph 1.is revised, under new heading 5(b)(1)(ii) Charges imposed as part of an open-end (not home-secured) plan., paragraph 1 is revised, and under new heading 5(b)(1)(iv) Membership fees., paragraphs 1., 2., 3. and 4. are added.

B. Under Section 226.5a – Credit and Charge Card Applications and Solicitations, under 5a(b) Required Disclosures, under new heading 5a(b)(3) Minimum Finance Charge, paragraph 2. is added, under 5a(b)(4) Transaction Charges, paragraph 2. is added, and under 5a(b)(5) Grace Period, paragraph 1. is revised and paragraph 2. is added.

C. Under revised heading Section 226.6—Account-opening Disclosures, under new heading 6(b) Rules affecting open-end (not home-secured) plans., under new heading 6(b)(2) Rules relating to rates for open-end (not home-secured) plans., under new heading Paragraph 6(b)(2)(iii)., paragraph 2. is revised, under new heading 6(b)(4) Format requirements for open-end (not home-secured) plans., paragraph 3. is revised, under new headings 6(b)(4)(iii) Fees. and 6(b)(4)(iii)(D) Minimum finance charge., paragraphs 1. and 2. are added, under new heading 6(b)(4)(iv) Grace period., paragraph 1. is added, and under new heading 6(b)(4)(vii) Available credit., paragraph 1. is added.

D. Under Section 226.9—Subsequent Disclosure Requirements:

i. Under revised heading 9(b) Disclosures for Supplemental Credit Access Devices and Additional Features., the heading Paragraph 9(b)(3) is revised, under the new heading Paragraph 9(b)(3)(E)., paragraph 1. is added.

ii. Under 9(c) Change in Terms., under new heading 9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans, under revised heading 9(c)(2)(ii) Charges Not Covered by § 226.6(b)(4), paragraph 1. is revised, and under new headings 9(c)(2)(iii) Disclosure Requirements and 9(c)(2)(iii)(A) Changes to Terms Described in § 226.6(b)(4), paragraph 8. is revised.

iii. Under new heading 9(g) Increase in Rates Due to Delinquency or Default or as a Penalty, paragraph 1. is revised.

E. Under Section 226.10—Prompt Crediting of Payments, under 10(b) Specific requirements for payments., paragraphs 1. and 2. are revised.

F. Under Section 226.12 – Special Credit Card Provisions:

i. Under 12(a) Issuance of credit cards., under Paragraph 12(a)(2), paragraph 2. is revised.

ii. Under 12(b) Liability of cardholder for unauthorized use., paragraph 3. is revised.

G. Under Section 226.13 – Billing-Error Resolution, under 13(f) Procedures if different billing error or no billing error occurred., paragraph 3. is added.

H. Under Section 226.16 – Advertising:

i. Paragraph 2. is revised.

ii. Under heading 16(b) Actually available terms., paragraph 4. is revised.

iii. Under revised heading 16(e) Promotional rates., paragraphs 1., 2., 3., 4. and 5.are revised and paragraph 6. is added.

iv. Under new heading 16(h) Deferred interest offers., paragraphs 1., 2., 3., 4. and 5.are added.

I. Under revised heading APPENDICES G AND H—OPEN-END AND CLOSED-END MODEL FORMS AND CLAUSES, under heading APPENDIX G—OPEN-END MODEL FORMS AND CLAUSES, paragraphs 1. and 5. are revised.

SUPPLEMENT I TO PART 226—OFFICIAL STAFF INTERPRETATIONS

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Subpart B – Open-End Credit

Section 226.5—General Disclosure Requirements

5(a) Form of disclosures.

[Paragraph] 5(a)(1) ►—General.◄

►Paragraph 5(a)(1)(ii)(A).

1. Electronic disclosures. Disclosures that need not be provided in writing under § 226.5(a)(1)(ii)(A) may be provided in writing, orally, or in electronic form. If the consumer requests the service in electric form, such as on the creditor's web site, the specified disclosures may be provided in electronic form without regard to the consumer consent or other provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et. seq.).

Paragraph 5(a)(1)(iii).

1. Disclosures not subject to E-Sign Act. See the commentary to § 226.5(a)(1)(ii)(A) regarding disclosures (in addition to those specified under § 226.5(a)(1)(iii)) that may be provided in electronic form without regard to the consumer consent or other provisions of the E-Sign Act.◄

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5(b) Time of disclosures.

5(b)(1) [Initial] ►Account-opening◄ disclosures.

►5(b)(1)(i) General rule.◄

1. Disclosure before the first transaction. ►When disclosures must be furnished "before the first transaction," account-opening disclosures must be delivered before the consumer becomes obligated on the plan. Examples include:

i. Purchases. The consumer makes the first purchase, such as when a consumer opens a credit plan and makes purchases contemporaneously at a retail store, except when the consumer places a telephone call to make the purchase and opens the plan contemporaneously (see commentary to paragraph 5(b)(1)(iii) below).

ii. Advances. The consumer receives the first advance. If the consumer receives a cash advance check at the same time the account-opening disclosures are provided, disclosures are still timely if the consumer can, after receiving the disclosures, return the cash advance check to the creditor without obligation (for example, without paying finance charges).◄ **[**The rule that the initial disclosure statement must be furnished "before the first transaction" requires delivery of the initial disclosure statement before the consumer becomes obligated on the plan. For example, the initial disclosures must be given before the consumer makes the first purchase (such as when a consumer opens a credit plan and makes purchases contemporaneously at a retail store) receives the first advance, or pays any fees or charges under the plan other than an application fee or refundable membership fee (see below). The prohibition on the payment of fees other than application or refundable membership fees before initial disclosures are provided does not apply to home equity plans subject to § 226.5b. See the commentary to § 226.5b(h) regarding the collection of fees for home equity plans covered by § 226.5b.

- If the consumer pays a membership fee before receiving the Truth in Lending account-opening disclosures, or the consumer agrees to the imposition of a membership fee at the time of application and the Truth in Lending disclosure statement is not given at that time, disclosures are timely as long as the consumer, after receiving the disclosures, can reject the plan. The creditor must refund the membership fee if it has been paid, or clear the account if it has been debited to the consumer's account.
- If the consumer receives a cash advance check at the same time the Truth in Lending disclosures are provided, disclosures are still timely if the consumer can, after receiving the disclosures, return the cash advance check to the creditor without obligation (for example, without paying finance charges).
- Initial disclosures need not be given before the imposition of an application fee under § 226.4(c)(1).
- If, after receiving the disclosures, the consumer uses the account, pays a fee, or negotiates a cash advance check, the creditor may consider the account not rejected for purposes of this section.**]**

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►5(b)(1)(ii) Charges imposed as part of an open-end (not home-secured) plan.

1. Disclosing charges before the fee is imposed. Creditors may disclose charges imposed as part of an open-end (not home-secured) plan orally or in writing at any time before a consumer agrees to pay the fee or becomes obligated for the charge, unless the charge is specified under § 226.6(b)(4). (Such charges may alternatively be disclosed in electronic form; see the commentary to § 226.5(a)(1)(ii)(A).) Creditors meet the standard

to provide disclosures at a relevant time if the oral, written, or electronic disclosure of such a charge is given when a consumer would likely notice it, such as when deciding whether to purchase the service that would trigger the charge. For example, if a consumer telephones a card issuer to discuss a particular service, a creditor would meet the standard if the creditor clearly and conspicuously discloses the fee associated with the service that is the topic of the telephone call.◄

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►5(b)(1)(iv) Membership fees.

1. Membership fees. See § 226.5a(b)(2) and related commentary for guidance on fees for issuance or availability of a credit or charge card.

2. Rejecting the plan. If a consumer has paid or promised to pay a membership fee (other than an application fee excludable from the finance charge under § 226.4(c)(1)) before receiving account-opening disclosures, the consumer may, after receiving the disclosures, reject the plan and not be obligated for the membership fee or any other fee or charge (other than an application fee excludable from the finance charge under § 226.4(c)(1)). A consumer who has received the disclosures and uses the account, or makes a payment on the account after receiving a billing statement, is deemed not to have rejected the plan. A creditor may deem a plan to be rejected if, 60 days after the creditor mailed the account-opening disclosures, the consumer has not used the account or made a payment on the account.

3. Using the account. A consumer uses an account by obtaining an extension of credit after receiving the account-opening disclosures, such as by making a purchase or obtaining an advance. A consumer does not "use" the account by activating the account,

such as for security purposes. A consumer also does not "use" the account when the creditor assesses fees (such as start-up fees or fees associated with credit insurance or debt cancellation or suspension programs agreed to as a part of the application and before the consumer receives account-opening disclosures) on the account. This includes, for example, when a creditor sends a billing statement with start-up fees, there is no other activity on the account, the consumer does not pay the fees, and the creditor subsequently assesses a late fee or interest on the unpaid fee balances.

4. Home-equity plans. Creditors offering home-equity plans subject to the requirements of § 226.5b are subject to the requirements of § 226.5b(h) regarding the collection of fees.

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Section 226.5a—Credit and Charge Card Applications and Solicitations

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►5a(b)(3) Minimum Finance Charge.

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2. Adjustment of $1.00 threshold amount. The $1.00 threshold amount will be adjusted to the next whole dollar amount when the sum of annual percentage changes in the Consumer Price Index in effect on the June 1 of previous years equals or exceeds $1.00. The Board will publish adjustments, as appropriate.◄

5a(b)(4) Transaction Charges.

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►2. Foreign transaction fees. A transaction charge imposed by the card issuer for the use of the card for purchases includes any fee imposed by the issuer for purchases in a foreign currency or that take place in a foreign country.◄

5a(b)(5) Grace Period.

1. How ►grace period◄ disclosure is made. ►The card issuer must state any conditions on the applicability of the grace period. An issuer that conditions the grace period on the consumer paying his or her balance in full by the due date each month, or on the consumer paying the previous balance in full by the due date the prior month will be deemed to meet these requirements by providing the following disclosure: "Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you interest on purchases if you pay your entire balance (excluding promotional balances) by the due date each month."◄**[**The card issuer may, but need not, refer to the beginning or ending point of any grace period and briefly state any conditions on the applicability of the grace period. For example, the grace period disclosure might read "30 days" or "30 days from the date of the periodic statement (provided you have paid your previous balance in full by the due date)."**]**

►2. No grace period. The issuer may use the following language to describe that no grace period is offered, as applicable: "We will begin charging interest on purchases on the transaction date."◄

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Section 226.6—►Account-opening Disclosures◄ **[**Initial Disclosure Statement**]**

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►6(b) Rules affecting open-end (not home-secured) plans◄**[**Other charges**]**.

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►6(b)(2) Rules relating to rates for open-end (not home-secured) plans.◄

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►Paragraph 6(b)(2)(iii).◄

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►2. Rate that will apply after initial rate changes.

i. Increased margins. If the initial rate is based on an index and the rate may increase due to a change in the margin applied to the index, the creditor must disclose the increased margin. If more than one margin could apply, the creditor may disclose the highest margin.

ii. Risk-based pricing. In some plans, the amount of the rate change depends on how the creditor weighs the occurrence of events specified in the account agreement that authorize the creditor to change rates, as well as other factors. Creditors must state the increased rate that may apply. At the creditor's option, the creditor may state the possible rates as a range, or by stating the highest rate that could be assessed. The creditor must disclose the period for which the increased rate will remain in effect, such as "until you make three timely payments," or if there is no limitation, the fact that the increased rate may remain indefinitely.◄

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►6(b)(4) Tabular format requirements for open-end (not home-secured) plans.◄

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►3. Terminology. Section 226.6(b)(4)(i) generally requires that the headings, content, and format of the tabular disclosures be substantially similar, but need not be

identical, to the tables in Appendix G; but see § 226.5(a)(2) for special rules that apply to the penalty rate disclosure required by § 226.6(b)(4)(ii)(C), and to the disclosure of required insurance products or debt cancellation or suspension products pursuant to § 226.6(b)(4)(v).◄

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►6(b)(4)(iii) Fees.

6(b)(4)(iii)(D) Minimum finance charge.

1. Example of brief statement. See Samples G-17(B), G-17(C), and G-17(D) for guidance on how to provide a brief description of a minimum interest charge.

2. Adjustment of $1.00 threshold amount. The $1.00 threshold amount will be adjusted to the next whole dollar amount when the sum of annual percentage changes in the Consumer Price Index in effect on the June 1 of previous years equals or exceeds $1.00. The Board will publish adjustments, as appropriate.

6(b)(4)(iv) Grace period.

1. Grace period. Creditors may use the following language to describe a grace period: "Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you interest on [applicable transactions] if you pay your entire balance (excluding promotional balances) by the due date each month." Creditors may use the following language to describe that no grace period is offered, as applicable: "We will begin charging interest on [applicable transactions] on the transaction date."◄

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6(b)(4)(vii) Available credit.

1. Right to reject the plan. Creditors may use the following language to describe consumers' right to reject a plan after receiving account-opening disclosures: "You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges (other than [name of fee that is excludable from the finance charge under § 226.4(c)(1)])."

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Section 226.9—Subsequent Disclosure Requirements

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9(b) Disclosures for Supplemental ►Credit◄ Access Devices and Additional Features.

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►9(b)(3) Checks That Access a Credit Card Account.◄

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►Paragraph 9(b)(3)(E).

1. Grace period. Creditors may use the following language to describe a grace period: "Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you interest when you use these checks if you pay your entire balance (excluding promotional balances) by the due date each month." Creditors may use the following language to describe that no grace period is offered, as applicable: "We will begin charging interest on these checks on the transaction date."◄

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9(c) Change in Terms.

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►9(c)(2) Rules Affecting Open-end (Not Home-secured) Plans.◄

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►9(c)(2)(ii) Charges Not Covered by § 226.6(b)(4).◄

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►1. Applicability. Generally, if a creditor increases any component of a charge, or introduces a new charge, that is imposed as part of the plan under § 226.6(b)(1) but is not required to be disclosed as part of the account-opening summary table under § 226.6(b)(4), the creditor may either, at its option (1) provide at least 45 days written advance notice before the change becomes effective to comply with the requirements of § 226.9(c)(2)(i), or (2) provide notice orally or in writing, or electronically if the consumer requests the service electronically, of the amount of the charge to an affected consumer any time before the consumer agrees to or becomes obligated to pay the charge. (See the commentary under § 226.5(a)(1)(ii)(A) regarding disclosure of such charges in electronic form.) For example, a fee for expedited delivery of a credit card is a charge imposed as part of the plan under § 226.6(b)(1) but is not required to be disclosed in the account-opening summary table under § 226.6(b)(4). If a creditor changes the amount of that expedited delivery fee, the creditor may provide written advance notice of the change to affected consumers at least 45 days before the change becomes effective. Alternatively, the creditor may provide oral or written notice, or electronic notice if the consumer requests the service electronically, of the amount of the charge to an affected

consumer any time before the consumer agrees to or becomes obligated to pay the charge.◄

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►9(c)(2)(iii) Disclosure Requirements.

9(c)(2)(iii)(A) Changes to Terms Described in § 226.6(b)(4).

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►8. Content. Sample G-20 contains an example of how to comply with the requirements in § 226.9(c)(2)(iii) when the following terms are being changed: (1) a variable rate is being changed to a non-variable rate of 16.99%; and (2) the late payment fee is being increased to $32 if the consumer's balance is less than or equal to $1,000 and $39 if the consumer's balance is more than $1,000. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply.◄

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►9(g) Increase in Rates Due to Delinquency or Default or as a Penalty.

1. Applicability. i. General. Section 226.9(g) requires a creditor to provide written notice to a consumer when (1) a rate is increased due to the consumer's delinquency or default, or (2) a rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit. This notice must be provided after the occurrence of the event that triggered the imposition of the rate increase and at least 45 days prior to the effective date of the increase. For example, assume a credit card account agreement provides that the annual percentage rates on the account may increase

to 28 percent if the consumer pays late once, and assume that the consumer pays late one month. If the creditor will increase the rates on the account because of this late payment, the creditor must provide the consumer written notice of the increase at least 45 days before the increase becomes effective.

ii. Illustrations. Under this section, creditors must provide written notice to a consumer when rates are increased due to the consumer's delinquency or default or as a penalty. The notice must be provided after the occurrence of the event that triggers the rate increase and at least 45 days prior to the effective date of the increase. Creditors subject to Regulation AA, 12 CFR 227.24 or similar law are generally prohibited from increasing the APR, as of the effective date of the increase, for balances outstanding at the end of 14 days after the date the notice of increased rates was provided, with certain exceptions, including, specifically, if the creditor fails to receive the consumer's minimum periodic payment within 30 days from the due date of that payment. For a creditor that is subject to Regulation AA, 12 CFR 227.24 or similar law that provides a notice of a rate increase due to the consumer's delinquency or default or as a penalty, and the creditor does not receive the consumer's minimum periodic payment within 30 days from the due date of the payment before the increased rate goes into effect, the creditor may apply the increased rate to all balances when the increased rate goes into effect. If, however, the consumer does not become 30 days late before the effective date of the rate increase, the creditor may only apply the increased rate to transactions made after the end of 14 days after the date the notice of increased rates was provided. Also, if the consumer becomes 30 days late after the increased rate becomes effective, the creditor must provide the consumer a written notice that the increased rate will now apply to all

balances, and that notice must be given an least 45 days prior to the effective date of the increased rate applying to all balances. The following illustrate the timing requirements for rate increases under § 226.9(g) for creditors that are also subject to Regulation AA, 12 CFR 227.24 or similar law:

A. A credit card account agreement provides that the annual percentage rates on the account may increase to 28 percent if the consumer pays late once. The consumer's minimum periodic payment is due June 15 and the consumer pays late. On June 24 the creditor provides written notice of the increase. The notice provides that the penalty rate of 28 percent has been triggered and will apply as of August 9 to transactions made on or after July 9. The consumer's minimum periodic payment for June is received on June 30. On August 9, an increased rate of 28 percent may be applied to transactions made on or after July 9. The current rate will apply to balances existing on July 8.

B. Same facts as in ii.A. above, except the consumer fails to make any payment until July 20. On August 9, the increased rate of 28 percent may be applied to transactions made on or after that date, and to existing balances, as provided in Regulation AA, 12 CFR 227.24 or similar law.

C. The same result would apply if under the credit card agreement, the annual percentage rates on the account may increase to 28 percent if the consumer exceeds the credit limit once, the consumer exceeded his credit limit on June 5 and the creditor provides written notice of the increase on June 9. As in ii.B. above, the consumer fails to make the minimum periodic payment due June 15 until July 20. On July 25, the increased rate of 28 percent may be applied to transactions made on or after that date, and

to existing balances, as provided in Regulation AA, 12 CFR 227.24 or similar law. See G-21 in Appendix G for language that complies with the requirements of § 226.9(g).

D. Same facts as in ii.A. above, except the following October, the consumer fails to make the minimum periodic payment due October 15 until November 20. The increased rate of 28 percent that has applied since August 9 continues to apply to transactions made on or after July 9. To apply the rate of 28 percent to the remaining outstanding balances that existed on July 8, the creditor would be required to send a new notice under § 226.9(g) after the consumer triggered the penalty rate for all balances. That is, if the creditor provides a written notice of the increase on November 26, the creditor could apply the penalty rate of 28% to all balances on January 11 of the following year.

E. A creditor currently assesses a non-variable annual percentage rate of 12.99 percent on purchases, and provides written notice on May 31 that a non-variable annual percentage rate will be increased to 15.99 percent as of July 16 for all purchase transactions on the account on or after June 15. Purchase balances existing on June 14 will remain at the current rate. The credit card account agreement indicates that the annual percentage rates on the account may increase to 28 percent if the consumer pays late once. The consumer's minimum periodic payment is due June 15 and the consumer pays late. On June 24 the creditor provides written notice of the increase to the penalty rate as a consequence of the consumer's late payment. The notice provides that the penalty rate of 28 percent has been triggered and will apply on August 9 to transactions made on or after July 9. The consumer's minimum periodic payment for June is received on June 30. On July 16, the new purchase annual percentage rate of 15.99 percent

becomes effective for new purchases made on or after June 15. The current rate of 12.99 percent will apply to balances existing on June 14. On August 9, the 28 percent annual percentage rate will apply to transactions made on or after July 9. A rate of 12.99 percent will apply to the balances existing on June 14, and a rate of 15.99 percent will apply to purchases between June 15 and July 8.

F. Same facts as ii.E. above, except the consumer fails to make any payment until July 20. On July 15, the new purchase annual percentage rate of 15.99 percent becomes effective for new purchases made on or after June 15. The current rate of 12.99 percent will continue to apply to balances existing on June 14. On August 9, the increased rate of 28 percent may be applied to transactions that occur on or after July 9, and to existing balances, as provided in Regulation AA, 12 CFR 227.24 or similar law.◄

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Section 226.10—Prompt Crediting of Payments

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10(b) Specific requirements for payments.

1. **[**Payment requirements. The creditor may specify requirements for making payments, such as:

- Requiring that payments be accompanied by the account number or the payment stub
- Setting a cutoff hour for payment to be received, or set different hours for payments by mail and payments made in person
- Specifying that only checks or money orders should be sent by mail
- Specifying that payment is to be made in U.S. dollars

- Specifying one particular address for receiving payments, such as a post office box**]**

►Payment by electronic fund transfer.◄ A creditor may be prohibited**[**, however, **]** from specifying payment for preauthorized electronic fund transfer. (See section 913 of the Electronic Fund Transfer Act.)

2. ►Payment via creditor's web site. If a creditor promotes electronic payment via its web site (such as by disclosing on the web site itself that payments may be made via the web site), any payments made via the creditor's web site would generally be conforming payments for purposes of § 226.10(b).◄**[**Payment requirements—limitations. Requirements for making payments must be reasonable; it should not be difficult for most consumers to make conforming payments. For example, it would not be reasonable to require that all payments be made in person between 10 a.m. and 11 a.m., since this would require consumers to take time off from their jobs to deliver payments.**]**

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Section 226.12—Special Credit Card Provisions

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12(a) Issuance of credit cards.

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Paragraph 12(a)(2)

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2. Substitution—examples. Substitution encompasses the replacement of one card with another because the underlying account relationship has changed in some way—such as when the card issuer has:

i. Changed its name.

ii. Changed the name of the card.

iii. Changed the credit or other features available on the account. For example, the original card could be used to make purchases and obtain cash advances at teller windows. The substitute card might be usable, in addition, for obtaining cash advances through automated teller machines. (If the substitute card constitutes an access device, as defined in Regulation E, then the Regulation E issuance rules would have to be followed.) The substitution of one card with another on an unsolicited basis is not permissible, however, where in conjunction with the substitution an additional credit card account is opened and the consumer is able to make new purchases or advances under both the original and the new account with the new card. For example, if a retail card issuer replaces its credit card with a combined retailer/bank card, each of the creditors maintains a separate account, and both accounts can be accessed for new transactions by use of the new credit card, the card cannot be provided to a consumer without solicitation.

iv. Substituted a card user's name on the substitute card for the cardholder's name appearing on the original card.

v. Changed the merchant base►, provided that◄ the new card ►is◄ **[**must be**]** honored by at least one of the persons that honored the original card. ►However, unless the change in the merchant base is the addition of an affiliate of the existing merchant

base, the substitution of a new card for another on an unsolicited basis is not permissible where the account is inactive and the consumer has not obtained an extension of credit with the existing merchant base within 24 months prior to the issuance of the new card. A credit card cannot be issued in these circumstances without a request or application. For purposes of § 226.12(a), an account is inactive if no credit has been extended and if the account has no outstanding balance for 24 months. See § 226.11(b)(2).◄

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12(b) Liability of cardholder for unauthorized use.

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3. Reasonable investigation. If a card issuer seeks to impose liability when a claim of unauthorized use is made by a cardholder, the card issuer must conduct a reasonable investigation of the claim. In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation. The card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a particular request►, including providing an affidavit or filing a police report◄; however, if the card issuer otherwise has no knowledge of facts confirming the unauthorized use, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation. The procedures involved in investigating claims may differ, but actions such as the following represent steps that a card issuer may take, as appropriate, in conducting a reasonable investigation:

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.

ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.

iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.

iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.

v. Requesting documentation to assist in the verification of the claim.

vi. Requesting a written, signed statement from the cardholder or authorized user. ►However, a creditor may not require an affidavit as a part of a reasonable investigation.◄

vii. Requesting a copy of a police report, if one was filed.

viii. Requesting information regarding the cardholder's knowledge of the person who allegedly used the card or of that person's authority to do so.

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Section 226.13—Billing-Error Resolution

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13(f) Procedures if different billing error or no billing error occurred.

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►3. Reasonable investigation. A creditor must conduct a reasonable investigation before it determines that no billing error occurred or that a different billing error occurred from that asserted. In conducting its investigation of an allegation of a billing error, the creditor may reasonably request the consumer's cooperation. The

creditor may not automatically deny a claim based solely on the consumer's failure or refusal to comply with a particular request, including providing an affidavit or filing a police report. However, if the creditor otherwise has no knowledge of facts confirming the billing error, the lack of information resulting from the consumer's failure or refusal to comply with a particular request may lead the creditor reasonably to terminate the investigation. The procedures involved in investigating alleged billing errors may differ.

i. Unauthorized transaction. In conducting an investigation of a billing error notice alleging an unauthorized transaction under paragraph (a)(1) of this section, actions such as the following represent steps that a creditor may take, as appropriate, in conducting a reasonable investigation:

A. Reviewing the types or amounts of purchases made in relation to the consumer's previous purchasing pattern.

B. Reviewing where the purchases were delivered in relation to the consumer's residence or place of business.

C. Reviewing where the purchases were made in relation to where the consumer resides or has normally shopped.

D. Comparing any signature on credit slips for the purchases to the signature of the consumer (or an authorized user in the case of a credit card account) in creditor's records, including other credit slips.

E. Requesting documentation to assist in the verification of the claim.

F. Requesting a written, signed statement from the consumer (or authorized user, in the case of a credit card account). However, a creditor may not require an affidavit as a part of a reasonable investigation.

G. Requesting a copy of a police report, if one was filed.

H. Requesting information regarding the consumer's knowledge of the person who allegedly obtained an extension of credit on the account or of that person's authority to do so.

ii. Nondelivery of property or services. In conducting an investigation of a billing error notice alleging the nondelivery of property or services under paragraph (a)(3) of this section, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the property or services were actually delivered, mailed, or sent as agreed.

iii. Incorrect information. In conducting an investigation of a billing error notice alleging that information appearing on a periodic statement is incorrect because a person honoring the consumer's credit card or otherwise accepting an access device for an open-end plan has made an incorrect report to the creditor, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the information was correct.◄

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Section 226.16—Advertising

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►2. Clear and conspicuous standard – promotional rates and deferred interest offers. For purposes of § 226.16(e), a clear and conspicuous disclosure means the required information in §§ 226.16(e)(4)(i) and (ii) must be equally prominent to the promotional rate to which it applies. If the information in §§ 226.16(e)(4)(i) and (ii) is the same type size as the promotional rate to which it applies, the disclosures would be

deemed to be equally prominent. For purposes of § 226.16(h), a clear and conspicuous disclosure means the required information in § 226.16(h)(3) must be equally prominent to each statement of "no interest", "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period. If the disclosure of the deferred interest period required in §§ 226.16(h)(3) is the same type size as the statement of "no interest", "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period, the disclosure would be deemed to be equally prominent.◄

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16(b) Advertisement of terms that require additional disclosures.

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►4. Deferred interest programs or other similar deferment programs. Statements such as "Charge it—you won't be billed until May" or "You may skip your January payment" are not in themselves triggering terms, since the timing for initial billing or for monthly payments are not terms required to be disclosed under § 226.6. However, a statement such as "No interest charges until May" or any other statement regarding when interest or finance charges begin to accrue or are charged to the consumer is a triggering term, whether appearing alone or in conjunction with a description of a deferred billing, deferred payment, or deferred interest program such as the examples above.◄

►16(e) Promotional rates.

1. Rate in effect at the end of the promotional period. If the annual percentage rate that will be in effect at the end of the promotional period (i.e., the post-promotional rate) is a variable rate, the post-promotional rate for purposes of § 226.16(e)(2)(i) is the

rate that would have applied at the time the promotional rate was advertised if the promotional rate was not offered, consistent with the accuracy requirements in § 226.5a(c)(2) and § 226.5a(e)(4), as applicable.

2. Example of promotional rate under § 226.16(e)(2)(i)(B). A creditor generally offers a 15% rate of interest for purchases on a consumer credit card account. For purchases made during a particular month, however, the creditor offers a rate of 5% that will apply until the consumer pays those purchases in full. Under § 226.16(e)(2)(i)(B), the 5% rate is a "promotional rate" because it is lower than the 15% rate that applies to other purchases.

3. Immediate proximity. Including the term "introductory" or "intro" in the same phrase as the listing of the introductory rate is deemed to be in immediate proximity of the listing.

4. Prominent location closely proximate. Information required to be disclosed in §§ 226.16(e)(4)(i) and (ii) that is in the same paragraph as the first listing of the promotional rate is deemed to be in a prominent location closely proximate to the listing. Information disclosed in a footnote will not be considered in a prominent location closely proximate to the listing.

5. First listing. For purposes of § 226.16(e)(4), the first listing of the promotional rate is the most prominent listing of the rate on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If the promotional rate is not listed on the principal promotional document or there is no principal promotional document, the first listing is the most

prominent listing of the rate on the front side of the first page of each document listing the promotional rate. If the listing of the promotional rate with the largest type size on the front side of the first page of the principal promotional document (or each document listing the promotional rate if the promotional rate is not listed on the principal promotional document or there is no principal promotional document) is used as the most prominent listing, it will be deemed to be the first listing.

6. Post-promotional rate depends on consumer's creditworthiness. For purposes of disclosing the rate that may apply after the end of the promotional rate period, at the advertiser's option, the advertisement may disclose the rates that may apply as either specific rates, or a range of rates. For example, if there are three rates that may apply (9.99%, 12.99% or 17.99%), an issuer may disclose these three rates as specific rates (9.99%, 12.99% or 17.99%) or as a range of rates (9.99%-17.99%).◄

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►16(h) Deferred interest offers.

1. Deferred interest clarified. Deferred interest offers do not include offers that allow a consumer to defer payments during a specified period of time, and the consumer is not obligated under any circumstances for any interest or other finance charges that could be attributable to that period. Deferred interest offers also do not include 0% annual percentage rate offers where a consumer is not obligated under any circumstances for interest attributable to the time period the 0% annual percentage rate is in effect, though such offers may be considered promotional rates under § 226.16(e)(2)(i).

2. Immediate proximity. Including the deferred interest period in the same phrase as the statement of "no interest," "no payments," or "deferred interest" or similar

term regarding interest or payments during the deferred interest period is deemed to be in immediate proximity of the statement.

3. Prominent location closely proximate. Information required to be disclosed in §§ 226.16(h)(4)(i), (ii), and (iii) that is in the same paragraph as the first statement of "no interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period is deemed to be in a prominent location closely proximate to the statement. Information disclosed in a footnote will not be considered in a prominent location closely proximate to the statement.

4. First listing. For purposes of § 226.16(h)(4), the first statement of "no interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period is the most prominent listing of one of these statements on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If one of the statements is not listed on the principal promotional document or there is no principal promotional document, the first listing of one of these statements is the most prominent listing of the statement on the front side of the first page of each document containing one of these statements. If the listing of one of these statements with the largest type size on the front side of the first page of the principal promotional document (or each document listing one of these statements if a statement is not listed on the principal promotional document or there is no principal promotional document) is used as the most prominent listing, it will be deemed to be the first listing. Consistent with comment 16(c)-1, a

catalog or multiple-page advertisement is considered one document for purposes of § 226.16(h)(4).

5. Additional information. Consistent with comment 5(a)-2, the information required under § 226.16(h)(4) need not be segregated from other information regarding the deferred interest offer. Advertisements may also be required to provide additional information pursuant to § 226.16(b) though such information need not be integrated with the information required under § 226.16(h)(4).◄

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►APPENDICES◄**[**APPENDIXES**]** G AND H—OPEN-END AND CLOSED-END MODEL FORMS AND CLAUSES

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APPENDIX G—OPEN-END MODEL FORMS AND CLAUSES

1. Model►s◄ G-1 ►and G-1A◄. The model disclosures in G-1 ►and G-1A◄ (different balance computation methods) may be used in both the ►account-opening◄**[**initial**]** disclosures under § 226.6 and the periodic disclosures under § 226.7. As is clear from the models given, "shorthand" descriptions of the balance computation methods are not sufficient►, except where § 226.7(b)(5) applies. For creditors using model G-1,◄ the phrase "a portion of" the finance charge should be included if the total finance charge includes other amounts, such as transaction charges, that are not due to the application of a periodic rate. **[**In addition,**]** If unpaid ►interest or◄ finance charges are subtracted in calculating the balance, that fact must be stated so that the disclosure of the computation method is accurate. Only model G-1(b) contains a final sentence appearing in brackets which reflects the total dollar amount of payments and credits received during

the billing cycle. The other models do not contain this language because they reflect plans in which payments and credits received during the billing cycle are subtracted. If this is not the case, however, the language relating to payments and credits should be changed, and the creditor should add either the disclosure of the dollar amount as in model G-1(b) or an indication of which credits (disclosed elsewhere on the periodic statement) will not be deducted in determining the balance. (Such an indication may also substitute for the bracketed sentence in model G-1(b).) (See the commentary to section 226.7►(a)(5) and 226.7(b)(5)◄**[**(e)**]**.) ►For open-end plans subject to the requirements of § 226.5b, creditors may, at their option, use the clauses in G-1 or G-1A.◄

* * * * *

5. Model G–10(A), sample►s◄ G–10(B) and **[**model**]** G–10(C)►, model G-10(D), sample G-10(E), model G-17(A), and samples G-17(B), 17(C) and 17(D)◄.

i. Model G–10(A) and sample►s◄ G–10(B) ►and G-10(C)◄ illustrate, in the tabular format, **[**all of**]** the disclosures required under § 226.5a for applications and solicitations for credit cards other than charge cards. **[**Model G–10(B) is a sample disclosure illustrating an account with a lower introductory rate and penalty rate.**]** Model G-10►(D)◄**[**(C)**]** ►and sample G-10(E)◄ illustrate**[**s**]** the tabular format disclosure for charge card applications and solicitations and reflects **[**all of**]** the disclosures in the table. ►Model G-17(A) and samples G-17(B), G-17(C) and G-17(D) illustrate, in the tabular format, the disclosures required under § 226.6(b)(4) for account-opening disclosures.◄

ii. Except as otherwise permitted, disclosures must be substantially similar in sequence and format to model forms G–10(A) ►, G-10(D)◄ and ►G-17(A)◄. **[**The

disclosures may, however, be arranged vertically or horizontally and need not be highlighted aside from being included in the table.**]** While proper use of the model forms will be deemed in compliance with the regulation, card issuers are permitted to use headings **[**and disclosures**]** other than those in the forms (with an exception relating to the use of **[**"grace period"**]** ►"penalty APR", and in relation to required insurance, or debt cancellation or suspension coverage, the term "required" and the name of the product◄) if they are clear and concise and are substantially similar to the headings **[**and disclosures**]** contained in model forms.

►iii. Models G-10(A) and G-17(A) contain two alternative headings ("Minimum Interest Charge" and "Minimum Charge") for disclosing a minimum finance charge under § 226.5a(b)(3) and § 226.6(b)(4)(iii)(D). If a creditor imposes a minimum finance charge in lieu of interest in those months where a consumer would otherwise incur an interest charge but that interest charge is less than the minimum charge, the creditor should disclose this charge under the heading "Minimum Interest Charge." Other minimum finance charges should be disclosed under the heading "Minimum Charge."

iv. Models G-10(A), G-10(D) and G-17(A) contain two alternative headings ("Annual Fees" and "Set-up and Maintenance Fees") for disclosing fees for issuance or availability of credit under § 226.5a(b)(2) or § 226.6(b)(4)(iii)(A). If the only fee for issuance or availability of credit disclosed under § 226.5a(b)(2) or § 226.6(b)(4)(iii)(A) is an annual fee, a creditor should use the heading "Annual Fee" to disclose this fee. If a creditor imposes fees for issuance or availability of credit disclosed under § 226.5a(b)(2) or § 226.6(b)(4)(iii)(A) other than, or in addition to, an annual fee, the creditor should use

the heading "Set-up and Maintenance Fees" to disclose fees for issuance or availability of credit, including the annual fee.

v. Although creditors are not required to use a certain paper size in disclosing the §§ 226.5a or 226.6(b)(4) disclosures, samples G-10(B), G-10(C), G-17(B) and G-17(C) are designed to be printed on an 8 x 14 sheet of paper. In addition, the following formatting techniques were used in presenting the information in the sample tables to ensure that the information is readable:

A. A readable font style and font size (10-point Ariel font style, except for the purchase annual percentage rate which is shown in 16-point type)

B. Sufficient spacing between lines of the text;

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate. For example, in the samples in the row of the tables with the heading "APR for Balance Transfers," the forms disclose three components: the applicable balance transfer rate, a cross reference to the balance transfer fee, and a notice about payment allocation. The samples show these three components on separate lines with adequate space between each component. On the other hand, in the samples, in the disclosure of the late payment fee, the forms disclose two components: the late-payment fee, and the cross reference to the penalty rate. Because the disclosure of both these components is short, these components are disclosed on the same line in the tables.

D. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type;

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text; and

F. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

vi. While the Board is not requiring creditors to use the above formatting techniques in presenting information in the table (except for the 10-point and 16-point font requirement), the Board encourages creditors to consider these techniques when deciding how to disclose information in the table, to ensure that the information is presented in a readable format.◄

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By order of the Board of Governors of the Federal Reserve System,

May *, 2008.

Jennifer J. Johnson,
Secretary of the Board
BILLING CODE 6210-01-P

DRAFT

FEDERAL RESERVE SYSTEM

12 CFR Part 230

[Regulation DD; Docket No. R-1315]

Truth in Savings

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Federal Reserve Board (Board) proposes to amend Regulation DD, which implements the Truth in Savings Act, and the staff commentary to the regulation, to provide additional disclosures about account terms and costs associated with overdrafts. The proposed amendments would set forth content and timing requirements for a notice to consumers about any right to opt out of an institution's overdraft service. Requirements for disclosing overdraft fees on periodic statements would be expanded to apply to all institutions and not solely to institutions that promote the payment of overdrafts. The proposed amendments also address balance disclosures provided in response to balance inquiries from consumers.

DATES: Comments must be received on or before **[Insert date that is 60 days after the date of publication in the Federal Register].**

ADDRESSES: You may submit comments, identified by Docket No. R-1315, by any of the following methods:

- Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions

for submitting comments.

- E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.
- FAX: (202) 452-3819 or (202) 452-3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments are available from the Board's web site at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Benjamin K. Olson, Attorney, or Vivian W. Wong, Senior Attorney, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, at (202) 452-2412 or (202) 452-3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. The Truth in Savings Act

The Truth in Savings Act (TISA), 12 U.S.C. 4301 et seq., is implemented by the Board's Regulation DD (12 CFR part 230). The purpose of the act and regulation is to assist consumers in comparing deposit accounts offered by depository institutions, principally through the disclosure of fees, the annual percentage yield (APY), the interest

rate, and other account terms. An official staff commentary interprets the requirements of Regulation DD (12 CFR part 230 (Supp. I)). Credit unions are governed by a substantially similar regulation issued by the National Credit Union Administration (NCUA).

Under TISA and Regulation DD, account disclosures must be provided upon a consumer's request and before an account is opened. Institutions are not required to provide periodic statements; but if they do, the act requires that fees, yields, and other information be provided on the statements. Notice also must be provided to accountholders before an adverse change in account terms occurs and prior to the renewal of certificates of deposit (time accounts).

TISA and Regulation DD contain rules for advertising deposit accounts. Under TISA, there is a prohibition against advertisements, announcements, or solicitations that are inaccurate or misleading, or that misrepresent the deposit contract. Institutions also are prohibited from describing an account as free (or using words of similar meaning) if a regular service or transaction fee is imposed, if a minimum balance must be maintained, or if a fee is imposed when a customer exceeds a specified number of transactions. In addition, the act and regulation impose substantive restrictions on institutions' practices regarding the payment of interest on accounts and the calculation of account balances.

II. Background on Overdraft Services and Regulatory Action to Date

Historically, if a consumer engaged in a transaction that overdrew his or her account, the consumer's depository institution used its discretion on an ad hoc basis to determine whether to pay the overdraft, usually imposing a fee for paying the overdraft. The Board recognized this longstanding practice when it initially adopted Regulation Z in

1969 to implement the Truth in Lending Act (TILA). The regulation provided that these transactions are generally not covered under Regulation Z where there is no written agreement between the consumer and institution to pay an overdraft and impose a fee. See 12 CFR § 226.4(c)(3). The treatment of overdrafts in Regulation Z was designed to facilitate depository institutions' ability to accommodate consumers' transactions on an ad hoc basis.

Over the years, most institutions have largely automated the overdraft payment process, including setting specific criteria for determining whether to honor overdrafts and limits on the amount of the coverage provided. From the industry's perspective, the benefits of overdraft, or bounced check, services include a reduction in the costs of manually reviewing individual items, as well as the consistent treatment for all customers with respect to overdraft payment decisions. Moreover, industry representatives assert that overdraft services are valued by consumers, particularly for check transactions, as they allow consumers to avoid additional fees that would be charged by the payee if the item was returned unpaid, and other adverse consequences, such as the furnishing of negative information to a consumer reporting agency.[1]

In contrast, consumer advocates believe overdraft transactions are a high-cost form of lending that traps low- and moderate- income consumers (particularly students and the elderly) into paying high fees. Moreover, consumer advocates note that consumers are enrolled in overdraft services automatically, often with no chance to opt out. In addition, consumer advocates believe that by honoring check and other types of

[1] See, e.g., Overdraft Protection: Fair Practices for Consumers: Hearing before the House Subcomm. on Financial Institutions and Consumer Credit, House Comm. on Financial Services, 110th Cong. (2007) (Overdraft Protection Hearing), (available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr0705072.shtml).

overdrafts, institutions encourage consumers to rely on this service and thereby consumers incur greater costs in the long run than they would if the transactions were not honored. Consumer advocates also express concerns about debit card overdrafts where the dollar amount of the fee may far exceed the dollar amount of the overdraft, and multiple fees may be assessed in a single day for a series of small-dollar transactions.[2]

According to a recent report from the Government Accountability Office (GAO), the average cost of overdraft and insufficient funds fees has increased roughly 11 percent between 2000 and 2007 to just over $26 per item, according to one estimate.[3] The GAO also reported that large institutions on average charged between $4 and $5 more for overdraft and insufficient fund fees compared to smaller institutions.[4] In addition, the GAO Bank Fees Report noted that a small number of institutions (primarily large banks) apply tiered fees to overdrafts, charging higher fees as the number of overdrafts in the account increases.[5]

Overdraft services vary among institutions but typically share certain characteristics. Coverage is "automatic" for consumers who meet the institution's criteria (e.g., the account has been open a certain number of days, the account is in "good

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[2] See, e.g., Overdraft Protection Hearing n.1; Jacqueline Duby, Eric Halperin & Lisa James, High Cost and Hidden From View: The $10 Billion Overdraft Loan Market, Ctr. For Responsible Lending (May 26, 2005) (noting that the bulk of overdraft fees are incurred by repeat users) (available at: http://www.responsiblelending.org/pdfs/ip009-High_Cost_Overdraft-0505.pdf).

[3] See Bank Fees: Federal Banking Regulators Could Better Insure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts, GAO Report 08-281 (January 2008) (hereinafter, GAO Bank Fees Report). See also Bankrate 2007 Checking Account Study, posted September 26, 2007 (available at: http://www.bankrate.com/brm/news/chk/chkstudy/20070924_bounced_check_fee_a1.asp?caret=2e) (reporting an average overdraft fee of over $28.00 per item).

[4] See GAO Bank Fees Report at 16.

[5] According to the GAO, of the financial institutions that applied up to 3 tiers of fees in 2006, the average overdraft fees were $26.74, $32.53 and $34.74, respectively. See GAO Bank Fees Report at 14.

standing", deposits are made regularly). While institutions generally do not underwrite on an individual account basis in determining whether to enroll the consumer in the service initially, most institutions will review individual accounts periodically to determine whether the consumer continues to qualify for the service, and the amounts that may be covered.

Most overdraft program disclosures state that payment of an overdraft is discretionary on the part of the institution, and disclaim any legal obligation of the institution to pay any overdraft. Typically, the service is extended to also cover non-check transactions, including withdrawals at automated teller machines (ATMs), automated clearinghouse (ACH) transactions, debit card transactions at point-of-sale, pre-authorized automatic debits from a consumer's account, telephone-initiated funds transfers, and on-line banking transactions. A flat fee is charged each time an overdraft is paid, and commonly, institutions charge the same amount for paying the overdraft as they would if they returned the item unpaid. A daily fee also may apply for each day the account remains overdrawn.

Where institutions vary most in their provision of overdraft services is the extent to which institutions inform consumers about the existence of the service or otherwise promote the use of the service. For those institutions that choose to promote the existence and availability of the service, they may also disclose to consumers, typically in a brochure or welcome letter, the aggregate dollar limit of overdrafts that may be paid under the service.

As the availability and customer use of these overdraft services has increased, the federal banking agencies (Board, Federal Deposit Insurance Corporation (FDIC), NCUA,

Office of the Comptroller of the Currency (OCC) and Office of Thrift Supervision (OTS)) have become concerned about aspects of the marketing, disclosure, and implementation of some of these services. In response to some of these concerns, the agencies published guidance on overdraft protection programs in February 2005.[6] The Joint Guidance addresses three primary areas – safety and soundness considerations, legal risks, and best practices, while the OTS Guidance focuses on safety and soundness considerations and best practices. The best practices focus on the marketing and communications that accompany the offering of overdraft services, as well as the disclosure and operation of program features, including the provision of a consumer election or opt-out of the overdraft service. The agencies have also published a consumer brochure on overdraft services.[7]

In May 2005, the Board separately issued revisions to Regulation DD and the staff commentary pursuant to its authority under the Truth in Savings Act (TISA) to address concerns about the uniformity and adequacy of institutions' disclosure of overdraft fees generally, and to address concerns about advertised overdraft services in particular. 70 FR 29582 (May 24, 2005).[8] The goal of the final rule was to improve the uniformity and adequacy of disclosures provided to consumers about overdraft and returned-item fees to assist consumers in better understanding the costs associated with

[6] See Interagency Guidance on Overdraft Protection Programs (Joint Guidance), 70 FR 9127 (Feb. 24, 2005) and OTS Guidance on Overdraft Protection Programs (OTS Guidance), 70 FR 8428 (Feb. 18, 2005).

[7] The brochure entitled "Protecting Yourself from Overdraft and Bounced-Check Fees," can be found at: http://www.federalreserve.gov/pubs/bounce/default.htm.

[8] A substantively similar rule applying to credit unions was issued separately by the NCUA. 71 FR 24568 (Apr. 26, 2006). The NCUA previously issued an interim final rule in 2005. 70 FR 72895 (Dec. 8, 2005).

the payment of overdrafts. In addition, the final rule addressed some of the Board's concerns about institutions' marketing practices with respect to overdraft services.

Under the May 2005 final rule, which became effective July 1, 2006, all depository institutions are required to specify in their account disclosures the categories of transactions for which an overdraft fee may be imposed, and to include in their advertisements about overdraft services, certain information about the costs associated with the service and the circumstances under which the institution would not pay an overdraft. The Board's final rule also requires institutions that promote the payment of overdrafts in an advertisement to disclose separately on their periodic statements the total amount of fees or charges imposed on the account for paying overdrafts and the total amount of fees charged for returning items unpaid. These disclosures must be provided for the statement period and for the calendar year to date. The final rule for the aggregate fee disclosures was narrower than the proposal, which would have applied the periodic statement requirements to all institutions, regardless of whether they market the payment of overdrafts.

Notwithstanding the issuance of the February 2005 Joint Guidance and the Board's May 2005 final rule under Regulation DD, the Board remains concerned that consumers may not adequately understand the costs of overdraft services nor how overdraft services operate generally. The Board is thus proposing additional disclosure requirements pursuant to its authority under Sections 263, 264, 268 and 269(a) of TISA to facilitate consumers' ability to make informed judgments about the use of their accounts. 12 U.S.C. 4302(e), 4303(b) & (d), 4307, 4308(a). The proposed requirements address disclosures to consumers about the costs associated with overdraft services on

periodic statements and disclosures to consumers about account balances in response to consumer inquiries.

In addition, as discussed elsewhere in this **Federal Register**, the Board, along with the OTS and the NCUA, are proposing to adopt substantive protections using their authority under the Federal Trade Commission Act (FTC Act) to address certain unfair or abusive protections associated with overdraft services.[9] The Board's proposal would add a new Subpart D on overdraft services to the Board's Regulation AA, Unfair or Deceptive Acts or Practices (2008 Regulation AA Proposal) (12 CFR part 227). Among other things, the proposal would require institutions to provide consumers the ability to opt out of their institutions' payment of overdrafts. The Board is proposing to amend Regulation DD to ensure that consumers receive effective disclosures about their right to opt out of overdraft services, by setting forth certain content, format and timing requirements for the notice.[10]

During this rulemaking process, Board staff has held discussions with representatives from banks, core systems providers, consumer groups, vendors of overdraft services, payment card associations, and industry trade associations. Board staff has also reviewed current account disclosures, and solicited input from members of the Board's Consumer Advisory Council regarding overdraft services.

[9] For simplicity, this notice will refer only to the Board's proposal.

[10] While NCUA is not proposing amendments to its 12 CFR part 707 in today's **Federal Register**, TISA requires NCUA to promulgate regulations substantially similar to Regulation DD. Accordingly, NCUA will issue amendments to part 707 following the Board's adoption of final rules under Regulation DD.

III. Summary of Proposal

Disclosure of consumer opt-out of overdraft services

The Board is proposing amendments under Regulation DD to set forth content and format requirements for the notices that would be given to consumers informing them about their right to decline, or opt out of, their institution's overdraft service. The substantive opt-out requirement is proposed separately in today's **Federal Register** under the Board's authority under the FTC Act. Under the proposal, the notice must be provided to the consumer before the institution assesses any fees in connection with paying an overdraft, and subsequently during or for each statement period in which a fee is imposed (for example, on a notice sent promptly after an overdraft informing the consumer of that fact, or on each periodic statement reflecting an overdraft fee or charge). The notice following assessment of an overdraft fee would help to ensure that consumers are apprised of their opt-out rights at a time when the information may be most relevant, that is, after the consumer has overdrawn his or her account and received information about the costs of using the service. The content of the notice is discussed in more detail in the **Section-by-Section Analysis** below. The Board intends to conduct consumer testing on the proposed notice following the issuance of this proposal and review of comments received.

Disclosure of the aggregate costs of overdraft services on periodic statements

As discussed above, the Board's May 2005 final rule under Regulation DD requires, among other things, institutions that promote the payment of overdrafts to provide consumers information about the aggregate costs of the overdraft service for the statement period and the calendar year to date. The Board is proposing to expand this

provision to require all institutions, regardless of whether they promote the payment of overdrafts, to disclose aggregate cost information. The amendment is intended to provide all consumers that use overdraft services with additional information about fees to help them better understand the costs associated with their accounts. Under the current rule, institutions that do not promote their overdraft service may be reluctant to provide information about their service, including other alternatives to overdraft services, out of concern that such disclosures might trigger the aggregate fee disclosure requirements. Thus, the proposal would promote greater transparency about the costs and terms of overdraft services for all institutions. The proposed rule would also add format requirements to help make the aggregate fee disclosures are more effective and noticeable to consumers.

Balance inquiries

To ensure that consumers are not confused or misled about the amount of funds in their account when they request their balance, the Board proposes to require that institutions generally disclose only the amount of funds available for the consumer's immediate use or withdrawal, without incurring an overdraft. This rule would apply to balance inquiries made through any automated system, including, but not limited to, an ATM, Internet web site, and telephone response system. Institutions would be permitted to provide a second balance that includes any additional funds that an institution may advance to cover an overdraft if this fact is also prominently disclosed to the consumer, along with that balance information.

IV. Section-by-Section Analysis

Section 230.10 Opt-out disclosure requirements for overdraft services

The February 2005 Joint Guidance recommended as a best practice that where overdraft protection is provided automatically, institutions should offer consumers the option of "opting out" of the overdraft service with a clear consumer disclosure of this option. See 70 FR at 9132. As discussed separately in this **Federal Register**, the Board is proposing to exercise its authority under the FTC Act to require institutions to provide consumers with a right to opt out of an institution's overdraft service before assessing a fee or charge for the service. Proposed § 230.10 sets forth content and timing requirements for the notice to ensure that the opt-out right is disclosed effectively to consumers. The Board anticipates that any final actions taken under the FTC Act and TISA will be issued simultaneously after the Board has reviewed comments received on the proposals.

To facilitate compliance, Sample Form B-10 provides a model form institutions may use to satisfy their disclosure obligations under the proposed rule. Following issuance of the proposal, the Board intends to conduct consumer testing to determine how well consumers understand and can use the proposed opt-out notice.

10(a) General rule

Proposed § 230.10(a) states the general rule that if a depository institution provides a consumer the right to opt out of the institution's payment of overdrafts pursuant to the institution's payment of overdrafts on the consumer's account pursuant to the institution's overdraft service, the institution must provide notice of that right in writing. As noted above, the Board is separately proposing, pursuant to its authority

under the FTC Act, to require institutions to provide consumers with a right to opt out of the institution's overdraft service before assessing a fee or charge for the service. Section 230.10 generally sets forth requirements regarding the content and timing requirements for providing this opt-out. See proposed comment 10-1.

10(b) Format and content

Under proposed § 230.10(b), institutions are required to include in their opt-out notice specified information about the institution's overdraft service. The new disclosures are proposed pursuant to the Board's authority under TISA Sections 264, 268, and 269. 12 U.S.C. 4303(b) & (d), 4308. Consistent with TISA's purpose, the proposal would require institutions to provide disclosures about the terms of deposit accounts to assist consumers in comparing accounts. Specifically, the proposed disclosures relate to the fees that are assessed against consumer accounts for the payment of overdrafts, the conditions under which the fees are imposed, how consumers can avoid such fees by opting out, and the availability of potentially less costly alternatives.

Under proposed § 230.10(b)(1), the notice must state the categories of transactions for which an overdraft fee may be imposed. For example, if the institution pays overdrafts created by check, ATM withdrawals and point-of-sale debit card transactions, it must indicate this fact. See comment 4(b)(4)-5.

Under the proposal, the notice must also include information about the costs of the institution's overdraft service. See proposed § 230.10(b)(2). In addition to stating the dollar amount of any fees or charges imposed on the account for paying overdraft items, including daily fees, institutions would also be required to inform consumers in the notice that overdraft fees could be charged in connection with an overdraft as low as $1, or the

lowest dollar amount for which the institution could charge a fee. This latter disclosure is intended to make consumers aware, in some cases, that the per item overdraft fee may far exceed the amount of the overdraft. See proposed § 230.10(b)(3).

In the February 2005 Joint Guidance, the federal banking agencies recommended that institutions consider imposing a cap on consumers' potential daily costs from the overdraft program, such as a limit on the number of overdraft transactions subject to a fee per day, or a dollar limit on the total fees that will be imposed per day. See 70 FR at 9132. The Board is proposing to require additional disclosures about the maximum costs that could be incurred in connection with an institution's overdraft service. Under the proposal, institutions must disclose any daily dollar limits on the amount of overdraft fees or charges that may be assessed in addition to any limits for the statement period. If the institution does not limit the amount of fees that can be imposed either for a single day or for a statement period, it must disclose that fact. See proposed § 230.10(b)(4). The Board intends that both this disclosure about fee limits as well as the notice that overdraft fees in some cases will exceed the amount of the overdraft would alert consumers to the potentially high costs of overdraft services, so that they may more effectively determine whether the service's terms and features are suited to their needs, or whether other alternatives would be more appropriate.

Proposed § 230.10(b)(5) requires institutions to inform a consumer of the right to opt out of the institution's payment of overdrafts, including the method(s) that the consumer may use to exercise the opt-out right.[11] Such methods may include providing a

[11] Under the Board's Regulation AA proposal in today's **Federal Register**, an institution would be required to allow consumers to opt out of the institution's overdraft service for all transaction types. In addition, the proposal would require the institution to allow consumers to opt out of the payment of overdrafts resulting only from ATM withdrawals and point-of-sale debit card transactions.

toll-free telephone number that the consumer may call to opt out or allowing the consumer to mail in the opt-out request. See proposed comment 10(b)-2. Comment is requested as to whether institutions should be required to provide a form with a check-off box that consumers may mail in to opt out. Comment is also requested regarding whether consumers should also be allowed to opt out electronically, provided that the consumer has agreed to the electronic delivery of information.

Proposed § 230.10(b)(6) incorporates the February 2005 Joint Guidance recommendation that when describing an overdraft protection program, institutions should inform consumers generally of other overdraft services and credit products, if any, that are available. These alternatives may include transfers from other accounts held at the institution, overdraft lines of credit, or transfers from a credit card issued by the institution. In some cases, these alternatives may be less costly than the overdraft service offered by the institution. Under the proposed rule, institutions must state whether it offers any alternatives for the payment of overdrafts. If one of the alternatives that the institution offers is an overdraft line of credit, it must state this fact. Institutions may also, but are not required to, list any additional alternatives they may offer to overdraft services.

In some cases, institutions may wish to explain to consumers the consequences of opting out of overdraft services. For example, the institution may explain that if a consumer opts out and writes a check that overdraws an account, the institution may still charge a fee if the check is returned, and that the merchant may also assess a fee. Proposed comment 10(b)-3 permits institutions to briefly describe the consequences of

opting out. Of course, institutions should not represent that the payment of overdrafts is guaranteed or assured if they are not. See comment 8(a)-10.ii.

Comment is requested regarding whether the proposed content requirements provide sufficient information for consumers to evaluate effectively whether an institution's overdraft service meets their needs. In addition, the Board's proposal would require that all opt-out notices contain the same content, regardless of when the notice is provided. As further discussed below, the Board is requesting comment whether the content requirements should differ when the opt-out notice is provided after an overdraft fee has been charged to the consumer's account.

Proposed § 230.10(b) also requires institutions to provide the opt-out notice in a format substantially similar to Sample Form B-10 to ensure that the opt-out content is segregated from other disclosures provided by the institution and noticeable by the consumer. The Board recognizes, however, that institutions may need flexibility in formatting disclosures, depending on where and when the disclosure is provided. For example, if the opt-out notice is included in disclosures provided at account opening, segregating the required content from other disclosures may overemphasize the importance of the disclosure to the consumer in comparison to other information about the account that the consumer is given at that time. In contrast, consumers may benefit from a more conspicuous opt-out notice when the notice is provided on the periodic statement once the consumer has incurred fees. As noted above, the Board expects to conduct consumer testing of the proposed sample form following issuance of this proposal, which may include exploring how the opt-out notice may be presented in a

manner that complies with the regulation's general clear and conspicuous requirements under § 230.3, including formatting methods.

10(c) Timing

Proposed § 230.10(c) sets forth timing requirements for providing an opt-out notice. The opt-out notice must initially be provided before the overdraft service is provided and overdraft fees are imposed on the consumer's account. For example, notice may be given at the time of account opening, either as part of the deposit account agreement or in a stand-alone document. Some institutions, however, do not enroll consumers in their overdraft service until some time after account opening, after the consumer has maintained his or her account in good standing for a certain period of time. Thus, institutions may provide the opt-out notice closer to the time in which overdraft services would be added to the consumer's account. The proposed rule would allow this later notice so long as it is provided, and the consumer has a reasonable opportunity to exercise the opt-out right, before the institution imposes any fees in connection with paying an overdraft.

The Board believes that providing an opt-out notice only at account opening may have limited effectiveness. For example, consumers may not focus on the significance of the information at account opening because they may assume they will not overdraw the account.[12] Thus, under both the Board's 2008 Regulation AA proposal and this proposed

[12] This behavior is referred to as "hyperbolic discounting." See Angela Littwin, Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers, 80 Tex. L. Rev. 451, 467-478 (2008) (discussing consumers' tendency to underestimate their future credit card usage when they apply for a card and thereby failing to adequately anticipate the costs of the product, and citing Shane Frederick, George Loewenstein & Ted O'Donoghue, Time Discounting and Time Preference: A Critical Review, 40 J. Econ. Literature 351, 366-67 (2002); Ted O'Donoghue & Matthew Rabin, Doing It Now or Later, 89 Am. Econ. Rev. 103, 103, 111 (1999) (explaining people's preference for delaying unpleasant activities and accepting immediate rewards despite their knowledge that the delay may lessen potential future rewards or increase potential adverse consequences)).

rule, institutions must also provide consumers notice of the right to opt out of their institution's payment of overdrafts at a time when the consumer is more likely to be focused on the cost impact of the service, specifically after the consumer has overdrawn the account and fees have been assessed on the account. Proposed § 230.10(c)(2)(i) generally requires institutions to provide a notice meeting the content requirements of § 230.10(b) on each periodic statement reflecting the assessment of any overdraft fee or charge. In addition, pursuant to authority under section 269 of TISA, the proposed rule requires that if the notice is included on the periodic statement, it must be provided in close proximity to the aggregate fee disclosures required under § 230.11(a) to ensure that these related disclosures are presented together.

Alternatively, many institutions notify consumers promptly after paying an overdraft of the fact of the overdraft and the amount the consumer's account is overdrawn. While this separate notice is not required by Regulation DD (it is considered a best practice under the February 2005 Joint Guidance), institutions providing an opt-out notice at this time would also be deemed to comply with the timing requirements of this proposed rule. See proposed § 230.10(c)(2)(ii). Institutions that elect to provide the opt-out disclosure on a separate notice sent following the institution's payment of an overdraft need only provide the opt-out notice once per statement period. For example, assume a statement cycle is for a calendar month. If a consumer overdraws on the account at the beginning of the month and receives an opt-out notice shortly after the overdraft is paid, the institution is not required to provide another opt-out notice for any additional overdrafts that occur during that statement period.

As noted above, the Board's proposal would require that institutions provide the same content in proposed § 230.10(b) for all opt-out notices to ensure uniform notices and because consumers may not see the initial opt-out notice. However, the Board is cognizant of the compliance burden imposed on institutions from the proposed content requirements. In addition, the Board recognizes that consumers may not require all of the information in proposed § 230.10(b) in the notices following an individual overdraft. For example, the consumer may not need to be reminded that he or she may incur an overdraft fee for a small dollar overdraft if the periodic statement reflects both the fee and the amount of the transaction that caused the consumer to overdraw the account. Similarly, the amount of the fee may not need to be included in the opt-out notice if the transaction history on the statement reflects fees charged to the account, including for paying an overdraft.

Comment is requested on the content requirements of the opt-out notice, and the burden to institutions and benefits to consumers of providing all of the proposed content in each notice, including the information about alternatives to overdraft services. Comment is also requested regarding whether consumers should receive the same content for all opt-out notices, regardless of when a notice is provided, or whether the rule should permit institutions to exclude some of the required content in subsequent notices. For example, if the information about alternatives to overdraft services is retained generally, should this information be excluded from periodic statements. In addition, comment is requested on the burden to institutions of requiring that the opt-out disclosures appear in close proximity to the fees. The Board also intends to explore these issues through its consumer testing of the opt-out notice following the issuance of this proposal.

The Board anticipates that the requirement to provide notice before overdraft fees are assessed would apply only to accounts opened after the effective date of the final rule. Thus, depository institutions would not be required to provide initial opt-out notices to existing customers. Nonetheless, the requirement to provide subsequent notice of the opt-out after the consumer has overdrawn the account and fees have been assessed on the account would apply to all accounts after the effective date of the final rule, including those existing as of the effective date of the rule.

Section 230.11 Additional disclosure requirements regarding overdraft services

11(a) Disclosure of total fees on periodic statements

Applicability of aggregate fee disclosures

Although periodic statements are not required under TISA, institutions that do provide such statements are required to disclose fees or charges imposed on the account during the statement period. See 12 U.S.C. 4307(3) and 12 CFR § 230.6(a)(3). Section 230.11(a) further requires institutions that promote the payment of overdrafts in an advertisement to provide aggregate dollar amount totals for overdraft fees and for returned item fees, both for the statement period as well as for the calendar year to date. Under the proposed rule, § 230.11(a) is amended to require all institutions to provide these fee disclosures, whether or not they promote the payment of overdrafts.

As originally proposed in May 2004, all institutions would have been required to separately disclose the total dollar amount of overdraft fees and the total dollar amount of returned-item fees for the statement period and for the calendar year to date. Most industry commenters opposed the proposal, stating that it would be costly and provide

little benefit to consumers. The majority of industry commenters stated that if the Board adopted such a requirement, it should apply to all institutions and not just institutions that market overdraft services. Some of these commenters stated that a rule based on "marketing" would be too vague, while others asserted that if the Board believed the cost disclosures are useful, they would be just as beneficial to consumers regardless of whether the overdraft service is marketed. See 70 FR at 29,588.

In limiting the aggregate fee disclosures to institutions that market overdraft services in the May 2005 final rule, the Board stated its intention to avoid imposing compliance burdens on institutions that pay overdrafts infrequently, such as institutions that only pay overdrafts on an ad hoc basis. See 70 FR at 29,589. To address industry concerns that a rule based on marketing would be too vague to administer, the final rule also specified certain types of communications and practices that would not trigger the requirement for disclosing aggregate fees on periodic statements, including responding to consumer-initiated inquiries about deposit accounts or overdrafts or making disclosures that are required by federal or other applicable law. See § 230.10(a)(2).

Since issuance of the May 2005 final rule, Board staff and staff of other federal banking agencies have received a number of questions and requests for more guidance about when an institution is deemed to be promoting the payment of overdrafts in an advertisement to trigger the aggregate fee disclosure requirements. Compliance issues have most often been raised by financial institutions that are concerned that implementing the best practices recommended by the February 2005 Joint Guidance may lead to a determination that they are promoting their overdraft service. For example, Board staff has received a number of inquiries about how institutions may provide notices informing

consumers about their ability to opt out of an institution's overdraft service without being considered to be promoting the service. Similarly, an institution may want to inform consumers of less costly alternatives to the institution's overdraft service as recommended by the February 2005 Joint Guidance, but refrain from doing so because they may inadvertently trigger the aggregate fee disclosure requirements under § 230.11(a). Based on further analysis, the Board is concerned that limiting the scope of the rule to institutions that market the service may have led to the unintended consequence of discouraging transparency by depository institutions regarding their overdraft payment practices.

In addition, although the rule's application only to institutions that market overdraft services was intended to avoid imposing compliance burdens on institutions that pay overdrafts infrequently, the Board is concerned that the vast majority of institutions may no longer pay overdrafts on an entirely "ad hoc" basis, but rather automate most of their overdraft payment decision process, leading to more frequent payment of overdrafts. Available data reviewed by Board staff indicates that the percentage of accountholders with one or more overdrafts paid during a calendar year appears to be consistent across institutions, whether or not an institution promotes its overdraft service. Thus, a significant number of consumers who use overdraft services on a regular basis do not receive the benefit of the aggregate fee disclosures which might otherwise help them in evaluating their approach to account management and determine whether other types of accounts or services would be more appropriate for their needs. Moreover, the Board notes that the ability of consumers to compare effectively the terms

of accounts is potentially undercut by a rule that distinguishes between institutions that promote overdraft services and those that do not.

In light of the concerns noted above, the Board is proposing to require all institutions to provide aggregate dollar amount totals of fees for paying overdrafts and for fees for returning items unpaid on periodic statements provided to consumers, pursuant to its authority under Sections 268 and 269 of TISA. See § 230.11(a)(1). As under the current rule, institutions must provide these totals for both the statement period and the calendar year to date. See § 230.11(a)(2). Comment is requested on the potential benefits to consumers and compliance burden for institutions for the proposed approach.

Format of aggregate fee disclosures

Board staff's review of current periodic statement disclosures for institutions that promote overdraft services indicates the aggregate fee totals are often disclosed in a manner that may not be effective in informing consumers of the totals. Accordingly, pursuant to its authority under Section 269 of TISA, the Board is proposing to require that these disclosures be provided in close proximity to fees identified under § 230.6(a)(3). See proposed § 230.11(a)(3). For example, the aggregate fee totals could appear immediately after the transaction history on the periodic statement reflecting the fees that have been imposed on the account during the statement period. The proposed format requirement has been informed to a significant degree by the Board's consumer testing in the context of credit card disclosures. In that testing, consumers consistently reviewed transactions identified on their periodic statements and noticed totals for fees and interest charges when they were grouped together with transactions. See 72 FR at 32996. Similarly, the Board believes that the requirement to provide the aggregate cost

disclosures for overdraft and returned item fees will be more noticeable to consumers when grouped together with the itemized fees, thus enabling them to act as appropriate to manage their accounts effectively. In addition, the proposed rule requires the information to be presented in a tabular format similar to the proposed interest charge and fees total disclosures under the Board's June 2007 proposal under Regulation Z. See 72 FR at 32996, 33052; proposed 12 CFR § 226.7(b)(6). The proposal includes two alternatives for Sample Form B-11 to illustrate how institutions may provide the aggregate cost information on their periodic statements. Following issuance of this proposal, the Board intends to conduct additional consumer testing to test the format, placement, and content of this periodic statement disclosure.

The proposal contains additional revisions to the provisions in § 230.11(a) and accompanying staff commentary to reflect the revised scope of institutions subject to the disclosure requirement, including deletion as unnecessary of the examples in § 230.11(a)(2) of communications that would not trigger the aggregate fee disclosure requirement.

11(b) Advertising disclosures for overdraft services

Section 230.11(b) contains a list of communications about the payment of overdrafts that are not subject to additional advertising disclosures. The Board proposes to add a new example under § 230.11(b) to include the proposed opt-out notice under § 230.10 of this rule. See proposed § 230.11(b)(2)(xii).

11(c) Disclosure of account balances

Section 230.11(b)(1) currently requires institutions that promote the payment of overdrafts to include certain disclosures in their advertisements about the service to avoid

confusion between overdraft services and traditional lines of credit. The May 2005 final rule provided additional guidance in the staff commentary in the form of examples of institutions promoting the payment of overdrafts and stated that an institution must include the additional advertising disclosures if it "discloses an overdraft limit or includes the dollar amount of an overdraft limit in a balance disclosed on an automated system, such as a telephone response machine, ATM screen or the institution's Internet site." See comment 11(b)-1.iii; see also § 230.11(b)(1); 70 FR at 29,590. To facilitate responsible use of overdraft services and ensure that consumers receive accurate information about their account balances, the Board is proposing additional restrictions on account balances that may be disclosed in response to a consumer inquiry. Specifically, to avoid consumer confusion with respect to account balances disclosed in response to an inquiry, proposed § 230.11(c) would prohibit institutions from including in the consumer's disclosed balance any funds the institution may provide to cover an overdraft item. The proposed provision would apply to any automated system used by an institution to provide balance information. The proposed rule would not apply to in-person discussions or telephone discussions or Internet chats with live personnel due to concerns about the compliance burden associated with monitoring individual conversations and responses. Of course, such discussions may not be deceptive.

The proposed provision implements the prohibition in TISA § 263(e) (12 U.S.C. 4303(e)) on misleading or inaccurate advertisements, announcement, or solicitations relating to a deposit account. Thus, under proposed § 230.11(c), institutions must disclose an account balance that solely includes funds that are available for the consumer's immediate use or withdrawal, and may not include any additional amount

that the institution may provide to cover an overdraft. For example, as part of its overdraft service, an institution may add a $500 cushion or overdraft limit to the consumer's account balance when determining whether to pay an overdrawn item; the additional $500 could not be included in this balance disclosed to the consumer in response to an inquiry. The proposed provision incorporates a best practice recommended by the February 2005 Joint Guidance. Similarly, as provided in the February 2005 Joint Guidance, institutions may, at their option, disclose a second balance that includes funds that may be advanced through the institution's overdraft service, provided that the institution prominently discloses at the same time that the second balance includes funds provided by the institution to cover overdrafts.

Proposed comment 11(c)-1 clarifies that for purposes of this provision, the institution may, but need not, include funds that are deposited in the consumer's account, such as from a check, but that are not yet made available for withdrawal in accordance with the funds availability rules under the Board's Regulation CC (12 CFR part 229). Similarly, the balance may, but need not, include any funds that are held by the bank to satisfy a prior obligation of the consumer (for example, to cover a hold for an ATM or debit card transaction that has been authorized but for which the bank has not settled). The proposed comment recognizes that the methods used by depository institutions for determining the balances that are available for the consumer's use or withdrawal may vary significantly by institution. For example, smaller institutions may only consider a balance that reflects the ledger balance for the consumer's account at the end of the previous day after the institution has completed its processing activities. Other institutions may update the balance on a near- or real-time basis to reflect recent

transactions that have been authorized, but have not been presented for settlement. The proposed comment is intended to make clear that institutions are not expected to reconfigure their internal systems to provide "real-time" balance disclosures. Regardless of the transactions that are reflected in the account balance disclosed to consumers, the proposed rule is intended only to require that the balance must not include any additional amounts that the institution may provide to pay an overdraft.

Proposed comment 11(c)-2 provides that the balance disclosure requirement applies to any automated system through which the consumer requests a balance, including, but not limited to, a telephone response machine (such as an interactive voice response system), at an ATM (both on the ATM screen and on receipts), or on an institution's Internet site (other than live chats with an account representative). The proposed comment further clarifies that the reference to ATM inquiries applies equally to inquiries at ATMs owned or operated by a consumer's account-holding institution, as well as to inquiries at foreign ATMs, including those operated by non-depository institutions.

While the Board considered addressing concerns about potentially deceptive balances under its separate rulemaking authority under Section 5(a) of the FTC Act (15 U.S.C. 45(n)), the Board is proposing to address this issue under its TISA authority because such rules (if similarly adopted under the NCUA's separate authority under TISA, see 12 CFR Part 707) would also extend to state-chartered credit unions.[13] Nevertheless, the Board believes that adoption of this rule under TISA would not preclude a separate determination by a federal banking agency that it is a deceptive

[13] The Board notes that rules promulgated by the NCUA under the FTC Act do not apply to state-chartered credit unions. As noted above, following the Board's adoption of final rules under Regulation DD, NCUA intends to issue substantially similar amendments to 12 CFR part 707.

practice under the FTC Act to disclose a single balance that includes funds that an institution may provide to cover an overdraft, if the institution does not state that fact.

V. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities.

However, under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. Statement of the need for, and objectives of, the proposed rule. TISA was enacted, in part, for the purpose of requiring clear and uniform disclosures regarding deposit account terms and fees assessable against these accounts. Such disclosures allow consumers to make meaningful comparisons between different accounts and also allow consumers to make informed judgments about the use of their accounts. 12 U.S.C. 4301. TISA requires the Board to prescribe regulations to carry out the purpose and provisions of the statute. 12 U.S.C. 4308(a)(1).

The Board is revising Regulation DD to set forth content, timing and format requirements for a notice provided to consumers about their right to opt out of an

institution's overdraft service. The proposed requirements are intended to ensure that consumers receive effective disclosures about the opt-out right. In addition, current requirements for disclosing totals for overdraft and returned item fees on periodic statements would be expanded to apply to all institutions and not solely to institutions that promote the payment of overdrafts. Thus, all consumers that use overdraft services will receive additional information about fees to help them better understand the costs associated with their accounts, regardless of whether the service is marketed to them. Lastly, the proposed rule would ensure that consumers are not misled about the funds they have available for a transaction by requiring institutions that provide balance information through an automated system in response to a consumer inquiry, to only include funds available for the consumer's immediate use or withdrawal pursuant to the terms of the account agreement, and not any funds that may be advanced through the institution's overdraft service.

2. Small entities affected by the proposed rule. Approximately 12,117 depository institutions in the United States that must comply with TISA have assets of $150 million or less and thus are considered small entities for purposes of the RFA, based on 2007 call report data. Approximately 4,774 are institutions that must comply with the Board's Regulation DD; approximately 7,343 are credit unions that must comply with NCUA's Truth in Savings regulations which must be substantially similar to the Board's Regulation DD.

Under the proposed rule, all small depository institutions that pay overdrafts will have to revise their disclosures both at account opening (or before the overdraft service is provided) and on periodic statements, to reflect the proposed consumer right to opt out.

(The rule provides alternative means for complying with the periodic statement opt-out disclosure requirement, such as by providing the opt-out disclosure on a notice sent promptly after an overdraft. To the extent a depository institution elects to comply with this alternative means, it will have to revise those disclosures, as appropriate.) The Board notes, however, that some depository institutions likely already provide some form of consumer opt-out based on their implementation of best practices under the February 2005 Joint Guidance.

In addition, institutions that did not previously revise their periodic statement disclosures to comply with the prior May 2005 Regulation DD amendments because they did not promote their overdraft service will need to do so to reflect aggregate overdraft and aggregate returned-item fees for the statement period and year to date. Lastly, institutions will have to reprogram their automated systems to provide balances that exclude additional funds the institution may provide to cover an overdraft in response to consumer balance inquiries, if the institution has not done so as previously recommended by the February 2005 Joint Guidance.

3. Recordkeeping, reporting, and compliance requirements. The proposed revisions to Regulation DD require all depository institutions to provide consumers notice of their right to opt out of the institution's overdraft service before the service is provided, and on each periodic statement reflecting an overdraft fee or charge (or alternatively, on a notice sent promptly after an overdraft informing the consumer of that fact). In addition, as discussed in more detail above, institutions that have not previously provided total dollar amounts of fees imposed on the account for paying overdrafts and total dollar amounts of fees for returning items unpaid will be required to do so for both

the statement period and the calendar year to date. Disclosures of account balances that include funds that the institution may provide to cover an overdraft will be prohibited, unless the institution specifically discloses that fact.

4. Other federal rules. The Board has not identified any federal rules that duplicate, overlap, or conflict with the proposed revisions to Regulation DD.

5. Significant alternatives to the proposed revisions. The Board solicits comment about additional ways to reduce regulatory burden associated with this proposed rule.

VI. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Federal Reserve by the Office of Management and Budget (OMB). The collection of information that is subject to the PRA by this proposed rulemaking is found in 12 CFR 230. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100-0271.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 et seq.). Since the Board does not collect any information, no issue of confidentiality arises. Since the Board does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are creditors and other entities subject to Regulation DD, including for-profit financial institutions and small businesses.

Section 269 of the Truth in Savings Act (TISA)(12 U.S.C. 4308) authorizes the Board to issue regulations to carry out the provisions of TISA. TISA and Regulation DD

require depository institutions to disclose yields, fees, and other terms concerning deposit accounts to consumers at account opening, upon request, and when changes in terms occur. Depository institutions that provide periodic statements are required to include information about fees imposed, interest earned, and the annual percentage yield earned during those statement periods. The act and regulation mandate the methods by which institutions determine the account balance on which interest is calculated. They also contain rules about advertising deposit accounts. To ease the compliance cost (particularly for small entities), model clauses and sample forms are appended to the regulation. Depository institutions are required to retain evidence of compliance for twenty-four months, but the regulation does not specify types of records that must be retained.

Regulation DD applies to all depository institutions except credit unions. Credit unions are covered by a substantially similar rule issued by the National Credit Union Administration. Under the PRA, the Federal Reserve accounts for the paperwork burden associated with Regulation DD only for Board-supervised institutions. Regulation DD defines Board-regulated institutions as: state member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden imposed on the depository institutions for which they have administrative enforcement authority.

As mentioned in the preamble, the proposed rulemaking sets forth content, timing and format requirements for a notice provided to consumers about their right to opt out of

an institution's overdraft service. Current requirements for disclosing totals for overdraft and returned item fees on periodic statements would be extended to apply to all institutions and not solely to institutions that promote the payment of overdrafts. The proposed rule would also require institutions that provide balance information in response to a balance inquiry by the consumer, to only include funds available for the consumer's immediate use or withdrawal without incurring an overdraft, and not any funds added through the institution's overdraft service.

The Board estimates that 1,172 respondents regulated by the Board would take, on average, 40 hours (one business week) to re-program and update their systems to comply with the proposed disclosure requirements. These disclosure requirements include opt-out disclosures for overdraft services (§ 230.10), disclosure of total fees on periodic statements (§ 230.11(a)), and disclosure of account balances (§ 230.11(c)). The Board estimates the total annual one-time burden to be 46,880 hours and believes that, on a continuing basis, there would be no increase in burden as the proposed disclosures would be sufficiently accounted for once incorporated into the current account disclosures (§ 230.4) and periodic statement disclosure (§ 230.6). To ease the compliance cost model clauses, B-10 consumer opt-out from overdraft services sample form (§ 230.10) and B-11 aggregate overdraft and returned item fees sample form (§ 230.11), are proposed in Appendix B.

The current total annual burden is estimated to be 176,177 hours for 1,172 Board-covered institutions. The proposed total annual burden is estimated to be 223,057 hours, an increase of 46,880 hours.

The other federal financial agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Board's burden estimates. Using the Board's method, the total estimated annual burden for all financial institutions subject to Regulation DD, including Board-supervised institutions, would be approximately 2,898,548 hours. The proposed amendments would impose a one-time increase in the estimated annual burden for all institutions subject to Regulation DD by 772,000 hours to 3,670,548 hours. The above estimates represent an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. All covered institutions, including depository institutions (of which there are approximately 19,300), potentially are affected by this collection of information, and thus are respondents for purposes of the PRA.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility; (2) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 151-A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such

comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100-0271), Washington, DC 20503.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and staff commentary. New language is shown inside bold-faced arrows, while language that would be deleted is set off with bold-faced brackets.

List of Subjects in 12 CFR Part 230

Advertising, Banks, Banking, Consumer protection, Reporting and recordkeeping requirements, Truth in savings.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend Regulation DD, 12 CFR part 230, and the Official Staff Commentary, as set forth below:

Part 230 – TRUTH IN SAVINGS (REGULATION DD)

1. The authority citation for part 230 continues to read as follows:

Authority: 12 U.S.C. 4301 et seq.

2. Section 230.1 is amended to read as follows:

§ 230.1 Authority, purpose, coverage, and effect on state laws.

(a) Authority. This regulation, known as Regulation DD, is issued by the Board of Governors of the Federal Reserve System to implement the Truth in Savings Act of 1991 (the act), contained in the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 USC 3201 et seq., Pub. L. 102-242, 105 Stat. 2236). Information-collection requirements contained in this regulation have been approved by the Office of

Management and Budget under the provisions of 44 USC 3501 et seq. and have been assigned OMB No. **[**7100-0255**]** ►7100-0271◄.

3. Section 230.10 is added to read as follows:

§ 230.10 ►Opt-out disclosure requirements for overdraft services.

(a) General rule. If a depository institution provides a consumer the right to opt out of the institution's payment of overdrafts pursuant to the institution's overdraft service, as defined in 12 CFR § 227.31(c), the institution must provide written notice of that right in accordance with the requirements of this section.

(b) Format and content. The notice described in paragraph (a) of this section must use a format substantially similar to Sample Form B-10, and include the following information:

(1) Overdraft policy. The categories of transactions for which a fee for paying an overdraft may be imposed;

(2) Fees imposed. The dollar amount of any fees or charges imposed for paying checks or other items when there are insufficient or unavailable funds and the account becomes overdrawn;

(3) Potential impact of fee in relation to overdraft amount. A statement that a fee may be charged for overdrafts as low as $1, or the lowest dollar amount for which the institution may charge an overdraft fee;

(4) Limits on fees charged. The maximum amount of overdraft fees or charges that may be assessed per day and per statement period, or, if applicable, that there is no limit to the fees that can be imposed;

(5) Disclosure of opt-out right. An explanation of the consumer's right to opt out of the institution's payment of overdrafts, including the method(s) by which the consumer may exercise that right; and

(6) Alternative payment options. As applicable, a statement that the institution offers other alternatives for the payment of overdrafts. In addition, if the institution offers a line of credit subject to the Board's Regulation Z (12 CFR part 226) for the payment of overdrafts, the institution must also state that fact. An institution may, but is not required to, list additional alternatives for the payment of overdrafts.

(c) Timing. As applicable, the notice described in paragraph (a) of this section must be provided:

(1) Prior to the institution's imposition of any fee for paying a check or other item when there are insufficient or unavailable funds in the consumer's account, provided that the consumer has a reasonable opportunity to exercise the opt-out right prior to the assessment of any fee for paying an overdraft; and

(2) (i) On each periodic statement reflecting any fee(s) or charge(s) for paying an overdraft, in close proximity to the disclosures required by § 230.11(a); or

(ii) At least once per statement period on any notice sent promptly after the institution's payment of an overdraft.◄

4. Section 230.11 is amended by revising the heading, and revising paragraphs (a) and (b)(2), and adding paragraph (c) to read as follows:

§ 230.11 Additional disclosure requirements [for institutions advertising the payment of overdrafts] ►for overdraft services.◄

(a) **[**Periodic statement disclosures**]** ►Disclosure of total fees on periodic statements◄- (1) **[**Disclosure of total fees**]**►General◄. **[**(i) Except as provided in paragraph (a)(2) of this section, if a depository institution promotes the payment of overdrafts in an advertisement, the**]** ►A depository◄ institution must separately disclose on each periodic statement►, as applicable◄:

[(A)**]** ►(i)◄ The total dollar amount for all fees or charges imposed on the account for paying checks or other items when there are insufficient funds and the account becomes overdrawn; and

[(B)**]** ►(ii)◄ The total dollar amount for all fees imposed on the account for returning items unpaid.

[(ii)**]** ►(2) Totals required.◄ The disclosures required by **[**this**]** paragraph ►(a)(1) of this section◄ must be provided for the statement period and for the calendar year to date**[** for any account to which the advertisement applies**]**;

►(3) Format requirements. The aggregate fee disclosures required by paragraph (a) of this section must be disclosed in close proximity to fees identified under § 230.6(a)(3), using a format substantially similar to Sample Form B-11 in appendix B.◄

[(2) Communications not triggering disclosure of total fees. The following communications by a depository institution do not trigger the disclosures required by paragraph (a)(1) of this section:

(i) Promoting in an advertisement a service for paying overdrafts where the institution's payment of overdrafts will be agreed upon in writing and subject to the Board's Regulation Z (12 CFR part 226);

(ii) Communicating (whether by telephone, electronically, or otherwise) about the payment of overdrafts in response to a consumer-initiated inquiry about deposit accounts or overdrafts. Providing information about the payment of overdrafts in response to a balance inquiry made through an automated system, such as a telephone response machine, an ATM, or an institution's Internet site, is not a response to a consumer-initiated inquiry for purposes of this paragraph;

(iii) Engaging in an in-person discussion with a consumer;

(iv) Making disclosures that are required by federal or other applicable law;

(v) Providing a notice or including information on a periodic statement informing a consumer about a specific overdrawn item or the amount the account is overdrawn;

(vi) Including in a deposit account agreement a discussion of the institution's right to pay overdrafts;

(vii) Providing a notice to a consumer, such as at an ATM, that completing a requested transaction may trigger a fee for overdrawing an account, or providing a general notice that items overdrawing an account may trigger a fee; or

(viii) Providing informational or educational materials concerning the payment of overdrafts if the materials do not specifically describe the institution's overdraft service.

(3) Time period covered by disclosures. An institution must make the disclosures required by paragraph (a)(1) of this section for the first statement period that begins after an institution advertises the payment of overdrafts. An institution may disclose total fees

imposed for the calendar year by aggregating fees imposed since the beginning of the calendar year, or since the beginning of the first statement period that year for which such disclosures are required.

(4) Termination of promotions. Paragraph (a)(1) of this section shall cease to apply with respect to a deposit account two years after the date of an institution's last advertisement promoting the payment of overdrafts applicable to that account.

(5) Acquired accounts. An institution that acquires an account must thereafter provide the disclosures required by paragraph (a)(1) of this section for the first statement period that begins after the institution promotes the payment of overdrafts in an advertisement that applies to the acquired account. If disclosures under paragraph (a)(1) of this section are required for the acquired account, the institution may, but is not required to, include fees imposed prior to acquisition of the account.**]**

(b) Advertising disclosures for overdraft services.

* * * * *

(2) Communications about the payment of overdrafts not subject to additional advertising disclosures. * * *

* * * * *

(x) A notice provided to a consumer, such as at an ATM, that completing a requested transaction may trigger a fee for overdrawing an account, or a general notice that items overdrawing an account may trigger a fee; **[**or**]**

(xi) Informational or educational materials concerning the payment of overdrafts if the materials do not specifically describe the institution's overdraft service**[**.**]**►; or

(xii) An opt-out notice regarding the institution's payment of overdrafts under § 230.10 of this part.◄

* * * * *

►(c) Disclosure of account balances. In response to an account balance inquiry by a consumer through an automated system, an institution must provide a balance that solely includes funds that are available for the consumer's immediate use or withdrawal, and may not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the consumer's account. The institution may, at its option, disclose a second account balance that includes such an additional amount, if the institution prominently indicates that this balance includes funds provided by the institution to cover overdrafts.◄

5. In Appendix B to Part 230, Appendix B-10 OVERDRAFT SERVICES OPT-OUT SAMPLE FORM and Appendix B-11 AGGREGATE OVERDRAFT AND RETURNED ITEM FEES SAMPLE FORM are added.

APPENDIX B TO PART 230 – MODEL CLAUSES AND SAMPLE FORMS

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B-10 Overdraft Services Opt-Out Notice Sample Form

We provide overdraft services for your account. This means that if there is a debit to your account when your account does not have sufficient funds, we may pay your overdraft.

There are fees associated with our overdraft services:

- We will charge you a fee of $__ for each overdraft item that we pay, including ATM withdrawals, debit card purchases, checks, and in-person transactions.
- We may charge you this fee even if your overdraft amount is as low as $__.
- [We may also charge you additional daily fees of $__ for each day your account remains overdrawn.]
- [We can charge you a maximum of $__ in fees per day and $ __ per statement period for overdrawing your account.] [There is no limit to the amount of fees we can charge you for overdrawing your account per day/per statement period.]

You have the right to opt out of this service and tell us not to pay any overdrafts. If you do, however, you may have to pay a fee if you make transactions that are returned unpaid. You also have the right to tell us not to pay overdrafts for ATM withdrawals and debit card purchases, but to continue to pay overdrafts for other types of transactions.

We also offer less costly overdraft payment services that you may qualify for, including a line of credit. To opt out of our overdraft service, or to obtain information about other alternatives, call us at 1-800-XXX-XXXX or write us at [insert address].

B-11 Aggregate Overdraft and Returned Item Fees Sample Form

Alternative 1:

Summary of Overdraft and Returned Item Fees		
	Total For This Period	Total Year-to-Date
Total Overdraft Fees	$50.00	$75.00
Total Returned Item Fees	$0.00	$33.00

Alternative 2:

Summary of Overdraft and Returned Item Fees	
Total overdraft fees charged this period	$50.00
Total overdraft fees charged year-to-date	$75.00
Total returned item fees charged this period	$0.00
Total returned item fees charged year-to-date	$33.00

6. In Supplement I to part 230:

a. In Section 230.10, the heading is revised and new paragraphs 1. through 3. are added.

b. In Section 230.11 and Section 230.11(a), the headings are revised and paragraphs (a)(1) 1. and (a)(1) 2. are removed.

c. In Section 230.11, paragraphs (a)(1) 3. through (a)(1) 8. are redesignated as paragraphs (a)(1) 1. through (a)(1) 6., respectively.

d. In Section 230.11, new paragraphs (a)(1) 2. and (a)(1) 3. are revised.

e. In Section 230.11, new paragraphs (c) 1. and (c) 2. are added.

Supplement I to Part 230 – Official Staff Interpretations

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Section 230.10 Opt-out disclosure requirements for the payment of overdrafts

►1. Disclosure of opt-out right. Section 230.10 sets forth the disclosures that must be provided if a depository institution provides a consumer the right to opt out of the institution's payment of overdrafts. Institutions may be required to provide consumers with the right to opt out in accordance with federal or other applicable law. See, e.g., § 227.31(a) of the Board's Regulation AA (12 CFR part 227).

2. Methods of opting out. Reasonable methods that a consumer may use to opt out of an institution's payment of overdrafts include mailing a form and calling a toll-free telephone number.

3. Additional opt-out notice content. In the opt-out notice provided under § 230.10(a) of this part, an institution may briefly describe the consequences of the consumer's election to opt out of the institution's payment of overdrafts. For example, the institution may state that if a consumer opts out, the consumer's payment may be denied, or returned unpaid, and that the consumer may incur returned item fees from both the institution as well as the payee.◄

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Section 230.11 Additional disclosures regarding the payment of overdrafts

(a) Disclosure of total fees on periodic statements

(a)(1) General

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2. Fees for paying overdrafts. **[**An institution that advertises the payment of overdrafts**]** ►Institutions◄ must disclose on periodic statements a total dollar amount for all fees charged to the account for paying overdrafts. The institution must disclose separate totals for the statement period and for the calendar year to date. The total dollar amount includes per-item fees as well as interest charges, daily or other periodic fees, or fees charged for maintaining an account in overdraft status, whether the overdraft is by check or by other means. It also includes fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. It does not include fees for transferring funds from another account to avoid an overdraft, or fees charged when the institution has previously agreed in writing to pay items that overdraw the account and the service is subject to the Board's Regulation Z, 12 CFR part 226.

3. Fees for returning items unpaid. **[**An institution that advertises the payment of overdrafts must disclose a**]** ►The◄ total dollar amount ►of◄ **[**for all**]** fees ►for returning items unpaid must include all fees◄ charged to the account for dishonoring or returning checks or other items drawn on the account. The institution must disclose separate totals for the statement period and for the calendar year to date. Fees imposed when deposited items are returned are not included.

* * * * *

►(c) Disclosure of account balances

1. Funds available for consumer's immediate use or withdrawal. For purposes of the balance disclosure requirement in § 230.11(c), an institution must generally disclose a balance that solely reflects the funds that are available for the consumer's immediate use or withdrawal, without the consumer incurring an overdraft. The balance disclosed may,

but need not, include funds that are deposited in the consumer's account, such as from a check, that are not yet made available for withdrawal in accordance with the funds availability rules under the Board's Regulation CC (12 CFR part 229). In addition, the balance disclosed may, but need not, include any funds that are held by the institution to satisfy a prior obligation of the consumer (for example, to cover a hold for an ATM or debit card transaction that has been authorized but for which the bank has not settled).

2. Balance inquiry channels. The balance disclosure requirement in § 230.11 applies to any automated system through which the consumer requests a balance, including, but not limited to, a telephone response system, the institution's Internet site or an automated teller machine (ATM) (whether or not the ATM is owned or operated by the institution). If the balance is obtained at an ATM, the disclosure requirement applies whether the balance is disclosed on the ATM screen or on a paper receipt.◄

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By order of the Board of Governors of the Federal Reserve System, May xx, 2008.

Jennifer J. Johnson,
Secretary of the Board.

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