The Credit Card Market and Regulation: In Need of Repair

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THE CREDIT CARD MARKET AND REGULATION: 
IN NEED OF REPAIR

CAROLYN CARTER, ELIZABETH RENUART, MARGOT SAUNDERS, AND 
CHI CHI WU

I. INTRODUCTION

This paper was originally one part of comprehensive comments 
submitted by the National Consumer Law Center (NCLC) to the Federal 
Reserve Board. The comments were submitted on behalf of the low 
income clients of the National Consumer Law Center, a variety of other 
national advocacy groups, and individual members of the Board’s 
Consumer Advisory Council. These national organizations and 

1. This paper was originally one section of comprehensive comments filed by the 
National Consumer Law Center on behalf of its low-income clients, with the Federal 
Reserve Board in response to its Advance Notice of Public Rulemaking, Docket No. R- 
1217, relating a review of the open end credit rules of Regulation Z.

2. All authors are attorneys with the National Consumer Law Center. The National 
Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation, founded in 
1969, specializing in low-income consumer issues, with an emphasis on consumer credit. 
See, National Consumer Law Center, http://www.consumerlaw.org (last visited Jan. 14, 
2006). On a daily basis, NCLC provides legal and technical consulting and assistance on 
consumer law issues to legal services, government, and private attorneys representing low-
income consumers across the country. NCLC publishes a series of sixteen practice treatises 
and annual supplements on consumer credit laws, including Truth In Lending, (5th ed. 
2003) and Cost of Credit (2nd ed. 2000) and Repossessions and Foreclosures (5th ed. 2002) 
as well as bimonthly newsletters on a range of topics related to consumer credit issues and 
low-income consumers. NCLC’s attorneys have written and advocated extensively on all 
aspects of consumer law affecting low income people, conducted training for tens of 
thousands of legal services and private attorneys on the law and litigation strategies to deal 
predatory lending and other consumer law problems, and provided extensive oral and 
written testimony to numerous Congressional committees on these topics. NCLC’s attorneys 
have been closely involved with the enactment of the all federal laws affecting consumer 
credit since the 1970s, and regularly provide comprehensive comments to the federal 
agencies on the regulations under these laws.

3. The Center for Consumer Affairs is part of the School of Continuing Education at 
the University of Wisconsin in Milwaukee. 
The Consumer Federation of America is a non-profit association of 300 organizations that, 
since 1968, has sought to advance the consumer interest through research, advocacy and 
education.
Consumers Union, the nonprofit publisher of Consumer Reports magazine, is an 
an organization created to provide consumers with information, education and counsel about 
goods, services, health, and personal finance and to initiate and cooperate with individual
individuals collectively represent a broad swath of American low- and middle-income consumers.

The Federal Reserve Board's ("the Board") thorough review of the Truth in Lending Act ("TILA") rules applicable to open-end credit is of considerable magnitude, as this federal law essentially comprises the only restraints on the financial services industry in the open-end credit relationship with consumers. This review of TILA highlights the Board's mandate "to protect consumers against inaccurate and unfair credit bill and credit card practices,"\(^4\) to propose meaningful changes to the TILA regulations, and to recommend to Congress significant changes in federal law to protect consumers from the escalating abusive practices of the credit card industry.

The Board must recognize the unique position it occupies at this crossroads for consumer protection. The virtually unregulated credit card industry - responsible for the $730 billion in credit card debt currently owed by American households - must be reined in. The amount of credit card debt juggled by a majority of American households has exploded in the past decade - much of it fueled by business practices that are often deceptive and abusive.\(^6\)

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6. See infra notes 32-91 and accompanying text.
The Board has a variety of choices. One – perhaps the easiest – would be to simply tweak the TILA regulations for open-end credit, essentially maintaining the current uneven playing field between a giant, well financed credit industry and individual consumers. Two – the preferred option – the Board could make serious changes in the regulations as currently permitted by the TILA to provide some balance to the regulatory structure. This would include encouraging Congress to make more significant changes to federal law to protect individual consumers, facilitate the reduction in debt in overburdened households, and increase family savings. Three – the Board could bow to heavy pressures from the consumer credit industry and make an already intolerable situation for American consumers much worse, by reducing open-end protections under TILA.

The Board should seize this opportunity to push the envelope on regulatory changes under TILA’s open-end rules and comprehensively propose disclosure reforms that recognize TILA’s unique control over open-end credit in this nation, especially considering the fact that consumers need the Board to exercise this control in a much more proactive way. Along with these regulatory changes, the Board must also strongly encourage Congress to pass substantive federal legislation that will protect American consumers from the increasingly unfair, abusive, and virtually unavoidable practices of the credit card industry. Given the preemption of state laws applicable to open-end credit provided by most financial institutions and the huge difference in bargaining power between consumers and the credit card industry, even perfect disclosures will not adequately protect consumers.7

This paper first builds a case for significant improvement to all of the rules applicable to open-end credit. Second, the paper outlines the improvements to federal law that the Board should recommend to Congress to provide substantive protections to consumers. Finally, the paper recommends a series of specific and necessary changes to TILA’s regulations to address some of the extensive problems we describe. The paper is divided into four sections. Section II of this paper discusses escalating credit card debt and how this escalating debt is hurting consumers. Section III of the paper discusses the abuses perpetrated by the credit card companies and how these abuses are proliferating.

7. See infra Part IV.
Section IV of the paper states that the system is broken and discusses how improved disclosures will not address the substantive problems. Section V concludes the paper, presenting recommendations for statutory reform.

II. ESCALATING CREDIT CARD DEBT IS HURTING CONSUMERS

The use of open-end credit is pervasive in American society. Credit cards have become an increasingly integral part of our lives. Three-quarters of all households have at least one credit card, and over half of cardholders carry credit card debt from month to month. There are now almost 1.5 billion cards in circulation — over a dozen credit cards for every household in the country. The amount of credit card debt outstanding at the end of 2004 was $781.1 billion, over three times more than existed in 1993.

While the explosion of credit card debt has fueled the U.S. economy, it has also had devastating impacts on millions of American consumers. Americans across all but the lowest income levels have

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12. Patrick McGeehan, The Plastic Trap—Debt That Binds: Soaring Interest Compounds Credit Card Pain for Millions, N.Y. TIMES, Nov. 21, 2004, at 1 ("[R]egulators and lawmakers have been reluctant to crack down on a popular consumer product that fuels America's economic engine. Consumer spending pulled the country through the last economic downturn, powered largely by purchases financed with debt, to the tune of $2 trillion.")
experienced dramatically increased credit card debt over the past ten years:

- "Between 1989 and 2001 credit card debt in America almost tripled from $238 billion to $692 billion. Worse, the savings rate steadily declined and the number of personal bankruptcies filed climbed 125%."\(^{13}\)

- "Credit card debt among older Americans with incomes under $50,000 (seventy percent of seniors) has also increased. About one in five older families with credit card debt is in debt hardship – spending over forty percent of their income on debt payments, including mortgage debt."\(^{14}\)

- The average credit card debt among young adults increased by fifty-five percent between 1992 and 2001 to $4,088 dollars, and these households now spend nearly twenty-four percent of their income on debt payments. In fact, among these young households with incomes below $50,000, "nearly one in five with credit card debt is in debt hardship – spending over forty percent of their income servicing debt (including mortgages and student loans)."\(^{15}\)

- The average credit card-indebted family member between fifty and sixty-four now spends one-third of their income on debt payments, "a ten percentage point increase over the decade."\(^{16}\)

The negative consequences of this escalating mountain of debt on individual consumers as well as the American economy cannot be overstated. Personal bankruptcy rates are increasing on an annual basis,\(^{17}\) and families are becoming destabilized due to the financial pressures.\(^{18}\)

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17. The number of personal bankruptcy filings has increased steadily since TILA was
A. Escalating Debt Loads Are Caused By Industry Practices

A significant amount of the debt load facing American households is caused not so much by consumer borrowing, but by the harsh – and exorbitantly expensive – tactics of the credit card industry. Generally consumers struggle to “do the honorable thing” and meet their obligations and pay their creditors, yet most consumers in debt trouble fail to appreciate that credit card companies will not take steps to facilitate the pay off of these debts. These issuers often act as if they intend to keep consumers on this treadmill of debt, paying fees and charges, for as long as possible. Credit card debt has caught millions of households in a trap they simply cannot extricate themselves from without feeling the pressure to file bankruptcy.

Even still, credit card companies make huge profits even on consumers who file bankruptcy. Consider the following case about a consumer from Cleveland, Ohio, who did play by the rules, but who was driven hopelessly into default by her credit card company.

B. Six-Year Struggle to Repay Debt – A Story of Unending Fees

In May 1997, Ruth Owens stopped using her credit card, made no further purchases or cash advances, and tried to pay off her debt to Discover Bank. At that time, she owed $1,963. Over the next six years, Ms. Owens made $3,492 in payments to Discover Bank. One might assume this was enough to pay off her debt. After all, if Ms. Owens had made the same payments on a $2,000 loan with interest at twenty-one percent annual


19. See infra notes 32-92 and accompanying text.


21. See infra notes 32-92 and accompanying text.

22. See infra Part II.B.

percentage rate (the usury limit in many states), her debt would [have been] paid off.

From May 1997 until her account was sent for collection in May 2003, not one penny of Ms. Owens’ $3,492 in payments went to reduce her debt. During this time, Discover Bank charged Ms. Owens various fees that [consumed] all of her payments and caused her debt to grow even larger. The following fees and interest were charged to Ms. Owens’ account:

<table>
<thead>
<tr>
<th>Fees and Interest</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over-limit Fees</td>
<td>$ 1,518.00</td>
</tr>
<tr>
<td>Late Fees</td>
<td>$ 1,160.00</td>
</tr>
<tr>
<td>Credit Insurance (CreditSafe)</td>
<td>$ 369.62</td>
</tr>
<tr>
<td>Interest and Other Fees</td>
<td>$ 6,008.66</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$ 9,056.28</strong></td>
</tr>
</tbody>
</table>

So, despite having received substantial payments for six years from Ms. Owens (all that she could really afford), Discover Bank claimed that she still owed $5,564 when [it] filed a collection lawsuit against her in an Ohio court.

In other words, [A]fter having paid $3,492 on a $1,963 debt, Ms. Owens’ balance grew to $5,564.

Card companies make huge profits off customers like

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24. Like many card customers, Ms. Owens was being charged for one of the numerous insurance-like products sold by card companies. Often, these products are sold through high-pressure telemarketing sales. In this case, Ms. Owens was charged approximately $10 per month for a Discover card product called CreditSafe Plus, which apparently provided for a suspension of payments and finance charges if Ms. Owens became unemployed, hospitalized, or disabled. Since Ms. Owens was already on Social Security Disability and unemployed, the CreditSafe product presumably would apply only if she became hospitalized. Ms. Owens was no doubt paying for a product that would likely never benefit her. *Id.*
Ms. Owens. Rather than work with these consumers to reduce their debt by curbing the excess fees and interest, card companies prefer to get as much out of consumers for as long as possible until they eventually stop paying or file bankruptcy.

In this case, Ms. Owens would have been far better off if she simply stopped paying Discover Bank years earlier and had them sue her in state court. If Discover Bank had [obtained] a court judgment for $2,000, all of the card fees and high-rate interest would have stopped and Discover would have then been entitled to 10% or less interest per year under Ohio law. Rather than have her debt increase, Ms. Owens' payments would have paid off the debt in full in approximately 4 years.25

When Discover Card finally sued Ms. Owens in state court, she submitted the following handwritten statement to the court:

I would like to inform you that I have no money to make payments. I am on Social Security Disability. After paying my monthly utilities, there is no money left except a little food money and sometimes it isn't enough. If my situation was different I would pay. I just don't have it. I'm sorry.26

The Ohio judge assigned to the collection case rightly found that Ms. Owens was not a deadbeat. He stated that her instincts were always that she wanted to plug away at meeting her financial obligations. While clearly placing her on the moral high road, that same highway unfortunately was her road to financial ruin. How is it that the person who wants to do right ends up so worse

25. Responsible Consumers Driven Into Default, supra note 23.
26. Id.
off? It is plain to the court that the creditor also bears some responsibility.  

In barring Discover Card from collecting any more money from Ms. Owens, the Ohio judge stated: “This court is all too aware of the widespread financial exploitation of the urban poor by overbearing credit-card companies. [Ms. Owens] has clearly been the victim of plaintiff’s unreasonable, unconscionable and unjust business practices.”

C. Credit Card Companies Enjoy Growing Profits

“Credit card earnings have been consistently higher than returns on all [other] commercial bank activities.” According to a Board Report, profitability increases reached 13.7% in 2003 when the credit card banks included in the sample were held constant. When the cost

<table>
<thead>
<tr>
<th>Account 1</th>
<th>Total Payments</th>
<th>Purchases</th>
<th>Balance Increase</th>
<th>Total Interest and Fees in 2 year period</th>
</tr>
</thead>
<tbody>
<tr>
<td>$3,058.00</td>
<td>$218.16</td>
<td>$469.00</td>
<td></td>
<td>$3,308.84</td>
</tr>
<tr>
<td>Account 2</td>
<td>$2008.00</td>
<td>$203.06</td>
<td>$586.76</td>
<td>$2,391.79</td>
</tr>
</tbody>
</table>


27. Discover Bank v. Owens, 822 N.E.2d 869, 873 (Ohio Mun. 2004); see also infra note 31 and accompanying text.

28. Discover Bank, 822 N.E.2d at 875. Another example is the bankruptcy case of Josephine McCarthy from the Eastern District of Virginia (In re McCarthy, No. 04-10493-SSM (Bankr. E.D. Va. filed July 14, 2004)), which also illustrates how consumers are routinely subjected to compounding fees and escalating interest charges, combined with unilateral changes to the terms of credit, and other abusive practices. The exhibits to the decision include two accounts the debtor had with one credit card company.

On one account, the debtor made $3,058 in payments over a two year period during which her balance on the account increased from $4,888 to $5,357. She had made only made only $218.16 (net of store credit) in purchases during this time. All of her payments went to pay finance charges (at a 29.99% interest rate), late charges, over-limit fees, bad check fees, and phone payment fees. On the other card, she made $2,008 in payments over the same period and the account balance increased from $2,020.90 to $2,607.66. This time she made all of $203.06 in purchases.

29. Bd. of Governors of the Federal Reserve System, The Profitability of Credit Card Operations of Depository Institutions (June 2004), available at http://www.federalreserve.gov/boarddocs/rptcongress/creditcard/2004/ccprofit.pdf. While the profitability of the credit card banks as a whole has fluctuated somewhat over these years, this is largely due to the changeability of the group of banks included in the sample.

Id. at 2.

30. Id. at 4.
of funds declines for the banks, the profit margins stay high; when the cost of funds increases, these expenses are passed along to consumers. Even when all other economic indicators are problematic, credit card companies experience increased profits. The problem is not that these companies are making huge profits—the problem is simply that these profits are acquired by employing abusive practices, and through the process American households are being seriously harmed. The root of these problems is that open-end credit in this nation is now completely unregulated—and this must change.

III. ABUSES BY CREDIT CARD COMPANIES ARE PROLIFERATING

Credit card abuses are not limited to one or a handful of practices. Instead, card issuers have devised a myriad of schemes and traps to squeeze consumers, particularly consumers who are carrying heavy debt loads or beginning to exhibit signs of financial distress. Furthermore, it is not just one or a handful of credit card companies that engage in abusive practices, but a great number of the top ten credit card issuers. This pattern of heavy-handed and manipulative conduct by an entire industry shows that credit card issuers have altered their fundamental treatment of consumers from a fair, respectful business relationship to an abusive, exploitative one.

Credit card companies were not always so free to engage in such abusive behavior. Credit card deregulation, and the concomitant spiraling credit card debt of Americans, began in 1978, with the Supreme Court's decision in Marquette National Bank of Minneapolis v. First of Omaha Service Corp. This case gave national banks the green light to take the most favored lender status from their home state across state lines and preempt the law of the borrower's home state.

32. See infra notes 32-85 and accompanying text.
35. It is worth noting that there was no interstate banking when the National Bank Act
As a result, national banks and other depositories established their headquarters in states that eliminated or raised their usury limits, giving them free rein to charge whatever interest rate they wanted.36 Therein lies the reason why so many of those credit card solicitations sent by mail every week come from Delaware or South Dakota: credit card issuers moved there to export those unregulated states’ lack of consumer protections nationwide.37 As of 1978, credit card debt had grown to $50 billion, up from just $5.3 billion when the TILA was passed.38

A. Punitive Junk Fees

A contributor to the snowballing credit card debt of American consumers is the increase in both the number and amount of non-periodic interest fees charged by credit card issuers. These “junk” fees include both fees considered finance charges (cash advance, balance transfer fees, wire transfer fees) and non-finance charges (“other” fees).39 Most important among the latter are late payment and over-limit fees. See Chart 1 showing the increase in fee income from these

36. Other depository institutions obtained the same most favored lender status when Congress enacted § 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (codified at 12 U.S.C. § 1831(d) (2000)).

37. South Dakota and Delaware, at the beginning of the explosive growth of the financial services industry around 1980, sought to attract that industry as part of their economic development strategy. They wanted to “provide [their] citizens with the jobs and benefits a large national credit card operation can provide (attracted by the ability to export limitless credit card rates to other states),” while, it should be noted, protecting their local banks from competition with the exporting banks. Indep. Cmty. Bankers’ Ass’n of S.D. v. Bd. of Governors of Fed. Reserve Sys., 838 F.2d 969, 975 (8th Cir. 1988); cf. Richard Eckman, Recent Usury Law Developments: The Delaware Consumer Credit Bank Act and “Exporting” Interest Under Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 39 BUS. LAW. 1251, 1265 (1984).

It worked, too. South Dakota’s tax revenue from banks went from $3.2 million in 1980 to almost $27.2 million in 1987, with the comparable figures for Delaware rising from $2.4 million to almost $40 million. Small Us Usurious, THE ECONOMIST, July 2, 1988, at 26.


two fees alone. Credit card issuers have made these fees higher in amount, impose them more quickly, and assess them more often.\textsuperscript{40}

![Chart 1: Credit card fees, 1994-2004](chart1.png)


\textsuperscript{40} Id. ("Credit card lenders have rushed to increase junk fees since the fees were deregulated in 1996, jacking up late payment and over-limit fees from an average of $14 to over $30. They have been quick to impose these fees for even transgressions of a single day. They have created traps for unwary consumers with early morning cut-off times for payment.").
From 1978 to 1995, credit card debt increased six-fold to $378 billion. In 1996, the Supreme Court paved the way for credit card banks to increase their income stream even more dramatically. In *Smiley v. Citibank (South Dakota), N.A.*, the court approved of the Office of Comptroller of Currency’s (“OCC”) definition of interest that included a number of credit card charges, such as late payment, over-limit, cash advance, returned check, annual, and membership fees. As a result, national banks and other depositories can charge fees in any amount to their customers as long as their home-state laws permit the fees and so long as the fees are “interest” under the OCC definition. Uncapping the amount of fees that credit card banks can charge nationwide has resulted in the rapid growth of and reliance on fee income by credit card issuers.

After *Smiley*, banks rushed to increase late charges, over-limit fees, and other charges. The average late payment fee has soared from fourteen dollars in 1996 to over thirty-two dollars in 2004. Over-limit fees have similarly jumped from fourteen dollars in 1996 to over thirty dollars in 2004.

Now banks impose these fees, not as a way to curb undesirable behavior from consumers – which used to be the primary justification for imposing high penalties – but as a significant source of revenue for the bank. Since *Smiley*, penalty fee revenue has increased nearly nine-fold from $1.7 billion in 1996 to $14.8 billion in 2004. The income from just three fees – penalty fees, cash advance fees and annual fees – reached $24.4 billion in 2004. Fee income topped $30 billion if balance transfer fees, foreign exchange, and other fees are added to this


46. Id.
Concurrently, card issuer profits, though declining somewhat between 1995 to 1998, have steadily increased between 1999 and 2004. These profits rose from 3.1% in 1999 to 4.5% in 2004. Not only has the size of fee income for credit card issuers grown enormously, the types of fees have mushroomed as well. The Board provides a list of fees to consumers in a brochure titled “Choosing a Credit Card.” The most common fees incurred in credit card transactions include:

<table>
<thead>
<tr>
<th>NAME OF FEE</th>
<th>DESCRIPTION OF FEE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Annual fee</strong> (sometimes billed monthly).</td>
<td>Charged for having the card. Fees range from zero to $130.</td>
</tr>
<tr>
<td><strong>Cash advance fee.</strong></td>
<td>Charged when the card is used to obtain a cash advance; the fee is usually 3% of the advance, with a minimum of $5 and no maximum.</td>
</tr>
<tr>
<td><strong>Balance-transfer fee.</strong></td>
<td>Charged when the consumer transfers a balance from another credit card. Fees range from 2% to 3% of the amount transferred, with a minimum.</td>
</tr>
<tr>
<td><strong>Late-payment fee.</strong></td>
<td>Charged if the consumer’s payment is received after the due date. Fees range from $10 to $49.</td>
</tr>
<tr>
<td><strong>Over-the-credit-limit fee.</strong></td>
<td>Charged if the consumer goes over the credit limit. Fees range from $10 to $39.</td>
</tr>
<tr>
<td><strong>Credit-limit-increase fee.</strong></td>
<td>Charged if the consumer asks for an increase in her/his credit limit.</td>
</tr>
<tr>
<td><strong>Set-up fee.</strong></td>
<td>One-time fee, charged when a new credit card account is opened.</td>
</tr>
<tr>
<td><strong>Return-item fee.</strong></td>
<td>Charged if the consumer pays the bill by check and the check is returned for non-sufficient funds.</td>
</tr>
</tbody>
</table>

47. Id. If merchant-paid fees are combined with consumer-paid fees, the total fee income is estimated at $50.8 billion.


| **Expedited payment fee.** | Charged when the consumer makes a payment over the phone. Fees range from $10 to $14.95. |
| **Expedited delivery fee.** | Charged when the consumer requests an additional credit card and requests that it be delivered in an expedited way. |
| **Replacement card fee.** | Charged when the consumer's credit card is lost, stolen, damaged, or otherwise needs to be replaced. |
| **Additional card fee.** | Charged when the consumer requests a card for a family member or otherwise wishes an additional card. |
| **Other fees.** | Some credit card companies charge a fee to cover the costs of reporting to credit bureaus, reviewing the consumer’s account, or providing other customer services. |

The problem with these punitive charges, especially in combination with the penalty interest rates, is that they exacerbate the problems of consumers who have hit hard times. Too often these charges drive consumers into bankruptcy, resulting in cascading losses to individuals, families and neighborhoods—lost savings, lost homes, and forced moves, with all of the consequential financial and emotional tolls.

In the example of Ruth Owens discussed above, $2,678 of her credit card debt was attributable to late fees and over-limit fees alone. Bankruptcy decisions shed further light on how high finance charges and junk fees, not irresponsible spending, may be the root cause of overwhelming credit card debt. In one proceeding, a bankruptcy court forced Capital One to break out principal versus interest and fees in its claims against thirty-one separate debtors. The bankruptcy court’s order reveals that on average, fifty-seven percent of the debts consisted of interest and fees.⁵⁰

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Some problems with specific fees include:

1. Balance transfer fees. Balance transfer fees can be insidious because they often involve consumers who have been carrying a large balance from month to month. Credit card issuers lure these consumers into transferring large balances by heavily advertising low or 0% APRs, but not disclosing the balance transfer fee as prominently. For example, the MBNA card solicitation at Attachment 1 trumpets a "low 2.9% Fixed APR" for balance transfers using large type, repeating the 2.9% APR several times. It only discloses the balance transfer fee of three percent on the reverse page in eight-point type. Thus, a consumer transferring a balance of $2,000 would be charged a sixty dollar fee. As a result of this balance transfer, this consumer would add more to her debt burden, although MBNA’s advertising would have led her to believe that a balance transfer would save her money.

2. Currency conversion fees. Currency conversion fees constitute a double whammy, in that they are imposed twice in many cases – once by the card issuer and once by the MasterCard or VISA network. These fees were previously hidden by deceptively “padding” the exchange rate, i.e., giving the consumer a worse exchange rate than that obtained by the card issuer.

3. Late payment fees. Issuers have moved even faster to impose late payment fees. Previously, credit card issuers gave consumers a leniency period of a few days before imposing late fees. Now, card issuers will impose late fees if the consumer is even one day over the due date. In fact, some issuers have imposed late fees for payments received on the payment due date but after a certain cut-off time, a practice discussed more fully in the next section on abusive practices.

4. Over-limit fees. Over-limit fees are particularly unfair because the card issuer technologically has the ability to decline over-limit transactions but chooses to permit them and then reap penalty fee income. Card issuers have also been known to lower customers’ credit

51. Credit Card solicitation (on file with the North Carolina Banking Institute Journal).
limits during the middle of the billing cycle, then charge over-limit fees when unsuspecting consumers exceed the new limit at the end of the cycle.\textsuperscript{54}

\textit{B. Other Abusive Practices}

Credit card companies use a variety of means to lure unsuspecting consumers into the trap of financial exploitation created by exorbitant interest and fees. Even cautious consumers, who are attempting to manage their personal finances wisely, too often find themselves caught up in the web of deception and abusive practices.

1. Penalty Rates and Universal Default

A penalty rate is an increase in the initial APR triggered by the occurrence of a specific event, such as the consumer’s making a late payment or exceeding the credit limit. These penalty interest rates can be as high as thirty percent to forty percent.\textsuperscript{55} The new terms apply to the old balance – leaving consumers stuck to pay often high balances at interest rates far higher than was originally agreed, with devastating consequences.\textsuperscript{56}

The existence of penalty rates for minor transgressions alone would be enough to draw criticism by consumer advocates. Raising an APR from the mid-teens to thirty percent or higher, simply on the basis of a single transgression, is itself unjustified and unfair. After all, the card issuer has already collected a one-time charge for that late payment or over-limit transaction, which probably more than covers its costs. Increasing the consumer’s APR is simply a way for the card issuer to reap additional profit by playing gotcha with unsuspecting consumers – if a consumer trips once, the company then imposes sky-high rates.

\textsuperscript{54} See Complaint at 14, State of Minnesota v. Capital One Bank, \textit{available at} \url{http://www.ag.state.mn.us/consumer/PDF/PR/CapitalOneComplaint.pdf}.


\textsuperscript{56} “Penalty interest rates usually are about 30 percent, with some as high as 40 percent, while late fees now often are $39 a month, and over-limit fees, about $35.” According to Robert McKinley, CEO of Cardweb, “[i]f you drag that out for a year, it could be very damaging . . . . Late and over-limit fees alone can easily rack up $900 in fees, and a 30 percent interest rate on a $3,000 balance can add another $1,000, so you could go from $2,000 to $5,000 in just one year if you fail to make payments.” \textit{See id.}
This practice is particularly problematic when it is applied retroactively. There is simply no legal or economic justification for retroactively assessing a penalty interest rate to an existing balance. No other industry in the country is allowed to increase the price of a product once it is purchased. Issuers have already assessed a consumer’s risk of not repaying the loan and presumably offered an interest rate based on that risk. Issuers should be required to allow a consumer to pay off his or her existing balance at that interest rate.

Card issuers have recently added insult to injury with the notion of “universal default,” the latest tactic to squeeze every drop of revenue from struggling consumers.57 With universal default, credit card issuers impose penalty rates on consumers, not for late payments or any behavior with respect to the consumer’s account with that particular issuer, but for late payments to any of the consumer’s other creditors.58 In some cases, issuers will impose penalties simply if the credit score drops below a certain number, whether or not the drop was due to a late payment or another factor.59 A survey of credit card issuers found that forty-four percent of banks surveyed had a universal default policy.60

An analysis of recent credit card solicitations shows that credit card issuers have been disclosing universal default policies in a less than prominent or understandable manner. These solicitations typically state:

All your APRs may increase if you default under any Card Agreement that you have with us because you fail to make a payment to us or any other creditor when due, you exceed your credit line, or you make a payment to us that is not honored.

58. Id.
59. See Patrick McGeehan, Plastic Trap—Debt That Binds: Soaring Interest Compounds Credit Card Pain for Millions, N.Y. TIMES, Nov. 21, 2004, § 1, at 1; Complaint at 14, supra note 54. The New York Times article was the companion piece to the PBS Frontline television episode The Secret History of the Credit Card, (PBS Frontline broadcast Nov. 23, 2004), which focused on among other issues, universal default and change-in-terms.
These disclosures are usually outside the required TILA disclosures highlighted in the Schumer box,\(^6\) sometimes in smaller type, and cross-referenced to the penalty rate as a footnote. While these solicitations mention briefly that a late payment to “any other” creditor will trigger a penalty rate, none of the solicitations disclosed that a mere drop in credit score may be the trigger. This is problematic because a drop in credit score is not always caused by late payments – it could be caused by having an unfavorable balance/limit ratio (sometimes a “utilization” greater than fifty percent, is enough to cause a score decline) on revolving accounts, an excessive number of inquiries, or a number of other factors that have little to do with the consumer’s ability or willingness to repay the credit.\(^2\)

The solution to this problem, however, is not simply better disclosure. It is fundamentally unfair to impose a penalty rate on a consumer who has not made a late payment or defaulted on the obligation, especially when this rate increase is applied retroactively. Another concern with using credit reports to trigger a penalty rate is the enormous problem with inaccuracies in credit scoring and credit reporting. A review of over 500,000 consumer credit files by the Consumer Federation of America and the National Credit Reporting Association found that twenty-nine percent of consumers have credit scores that differ by at least fifty points between credit bureaus, while four percent have scores that differ by at least 100 points.\(^4\) Other studies have found that between fifty to seventy percent of credit reports contain inaccurate information.\(^4\)

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61. The Schumer box is the box that contains the required TILA disclosures like APR, amount financed, etc.
2. Deceptive Marketing

Some card issuers have engaged in questionable marketing practices when soliciting consumers. "Bait and switch" tactics are common. For example, card issuers have marketed "no annual fee" credit cards, then imposed an annual fee six months later using a change-in-terms notice. They heavily advertise low "fixed" rates, but subsequently raise rates through change-in-terms notices and use penalty fees with punitive late payment and over-limit policies to subsequently entrap consumers.

Another deceptive practice is that of "downselling" consumers by prominently marketing one package of credit terms, but then approving consumers only for accounts with less favorable terms, and touting the approved account in a fashion designed to mislead the customer about the fact that the received card is more expensive.

Moreover, any discussion of deceptive marketing is almost secondary given the existence of expansive change-in-terms provisions. Avoiding bait and switch abuse would require that advertising honestly reflect the terms of the credit card contract. If these terms can be changed at will by card issuers with a mere fifteen day notice, no amount of honesty in advertising will help consumers because the advertising will only reflect the terms of the contract at that moment and cannot reflect future changes by issuers.

3. Payment Allocation Order

Many credit card companies heavily advertise low APRs in their solicitations that are only applicable to one category of transactions. They then allocate payments first to the balances with lower APRs. According to cases, the disclosure of payment allocation order has been

very minimal\textsuperscript{68} or nonexistent.\textsuperscript{69} A review of several recent solicitations show some banks disclosing their payment allocation order, but in smaller print and as a footnote to the Schumer box, in contrast to the prominence of the promotion for low APRs.

While better payment allocation order disclosure under TILA – conspicuous enough to counterbalance a prominently promoted low APR – would be helpful, that is not the fundamental issue. The essential practice of allocating a consumer's payment to the lowest-rate balance first is a deceptive and unfair practice. It is an additional indication that credit card banks have shed any sense of fair play and good faith customer treatment in their relationships with consumers. Instead of treating customers with respect and honesty, banks aggressively mine for profit on every aspect of credit card lending. These practices do nothing but prolong the debt of consumers and provide an additional revenue stream for banks.

4. Posting Cut-offs

Card issuers have established cut-off times for posting payments. Some of these hours have been set ridiculously early, established deliberately to result in the imposition of late payment fees. In reported cases, creditors have used times as early 9:00 or 10:00 AM as the cut-off time for crediting payments received that day.\textsuperscript{70} Consequently, if a consumer's payment is received on the payment due date, it will be considered late because in all likelihood, the U.S. Postal Service will not have delivered the mail so early in the morning. Furthermore, when due dates fall on a weekend or holiday, card issuers

\textsuperscript{68} Broder v. MBNA Corp., 281 A.D.2d 369, 370 (N.Y. App. Div. 2001) (promotional material ambiguously disclosed in small print footnote that card issuer "may" allocate payments to promotional balances first).


will consider the payment late if not received on the prior business day. Non-business day due dates are inherently deceptive.

Requiring issuers to post payments as of the date of receipt, regardless of time, is a step in the right direction. It is important, however, to consider this practice in the broader context of a pattern of unfair behavior by card issuers. Creditors should not be allowed to rig the system to trap unwary consumers. Consumers need the protections of a general prohibition against unfair conduct by card issuers, such as the one contained in section 5 of the Federal Trade Commission Act.\(^7\)

The ability of consumers to enforce section 5 would go a long way toward curbing abuses, of which posting cut-offs is but one example.

5. Changes to Credit Limits

Another recent abuse is the sudden changes in credit limits made by card issuers. The Minnesota Attorney General’s Office has documented how Capital One engaged in this practice. In one case, two days after lowering the consumer’s limit and before the consumer had received any notice of the change, Capital One charged this consumer an over-limit fee. To pour salt on the wound, Capital One then imposed a penalty rate.\(^7\)

6. Debt Collection Abuses

Credit card issuers, like many creditors, have been known to engage in plain old-fashioned debt collection misconduct – harassment, deception and abuse.\(^7\) However, there are a few practices that are unique to credit card companies and their collectors.

Most important is the fact that credit card companies, or the debt buyers to whom they sell the debt, often initiate collection cases against consumers without any documentation of a credit card agreement signed by the consumer or even periodic statements to show transaction activity. Instead, they simply offer up an affidavit from an employee in

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their loss recovery department and/or sue on an account stated theory.\textsuperscript{74} This deprives the consumer of the ability to challenge erroneous transactions or demonstrate how much of their debt is due to purchases versus finance charges and junk fees.

Indeed, there is evidence that credit card issuers would be unable to offer up the original agreement or application signed by the cardholder. In one case, a major card issuer admitted in litigation that it does not retain the original account application of cardholder’s beyond five years.\textsuperscript{75} Yet these same issuers may sue the consumer, claiming that the terms of the now-destroyed documents justify charges, fees, and the liability of co-signers.

Another practice peculiar to credit card debt is “zombie debt collection,”\textsuperscript{76} where card issuers buy old credit card debts, then offer the debtors new credit cards to revive the old debt. Oftentimes, the debts are time-barred by the statute of limitations and would constitute stale information on the consumer’s credit report under the Fair Credit Reporting Act.\textsuperscript{77} Of course, the debt-buying card issuers deceptively omit this critical fact or bury it in fine print. In addition, the debt buyer/card issuers fail to clearly provide required disclosures as debt collectors under the Fair Debt Collection Practices Act.\textsuperscript{78}

7. Use of Mandatory Arbitration Clauses

The use of arbitration provisions in credit card agreements has been a tremendous barrier for consumers seeking redress under the TILA. Most of the reported cases have been about consumers who have filed suit as plaintiffs attempting to enforce their rights under the TILA. Consumers who complain about deceptive TILA disclosures, late posting of payments, payment allocation abuses, and failure to follow the Fair Credit Billing Act ("FCBA") procedures have lost their day in

\textsuperscript{75} Johnson v. MBNA, 357 F.3d 426, 432 (4th Cir. 2004).
\textsuperscript{76} The term is taken from Liz Pulliam Weston, MSNMoney.com, Zombie Debt Collectors Dig Up Your Old Mistakes, http://moneycentral.msn.com/content/Savinganddebt/Managedebt/P74812.asp (last visited Jan. 16, 2006).
\textsuperscript{77} Brink v. First Credit Resources, 185 F.R.D. 567, 569 (D. Ariz. 1999).
\textsuperscript{78} Carbajal v. Capital One, F.S.B., No. 03 C 1123, 2003 WL 22595265, at *1 (N.D. Ill. Nov. 10, 2003) (stating there was a validation notice, but that it was obscured).
court due to arbitration provisions (added using change-in-terms notices discussed below).\(^7^9\)

Arbitration provisions also burden the ability of consumers to use the TILA’s substantive protections. Mandatory arbitration renders nugatory the right to dispute erroneous charges because creditors can ignore consumer disputes and the consumer’s only option for relief is an expensive arbitration proceeding (often conducted by arbitration providers that are amazingly biased against consumers).\(^8^0\)

Most shockingly, card issuers are now using arbitration provisions offensively, as a lopsided method to obtain judgments against unsuspecting consumers. Some of these consumers include victims of unauthorized use and identity theft. A report recently issued by the National Consumer Law Center and Trial Lawyers for Public Justice documents how credit card debt buyers use arbitration proceedings to obtain judgments for thousands of dollars against identity theft victims.\(^8^1\)

8. Aggressive Solicitation

Many card issuers now make offers of credit based solely on the credit score. Credit scores measure the propensity to repay and the ratio of revolving credit used, but they do not measure whether the consumer’s income is adequate to repay a new debt or include a debt-to-income ratio that would show if the consumer is already overextended. As a result, card issuers often grant new credit cards to consumers who are already overextended. Federal regulators have issued guidance


\(^8^0\) According to documents produced by the National Arbitration Forum itself, the consumer prevailed in just 87 out of 19,705 arbitrations conducted by NAF for First USA Bank. Thus, the credit card company prevailed a disturbing 99.56% of the time!

urging card issuers to consider repayment capacity when granting new credit, but this guidance is not mandatory or enforceable by injured consumers. Federal law should prohibit card issuers from issuing credit cards without first engaging in real underwriting that considers the consumer’s ability to repay the debt.

9. Tiny Minimum Monthly Payments

Creditors have decreased the minimum monthly payments from four percent to two percent to three percent of the consumer’s balance. With lowered monthly minimum payments, consumers who pay only the minimum will take much longer to pay off the credit card debt and will pay substantially more in finance charges. Worse, the combination of the minimum monthly payments and the penalty interest rates often results in negatively amortizing debt. Even when the consumer is making the payments as requested and not incurring any new charges, the debt keeps climbing. While federal guidelines have existed for some time pushing creditors to increase minimum payments, minimum payment rates generally stayed well under three percent until very recently. In the last few months of 2005, largely in response to the anti-debtor Bankruptcy Reform Act, requiring disclosures relating to the length of time it will take to repay a debt by making minimum payments, most issuers have increased minimum payments slightly.

C. Change-in-terms

The expansive change-in-terms provisions in many credit card agreements are the mechanism that permits card issuers to impose excessive junk fees and engage in abusive practices. Many issuers

83. Sherry, supra note 60.
84. Jane J. Kim, Minimums Due On Credit Cards Are on the Increase, WALL ST. J., Mar. 24, 2005, at D2. Although federal regulators admit concern over this widespread practice, new rules addressing the problem have been delayed. See Day & Mayer, supra note 55.
place extremely expansive change-in-term provisions in their credit card agreements, which allow the issuers to change any of the terms in the agreement at any time. A typical change-in-terms agreement provides:

We may amend or change any part of your Agreement, including the periodic rates and other charges, or add or remove requirements at any time. If we do so, we will give you notice if required by law of such amendment or change. Changes to the annual percentage rate(s) will apply to your account balance from the effective date of the change, whether or not the account balance included items billed to the account before the change date and whether or not you continue to use the account. Changes to fees and other charges will apply to your account from the effective date of the change.  

Some states even permit changes in the terms of a credit agreement without such a clause in the credit agreement.

87. DEL. CODE ANN. tit. 5, § 952(a) (1999) states:
[A] bank may at any time and from time to time amend [an open-end credit plan] in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney’s fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. Unless the agreement governing a revolving credit plan otherwise expressly provides, any amendment may, on and after the date upon which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower’s account under the plan, including any such indebtedness that arose prior to the effective date of the amendment. An agreement governing a revolving credit plan may be amended pursuant to this section regardless of whether the plan is active or inactive or whether additional borrowings are available thereunder. Any amendment that does not increase the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this
Thus, even when a TILA disclosure shows and the terms of a credit agreement provide for a fixed APR, the reality is that the creditor may be able to change the APR in fifteen days with a change-in-terms notice.88

There are two problems with these changes in terms notices. First, these expansive change-in-terms provisions deprive consumers of any “benefit of bargain” and thus undermine the TILA’s purpose in ensuring effective disclosure. They make a mockery of contract law because the terms of the “bargain” are illusory. A savvy consumer can select a credit card after reviewing TILA application and solicitation disclosures, comparing terms, reading articles about picking a credit card— in other words, be the smart consumer shopper that the TILA envisioned— then be faced with a change-in-terms notice that totally changes the APR and other terms of the credit card. One court has described change-in-terms provisions as “an Orwellian nightmare, trapped in agreements that can be amended unilaterally in ways they never envisioned.”89

Second, the vast majority of consumers probably neither fully read nor comprehend change-in-terms notices. While not involving credit cards, the case of Ting v. AT&T, is instructive.90 In that case,
AT&T mailed a consumer services agreement to its customers that, among other provisions, added a mandatory arbitration clause. Before mailing this agreement, AT&T conducted extensive market research designed to predict how consumers would react to the mailing. AT&T then designed its mailing to ensure that consumers were less likely to read and understand the details of the agreement.

Furthermore, AT&T’s research found that very few customers actually would read the agreement, especially if it was sent in a separate mailing. For a mailing separate from a monthly statement, AT&T’s research found that only twenty-five percent of customers were likely to open the envelope. If the customer did open the envelope, AT&T’s research found that only thirty percent of consumers would read the entire agreement.91

The separate mailings for credit card change-in-terms notices are not any more likely to be opened by consumers. When opened, or when they are “bill stuffers,” they are no more likely to be read. The market research data uncovered in Ting suggests that the vast majority of consumers do not read change-in-terms disclosures.

Furthermore, even when consumers do open and read change-in-terms notices, the notices are full of dense, impenetrable legal jargon that even lawyers and seasoned consumer advocates have difficulty understanding. For example, a sample change-in-terms notice states:

Your Daily Periodic Rate and corresponding APR may increase or decrease from time to time according to the movements up or down of the Index, which is the highest Prime Rate published in the “Money Rates” section of the Midwest Edition of The Wall Street Journal in the last 90 days, before the date on which the billing cycle closed (in other words, the “statement date”). Any variable rate adjustment based on an Index change will be effective as of the first day of the billing cycle, and will apply to the new and outstanding

91. An article by Bill Burt at Bankrate.com reports similar data, i.e. a survey by Auriemma Consulting Group finding that only one-third of consumers who received change-in-terms notices were aware of the changed terms. Bill Burt, Ignoring Credit Changes Can Cost You, BANKRATE.COM (Jan. 30, 2004) http://www.bankrate.com/brm/news/cc/20040129a1.asp.
Account balances and transactions subject to that variable rate.

Using the Flesch Reading Ease score built into Microsoft Word, this text rates at a mere 29.7 out of 100. Generally, the higher score the better, and standard documents score around sixty to seventy, and require a twelfth grade reading level to understand. In addition, this particular change-in-terms agreement was written in 4.5-point type, in a bill stuffer consisting of sixteen folded panels.

The fifteen-day notice period is entirely inadequate for a change-in-terms notice, and is also so full of exceptions that it is nearly meaningless. The issue, however, is not whether consumers need more time for a change-in-terms notice, but that changes in terms should not be permitted at all in credit card contracts. Thus, the Board should seek legislation banning changes in terms altogether for credit card agreements.

Furthermore, the Board has the authority under the TILA to prohibit changes in terms for at least the term of the credit card agreement. As discussed earlier, changes in terms undermine the TILA disclosure requirements. The change-in-terms provisions of Regulation Z exacerbate the problem because they legitimize the practice of changing terms. In other words, Regulation Z embraces the notion that “if you disclose it, it’s okay.” Rather than merely increase the time for change-of-terms notices, the Board should amend Regulation Z to provide that for open-end credit other than home equity plans, the creditor may not change the terms during the term of the credit card: As such, § 226.9(c)(1) and (2) be replaced with a single paragraph reading:

(1) Any term required to be disclosed under section 226.6 must remain in effect until the renewal disclosures required by subsection (e). However, the creditor may change a term if the consumer agrees to the specific change by signing or initialing a revised agreement or if

92. See also Alan M. White & Cathy Lesser Mansfield, Literacy and Contract, 13 STAN. L. & POL’Y REV. 233, 237-38 (2002) (according to National Adult Literacy Survey, only 3-4% of the American adult population has the documentary literacy skills necessary to utilize a table comparing the features of two credit cards, so as to identify two differences between the cards).
the consumer agreed at the time the credit card was issued that a specific change would occur on a specific date or upon the occurrence of a specific event not within the control of the creditor. If the creditor changes a term as permitted by this paragraph, it shall mail or deliver written notice of the change to each consumer who may be affected, at least 15 days prior to the effective date of the change. Creditors may not evade the requirements of this paragraph by issuing credit cards with terms shorter than twelve months.

This proposal is consistent with the Third Circuit’s decision in Rossman v. Fleet Bank (R.I.) N.A. that the Truth in Lending Act requires open-end credit disclosures to be true and that a disclosure that there is “no annual fee” must remain true for at least a year.

IV. THE SYSTEM IS BROKEN AND IMPROVED DISCLOSURES WILL NOT ADDRESS THE PROBLEMS

Because of the deregulation of bank credit, virtually no state regulation on creditor conduct applies to the practices of the credit card industry. While there are some – very few – limits placed on the most outrageous abuses of consumers by banks by the federal banking regulators, the TILA is the primary regulatory structure applicable to the relationship between credit card issuers and their customers. The TILA was intended to be – and remains – primarily a disclosure statute. Through its enactment and enforcement, Congress intended to enable consumers to fairly compare the costs of credit. However, the TILA was never intended to stand on its own – to be the sole and primary means of regulating and limiting a powerful industry vis-à-vis the individual consumers who borrow money for personal, family or

94. For example, when the state of California tried to address the issue of tiny minimum payments by requiring creditors to provide information to each consumer on how long it would take to pay off a sample credit card balance if only the minimum payment was paid each month, a federal district held the statute was preempted by federal banking statutes. American Bankers Assn. v. Lockyer, 239 F. Supp.2d 1000 (E.D. Cal 2002).
95. See supra Section III.B (regarding the handful of enforcement actions taken by bank regulators against subprime credit card lenders).
household purposes. Indeed, when the TILA passed in 1968, state usury and fee caps applied to credit card transactions.

Uniform and accurate disclosures are useful for consumers, but they cannot substitute for real regulation. The best proof of this is the unbalanced and dangerous situation that the American consumers find themselves in with the open-end credit industry today.

Disclosures are only useful for consumers when all of the following conditions exist –

- The consumer has the opportunity to read the disclosures fully;
- The disclosures are unambiguous and understandable;
- The disclosures are true and apply to the entire term of the contract;
- The consumer has the knowledge and sophistication to understand the meaning of the information provided in the disclosures;
- The consumer has the opportunity to make choices based on the information gained through the disclosures.

None of these conditions exist today with regard to open-end credit. More importantly, even if the Board were to make every recommended improvement to the TILA disclosures, the most critical of these conditions would not exist – the consumer would not have the opportunity to make choices to avoid the onerous and abusive terms of open-end credit. This is because most large issuers of open-end credit engage in a reverse competition to provide the most exploitative terms of credit that will maximize profits, regardless of the effect on the consumer, the community, or the nation’s household debt or rate of savings.

Disclosures alone are not sufficient to protect consumers from over-reaching creditors. This is because –

- Consumers lack equal access to information – most consumers will not have the knowledge to understand the legal consequences of the terms of credit.
- Consumers lack equal bargaining power – no consumer has the market power to call up a credit card company and
negotiate either the basic terms or those in the adhesion contract.

- The credit card market does not provide real choices. With the increasing consolidation of credit card providers, the industry guarantees less meaningful competition. There is generally competition only on the surface, on a few prominently-advertised terms such as the periodic rate and annual fee. Consumers have little or no meaningful choices on the terms that create the bulk of the cost of open-end credit.

- Without some basic substantive regulation, there will continue to be competition between industry players only as to which can garner the most profit from the most consumers—regardless of the fairness, or the effects on consumers.

As the majority of the questions posed in the Advanced Notice of Proposed Rulemaking by the Board ("ANPR") relate to disclosures, and ways to improve the disclosures required under the current TILA statute, these comments provide extensive answers to these questions. There is no doubt that the disclosures relating to open-end credit can be dramatically improved—and that the Board should accept these suggestions. However, the primary message to the Board in these comments is that disclosures are not sufficient. The Board should recommend to Congress that it impose substantive regulation of open-end credit terms and charges.

For the past two decades substantive credit regulation has been steadily whittled away, with no discernable benefits for consumers. The twin justifications for this diminution in credit regulation have been that too much regulation limits access to credit, and that consumers can adequately protect themselves so long as they are armed with full information about the costs of the credit. The pendulum has swung too far—there is no lack of available credit; indeed, for many families there is far too much credit available.

The current financial condition of many American households and the escalating credit card debt is an indication that disclosures, standing alone, do not adequately protect consumers. Even dramatic improvements to the current disclosure regime required by the TILA
will not equalize the differences between consumers and industry – consumers will still lack equal access to information regarding meaning and consequences and they will still lack sufficient bargaining power to protect themselves from onerous charges and terms.

V. RECOMMENDATIONS FOR STATUTORY REFORM

It is time for the re-regulation of open-end credit. Real, substantive limits on the terms of credit, and the cost of the credit, including the interest rate and all fees and charges, must be re-imposed. Substantive regulation along the following lines should ensure—

- A cap on all periodic interest rates, for example, prime plus 10%.
- A cap on all other charges, whether considered a finance charge or not, to an amount the card issuer can show is reasonably related to cost.
- No unilateral change-in-terms allowed.
- No retroactive interest rate increases allowed.
- No penalties allowed for behavior not directly linked to the specific card account at issue.
- No over limit fees allowed if issuer permits credit limit to be exceeded.
- No improvident extensions of credit – require real underwriting of the consumer’s ability to pay.
- No mandatory arbitration, either for consumers’ claims or for collection actions against consumers.
- Meaningful penalties for violating any substantive or disclosure rules that provide real incentives to obey the rules.
- A private right of action to enforce section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive practices by businesses, including banks.

It is no longer a question of balancing the appropriate regulation with the need to assure access to credit. The increasing mountain of debt

97. We also advocate the re-regulation of closed end credit. However, as that issue is not addressed in the Board’s ANPR, we will leave that discussion for another day.
held by American consumers, coupled with the growing number of abusive practices practiced by the credit card companies, illustrate amply that de-regulation has not worked. Since biblical times, the government has recognized that consumers need strong, enforceable limits placed on the power of lenders to exert their far greater bargaining power in the marketplace. The age-old protection of borrowers from over-reaching lenders must be reinstated.