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Third Circuit's Decision in Roberts v. Fleet Bank: Thinking outside of the Schummer Box or Consumerism Gone Berserk

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Third Circuit’s Decision in Roberts v. Fleet Bank: 
Thinking Outside of the “Schumer Box” or “Consumerism Gone Berserk”?

Since the mid-1980’s, banks have become dependent on non-interest income, such as credit card and banking-related fees.\(^1\) In fact, nearly half of the operating income of many commercial banks is derived from non-interest income.\(^2\) Consequently, credit card issuers fiercely compete to win a greater market share by aggressive marketing techniques.\(^3\) “Pre-approved” credit card solicitations offering “low introductory” interest rates\(^4\) or no annual fees are commonplace in America’s mailboxes.\(^5\) Consumer activists refer to these offers as “bait and switch” or “shark in the mailbox” tactics that are designed to trick the unwary consumer.\(^6\)

Credit card marketing efforts have intensified over the past decade.\(^7\) In 1990, 1.1 billion credit card solicitations assailed

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2. Williams, supra note 1.

3. Id.

4. “Introductory interest rate,” or “teaser rate,” is a credit card interest rate that increases to a higher interest rate after a period specified in the cardholder agreement. See In re Advanta Corp. Securities Litigation, 180 F.3d 525, 528 (3d Cir. 1999).


6. See Jeff Gelles, Consumer Watch Beware credit cards’ rate ‘promises’, PHILA. INQUIRER, Aug. 31, 2003, at E11. An example is a Philadelphia school teacher who accepted a zero percent balance transfer offer which “morphed into a 22.9 percent loan” once she became delinquent in paying minimum payments on her $12,000 credit card balance. Id.

homes in the United States.\(^8\) By 2001, credit card solicitation volume hit an all time high of 5.01 billion, or thirty-nine solicitations per home.\(^9\) Although the sluggish U.S. economy reduced solicitation volume to 4.86 billion in 2002, the credit card industry successfully generated 28 million card applications by direct mail offers (0.58\% response rate).\(^10\) Though response rates have declined slightly,\(^11\) consumer debt and charge-off rates have steadily risen since 1998.\(^12\) In order to wage these massive marketing campaigns, which are necessary to compete in today's credit card market, banks must use agents, such as telemarketing service companies, to market their credit card products and services.\(^13\) Moreover, banks collaborate with third party vendors, such as credit protection insurance companies, and offer assorted products to bank customers.\(^14\) Overall, aggressive marketing efforts by credit card issuers have increased consumer debt-service burden\(^15\) in the past ten years.\(^16\) Thus, bank credit card businesses

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11. Id.

12. See Consumer Credit, Federal Reserve Statistical Release (Sept. 8, 2003), available at http://www.federalreserve.gov/releases/G19/20030908/ (last visited Feb. 7, 2004). Consumer debt from revolving lines of credit, or credit cards, was $562.5 billion in 1998. See id. By 2002, this figure increased to $712.0 billion. Id. Second quarter of 2003 reflects $726.6 billion. Id. As the average credit card interest rate has decreased from 15.56\% in 1998 to 12.82\% in the second quarter of 2002, more consumers are transferring balances to "refinance" their credit card debt. Id.


14. Guidance on Unfair or Deceptive Acts or Practices, supra note 5.

have become profitable business ventures as revolving credit card balances grow.\textsuperscript{17}

These marketing strategies increase the likelihood that a bank or its agent may engage in unfair or deceptive acts or practices, which increase customer dissatisfaction and harm to corporate image.\textsuperscript{18} These aggressive marketing efforts have resulted in civil penalties and government enforcement actions.\textsuperscript{19} One such issue was addressed by the United States Court of Appeals for the Third Circuit in \textit{Rossman v. Fleet Bank}\textsuperscript{20} and \textit{Roberts v. Fleet Bank}\textsuperscript{21} when it decided whether credit card issuers may take advantage of a change-in-terms provision\textsuperscript{22} of the cardholder agreement. Until these Third Circuit decisions, the federal courts did not consider solicitation material in the “meaningful disclosure” analysis of a violation of the Truth in Lending Act\textsuperscript{23} (“TILA”) disclosure requirements.\textsuperscript{24} In fact, prior

\begin{itemize}
\item the ratio of debt payments to disposable personal income. Debt payments consist of the estimated required payments on outstanding mortgage and consumer debt.” \textit{Id.}
\item \textit{Id.} From 1993 to 2003, household debt service payments have increased from 6.09 percent to 7.63 percent of disposable personal income. \textit{Id.}
\item \textit{Id.} at 2; see Williams, \textit{supra} note 1.
\item Williams & Bylsma, \textit{supra} note 9.
\item Rossman v. Fleet Bank, 280 F.3d 384 (3d Cir. 2002) (holding that (1) Truth in Lending Act (TILA) requirement that credit card issuers disclose annual, periodic, and membership fees imposed for issuance or availability of credit card did not require issuer to disclose any fees which could ever be imposed; (2) further clarifications were required for issuer to comply with its TILA disclosure requirements to the extent that terms of cardholder agreement permitted issuer to dispense with its no-annual-fee promise mid-year; and (3) bait-and-switch allegations supported claim that issuer’s required disclosures were misleading in violation of TILA).
\item Roberts v. Fleet Bank, 342 F.3d 260 (3d Cir. 2003) (holding that (1) an issue of fact existed as to whether issuer's solicitation materials were so misleading as to violate TILA and its Regulation Z; (2) solicitation materials other than those covered by TILA can be considered in determining whether credit card issuer has met TILA's clear-and-conspicuous disclosure requirements; (3) the fact that an issuer in Cardholder Agreement reserved right to change terms of agreement could not cure alleged TILA defects in solicitation; (4) cardholder had no cause of action under Rhode Island unfair trade practices statute; and (5) an issuer did not breach cardholder agreement).
\item The change of terms provision provides that the bank or lending institution can change any term, condition, service or feature of the account. \textit{See, e.g.}, 12 C.F.R. § 229.6 (2003).
\item \textit{See infra} note 251 and accompanying text.
\end{itemize}
to these recent Third Circuit decisions, many federal and state courts tempered the possibly expansive definition that the term "meaningful disclosure" would be afforded in finding a bank in violation of the TILA. The Third Circuit's expansion of this term will have severe consequences on how banks will draft solicitation materials and disclose key financial data on the TILA form.

This Note will examine the Roberts v. Fleet Bank decision and the possible impact it may have on credit card TILA disclosure statements. Part I will explain the history and purpose of relevant federal statutes affecting credit card disclosure statements. Part II will briefly discuss the background of Roberts v. Fleet Bank. Part III will assert that the Third Circuit was in error for applying one of its prior decisions, Rossman v. Fleet Bank, to reach its holding in Roberts and for employing a flawed interpretation of the TILA and Regulation Z to reach its conclusions. Part IV will present suggestions for improved TILA credit card disclosures after the Roberts decision.

I. RELEVANT STATUTES AFFECTING CREDIT CARD DISCLOSURE STATEMENTS

The Truth in Lending Act is a cornerstone of consumer credit legislation. The TILA allows the consumer to view the actual costs of credit before making a contractual obligation to incur debt.

\[\text{I. RELEVANT STATUTES AFFECTING CREDIT CARD DISCLOSURE STATEMENTS}\]

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\[25. \text{See infra note 251 and accompanying text.}\]
\[26. \text{See infra notes 31-121 and accompanying text. Specifically, it will address the Truth in Lending Act ("TILA"), Fair Credit and Charge Card Disclosure Act of 1988 ("FCCCDA"), the Federal Reserve Board's Regulation Z, and Federal Trade Commission Act ("FTC Act").}\]
\[27. \text{See infra notes 122-158 and accompanying text.}\]
\[28. \text{Rossman, 280 F.3d at 384.}\]
\[29. \text{See infra notes 159-264.}\]
\[30. \text{See infra notes 265-284.}\]
\[32. \text{Richard J. Link, Jr., What Constitutes Violation of Requirements of § 106(b), (c) of the Truth in Lending Act (TILA) (15 U.S.C.S. § 1605(b),(c)) Concerning Inclusion of Premiums for Life, Accident, or Health Insurance, or for Property Damage or Liability Insurance, in Determination of Finance Charge, 116 A.L.R. FED. 635 (1993).}\]
In 1968, after years of legislative haggling and research, President Lyndon B. Johnson signed TILA into law. Enactment of the TILA marked the birth of modern-day, consumer legislative activism. The TILA drastically eliminated understated interest rates used by unethical lenders to trap consumers. The TILA’s purpose was to “assur[e] meaningful disclosure of credit terms . . . and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” TILA outlined civil liability for any creditor who failed to comply with credit disclosure requirements outlined in the act. Rather than passing laws that imposed limits on credit charges, Congress delegated to the states the authority to set credit terms. Congress did require lenders to disclose these terms in a uniform manner. One remedy was to require a uniform definition of what kinds of credit-related charges should be included when calculating the Annual Percentage Rate (“APR”), called the actuarial rate applicable to the credit extension. By adopting the actuarial rate as the uniform method of interest rate calculation and disclosure, Congress believed that “shopping” for loans would become an easier process to the lay consumer, thus avoiding the uninformed use of credit.

33. ELIZABETH RENUART AND KATHLEEN E. KEEST, NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING 36 (1999) [hereinafter RENUART & KEEST].
34. John Roddy, Reversing Field: Is There A Trend Toward Abrogating Truth in Lending?, 772 PLI/COMM. 637, 639 (1998) (stating that TILA was an effort to “level the playing field” between consumers and “large corporations”).
35. Id. at 33-34. Example: Comparing the cost of $6000 automobile loan. Id. The dealer with 6% add-on rate = 11.08% APR, the dealer with 6% discount rate = 13.38% APR, and the Credit Union/Bank with 10% actuarial rate = 10.00% APR. Id. Clearly, the actuarial rate discloses most accurately the cost of the loan to the consumer and is the rate calculation method adopted by TILA. See id.
37. Id. at §§ 1635, 1640.
38. SPONG, supra note 31, at 204.
39. Id.
40. Federal Reserve, Shop: The Credit Card You Pick Could Save You Money (Apr. 17, 2003), available at http://www.federalreserve.gov/pubs/shop/. An APR (abbreviation for Annual Percentage Rate) is a measure of the cost of credit expressed as a yearly rate. Id. Many credit card plans charge different APRs for credit used in different ways - for example, one APR for purchases, another for cash advances, and still another for balance transfers. Id. Some plans may increase the APR if a payment is late. Id.
41. RENUART & KEEST, supra note 33, at 33-34.
When designing the TILA, Congress realized that the management of consumer credit is a day-to-day task. As a result, Congress delegated broad authority to the Federal Reserve Board ("FRB") to implement TILA provisions. Although the purpose of the statute is well intentioned, the TILA is a complex, technical body of law and handling these statutory issues involves a number of sources of law. The sources of law include the TILA, the FRB’s Regulation Z (which implements the Act), the Official Staff Commentary on Regulation Z, and case law interpreting TILA and its regulations.

Regulation Z promotes the informed use of consumer credit by requiring disclosures about its terms and cost. The regulation controls certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes. Occasionally, Regulation Z leaves TILA questions unanswered.

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44. See 15 U.S.C. § 1604 (2000). “The Board shall publish model disclosure forms and clauses for common transactions to facilitate compliance with the disclosure requirements of this subchapter and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures.” Id. See Mourning v. Family Publications Service, Inc., 411 U.S. 356, 365-66, 93 S.Ct. 1652, 1659 (1973) (holding that Congress — in delegating broad authority to Federal Reserve Board to promulgate regulations necessary to render this subchapter effective — gave the Federal Reserve Board the power to define such classifications as are reasonably necessary to ensure that objectives of this subchapter are fulfilled).
45. Canaday v. Household Retail Svs., Inc., 119 F.Supp.2d 1258, 1266 (M.D. Ala. 2000). “When dealing with a complex statute like TILA, it is best for the court to trust the administering agency to develop appropriate implementing guidelines, rather than twist the language of the statute beyond its plain meaning.” Id. See RENUART & KEEST, supra note 33, at 42.

A narrowing of assignee liability is consistent with the overarching reasons put forth by Congress for amending the TILA in 1980. Explaining the purpose behind the amendments, the Senate Committee on Banking, Housing and Urban Affairs noted that ‘many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation.’ S. REP. NO. 96-73, reprinted in 1980 U.S.C.C.A.N. 236, 281.

Ramadan v. Chase Manhattan Corporation, 229 F.3d 194 (3d Cir. 2000).
46. RENUART & KEEST, supra note 33, at 42.
47. 12 C.F.R. § 266.1 (2003).
48. Id.
49. RENUART & KEEST, supra note 34, at 44.
Today, Regulation Z implementation and clarification come from three sources: (1) Regulation Z itself; (2) Official Board Interpretations of Regulation Z; (3) FRB Official Staff Commentary. The Board of Governors of the Federal Reserve issues the most authoritative interpretation of Regulation Z; these interpretations carry the same legal value as the regulation itself. After an amendment to the TILA in 1976, FRB Official Staff Commentaries, written in response to creditor inquiries, provide civil liability protection to creditors who followed the FRB's commentaries. The FRB Official Staff Commentary follows

50. Id.
51. See Aronson v. Peoples Natural Gas Co., 180 F.3d 558, 562 (quoting Ford Motor Credit Co. v Milhollin, 444 U.S. 555, 559-60). “Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA . . . . Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law.” Id. See infra note 54 and accompanying text.
54. “The Official Staff Commentary is binding and conclusive unless ‘demonstrably irrational,’ and therefore is ‘unwaveringly follow[ed] by the courts.’” Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). See also U.S. v. Mead Corporation, 533 U.S. 218, 226-38 (2001) (holding that “[w]hen Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute”).

TILA and Regulation Z make no explicit mention of civil liability arising in the TILA from “misleading” solicitation materials. See infra notes 236-39. Congress never explicitly intended to include civil liability for misleading solicitation materials. Id. In fact, Congress did not expressly intend for the TILA to do any more than force financial institutions to clearly disclose credit financial terms in a uniform tabular format on credit applications. See 15 U.S.C. § 1632(a), (c) (2000) (emphasis added); 12 C.F.R. § 226.5a(a)(2) (2003). Congress expressly delegated authority to FRB to promulgate regulations to implement TILA. 15 U.S.C. § 1604(a) (2000). The Roberts court left much to be desired regarding the agency deference analysis because the court cites regulations pertaining to the tabular disclosure requirements, not solicitation materials, in concluding that the “clear and conspicuous” standard is applicable to solicitation materials. See Roberts, 342 F.3d at 265-66; see infra notes 238-39. The FRB requires that a credit card issuer “shall make the disclosures required by this subpart clearly and conspicuously in writing.” 12 C.F.R. § 226.5(a)(1) (2003). Thus, the FRB requires that the APR and certain fees be disclosed “clearly and conspicuously” in a table, the Schumer Box. Roberts, 342 F.3d at 266. If the court had deferred to the FRB’s interpretation of only applying the “clear and conspicuous” standard to the TILA disclosure tables and initial disclosure statement,
each clause of Regulation Z and clarifies the intent of the regulation by giving examples of its application.\textsuperscript{55}

In 1988, due to changes in consumer credit products and creditor marketing practices, the TILA was amended by the Fair Credit and Charge Card Disclosure Act ("FCCCDA").\textsuperscript{56} The purpose of the amendment was to provide for more specific and uniform disclosure by credit and charge card issuers with regard to information relating to interest rates and other fees.\textsuperscript{57} In the 1980's credit card interest rates skyrocketed along with interest rates in all other consumer loan products.\textsuperscript{58} By the late 1980's interest rates had fallen, yet credit card interest rates remained at an all-time high.\textsuperscript{59} Since consumers were not adequately informed of the credit card product's interest rate and membership fee terms and conditions, banks were making wide margins on revolving credit card balances.\textsuperscript{60} In response, Congress amended the TILA to require that cost disclosures be made earlier, at the time of application and solicitation.\textsuperscript{61}

As a result, the TILA mandates that credit card applications and solicitations sent through the mail disclose "[a]ny annual fee, other periodic fee, or membership fee imposed for the issuance or availability of a credit card."\textsuperscript{62} Further, the TILA requires that this information be disclosed clearly and conspicuously in a tabular format, known as the "Schumer Box."\textsuperscript{63}
Consistent with TILA, Regulation Z also instructs the creditor to make the credit card financial disclosures clearly and conspicuously in writing. Regulation Z requires that all credit card applications or solicitations include an initial disclosure statement, or IDS. The IDS discloses certain financial data required under TILA and Regulation Z, such as the computation method for finance charges and cardholder billing rights.

Regulation Z requires credit card issuers to disclose in credit card solicitations or applications "any annual or other periodic fee, expressed as an annualized amount, or any other fee that may be imposed for the issuance or availability of a credit or charge card . . . ." The regulation also directs the credit card issuer to provide the APR, fee, grace period, and finance charge information in a prominent location on or with an application or a solicitation, and in the form of a table with headings (i.e. the

64. 12 C.F.R. § 226.5a(b)(1)-(7) (2003).
66. 12 C.F.R. § 226.5(b)(1) (2003). "(1) Initial disclosures. The creditor shall furnish the initial disclosure statement required by § 226.6 before the first transaction is made under the plan." Id.
68. 12 C.F.R. § 226.5a(b)(2) (2003).
Schumer Box). Also, credit card issuers must disclose this information either before or at the time the annual fee is posted to existing accounts.

TILA and Regulation Z also make a distinction between closed-end and open-end consumer credit. Revolving lines of credit which impose finance charges on an outstanding balance are considered open-end credit. Financial institutions offering open-end credit plans are required to disclose the essential financial terms of the plan before the consumer's first transaction occurs. A statement which itemizes activity and discloses the finance charges and the billing cycle APR must be regularly received by consumers with open-end credit accounts. Closed-end credit is defined by exclusion: it is any consumer credit that does not meet the definition of open-end credit. Closed-ended loans must disclose 18 "material" credit terms. Six of these items — including the amount financed, payment schedule, total of payments, finance charge, APR, and collateral requirements — carry civil liability exposure if omitted or misstated.

The Federal Trade Commission Act of 1914 ("FTC Act") was enacted in 1914 to prohibit "unfair methods of competition in commerce." This Act, however, exempted banks and specific

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69. 12 C.F.R. § 226.5a(b)(1)-(7) (2003). See also 12 C.F.R. § 226.5a(a)(2)(i) (2003). "The disclosures in paragraphs (b)(1) through (7) of this section shall be provided in a prominent location on or with an application or a solicitation, or other applicable document, and in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in Appendix G." Id. See generally 12 C.F.R. § 226.5(a)(3) (2003) (detailing that disclosures in credit and charge card applications and solicitations must be provided in a tabular or prominent location); Feddis, supra note 61, at 14.

70. Feddis, supra note 61, at 14.

71. See SPONG, supra note 31, at 205.

72. Id. "Typical examples of open-end credit are credit cards, overdraft protection plans, and home equity lines of credit." Id.

73. Id. at 206.

74. Id. at 207.

75. Id. at 205. "[H]ome purchase loans, home improvement loans, car loans, and demand loans are examples of closed-end credit." Id.

76. Id. at 208.

77. Id.


79. Williams & Bylsma, supra note 9, at 1245 (quoting Id. at 719).
businesses from the Federal Trade Commission's ("FTC") authority. In 1938, the FTC Act was amended to police "unfair or deceptive acts or practices in commerce," but, again, banks were exempted. The Federal Trade Commission Improvement Act of 1975 ("FTC Improvement Act") amended the FTC Act to require banking agencies to track unfair or deceptive acts or practices by financial institutions under their supervision and issue regulations accordingly. Furthermore, it gave the FRB the authority to decide which FTC regulations prohibiting certain unfair or deceptive acts or practices would be enforced against banking institutions. The federal bank regulatory agencies did not know whether any enforcement action could be brought against a member bank engaging in unfair or deceptive practices unless the FRB issued regulations specifying that those practices were unlawful. Thus, whether banks could only violate the FTC Act without violating a FRB regulation remained an open question.

The Office of the Comptroller of Currency ("OCC"), part of the U.S. Treasury Department, answered that question in 2000

80. Williams & Bylsma, supra note 9, at 1245.
81. Id.
83. Id.
84. Williams & Bylsma, supra note 9, at 1247; see NCB Nat'l Bank of North Carolina v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987) (holding that borrowers' action against lender under state Unfair Trade Practices Act was properly dismissed, in that Board of Governors of Federal Reserve System had "authority to promulgate and enforce regulations to define and prevent unfair or deceptive acts or practices by banks").
85. The national charter banking agencies are the Office of the Comptroller of Currency (OCC), the Federal Reserve Board (FRB), and the Federal Deposit Insurance Corporation (FDIC). The OCC is the primary regulator of national banks pursuant to authority granted by the National Bank Act.
86. Williams & Bylsma, supra note 9, at 1245.
87. Id. at 1247.
by finding another means of enforcing the FTC Act through the Federal Deposit Insurance Act ("FDI Act").\textsuperscript{88} If a nationally chartered bank engages in a practice that is unfair or deceptive under the FTC Act, but that is not defined as such in an FRB regulation, the bank may be found to have violated a law.\textsuperscript{89} Consequently, the OCC may use its enforcement power under Section 8 of the FDI Act to address the violation.\textsuperscript{90} In March 2002, FRB Chairman Alan Greenspan\textsuperscript{91} and Representative John J. LaFalce\textsuperscript{92} of the House Committee on Financial Services endorsed the OCC's position, stating that the "FTC Act's general prohibition against unfair or deceptive acts or practices applies to banks as a matter of law;" therefore, federal banking agencies could enforce section 5 of the FTC Act against its member banks.\textsuperscript{93} The Federal Deposit Insurance Corporation ("FDIC"), regulator of state non-member banks, followed suit.\textsuperscript{94} After seventy-six years, banks were finally included within the ambit of the FTC

\textsuperscript{88} Williams & Bylsma, supra note 9, at 1247-48; see also Federal Deposit Insurance Act, 12 U.S.C. § 1818 (2000) [hereinafter FDI Act].

\textsuperscript{89} See Williams & Bylsma, supra note 9, at 1247-48.

\textsuperscript{90} If... the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation... the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof.


\textsuperscript{91} Williams & Bylsma, supra note 9, at 1247-48. See FDI Act, 12 U.S.C. § 1818(b)(1); see also Minnesota ex rel. Hatch v. Fleet Mortgage Corp., 181 F.Supp.2d 995, 1002 (D. Minn. 2001) (holding that "[i]t is not convincing that the FTC Act of 1914 excluded national banks from FTC jurisdiction, because that broad bank exclusion operates with respect to banks, not subsidiaries of banks").


Although a violation of the FTC Act is available to banking regulators to bring an enforcement action against a bank, no private cause of action is available under the FTC Act. Neither the TILA nor the FTC Act provide for private causes of action for unfair and deceptive trade practices or advertising.

Every state, in one form or another, has passed laws that prohibit unfair and deceptive business practices. Every business, including some banks, must be aware of the risk posed by state unfair and deceptive business practice laws, such as substantial liability based on seemingly harmless promotional, advertising, and invoicing practices. Many of these laws are modeled after the FTC Act, which places broad discretion in the hands of the FTC to flush out and enjoin improper trade practices.

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95. See Minnesota ex rel. Hatch, 181 F.Supp.2d at 1001-02; Roberts v. Fleet Bank, 342 F.3d at 269. Two federal courts have made decisions recognizing the OCC’s authority to enforce section 5 of the FTC Act. Id.

96. FTC Act § 45(b). See Mid America Title Co. v. Chicago Title Ins. Co., No. 88 C 5864, 1989 WL 39780, at 2 (N.D. Ill. 1989) (stating that “FTC Act § 45(b) authorizes only the FTC to proceed against FTC Act violators—the courts have uniformly held no private cause of action is allowed”); Dreisbach v. Murphy, 658 F.2d 720, 730 (9th Cir. 1981) (stating that “The [FTC] Act rests initial remedial power solely in the Federal Trade Commission”). See also JONATHAN SHELDON & CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 231 (2001).

97. Jeff Sovern, Private Action Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model, 52 OHIO ST. L.J. 437, 444 at n. 21 (1991) (explaining that not only can consumers not sue under the FTC Act, but also consumers have no recourse when the Commission declines to bring a case); Steven W. Bender, Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead, 73 OR. L. REV. 639, 657 (1994) (stating that “the Federal Truth in Lending Act imposes technical loan disclosure requirements but neither prohibits nor remedies deceptive practices”). See RENUART & KEEST, supra note 33, at 33.


99. Id. at 365-67. Including injunctive relief, restitution (such as disgorgement of profits), actual damages, treble damages, court costs and attorney fees, punitive damages, other statutory penalties, and, in California, class-wide relief possible even absent class certification. Id.

100. Id. at 363.

Little FTC Acts place the same discretion in the hands of private citizens acting as private attorneys general.\textsuperscript{102} Many local governments, plaintiff's attorneys, and local prosecutors are aggressive in asserting state UDAP claims due to the lucrative damage and restitution awards,\textsuperscript{103} thus giving a strong incentive to sue.\textsuperscript{104} Consumers and public officials may seek monetary remedies, and civil penalties.\textsuperscript{105} At least forty-seven of the fifty states expressly authorize private suits under these acts, although Arkansas, Nevada, and North Dakota appear to be exceptions to this rule.\textsuperscript{106} Approximately twenty states expressly contemplate consumer class actions under these statutes.\textsuperscript{107} Thus, UDAP statutes provide a flexible, practical remedy for almost any abusive business practice aimed at consumers.

The Roberts court carefully considered whether the Rhode Island Unfair Trade Practices and Consumer Protection Act ("UTPCPA")\textsuperscript{108} could provide a private remedy for Roberts.\textsuperscript{109} Although the UTPCPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful,"\textsuperscript{110} the Third Circuit concluded that Rhode Island's UTPCPA was preempted by federal law.\textsuperscript{111} The UTPCPA states that "[n]othing in this chapter shall apply to actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this state or the United States."\textsuperscript{112} Combined with its statutory authority to bring enforcement actions against banks for violations of law, rule, or regulation,\textsuperscript{113} the OCC has the statutory power to regulate false and misleading advertising under Section 5 of the

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\item \textsuperscript{102} Richard R. Patch, \textit{supra} note 98, at 351-52.
\item \textsuperscript{103} \textit{Id.}, at 351, 363.
\item \textsuperscript{104} \textit{Id.}, at 363.
\item \textsuperscript{105} \textit{Id.}, at 352, 367.
\item \textsuperscript{106} \textit{Id.}, at 363.
\item \textsuperscript{107} Richard R. Patch, \textit{supra} note 98, at 363.
\item \textsuperscript{109} \textit{Roberts v. Fleet Bank}, 342 F.3d 260, 269-70 (3d Cir. 2003).
\item \textsuperscript{110} R.I. GEN. LAWS § 6-13.1-2 (2001).
\item \textsuperscript{111} \textit{Roberts}, 342 F.3d at 269-70.
\item \textsuperscript{112} R.I. GEN. LAWS § 6-13.1-4 (2001).
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\end{footnotesize}
FTC Act,\textsuperscript{114} thus placing Fleet Bank, a federally regulated and nationally chartered bank, within the state statute's "monitor[ed] by state or federal regulatory bodies or officers" exception.\textsuperscript{115} Finally, the Third Circuit held that Roberts had no right of action against Fleet Bank under Rhode Island UTPCPA to recover for allegedly misleading consumers concerning the credit card's interest rate.\textsuperscript{116}

While Rhode Island state law failed to find a private cause of action for Roberts, the court found a violation by Fleet Bank within the overall legislative goal of TILA.\textsuperscript{117} The Third Circuit's decision in Roberts will allow judges to include credit card solicitation materials in conjunction with the Schumer Box and IDS to flush out a TILA violation.\textsuperscript{118} Under the FTC Act, a consumer victimized by an unfair and deceptive trade practice would file a complaint to the Federal Trade Commission, or the proper bank regulatory agency, and await government enforcement action against the FTC Act violator.\textsuperscript{119} Now, Roberts will allow class action suits to be filed based upon conflicting language between the solicitation and the TILA disclosure materials.\textsuperscript{120} Thus, the line is blurring between the TILA and the FTC Act.\textsuperscript{121}

\begin{itemize}
  \item \textsuperscript{114} Roberts, 342 F.3d at 270.
  \item \textsuperscript{115} Id. at 269-70; see also R.I. Gen. Laws § 6-13.1-4, available at http://www.rilin.state.ri.us/Statutes/TITLE6/6-13.1/INDEX.HTM. See also State v. Piedmont Funding Corp., 119 R.I. 695, 382 A.2d 819, 822 (1978) (holding that based on the plain meaning of § 6-13.1-4, the Legislature clearly exempted from the Act all those activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers).
  \item \textsuperscript{116} Roberts, 342 F.3d at 270.
  \item \textsuperscript{117} See id. at 267.
  \item \textsuperscript{118} Id. at 267-69; see MaryClaire Dale, Credit-Card Lawsuit Reinstated, PROVIDENCE JOURNAL, Aug. 30, 2003, at B01 [hereinafter MaryClaire Dale].
  \item \textsuperscript{120} Roberts, 342 F.3d at 267-69.
  \item \textsuperscript{121} Williams & Bylsma, supra note 9, at 1257 n.84.
\end{itemize}
II. FACTUAL AND PROCEDURAL BACKGROUND: ROBERTS V. FLEET BANK

In May 1999, Denise Roberts received a packet of solicitation materials for a new Fleet Bank Titanium MasterCard. The packet included an “introductory flyer,” a solicitation letter, a Pre-Qualified Invitation, and an Initial Disclosure Statement (“IDS”), which is required under Regulation Z, 12 C.F.R. § 226.5a(b). The introductory flyer and IDS stated that the credit card would charge a Fixed Annual Percentage Rate of 7.99% on purchases and balance transfers. In addition to the flyer, the solicitation letter and invitation form again restated that the Annual Percentage Rate would be 7.99% Fixed.

In compliance with TILA, the invitation form listed the “TERMS OF PRE-QUALIFIED OFFER” and the “CONSUMER INFORMATION” sections. The first two sentences of the “TERMS OF PRE-QUALIFIED OFFER” stated:

I request a Fleet Titanium MasterCard account upon acceptance of my request by Fleet Bank (RI), National Association in Rhode Island. I agree to the terms of the Cardholder Agreement mailed with my Card, including those which provide that the Cardholder Agreement and may [sic] account will be governed by Rhode Island and Federal law and that my Agreement terms (including rates) are subject to change.

122. Roberts, 342 F.3d at 262-63.
123. Id. at 263.
124. Id. at 263.
125. Id.
127. Roberts, 342 F.3d at 263.
128. Id. (emphasis added).
The "CONSUMER INFORMATION" section, located on the back of the application, contained the Schumer Box. The Schumer Box is the table of basic credit card information required under the TILA, as amended by the FCCDA. The Schumer Box displayed a column with the heading "Annual Percentage Rate (APR) for Purchases and Balance Transfers." The box immediately underneath the heading disclaimed that "7.99% APR" was the applicable rate. Inside the Schumer Box, Fleet listed two circumstances under which that rate could be increased: "(1) if the prospective cardholder failed to meet any repayment requirements; or (2) upon closure of the account." Fleet Bank did not list any other circumstances in the Schumer Box in which it could increase the APR.

In June 1999, Roberts received her Fleet Titanium MasterCard and the accompanying Cardholder Agreement. After her application had been received and approved by the bank, Roberts signed a credit card agreement that contained an express provision giving Fleet Bank the right to change the interest rate. "Section 10 of the Agreement, titled 'Annual Percentage Rate,' indicated that the APR would be 7.99%." Again, in Section 10, Fleet Bank repeated that it reserved the right to

129. Joseph W. Gelb & Peter N. Cubita, Credit Card Application and Solicitation Disclosure Legislation: An Alternative to the Rate Ceiling Approach, 43 BUS. LAW. 1557, 1561 (1988). The "Schumer Box" is the tabular disclosure of certain credit terms that must be made in credit card applications and solicitations pursuant to the Fair Credit and Charge Card Disclosure Act of 1988. Brief of Appellee, infra note 182, at 122 n.11. The tabular chart required under the TILA has become popularly referred to as the "Schumer Box" in honor of the principal sponsor of the House bill, Congressman, now Senator, Charles Schumer. Roberts, 342 F.3d at 263.
130. Roberts, 342 F.3d at 263.
131. Id. at 263.
132. Id.
133. Id.
134. Roberts, 342 F.3d at 264.
135. Id.
136. Roberts v. Fleet Bank, No. CIV. A. 00-6142, 2001 WL 892846, at *1 (E.D.Pa., Jun. 5, 2001) (holding that the credit card agreement which Roberts signed, after her application had been received and approved, also contained an express provision giving the defendant the right to change the interest rate; therefore, defendant did not violate the disclosure requirements of the TILA, or any other provision of that statute).
137. Roberts, 342 F.3d at 264.
change the rate under the two specific circumstances. However, in Section 24 of the Cardholder Agreement, entitled “Change in Terms,” Fleet stated:

We have the right to change any of the terms of this Agreement at any time. You will be given notice of a change as required by applicable law. Any change in terms governs your Account as of the effective date, and will, as permitted by law and at our option, apply both to transactions made on or after such date and to any outstanding Account balance.

Fleet later sent a letter to Roberts notifying her that Fleet would be increasing the fixed-rate APR. In July 2000, over a year after Roberts had received her card, Fleet increased the “fixed rate” APR to 10.5%.

On December 5, 2000, Roberts filed a class action suit claiming violations of the TILA and the Rhode Island Unfair Trade Practices and Consumer Protection Act. On June 5, 2001, the district court dismissed her claims under the TILA. The court reasoned that Roberts received adequate notice that the bank reserved the right to change the terms of the original agreement. On November 20, 2001, the district court dismissed her state law claims for violation of the Rhode Island Unfair Trade Practices and Consumer Protection Act and breach of contract. The court decided that Roberts could not pursue a claim for violation of the Rhode Island Unfair Trade Practices and Consumer Protection Act (UTPCPA) because that state statute did not apply to transactions that are otherwise subject to

138. Id.
139. Id. (italics added).
140. Id.
141. Id.
142. Id. (italics added).
143. Id. at *2.
144. Id. at *1.
regulation by a "regulatory body or officer acting under statutory authority of [Rhode Island] or the United States." 146 Fleet Bank, a nationally chartered bank regulated by the Office of the Comptroller of the Currency (OCC), fell within that exemption and was not subject to the UTPCPA statute. 147 Soon after, Roberts appealed. 148

The Third Circuit Court of Appeals, in an August 2003 opinion, overturned the district court’s decision, thus allowing Denise Roberts to pursue a class-action lawsuit against Fleet Credit Card Services. 149 The Third Circuit concluded that the TILA permitted a judge to consider solicitation content outside of the Schumer Box to determine if the credit issuer disclosed the required information "clearly and conspicuously." 150 In reaching

146. Id. (quoting R.I. GEN. LAWS § 6-13.1-4).
147. Id.
149. See MaryClaire Dale, supra note 118.
150. Roberts, 342 F.3d at 268. "When Congress decided to require credit card issuers to disclose required terms in a clear and conspicuous manner, we doubt that it intended for us to ignore other statements made by those issuers in their credit card solicitation materials." Id. "Clear and Conspicuous standard" means that the disclosures must be "in a reasonably understandable form and readily noticeable to the consumer." Official Staff Commentary to Regulation Z, 12 C.F.R Pt. 226, Supp. I, cmt. 5a(a)(2) (2003).

An interesting commentary on the "reasonable consumer" and "clear and conspicuous" standards was made by Circuit Judge Easterbrook of the United States Seventh Circuit Court of Appeals in 1999:

[i]t[i]he legal standard under the Truth in Lending Act is the objective "reasonable person" approach, see Cash Store Management, 195 F.3d at 327-28. More to the point, § 226.17(a)(2) has nothing to do with borrowers' comprehension. What is "more conspicuous than any other disclosure" depends on the contents of the form, not on how it affects any particular reader. See Herrera v. First Northern Savings & Loan Ass'n, 805 F.2d 896, 900 (10th Cir.1986), and Dixey v. Idaho First National Bank, 677 F.2d 749 (9th Cir.1982), both of which treat compliance with § 226.17(a)(2) as a legal rather than factual matter . . . .

[T]he premise of the statute and regulations is that one size fits all; a form complies or it doesn’t, and the fact that some or even many of the recipients are abnormal in their perception of "conspicuousness" does not affect the form’s validity. Thus the inquiry must be objective, which makes the question legal rather than factual.

If we were to treat the determination of conspicuousness as a matter of “fact,” then the regulation would fail in its purpose. No matter what a lender did, a borrower could say that to his eyes the combination of color, typeface, spacing, size, style, underlining,
its decision, the Third Circuit relied heavily on its earlier decision in *Rossman v. Fleet Bank*, where the court began reading required TILA disclosure forms in conjunction with solicitation materials to root out a TILA violation by a lender.\textsuperscript{151} The *Roberts* court compared the two cases and concluded that a material question of fact existed whether Fleet Bank accurately disclosed the Annual Percentage Rate, thus precluding summary judgment.\textsuperscript{152}

The Third Circuit agreed with Roberts that the introductory letter in the solicitation packet could confuse a "reasonable consumer."\textsuperscript{153} The court held that: (1) an issue of fact existed as to whether the issuer's solicitation materials were so misleading as to violate the TILA and its regulations; (2) the solicitation materials other than those covered by the TILA could be considered in determining whether the credit card issuer met the TILA's clear-and-conspicuous disclosure requirements; and (3) the fact that the issuer reserved in the Cardholder Agreement and IDS the right to change the terms of agreement did not cure the alleged TILA defects in the solicitation.\textsuperscript{154}

Since the credit card solicitation from Fleet disclosed only two conditions upon which Fleet could increase the APR,\textsuperscript{155} the

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capitalization, border, and placement made one feature of the agreement stand out relative to the mandatory disclosures, or emphasized one disclosure over another . . . . The Federal Reserve has included many sample forms in its regulations, but if the effect of typeface and type placement is open to fact-finding, then even the model forms are not safe.

Smith v. Check-N-Go of Illinois, Inc., 200 F.3d 511, 514-515 (7th Cir. 1999) (holding that a single circle placed around the due date by the lender — the piece of information most vital to the consumer once the loan has been made, for failure to repay on time can lead to penalties — does not turn a model form into a violation of TILA) (italics added).

\textsuperscript{151} Roberts, 342 F.3d at 266-68.

\textsuperscript{152} Id. at 269.

\textsuperscript{153} Id. at 268. See Bustamante v. First Fed. Sav. & Loan Ass'n, 619 F.2d 360, 364 (5th Cir.1980) (applying "reasonable consumer" standard includes protection for the "unsophisticated or uneducated consumer"); see generally *Rossman*, 280 F3d at 394 (stating that "reasonably understandable" does not require that they be understandable by the *average consumer*; instead, disclosures must be reasonably understandable "in light of the inherent difficulty or complexity of the information disclosed"). (emphasis added).

\textsuperscript{154} See *Roberts*, 342 F.2d at 266-69.

\textsuperscript{155} MaryClaire Dale, *supra* note 118, at B01. "The application included a ‘Schumer Box’ the table of basic information required under the federal Truth in
Third Circuit's concern was whether Fleet might have misled potential consumers by indicating that the rate could only change in the instances it specified in the solicitation materials. After reading the solicitation materials together as a whole, the court believed a question of fact existed as to whether Fleet made any misleading statements in the solicitation by failing to disclose information "clearly and conspicuously" pursuant to TILA's requirements. The Third Circuit reversed the ruling of the district court on the TILA claim and affirmed the district court's grant of summary judgment to Fleet on the state law claims.

III. ANALYSIS OF ROBERTS DECISION: THE THIRD CIRCUIT GIVES BIRTH TO A NEW PRIVATE CAUSE OF ACTION UNDER THE TILA

A. The Third Circuit Court's Misapplication of Rossman v. Fleet Bank

In late 1999, plaintiff Paula Rossman received a Pre-Qualified Invitation in the mail soliciting her to apply for a credit card from Fleet Bank. The solicitation advertised a "Fleet Platinum MasterCard" with a low APR and "no annual fee." If the recipient was interested in applying he or she checked a box that indicated, "YES! I want the top card for genuine value and superior savings, the no-annual-fee Platinum MasterCard." An asterisk directed the recipient of the credit card solicitation to a note below that said, "See the TERMS OF PRE-QUALIFIED Lending Act that listed only two reasons the rate could change: if the consumer failed to meet repayment rules or closed the account." Id.

156. Roberts, 342 F.3d at 268.
157. Id. at 269. "[W]e agree with Roberts that the claims in the introductory letter that the 'fixed 7.99% APR' is 'NOT an introductory offer' and ‘won't go up in just a few short months' could cause a reasonable consumer to be confused about the temporal quality of the offer." Id. at 268.
158. Id. at 271. Roberts also alleged violation of the Rhode Island Unfair Trade Practices and Consumer Protection Act, breach of contract and unjust enrichment. Id. at 269-71.
159. Rossman, 280 F.3d at 387.
160. Id.
161. Id.
OFFER and CONSUMER INFORMATION for detailed rate and other information." 162

The enclosure entitled "Consumer Information" contained the Schumer Box, the table of important credit card financial information which is required by TILA after it was amended by the FCCCD Act of 1988. 163 The Schumer Box contained a column with the heading "Annual Fee," just below it a box contained only the word "None." 164 Outside the Schumer box in the "Consumer Information" enclosure, Fleet Bank listed other applicable fees. 165 The "Consumer Information" enclosure also disclaimed, "We [Fleet] reserve the right to change the benefit features associated with your Card at any time." 166

Rossman responded to Fleet's offer, and received her "no-annual-fee Platinum MasterCard" in December 1999 or January 2000. 167 Along with the card, Fleet sent Rossman a "Cardholder Agreement." 168 Paragraph 15 of the Agreement stated that: "No annual membership fee will be charged to your Account." 169

The Cardholder Agreement, in paragraph 24, again disclosed the change-in-terms provision, which said "[w]e have the right to change any of the terms of this Agreement at any time." 170 In May 2000, Rossman received a second letter giving her notice that on the "next anniversary date of your account opening," the account would be charged an annual membership fee. 171 At this point, Rossman was unable to walk away from her credit arrangement since she was carrying a balance on the credit card. 172

162. Id.
163. Rossman, 280 F.3d at 387.
164. Id.
165. Id.
166. Id.
167. Rossman, 280 F.3d at 388.
168. Id.
169. See Rossman, No. CIV. A. 00-CV-3879, at *1, 2000 WL 33119419 (E.D.Pa., Dec. 29, 2000) (holding that Rossman did not allege that Fleet engaged in conduct expressly prohibited by any of the substantive sections of the TILA, motion granted to dismiss to Fleet Bank).
170. Id. (italics added).
171. Id. at *2.
On June 20, 2000, in a third letter, Fleet announced a modification of its first change letter saying the annual membership fee would be assessed in the next billing cycle (July 2000). By July 6, 2000, in accordance with the second letter, a $35.00 fee was charged to Rossman's account.

Rossman commenced a putative class action on July 31, 2000, alleging that Fleet violated the TILA by offering a credit card at no annual fee and failing to disclose the fee imposed shortly thereafter. Rossman claimed that the concealment of the annual fee was part of a "bait and switch" operation in which, argued Rossman, Fleet induced customers to open Fleet accounts "with the bait of a no annual fee credit card," and then switched the terms of the Cardholder Agreement after a consumer opened an account. The district court dismissed Rossman's TILA count for failure to state a valid TILA claim.

The Third Circuit, finding that a TILA claim was stated, reversed the district court's dismissal. The Third Circuit held that "no annual fee" is reasonably understood to imply a term of one year because the initial offer was for a card with "no annual fee." The offer, the court said, did not clearly and conspicuously reflect that the bank's reserved right to charge an annual fee to Rossman after the one-year term.

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174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at *3.

The Truth in Lending Act does not provide a cause of action when a lender engages in 'bait and switch' techniques. It does require that the lender make certain disclosures with respect to the offered terms. Fleet's disclosures in late 1999 were accurate with respect to the terms offered at that time; the fact that Fleet allegedly intended to change those terms in the near future did not render the disclosures inaccurate for purposes of the TILA... Plaintiff has not alleged that Fleet engaged in conduct expressly prohibited by any of the substantive sections of the TILA. Accordingly, the Court will grant Fleet's "Motion to Dismiss Truth In Lending Act Claim."

*Id.* (additional emphasis added) (citations omitted).
178. *Rossman*, 280 F.3d at 400.
179. Steven P. Bann, *supra* note 172, at 60.
180. *Id.*
Although there are some factual similarities between the two cases, the Third Circuit’s recent use of Rossman in reaching its holding in Roberts is ineffective and unconvincing for two reasons. First, the Third Circuit stated in Rossman that the offer of a “no-annual-fee” credit card is “fairly understood to contain an implied term of a year.” Moreover, the Rossman court concluded that the “no annual fee” statement, which reflected “None,” in the Schumer Box was “not a clear and conspicuous disclosure of a set of contract terms that permit the imposition of an annual fee within a year.” In Roberts, however, the TILA disclosures stated that there was a “7.99% Annual Percentage Rate,” but did not imply that the APR would remain unchanged for any period. Indeed, the “TERMS OF PRE-QUALIFIED OFFER” referred to the Cardholder Agreement, subsequently mailed with the card, disclosed that all terms, including rates, were subject to change. Furthermore, the Annual Percentage Rate was changed thirteen months after the card was issued, thus satisfying the “implied term of a year” reasoning asserted in Rossman. The disclosure of a “7.99% APR” in the Schumer Box was not misleading with respect to the duration of the offer.

181. Roberts, 342 F.3d at 267.

Fleet argued to the Court that a clear and conspicuous statement of its authority to change the annual fee at any time was unnecessary because the change-in-terms provision of the agreement is not among the terms that must be disclosed in tabular format under the TILA. In rejecting this argument, the Court stated that the issue was “not Fleet’s obligation to disclose the change-in-terms provision, but its obligation to disclose annual fees.”

Similarly, in this case, the issue is not Fleet’s obligation to disclose the change-in-terms provision, but its obligation to disclose the APR.

Id. (citations omitted).

182. Rossman, 280 F.3d at 394. See Burt M. Rublin, Brief for Appellee in Roberts v. Fleet Bank 91, 102 (PLI Corp. Law & Practice Course, Handbook Series No. 01-4420), WL 1361 PLI/Corp 91 [hereinafter Brief of Appellee].

183. Rossman, 280 F.3d at 394 (stating that a reasonable consumer would be entitled to assume upon reading Fleet’s solicitation that the issuer was committed to refraining from imposing an annual fee for at least one year. The statement “no annual fee” implies a term of one year without an annual fee).

184. Roberts, 342 F.3d at 263.

185. Id.

186. Rossman, 280 F.3d at 394
since none of the TILA disclosures made an express or implied representation regarding the duration of that offer.\textsuperscript{187} Thus, the nature of the violation found in \textit{Rossman} is distinguishable from the violation found in \textit{Roberts}.\textsuperscript{188}

Second, the \textit{Rossman} Court based its TILA ruling on the Rossman's "bait and switch" allegations.\textsuperscript{189} The court stated that "even if the language of the disclosures did not imply that Fleet was obligated for at least a year" to refrain from charging an annual fee, then "the disclosures were misleading with respect to Fleet's alleged intentions" at the time of the solicitation to impose an annual fee shortly after Rossman had opened her account.\textsuperscript{190} Fleet allegedly "solicited her business with the no-annual-fee offer while intending to change the terms shortly thereafter."\textsuperscript{191} By contrast, Roberts did not allege a "bait and switch" by Fleet.\textsuperscript{192} Based on the "bait and switch" allegations asserted in \textit{Rossman}, the Third Circuit stated:

\begin{quote}
A reasonable consumer would expect that, even if the terms may change, the stated terms are those that the card issuer intends to provide. The disclosures – we assume for these purposes – feigned an intention to provide credit under a set of terms that Fleet did not intend to provide over time. Thus, even if the language of the disclosures did not imply that Fleet was obligated for at least a year, the disclosures were misleading with respect to Fleet's alleged intentions.\textsuperscript{193}
\end{quote}

The Third Circuit should have recognized that the \textit{Rossman} decision was distinguishable from \textit{Roberts}. First, Roberts did not make a "bait and switch" allegation against Fleet and, second, the

\begin{itemize}
\item \textsuperscript{187} Brief of Appellee, \textit{supra} note 182, at 126.
\item \textsuperscript{188} \textit{Id.}, at 126-27.
\item \textsuperscript{189} \textit{Id.}, at 97.
\item \textsuperscript{190} \textit{Rossman}, 280 F.3d at 396; \textit{see} Brief of Appellee, \textit{supra} note 182, at 103.
\item \textsuperscript{191} \textit{Rossman}, 280 F.3d at 396.
\item \textsuperscript{192} \textit{See} Brief of Appellee, \textit{supra} note 182, at 97.
\item \textsuperscript{193} \textit{Rossman}, 280 F.3d at 397.
\end{itemize}
factual circumstances leading up to the alleged TILA violations were dissimilar.\textsuperscript{194}

In fact, the \textit{Rossman} decision lends support to Fleet Bank's argument in \textit{Roberts}. For example, Fleet's solicitation disclosure of a 7.99\% APR accurately "reflect[ed] the terms of the legal obligation between the parties."\textsuperscript{195} The solicitation Roberts received precisely "reflect[ed] the credit terms to which the parties [were] legally bound at the time of giving the disclosures"\textsuperscript{196} in May 1999. Changing the terms of the Agreement thirteen months after Roberts received the Cardholder Agreement does not affect the accuracy of the previously made terms.\textsuperscript{197} Furthermore, \textit{Rossman} stated that the TILA disclosures do not need to anticipate future changes in the terms of the lending agreement.\textsuperscript{198} "[T]wo unique circumstances" which were the basis for the Third Circuit's conclusion in \textit{Rossman} are "absent in \textit{Roberts}"\textsuperscript{199}

\begin{itemize}
\item \textsuperscript{194} See Brief of Appellee, \textit{supra} note 182, at 152. "As plaintiff acknowledged in her brief in opposition to Fleet's motion to dismiss, 'Plaintiff, however, is not alleging bait and switch' and 'Plaintiff's TILA claim is not premised on Defendants' intent to change the APR later.'" \textit{Id.}
\item \textsuperscript{195} \textit{Rossman}, 280 F.3d at 390.
\item \textsuperscript{196} \textit{Id.} at 391.
\item \textsuperscript{197} \textit{Id.} at 392. In fact, the Third Circuit in \textit{Rossman} recognized that "a future change in terms need not be anticipated in disclosures." \textit{Id.} at 393.
\item \textsuperscript{198} \textit{Id.} at 393. State and federal courts have regularly enforced change-in-terms provisions for open-end credit. Grasso v. First USA Bank, 713 A.2d 304, 305 (Del. Super. 1998) (holding that credit card issuer did not act unlawfully by offering a low fixed APR of 11.9\% that it later increased to 16.9\% pursuant to a change in terms clause); Bank One v. Coates, 125 F.Supp.2d 819, 831 (S.D. Miss. 2001) (holding that the cardholder agreement stated simply, unambiguously and without limitation, that Bank One could change or amend the terms of the Agreement); see also Marsh v. First USA Bank, N.A., 103 F.Supp.2d 909, 921 (N.D. Tex. 2000) (holding that arbitration agreement added by way of amendment to credit card agreement was enforceable); Herrington v. Union Planters Bank N.A., 113 F.Supp.2d 1026, 1031 (S.D. Miss. 2000) (holding that arbitration agreement added to account agreement via amendment is enforceable); \textit{cf.} Goetsch v. Shell Oil Co., 197 F.R.D. 574 (W.D.N.C. 2000) (holding that authorized amendments to credit card agreement which first added and then modified an arbitration agreement were enforceable). \textit{But see} DeMando v. Morris, 206 F.3d 1300, 1303-04 (9th Cir. 2000) (holding that lowering then, 2 years later, raising interest rate for existing cardholder a violation of Regulation Z when the change-in-terms notice contained terms that were in violation of the credit agreement); Hubbard v. Fidelity Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996) (credit lender liable under TILA for subsequent disclosures, or change-in-terms notice, that failed accurately to reflect the legal obligation of the parties).
\item \textsuperscript{199} Brief of Appellee, \textit{supra} note 182, at 111.
\end{itemize}
Therefore, the Roberts court's holding did not conform to the rationale and analysis in the Rossman decision.200

B. The Court's Misinterpretation of the TILA and Regulation Z

The Third Circuit's decision in Roberts raises several issues, the most important of which is whether the holding is consistent with the provisions outlined in the TILA and Regulation Z. The TILA and Regulation Z mandate clear and conspicuous disclosure of the annual percentage rate and other applicable fees in a table (the Schumer Box) and the IDS.201 The Third Circuit agreed with Roberts that a material issue was raised as to whether the Schumer Box "failed to clearly and conspicuously" notify a reasonable consumer that "the 7.99% APR was subject to change at any time."202 The Schumer Box included in the solicitation Roberts received in the mail disclosed only two conditions under which Fleet could raise her APR.203 The solicitation, however, did not disclose the change-in-terms provision in the Schumer Box, but did disclose the location of the change-in-terms provision in the IDS.204 Based on this omission in the Schumer Box, the court believed that a "reasonable consumer could read this list as exhaustive and conclude that the 7.99% APR could be raised only under those two described circumstances."205 Citing Rossman, the Third Circuit declared that the TILA was designed to assure meaningful disclosures and "[t]he accuracy demanded excludes not only literal falsities, but also misleading statements."206

200. Brief of Appellee, supra note 182, at 111.
201. See Roberts, 342 F.3d at 265-66. The tabular chart required under the TILA has become popularly referred to as the "Schumer Box" in honor of the principal sponsor of the House bill, Congressman, now Senator, Charles Schumer. Id. at 263 n.1.
202. Id. at 266.
203. Id. at 263. "[The] solicitation materials stated only two conditions under which Fleet could raise Roberts' APR: (1) failure of the cardholder to meet any repayment requirement; or (2) upon closure of the account. Roberts argues that, because a reasonable consumer could read this list as exhaustive." Id. at 266.
204. Id. at 264. infra notes 221-25 and accompanying text.
205. Roberts, 342 F.3d at 266. See supra note 203.
Regulation Z § 226.9(c) determines whether the creditor must make a new disclosure when a term in the initial disclosure statement, or IDS, is changed. Regulation Z permits creditors to make subsequent changes to the terms and conditions that apply to a cardholder's account through a change-in-terms notice. The Roberts court assumes that Fleet Bank was permitted by law to disclose the change-in-terms provision in the Schumer Box; however, Regulation Z limits the information that may be included in the Schumer Box. Regulation Z states that "only the

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207. See 12 C.F.R. § 226.9(c) (2003).
(c) Change in terms—

(1) Written notice required. Whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change . . . . [T]he notice shall be given, however, before the effective date of the change.

(2) Notice not required. No notice under this section is required when the change involves late payment charges, charges for documentary evidence, or over-the-limit charges; a reduction of any component of a finance or other charge; suspension of future credit privileges or termination of an account or plan; or when the change results from an agreement involving a court proceeding, or from the consumer's default or delinquency (other than an increase in the periodic rate or other finance charge).

Id. (italics added).

208. Id.

209. Roberts, 342 F.3d at 266-67.

210. 15 U.S.C. § 1632(a) (2000), "Information required by this subchapter shall be disclosed clearly and conspicuously, in accordance with regulations of the Board." Id. (emphasis added); 12 C.F.R. § 226.5(a)(1) (2003). "The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep." Id. See, e.g., Mark A. Aronchick, Brief of Amici Curiae American Bankers Association, American Financial Services Association, and Consumer Bankers Association in Support of Affirmance of the District Court's Decisions Granting Judgment in Favor of Appellees, Roberts v. Fleet Bank (R.I.) (No. 00-CV-6142), at 4 [hereinafter Brief of Amici Curiae American Bankers Association]. See also Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568-69 (1980) (holding that task of "striking the proper balance is an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices. Administrative agencies are better suited than [the] courts to engage in such a process") (quotation omitted); Household Finance Corp. v. Buck, 437 N.E.2d 425, 429 (Ill. App. 1982) (holding that TILA and Regulation Z are violated if statutory terms are unclear and meaningless to the consumer).
information required or permitted in this section” may be placed in the Box and then, “[t]he table containing the disclosures required by § 226.5a [the Schumer Box] should contain only the information required or permitted by this section . . . [o]ther credit information may be presented on or with an application or solicitation, provided such material appears outside the table.”

Neither the TILA nor Regulation Z requires the disclosure of the change-in-terms provision in any of the required disclosures included with credit card applications and solicitations. While Regulation Z does not impose any obligation to disclose a change-in-terms provision at the time a credit card account is solicited or opened, it does impose “subsequent disclosure requirements” when a change-in-terms is implemented pursuant to such a provision.

Furthermore, the clear and conspicuous standard only applies to required disclosures. Since a change-in-terms provision is not a required disclosure item in the Schumer Box or the IDS, the “clear and conspicuous” standard would not apply.

Certainly, a TILA violation would have occurred had the change-in-terms provision been included in the Schumer Box under the APR heading. Regulation Z requires the APRs for purchase transactions, cash advances, balance transfers, and any penalty rates to be prominently disclosed in the Schumer Box and

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212. Brief of Appellee, supra note 182, at 125. See 15 U.S.C. § 1637(c), (e) (2000); 12 C.F.R. § 226.5a(b) (2003) (listing the required “Schumer Box” disclosures for credit card applications and solicitations); Official Staff Commentary, Comment 226.5a(a)(2)-4; 12 C.F.R. Pt. 226, App. G, Model Forms 10(A) and 10(B).

213. Brief of Amici Curiae American Bankers Association, supra note 210, at 7. See 12 C.F.R. § 226.9(c)(1) (requires 15 days’ notice of changes in terms involving increases in charges).


216. Brief of Appellee, supra note 182, at 123.

217. See Official Staff Interpretations, supra note 211 and accompanying text. Official Staff Comment, 65 Fed. Reg. 58905-11, (Oct. 3, 2000) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-25316-filed.pdf [hereinafter Official Staff Comment]. “To simplify the table, the existing commentary is revised so that only the penalty rates can appear inside the table; the explanatory information must appear outside the table.” Id.
on the same page. However, balance transfer, over-the-limit, cash advance, and late fees may be disclosed clearly and conspicuously in or outside the table, but the disclosures must start on the same page as the table and may continue on subsequent pages. Furthermore, Regulation Z states that subsequent events that make a disclosure inaccurate after the creditor has mailed the disclosure is not a violation.

To ensure that consumers receive meaningful disclosures on a consistent basis, comment 5a(a)(2)-1 provides that disclosures in the IDS and Schumer Box are clear and conspicuous if they are both understandable and readily noticeable to the average consumer acting reasonably. On the application form Roberts completed, immediately above the signature line, it stated, "I (we, if any co-applicant) have read and agree to the TERMS OF PRE-QUALIFIED OFFER." Fleet clearly and conspicuously disclosed above the Schumer Box in the "TERMS OF PRE-QUALIFIED OFFER" that "my Agreement terms (including rates) are subject to change." The change-in-terms provision was explicitly disclosed in the "TERMS OF PRE-QUALIFIED OFFER."
OFFER" section in the same sized print as the required disclosures in the Schumer Box.\footnote{225}

The TILA requires courts to apply the "clear and conspicuous" standard to assess the adequacy of required disclosure statements in the IDS and Schumer Box.\footnote{226} "Conspicuousness is a question of law under the TILA that is governed by an objective, reasonable person standard."\footnote{227} Until the Third Circuit's decisions in \textit{Rossman} and \textit{Roberts}, federal courts did not consider solicitation material as part of the TILA disclosure statement.\footnote{228} The courts determined whether the reasonable consumer, the cardholder, ought to have noticed the term or clause written on the TILA disclosure statement.\footnote{229} A

\begin{itemize}
\item \footnote{225} Id. at 124-25.
\item \footnote{226} See \textit{Stein v. JP Morgan Chase Bank}, 279 F.Supp.2d 286, 292-93 (S.D.N.Y. 2003) (holding that TILA requires meaningful disclosure of credit terms, meaning balance between complete disclosure and information overload; such a balance does not require disclosure of all terms of potential interest); \textit{Miller v. European American Bank}, 921 F. Supp. 1162, 1166-67 (S.D.N.Y. 1996) (holding that "meaningful disclosure" of credit terms, as required by TILA, did not extend to disclosure of terms and conditions of offer of travel certificate made to induce customer to enter into credit card arrangement); \textit{see also \textit{Hale v. MBNA Am. Bank, N.A.}}, No. 99 Civ. 8831 (AGS), 2000 WL 1346812, at *6 (S.D.N.Y. Sept. 18, 2000) (holding that failure to disclose information about treatment of credit balances not violative of TILA); \textit{see, e.g., \textit{Schnall v. Marine Midland Bank}}, 225 F.3d 263, 269-70 (2d Cir. 2000) (holding that failing to disclose periodic rates applicable to promotional offer in promotion letter did not violate TILA as promulgated by the FRB under Regulation Z, 12 C.F.R. § 226.9(c)).
\item \footnote{227} Harper v. Lindsay Chevrolet Oldsmobile, LLC, 212 F.Supp.2d 582, 588 (E.D. Va. 2002) (holding that used car seller's failure to provide TILA disclosures in writing on a document separate from a retail installment sales contract (RISC) did not violate TILA).
\item \footnote{228} \textit{See \textit{Miller}}, 921 F. Supp. at 1166-67.
\item \footnote{229} U.C.C. § 1-201(10) (2000). "'Conspicuous.' A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." \textit{Id.; see \textit{13 PA. CONS. STAT. ANN. § 1201 (2003)}}. "A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color. But in a telegram any stated term is conspicuous. Whether a term or clause is conspicuous or not is for decision by the court." \textit{Id.; see \textit{Borden, Inc. v. Advent Ink Co.}}, 701 A.2d 255, 259 (Pa. Super. 1997) (stating that Pennsylvania law defines conspicuous as reasonable person should have noticed it included disclaimer's placement in document, size of disclaimer's print, and whether disclaimer was highlighted by being printed in all capital letters or in type style or color different from remainder of document); \textit{see also \textit{Applebaum v. Nissan Motor Acceptance Corp.}}, 226 F.3d 214, 219 (3d Cir. 2000) (citing that "The Uniform Commercial Code defines "conspicuous" as 'so written that a reasonable person against whom it is to operate ought to have noticed it'"") (quoting the U.C.C.).
\end{itemize}
credit card issuer may add non-promotional information to the required disclosures without violating the clear and conspicuous standard. In addition, if a lender includes a change-in-terms provision in the required Cardholder Agreement, a subsequent change to the agreement does not constitute a violation of the clear and conspicuous standard. Consumers misled by other promotional inducements in solicitations, such as deceptive promises of gifts, may find a remedy under state law, such as unfair or deceptive acts and practices ("UDAP") statutes, but not under the TILA.

The Third Circuit dismissed Fleet's argument that the "clear and conspicuous" standard only applied to required disclosures in the IDS and Schumer Box. The court said that it was the intention of Congress to allow judges to look outside the IDS and Schumer Box to find TILA violations in credit card solicitation materials. "[W]e doubt that [Congress] intended for us to ignore other statements made by those issuers in their credit card solicitation materials." Congress, however, excluded a

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231. Guidance on Unfair or Deceptive Acts or Practices, supra note 5, at 6. [A]dvertising a "guaranteed" or "lifetime" interest rate could be misleading when the institution makes the representation despite an intention to increase the rate. Such an institution could face reputation or litigation risks if consumers are not provided information that the institution may unilaterally change the contract terms. Id. (emphasis added).
232. RENUART & KEEST, supra note 33, at 282; see also Tyler Chavers, Alexandra Lossini and Daniece Owse...201)(stating that, although the federal district court in Rossman (Rossman v. Fleet Bank, 2000 WL 33119419 (E.D. Pa. 2000)) held that plaintiff failed to allege that Fleet engaged in conduct expressly prohibited by the TILA, the court did not foreclose the plaintiff's claims under state law), available at http://www.courts.state.ri.us/superior/pdf/00-5237-7-02-01.pdf (last visited Feb. 7, 2004).
233. Roberts, 342 F.3d. at 267. "As a result, while we recognize that the TILA only applies the 'clear and conspicuous' standard to required disclosures, we conclude that the TILA permits us to consider materials outside of the Schumer Box in determining whether the credit issuer disclosed the required information clearly and conspicuously." Id.
234. Id.
235. Id.
private cause of action based on credit-advertising violations.\footnote{236} The TILA section that imposes civil liability, Section 1640,\footnote{237} explicitly provides for civil liability with respect to Parts B, D, and E of Subchapter I,\footnote{238} and does not expressly impose civil liability with respect to Part C and Section 1663,\footnote{239} which regulate advertising of open end credit plans.\footnote{240} Thus, Section 1640 clearly does not confer original subject matter jurisdiction in federal court over a private individual’s allegation of violations of the TILA Credit Advertising Provisions [Part C].\footnote{241} Moreover, there is no

\footnote{236} 15 U.S.C. § 1661-1665b (2000). See, e.g., \textit{Miller}, 921 F. Supp. at 1166 (holding that TILA does not require disclosure of conditions on promotional inducements that are not related to credit terms); \textit{Clark v. Troy & Nichols}, Inc., 864 F.2d 1261, 1264 (5th Cir. 1989) (holding that the TILA does not provide a cause of action when a lender engages in ‘bait and switch’ techniques); \textit{Janikowski v. Lynch Ford}, Inc., 210 F.3d 765, 769 (7th Cir. 2000) (holding that “spot delivery” schemes do not violate TILA). \textit{Accord Smeyres v. General Motors Corp.}, 660 F. Supp. 31, 35 aff’d 820 F.2d 782, 783-84 (N.D. Ohio 1986) (holding that no private right of action existed under credit advertising provisions of TILA); \textit{see also Renuart & Keest}, supra note 33, at 273. \textit{But see Williams v. Empire Funding Corp.}, 109 F.Supp.2d 352, 358-359, 361 n.8, 361 (E.D. Pa. 2000) (holding that the court may consider language of the TILA when the notice of the right to rescission required under TILA is rendered unclear by information presented to the customer outside of the TILA disclosures).


(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part [Part B], including any requirement under section 1635 of this title, or part D or E of this subchapter [Subchapter I] with respect to any person is liable... (c) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.


\footnote{239} \textit{See Supra} note 236 and accompanying text.

\footnote{240} \textit{Smevres}, 660 F. Supp. at 33.

\footnote{241} \textit{Jordan}, 442 F.2d at 78, 81-2 (8th Cir. 1971), \textit{cert. denied}, 404 U.S. 870, 92 S.Ct. 78 (1971).
express civil liability provision within Part C of the TILA.\textsuperscript{242} The Third Circuit created a private remedy in Part C, which was never expressly intended by Congress.\textsuperscript{243}

TILA and Regulation Z do not provide a private cause of action for improper credit advertising.\textsuperscript{244} Misrepresentations or omissions in the Schumer Box and the IDS provide the consumer with a statutory remedy for civil damages under §1640, which includes statutory and actual damages sustained by the borrower as a result of the lender's disclosure violation.\textsuperscript{245} Section 1640, however, provides that a creditor cannot be held liable for any "act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the [Federal Reserve Board]."\textsuperscript{246} In Roberts, the Third Circuit acknowledged that the clear and conspicuous standard applied only to statements made in the IDS and the Schumer Box.\textsuperscript{247} The court, however, rejected the

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  \item \textsuperscript{243} S. REP. No. 100-259 at 5, \textit{reprinted in} 1988 U.S.C.C.A.N. 3936, 3941 (1988). Section 2 amends section 127 of the Truth in Lending Act (15 U.S.C. 1637) to require new disclosures in connection with applications and solicitations for all credit cards... into separate provisions for mailed applications and solicitations... Card issuers may provide the required disclosures either on or with the application or solicitation, and the disclosures can be presented on that part of the application which is returned to the creditor... If a card issuer includes an application as part of an advertisement and, as a result, discloses the information required by section 127(c), \textit{the inclusion of this information shall not 'trigger' the requirement to make additional disclosures under section 143.}
  \item \textsuperscript{244} 15 U.S.C. § 1661-1665b (2000).
  \item \textsuperscript{245} 15 U.S.C. § 1640; \textit{see} RENUART & KEEST, \textit{supra} note 33, at 273; \textit{see also} supra note 37 and accompanying text. In a class action, a lender liable for a TILA violation is subject to statutory damages even in the absence of any actual damages. \textit{See} 15 U.S.C. § 1640(a). TILA provides that statutory damages are to be "such as the court may allow," with no minimum applicable to each class member and a total cap of either $500,000 or 1 percent of the creditor's net worth, whichever is lower. \textit{Id.} at § 1640(a)(2)(B). Lenders are also liable for "a reasonable attorney's fee as determined by the court." \textit{Id.} at § 1640(a)(3).
  \item \textsuperscript{246} 15 U.S.C. § 1640(f); \textit{see} Warren v. Credithrift of America, Inc., 599 F.2d 829, 831-32 (7th Cir. 1979).
  \item \textsuperscript{247} Roberts, 342 F.3d. at 268.
\end{itemize}

When Congress decided to require credit card issuers to disclose required terms in a clear and conspicuous manner, we doubt that it intended for us to ignore other statements made by those issuers in their credit card solicitation materials... Congress created the Schumer Box to assist consumers in accessing such information,
“broader implications” associated with applying the standard only to those disclosures required by the TILA and Regulation Z, which could “shield credit card companies from liability for information placed outside of the Schumer Box.”

Certainly, one of the purposes of TILA is to provide “meaningful disclosure[s].” The federal courts have tempered the possibly expansive definition this term could be afforded to preserve the simplicity of the Schumer Box. The federal courts,

not to shield credit card companies from liability for information placed outside of the Schumer Box. As a result, while we recognize that the TILA only applies the “clear and conspicuous” standard to required disclosures, we conclude that the TILA permits us to consider materials outside of the Schumer Box in determining whether the credit issuer disclosed the required information clearly and conspicuously.

Id. at 267-68 (italics added).

248. Id. at 267.
249. Id. at 267-68.
251. See Miller, 921 F.Supp. at 1166-67. See Ford Motor Credit Co., 444 U.S. at 568-69 (quoting S.REP. 96-73, p. 3) (1979) “Meaningful disclosure does not mean more disclosure. Rather, it describes a balance between “competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload.]”).

The Truth-in-Lending Act is intended to promote “the informed use of credit” by asserting “meaningful disclosure of credit terms” to consumers. The provisions of the Act and implementing regulations, as remedial legislation, are to be broadly construed in favor of the consumer to implement this Congressional intent. ‘Meaningful disclosure’ does not mean, however, more disclosure. The goal must be carefully balanced against the possibility of informational overload. I read the Act’s requirements in light of its general purpose - to produce meaningful information to aid credit consumers.

Milhollin v. Ford Motor Credit Co., 531 F.Supp. 379, 383-84 (D.C.Or. 1981) (citations omitted); Schell v. First Union Direct Bank, 2000 WL 89300, at *2 (N.D.Ill. Jan 20, 2000) (holding that “no language in either TILA’s statutory provisions or its underlying regulations which require the disclosure of the terms or conditions of a creditor’s promotional program”); see, e.g., Virachack v. University Ford, 259 F.Supp.2d 1089, 1091-92 (S.D. Cal. 2003) (holding that meaningful disclosure required by TILA does not mean more disclosure; rather, it describes a balance between competing considerations of complete disclosure and the need to avoid information overload); see also Stein, 279 F.Supp.2d 286, 292-93 (S.D.N.Y. 2003); Badie v. Bank of America, 79 Cal. Rptr. 2d 273, 278 (Cal. App. 1998) (stating that “including a change of terms provisions in account agreements ha[s] been the standard industry practice since bank credit cards first became available in the 1960’s”). Accord Grasso v. First USA Bank, 713 A2d 304, 311 (Del. Super. 1998) (approving change in terms increasing “fixed APR”); Samuels v. Old Kent Bank, 1997 WL 458434, at *6-*7 (N.D. Ill. Aug. 1, 1997) (approving change in terms
have resisted the temptation to elevate the broader purposes, or legislative goals, of TILA over its specific provisions.

In 2000, the Second Circuit affirmed dismissal of a TILA violation claim in *Schnall v. Marine Midland Bank*. Despite the plaintiff's argument that TILA is a remedial statute that should be given a broad construction in favor of the consumer, the Second Circuit relied upon the unaided text of TILA in the absence of "any illuminating commentary supplied by the Federal Reserve Board." In *Cades v. H&R Block, Inc.*, the U.S. Fourth Circuit Court of Appeals affirmed the dismissal of a TILA claim in the absence of any authority that "the broad purposes of the Act should override its specific provisions." Similarly, in *Bissette v. Colonial Mortgage Corp. of D.C.*, the D.C. Circuit Court of Appeals held that a mortgagee bank was not required to make Truth in Lending Act disclosures to the borrowers until closing. It rejected the borrowers' argument that statutory policy required earlier disclosure, stating that the language of the statute and regulations was clear. In 1998, in *Ellis v. General Motors Acceptance Corp.*, the U.S. Eleventh Circuit Court of Appeals held that a bank was not liable under the TILA for misrepresenting the cost of an extended vehicle warranty to justify liability against a loan assignee. The court stated that it was forbidden by the plain language of § 1641(a) to resort to evidence or documents eliminating dividend miles program); Fineman v. Citicorp USA, Inc., 485 N.E.2d 591, 596 (Ill. Ct. App. 1985) (approving change of terms increasing annual fee).

252. *Roberts*, 342 F.3d at 266 "[T]he TILA is a remedial consumer protection statute, we have held it 'should be construed liberally in favor of the consumer.'" *Id.* (quoting *Rossman*, 280 F.3d at 390).

253. *See infra* notes 254-64 and accompanying text. *See also supra* notes 226-27.


255. *Id.* at 267-68.


257. *Bissette v. Colonial Mort. Corp. of D.C.*, 477 F.2d 1245, 1247 (D.C. Cir. 1973) (holding that liberal construction and interpretation based on legislative purpose can only go so far. Where the meaning of the statute and regulations is clear, a contrary reading would become destruction of the statutory scheme, as administered by the Board).

258. *Id.* at 1246-47.

259. *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709-10 (11th Cir. 1998).
extraneous to the disclosure statement, despite the TILA's "clearly remedial purpose." Finally, the Third Circuit Court of Appeals affirmed the dismissal of a TILA claim in Ramadan v. Chase Manhattan Corp. The plaintiffs argued that the TILA is a remedial statute and should be construed liberally in favor of the consumer in order to find assignee liability under § 1641(a). However, the Third Circuit held that the plain language of § 1641(a) of the TILA does not permit such an expansive interpretation of what provides adequate assignee notice to trigger liability under the TILA.

IV. SUGGESTIONS FOR IMPROVED TILA CREDIT CARD DISCLOSURES POST-ROBERTS

If Rossman and Roberts are the beginning of a judicial trend to read every word on a credit card solicitation for TILA violations, then banking institutions should be aware of guidelines for managing risk and class action liability.

First, a bank's marketing personnel should confirm that the information provided in the solicitation is a complete and accurate portrayal of the product offered. A credit card issuer should avoid the use of advertising claims such as "guaranteed," "pre-approved," and "lifetime rates," if there is at least the possibility

260. Id. at 709-10; see also Green v. Levis Motors, Inc., 179 F.3d 286, 295 (5th Cir. 1999) (holding that common sense readings of § 1641(a) all point towards the conclusion that the alleged TILA violations were not apparent on the face of the Greens' contract, thus, under § 1641(a), Hancock Bank not liable for Levis Motors's violations).
261. Id. at 708.
263. Id. at 197.
264. Id. at 197.
266. Id. at 8.
that consumers will not receive the terms as advertised.\textsuperscript{267} In \textit{Rossman}, the court determined that the solicitation described the credit card as "the no-annual-fee Platinum MasterCard."\textsuperscript{268} The court reasoned that had the disclosure said "no annual fee subject to change at any time, including in the first year," then the disclosure would be perfectly accurate.\textsuperscript{269} Absent such language, the court concluded that a reasonable consumer would be entitled to assume that the issuer would refrain from imposing an annual fee for at least one year.\textsuperscript{270}

The standard outlined in Regulation Z requires the disclosures to be "in a reasonably understandable form and readily noticeable by the consumer."\textsuperscript{271} First, prior to mailing out solicitation materials, a bank should review the solicitation or other communication for language that may conflict with or contradict required consumer disclosures, such as the TILA or the FTC Act.\textsuperscript{272} Such contradiction could lead courts to deem the disclosures not "clear and conspicuous" for purposes of TILA.\textsuperscript{273} Under the FTC Act, now enforceable through bank regulatory agencies,\textsuperscript{274} an unclear or contradictory solicitation or advertisement could be deemed a violation of law because it is an unfair and deceptive act or practice.\textsuperscript{275}

Second, a credit card issuer or banking institution should provide a clear and conspicuous disclosure of any contract provision that will change the terms of the products, benefits, or services that are offered.\textsuperscript{276} Also, a credit card issuer or banking institution should not promote a product or service in a solicitation

\begin{footnotesize}
\textsuperscript{267} Id.
\textsuperscript{268} \textit{Rossman}, 280 F.3d at 393.
\textsuperscript{269} Id.
\textsuperscript{270} Id. at 394.
\textsuperscript{272} \textit{See} Guidance on Unfair or Deceptive Acts or Practices, \textit{supra} note 5, at 8.
\textsuperscript{273} Id.
\textsuperscript{274} \textit{Williams & Bylsma, supra} note 9, at 1243-44, 1251. \textit{See also} FDIC Financial Institution Letter, \textit{supra} note 94. The Federal Reserve Board, FDIC, and the OCC have concluded that they could use Section 8 of the Federal Deposit Insurance Act to enforce section 5 of the FTC Act governing unfair and deceptive acts and practices in or affecting commerce. \textit{Id}.
\textsuperscript{275} \textit{Williams & Bylsma, supra} note 9, at 1253-58.
\textsuperscript{276} \textit{Guidance on Unfair or Deceptive Acts or Practices, supra} note 5, at 8.
\end{footnotesize}
that highlights a particular benefit that will be negated by another aspect of the transaction.277 “For example, a product should not be promoted as having “no annual fees” if the product requires the consumer to pay annual premiums for another linked product, such as mandatory credit life insurance.”278 Likewise, clearly notify the consumer at the time of the initial solicitation to act affirmatively to cancel a service at the end of the “free trial period” in order to avoid being billed for the service.279

Lastly, monitoring third-party vendor performance by reviewing scripts used to market products to bank customers is a major step in avoiding a TILA violation.280 These scripts should be accurate and concisely describe the terms, benefits, and material limitations of the product or service being offered.281 If a bank enters a contract with a third-party vendor, containing financial incentives to a telemarketer to mislead a consumer, then the bank may incur civil liability under the TILA or regulatory agency penalties under FTC Act.282 Maintaining internal procedures governing consumer complaints can provide issuers with early detection of violations from improper third party vendor practices, deceptive telemarketing procedures, and misleading language used in marketing materials or solicitation campaigns.283 The FTC offers guidance letters that outline how to properly word and disseminate solicitation material to avoid claims under the FTC Act.284

277. Id.
278. Id.
279. Id.
280. Id.
281. Guidance on Unfair or Deceptive Acts or Practices, supra note 5, at 8
282. Id. at 2-8.
283. Id. at 8.
V. Conclusion

Roberts v. Fleet Bank may have drastic influence on how banks write solicitations, initial disclosure statements, the Schumer Box, and cardholder agreements. The Third Circuit's ruling in Roberts will subject credit card issuers to a new form of liability under the TILA. If a credit card issuer offers, or previously offered, a fixed rate card and did not disclose inside the Schumer Box the possibility of an increase based upon a change-in-terms clause, then it will be open to civil liability under the TILA even if the disclosure forms are consistent with the Model Forms provided by the FRB. The Third Circuit's ruling, in the absence of any language in the TILA or Regulation Z, imposes a duty on credit card issuers to disclose in the Schumer Box the issuer's right to increase the APR at any time; however, the Official Staff Commentary prohibits such disclosures in the Schumer Box. The Roberts decision, devoid of any substantial basis in case law, statutory law, regulatory law, or Congressional legislative history, inflicts unnecessary and substantial liability on credit card issuers. It is well established that courts may not enlarge by construction the language of a clear and unambiguous statute.

285. MaryClaire Dale, supra note 118, at B01.
287. See Official Staff Comment, at 58909-10. Specifically, G10A and G10B. Id.
288. Id.
290. See Brief of Amici Curiae American Bankers Association, supra note 210, at 16. “Not only would they be subject to statutory damages of up to $500,000, plus attorneys’ fees and court costs, 15 U.S.C § 1640(a), issuers who actually invoke their right to change terms would, like Fleet, also find themselves defending TILA claims for actual damages.” Id. at 16-17.
291. See Beattie Investment Co. v. United States, 101 F.2d 850, 852 (8th Cir. 1939). “The fact that it may be a seeming injustice in some cases is therefore not a matter which the courts have power to correct. Congress alone can give relief in such a case.” Id. (citing Magnano Co. v. Hamilton, 292 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780); see also supra note 54 and accompanying text.
The Supreme Court has ruled that courts may not expand by construction the language of a clear and unambiguous statute. By assuring a meaningful disclosure of credit terms through the Schumer Box, Congress hoped the consumer would be able to readily compare the various credit terms available. When Congress amended TILA in 1988, Congress emphasized its intent to provide "more detailed and uniform disclosure by credit and charge card issuers, at the time of application or solicitation." Furthermore, the amendment gave consumers "early disclosure of relevant cost information from credit card companies." Congress then delegated the responsibility of "prescribing regulations to carry out the purposes" of TILA to the Federal Reserve Board. If a regulation issued by an agency is unclear, then a court may interpret the regulation to resolve the ambiguity. However, if the regulation is clear and unambiguous, as in Roberts, then the court should defer to the expert agency's regulation, especially when the agency is the comprehensive regulator of a technical activity, such as consumer credit disclosures. In Gennuso v. Commercial Bank & Trust Co., the

292. See supra note 54 and accompanying text. See, e.g., Beattie Investment Co., 101 F.2d at 852.
294. Id.
296. Id.
297. 15 U.S.C. § 1604(a) (2000). "Traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in setting the statutory machinery in motion." Ford Motor Credit Co., 444 U.S. 555, 566 (citations omitted) (holding that courts must defer to Federal Reserve Board staff opinions construing TILA or the underlying regulations unless such opinions are "demonstrably irrational").
298. See supra note 54 and accompanying text.
299. Benion v. Bank One, 144 F.3d 1056, 1059 (7th Cir. 1998).
300. Gennuso, 566 F.2d at 443 (3d Cir. 1977).
Third Circuit stated that whether the technical requirements of the TILA and Regulation Z work for or against the creditor, "[a]ny misgivings about the technical nature of the requirements under the Act or Regulation should be addressed to Congress and the Federal Reserve Board, not to this court."  

In a court case principally involving the TILA, a federal court said that "[i]t appears to be all too easy, in the light of some reported cases, for courts to abdicate the realm of reality. The required disclosures must be strictly required and enforced by the courts, but the courts should not condone or give credence to suits which attempt to subvert the Act [TILA] into an instrument of harassment and oppression of the lending industry."  

By expanding credit card issuer liability, the Third Circuit’s decision advanced the cause of consumerism and, in effect, created a new area of TILA class action liability for deceptive advertising by credit card issuers.  

The Third Circuit’s consumer activism in Roberts is noble; however, it was accomplished at the expense of applying sound legal analysis. Expressed Congressional intent, explicit provisions in the TILA statute and accompanying Regulation Z, and relevant case law were completely disregarded for what the Third Circuit believed was Congress’ implicit desire to include solicitation materials in the analysis of the TILA disclosure statement violation.  

By comparison to the vast ocean of TILA...
case law, this court’s decision in Roberts is not an example of historic judicial reasoning but simply “another example of consumerism gone berserk.”

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Disclosure of terms of consumer credit loan shall not be stated, utilized, or placed so as to mislead or confuse consumer).

Third, the Roberts court concluded that the legislative intent of Congress in drafting the TILA, and subsequently amending it with the FCCCDA, was to assure meaningful disclosures by financial institutions that “exclude[d] not only literal falsities, but also misleading statements.” Roberts, 342 F.3d at 267-68 (citations omitted). The Third Circuit then decided that Congress created the Schumer Box to help consumers in accessing financial information “not to shield credit card companies from liability for information placed outside of the Schumer Box.” Id. (italics added). Though the court recognized that the TILA only applies the clear and conspicuous standard to required disclosures, the court concluded “that the TILA permits us to consider materials outside of the Schumer Box in determining whether the credit issuer disclosed the required information clearly and conspicuously.” Roberts, 342 F.3d at 268 (italics added).

In sum, the court’s analysis is erroneous because the TILA provides a private cause of action for misleading statements made in the disclosure forms, the IDS and Schumer Box. See supra notes 177 and 217 with accompanying text. If Congress intended to impose civil liability for misleading statements made in solicitation materials it would have done explicitly in the TILA. See supra notes 217-223 with accompanying text. However, Congress when it drafted the FTC Act does impose liability to any business that makes misleading, false, or deceptive statements in solicitations, but presently no private right of action exists under the FTC Act. See supra notes 89-97 with accompanying text; see also Lauletta v. Valley Buick, Inc., 421 F.Supp. 1036, 1040 (W.D. Pa.1976).

Many of the requirements of the Truth-In-Lending Act are technical in nature, and the Court is not at liberty to deviate from them as it sees fit. Regulation Z unequivocally requires that necessary disclosures shall be written and made together on one document. ...Regardless of the wisdom or validity of that proposition, it is not this Court's prerogative to substitute its own view for that of Congress.

Id. (emphasis added).
