October 12, 2007

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

Re:  Docket No. R-1286

Dear Ms. Johnson:

This comment letter is submitted by the American Financial Services Association (“AFSA”)1 in response to the Proposed Rule issued by the Board of Governors of the Federal Reserve System (“Board”) to amend the open-end credit provisions of Regulation Z (“Proposed Rule”). AFSA appreciates the opportunity to provide its comments on the Proposed Rule to the Board.

Summary

AFSA commends the Board for its thoughtful and thorough approach to proposing revisions to Regulation Z. On the whole, we believe the Proposed Rule represents a reasonable approach to improving several of the disclosures required under Regulation Z. The Proposed Rule also includes many beneficial substantive revisions to Regulation Z. AFSA also believes, however, that the Proposed Rule could be modified in various ways to result in an improved regulation for consumers and creditors alike. Although we provide more specific and detailed comments below, AFSA’s comments can be summarized as follows:

- The proposed revisions to the application and solicitation disclosures, as well as to the account-opening disclosures, are generally appropriate but more flexibility with respect to some of the proposed requirements is necessary;
- The Board should not mandate periodic statements that will impose significant costs with little or no benefit provided to cardholders;
- The inherently inaccurate and misleading disclosure of the “effective” annual percentage rate (“APR”) should be eliminated;
- The requirements pertaining to change-in-terms notices and so-called “penalty” pricing are too onerous and could result in higher costs of credit for all types of cardholders;
- AFSA believes that the billing error protections under Regulation Z have provided consumers with significant benefits and that they do not need significant revision;

1 Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit. AFSA member companies offer or are assigned many types of credit products, including credit cards, retail credit, automobile retail installment contracts, and mortgage loans.
• AFSA believes the Board strongly considered weighing costs and benefits in connection with several portions of the Proposed Rule, and we urge the Board to revisit such considerations when crafting a final rule (“Final Rule”); and
• The Board should provide a strong safe harbor for creditors complying with Regulation Z as amended by the Final Rule.

General Disclosure Requirements

More Flexibility Necessary

AFSA commends the Board for developing models of key disclosures that appear to summarize significant amounts of information in a manner that consumers can understand. We believe that, if the Final Rule is to be successful, consumers must understand the information they are provided. We also believe, however, that the Proposed Rule suggests a level of rigidity that is not necessary to achieve the Board’s goals. For example, the Proposed Rule suggests that the tabular disclosures provided under §§ 226.5a and 226.6, as well as the periodic disclosures, must be presented in the “portrait” paper orientation, even though “landscape” orientation could be equally or more effective.

We also note, as another example, that the Official Staff Commentary (“Commentary”) suggests that the tabular disclosures under §§ 226.5a and 226.6 should be presented on legal-size paper. AFSA does not believe that legal paper is necessary to convey such disclosures in a clear and conspicuous manner, nor is the use of such paper efficient or economical in connection with many types of delivery mechanisms. If the Board truly believes that compliance with these disclosure requirements can be achieved using paper other than 8” x 14” paper, it should delete any reference to legal-size paper in the Commentary. Despite the language in the Commentary noting that such paper is not required, the mere suggestion that compliance with these disclosure requirements should be achieved through use of legal-size paper creates regulatory and possibly legal jeopardy for creditors. It is not unusual, for example, for agency examiners (which could include examiners from agencies other than the Board, and therefore not subject to direct influence or control by the Board) to require compliance with regulatory examples that are not necessarily required. We also note that trial attorneys may attempt to claim that a disclosure under §§ 226.5a or 226.6 made on anything other than cumbersome legal paper is presumptively deficient. We strongly urge the Board to delete any suggestion of paper size in connection with these disclosures.

Electronic Disclosures

The Board proposes to permit creditors to provide the disclosures required under the open-end provisions of Regulation Z “subject to compliance with the consumer consent and other applicable provisions of the [E-SIGN] Act.” Furthermore, the solicitation and application disclosures, as well as the advertising disclosures, may be provided electronically without regard to the consumer consent provisions of the E-SIGN Act. AFSA commends the Board for proposing this approach to the electronic delivery of disclosures under Regulation Z, and notes that it is consistent with a previous proposed rule issued by the Board. E-SIGN is a self-executing law that does not require regulatory implementation. We believe that creditors have
found most provisions of the E-SIGN Act to be relatively unambiguous, and creditors have devised effective and consumer-friendly compliance programs for the law. Therefore, we do not believe it is necessary for the Board to provide additional guidance at this time under the E-SIGN Act. It is appropriate, however, for the Board to exclude the disclosures under §§ 226.5a and 226.16 from the E-SIGN Act consumer consent requirements. For the reasons provided by the Board in this and prior rulemakings, those requirements are unnecessary in the context of such disclosures, and to require compliance would essentially eliminate the ability to market open-end credit in an electronic medium.

**Oral Disclosures**

The Board proposes to allow a creditor to comply with § 226.6 by disclosing orally charges that are not required to be included in the account-opening table, so long as the disclosure is prior to the consumer agreeing to pay or becoming obligated to pay for the charge. AFSA strongly supports this provision of the Proposed Rule, and we urge the Board to retain it. The account-opening table proposed by the Board includes the key information necessary for a consumer at the account opening. Furthermore, the Board correctly notes that creditors will generally identify relevant fees in their account agreements. It is most appropriate, therefore, to allow creditors to disclose charges not required in the account-opening table at a time when the consumer is most likely to find them pertinent and important, *i.e.*, “any relevant time before the consumer agrees to pay or becomes obligated to pay for the charge[s].”

**Opening Accounts over the Telephone**

Regulation Z generally requires that the account-opening disclosures be provided to the consumer “before the first transaction is made under the [credit] plan.” The Proposed Rule includes a provision that would permit certain open-end credit accounts to be opened over the telephone and available for immediate use, regardless of whether the disclosures required by § 226.6 have been provided. We believe that the flexible concept provided by the Board with respect to accounts opened by telephone will benefit consumers, and we urge the Board to make the concept more generally applicable.

Under the Proposed Rule, a consumer may open an account *with the merchant* in connection with a concurrent purchase of goods, so long as: (i) the merchant permits consumers to return such goods and reject the account free of cost after receiving the § 226.6 disclosures; and (ii) these rights are disclosed to the consumer as part of the offer to finance the purchase. AFSA agrees with the Board’s determination to provide flexibility in these circumstances. However, few merchants extend credit directly to consumers in connection with the sale of products or services—most financing of this type is now provided by a bank or other party. We believe, therefore, the flexibility proposed by the Board should be made available to creditors other than those relatively few merchants financing the sale of goods. For example, a creditor should be able to allow a consumer to engage in immediate use of an account opened by telephone so long as the consumer can reject the account upon receipt of the § 226.6 disclosures and avoid paying any charge or fee not clearly and conspicuously disclosed to the consumer as part of the account opening process (*e.g.*, a clearly disclosed APR). At the very least, the regulations should not favor one form of financing over another (*i.e.*, credit offered by the
merchant versus credit offered by a third party) for purposes of financing the sale of a merchant’s goods over the telephone. Therefore, the provision proposed by the Board should be available to creditors offering private label or co-brand credit arrangements in connection with the purchase of a merchant’s goods.

Timeframe for Mailing Periodic Statements

The Board requests comment on whether it should recommend to Congress a revision to section 163(a) the Truth in Lending Act (“TILA”) regulating the timeframe for mailing certain periodic statements. TILA currently requires creditors to send periodic statements for accounts that have a grace period at least 14 days before finance charges could apply. The Board has implemented this provision in Regulation Z to require the 14-day period prior to “any date or the end of any time period required to be disclosed under section 226.7(j) [i.e., the free-ride period] in order for the consumer to avoid an additional finance or other charge,” and has specifically noted in the Commentary that this would include the imposition of a late fee. AFSA does not believe it is necessary or appropriate to increase the 14-day period in the statute or regulation.

We are unaware of issues arising in connection with consumers not having sufficient time to obtain, review, and pay a creditor when a periodic statement is mailed in compliance with TILA and Regulation Z. Furthermore, we are unaware of any changes to mailing timeframes or consumer behavior compared to 1974, when this requirement was first enacted. In fact, as mail processing has become more efficient, and as consumers have more efficient payment options at their disposal (e.g., electronic bill payment), the 14-day time period under TILA and Regulation Z results in consumers generally having more time to receive and pay their bills than they did when Congress enacted this provision. It is also important to note that a record has not been made suggesting that consumers who are sent statements in compliance with the legal and regulatory requirements do not have sufficient time to review and pay their periodic bill.

We also ask the Board to consider potential unintended consequences associated with a recommendation for Congress to extend the 14-day period. Currently, the requirement strikes a balance between allowing creditors to determine whether and how to offer grace periods and ensuring that any such grace period is not illusory. However, to require a longer timeframe could disrupt this balance by forcing creditors now or in the future to design products around arbitrary minimum grace periods. The longer a creditor is forced to absorb the cost of the float associated with the grace period, the less likely the creditor is to offer other types of benefits to cardholders.2

Application and Solicitation Disclosures

Combining Disclosures

2 We also note that extending the timeframe may disproportionately disadvantage smaller creditors by requiring them to offer longer grace periods relative to their larger competitors due to the smaller creditors’ potential inability to process statements as quickly as some larger creditors. In other words, while a larger creditor may be able to offer a 25-day grace period even if the timeframe is extended to 20 days, a smaller creditor may be forced to extend the grace period to 30 days, placing the smaller creditor at a competitive disadvantage solely as a result of the change in timeframe.
The Proposed rule states that a creditor may satisfy the disclosure requirements of § 226.5a by providing the account-opening table on or with a card application or solicitation instead of providing the table required under § 226.5a. AFSA strongly supports this interpretation, and we urge the Board to retain it. This approach is especially important in circumstances when the time period between account application and account opening may be compressed, such as in connection with a point-of-sale (“POS”) transaction or balance transfer. The Board’s interpretation would allow a creditor to provide the necessary disclosures in a single exchange, as opposed to requiring a store clerk, for example, to provide multiple disclosures at various point during the transaction. In order for the Board’s intended flexibility to have any meaning for creditors offering credit priced according to consumer risk, the Board must allow the account-opening table to reference the range of rates, as would be permissible in connection with an application and solicitation disclosure, while also noting where the rate actually applicable to the account can be found, such as on a receipt handed to the consumer at the POS in connection with opening the account.3

*Delivery of Application and Solicitation Disclosures Electronically*

The Proposed Rule includes provisions relating to the electronic delivery of § 226.5a disclosures. These provisions are substantively similar to those included in the Board’s prior rulemaking pertaining to electronic disclosures. For the reasons provided by the Board in this and the prior rulemaking, we urge the Board to retain all but one of these provisions in the Final Rule.

Although AFSA generally supports the Board’s approach to electronic disclosure of application and solicitation disclosures, we urge the Board to revise its proposal with respect to its interpretation of what would be deemed an electronic disclosure “closely proximate” to an application or solicitation. In particular, the Commentary states that an electronic disclosure would be “closely proximate” if it: (i) automatically appears on the screen with the application or reply form; (ii) is located on the same web “page” as the application or reply form if the application or reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable; or (iii) is posted on a web site and the application or reply form is linked to the disclosures in a manner that prevents the consumer from by-passing the disclosures before submitting the application or reply form.

The net result of the Commentary is that a creditor must require the consumer to access the 226.5a disclosures if such disclosures are not automatically provided or provided on the same web page. We do not believe this is necessary, nor is it consistent with the requirements associated with providing the application and solicitation disclosures in a paper format. Specifically, the Commentary to Regulation Z provides that a paper disclosure not appearing on the same page as the application or solicitation may appear on or with the application or solicitation “if the application or solicitation reply form contains a clear and conspicuous reference to the location of the disclosures and indicated that they contain rate, fee, and other

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3 We recognize that such flexibility may require additional clarification with respect to the “integrated document” requirement included in § 226.5.
cost information as applicable.” We believe the Commentary as it relates to paper disclosures is appropriate, and it should also apply for purposes of electronic disclosures. We are unaware of any suggestion that an issuer must ensure that a consumer accesses paper disclosures provided on or with the application or solicitation, such as by making them the first materials seen by the consumer, and it is not clear why the disclosure requirements for electronic disclosures should be more cumbersome. The reference in the Proposed Rule to preventing the consumer from bypassing the disclosures should therefore be deleted.

Revisions to Tabular Disclosures: In General

In general, AFSA believes the Board’s proposed revisions to the tabular application and solicitation disclosures are appropriate. We believe that, if adopted, the revisions would provide consumers with a better understanding of key terms associated with credit card accounts offered to them. We are particularly supportive of the Board’s recognition of risk-based pricing and the clarification that a creditor may provide a range of rates in the table when the applicable APR may not be known at the time of solicitation.

It is important to note, however, that the changes proposed by the Board, if adopted, are not cost-free. The application and solicitation disclosures will be more cumbersome to print and mail than existing disclosures, resulting in increased printing and mailing costs for card issuers. Indeed, many card issuers may need to redesign their applications and solicitations entirely to accommodate the Board’s revisions. We raise this not as an argument against the adoption of the proposed changes, rather as an issue of which the Board should be mindful. The costs of these and other revisions will accumulate fast, and we urge the Board to consider these costs when adopting a Final Rule.\(^4\)

Revisions to Tabular Disclosures: Payment Allocation

The Board proposes to add a rather complicated payment allocation disclosure to the application and solicitation disclosures, but only in limited circumstances. We believe a simpler disclosure that could be provided in all circumstances may be more useful to consumers. Specifically, a creditor could disclose simply: “We may apply your payments to the balance with the lowest APR first before we apply them to balances with higher APRs.” For those circumstances in which the consumer would not have a grace period until payment in full of a balance transfer or cash advance, the disclosure could additionally read: “If you obtain a balance transfer or cash advance, you will not have an interest-free grace period, and you will be charged interest on your balance (including purchases), [until the specified condition, such as until you pay your account balance in full].”

Balance Computation Disclosure

Under the Proposed Rule, a card issuer must make a short reference to the balance computation method directly below the tabular disclosure. We do not believe this is necessary, and the requirement to disclose the balance computation method in the application and

\(^4\) Similar cost issues arise regarding use of the account-opening table which may require additional paper and postage in addition to redesigned initial disclosure compliance programs.
solicitation disclosures should be deleted. Although much has been made of the balance computation method—especially the so-called “double-cycle billing” method—by some of late, the balance computation method generally does not have a significant impact on the amount of interest the consumer pays on a given balance. Furthermore, as the Board notes, consumers generally do not rely on balance calculation information for purposes of comparing credit card accounts offered to them. For these reasons, we believe the disclosure should be eliminated to give the remaining disclosures added effect.

**Account-Opening Disclosures**

*APR in Tabular Disclosure*

The Proposed Rule would require a creditor to disclose the APR applicable to an account in the account-opening table. This requirement would impose significant new costs on many issuers. AFSA concurs that it is important for the table to provide information about the APR to the consumer, but we believe that a creditor should have the option to disclose in the table either: (i) the APR applicable to the account; or (ii) the range of potential APRs and a clear and conspicuous reference as to where the consumer may find the specific APR applicable to the account as part of the integrated account-opening disclosures.

We believe this flexibility is critical in several contexts. First, for credit offered at the POS, it may not be practical or reasonable to require a creditor to print the ultimate APR for the account in the account-opening table, regardless of whether the table is provided in lieu of the § 226.5a disclosures or after the application has been approved. If the creditor engages in risk-based pricing, such a requirement would result in the creditor having to provide store locations with multiple pre-printed account-opening tables corresponding to any possible APR under available credit programs for distribution at the POS. This would significantly complicate the provision of Regulation Z disclosures to consumers in these circumstances without any corresponding benefit for consumers. Today, a creditor may provide the necessary disclosures as part of the application materials with a store receipt included as part of the integrated document. The store receipt would include the APR for the account. However, such a process, although it provides the requisite information to consumers in a meaningful and efficient manner, would not appear to be compliant with the Proposed Rule. Instead, for example, a creditor would need to rely on store management to have an adequate supply of each table for each possible APR at every POS. Furthermore, the creditor would need to rely on the sales clerk to provide the correct account-opening table to the consumer at the POS as opposed to simply expecting the clerk to provide the consumer with a receipt. Neither of these issues is necessarily simple, nor may a creditor providing credit at the POS feel that it could devise a program to comply with the proposed requirements in a reliable manner. Therefore, we believe that a creditor in such a circumstance should be able to refer in the account-opening table to another part of the account-opening disclosures as to where the consumer may find the APR for the account.

Similar issues arise in connection with cards issued through more “traditional” channels. Even in those circumstances when an application is mailed to a creditor for consideration, the creditor would need to estimate the number of consumers who may qualify for given APRs and stock account-opening tables accordingly. This becomes especially cumbersome for creditors
basing APRs on variable rates that must be accurate within 30 days of mailing. Furthermore, the assembly of account-opening mailings would be made much more complicated if consumers were required to receive only one of up to a dozen or more different preprinted disclosures for similar programs.

Payment Allocation

Our comments relating to the payment allocation disclosure in the application and solicitation disclosures are equally applicable for purposes of the account-opening disclosures.

Periodic Disclosures

In General

AFSA is concerned that the Board’s proposal would impose significant new costs on card issuers to completely redesign billing statements in a manner that may not improve the overall value and utility of the periodic statement to consumers. Creditors rely on their periodic statements, among other communications, to communicate a variety of types of information and to differentiate themselves from their competitors. Not only do periodic statements provide the information required by Regulation Z in a clear and conspicuous manner, but they also enable creditors to deliver other information consumers find important, such as information about account features, rewards programs, and/or how to maximize the utility of the account. In fact, although periodic statements arguably convey some of the most complex and important information to consumers, AFSA is unaware of significant criticism of how creditors communicate through periodic statements, including communicating the information required by Regulation Z.

Although periodic statements appear to be meeting consumers’ and creditors’ needs, the Board would make significant revisions to them. In effect, the Board would require creditors to communicate with consumers using a standardized format that will make it difficult for creditors to customize periodic statements to suit particular credit card products or programs. AFSA understands that consumers appear to find at least some of the proposed disclosures useful as proposed by the Board. However, it is not clear whether the Board’s consumer testing found that consumers would prefer a standardized periodic statement instead of those that they may receive today. Even if a marginal benefit exists in the proposed revisions, it comes at an enormous cost to creditors in the form of diminished ability to customize information for their consumers based on their competitive niche in the marketplace. We therefore strongly urge the Board to eliminate many of the revisions proposed for the periodic statement. We also note that the Board has made some judgments regarding the relative importance of certain disclosures by requiring that some appear before others. We do not believe this is necessary. To the extent one could prioritize the periodic statement disclosures in a manner reflecting their importance, AFSA does not necessarily agree with the Board’s determinations. We describe those provisions causing us the greatest concern, as well as others, below.

5 If the Board retains the requirement to provide the APR in the table, including for variable APRs, we ask the Board to allow for the variable APR to accurate as of 60 days of providing it to a consumer so long as the “as of” date is provided.
AFSA notes that the Board could provide card issuers with flexibility regarding the periodic statement by revising the proposed “Payment Information” box requirements. We believe that issuers could make these disclosures in a clear, conspicuous, and meaningful manner to consumers without necessarily having the format prescribed.

The Payment Information Box, as proposed, includes up to five pieces of information: (i) the new balance; (ii) the minimum payment due; (iii) the payment due date; (iv) the late payment “warning;” and (v) in certain circumstances, a minimum payment disclosure. AFSA believes that card issuers already place the first three items on the first page of the billing statement in a manner that is readily noticed by consumers. We are unaware of consumers indicating that they cannot easily locate the new balance, minimum payment due, and payment due date information on issuers’ billing statements, despite the fact that Regulation Z does not standardize these disclosures. We believe card issuers should be permitted to continue to customize these disclosures for their cardholders.

With respect to the two new disclosures proposed in the Payment Information Box, we do not believe it is necessary for the Board to require the disclosures to be placed in a manner that is more prominent than the credits, transactions, or interest charge calculations. Although some issuers may make such a determination based on their evaluation of cardholder needs, we do not believe the Board should mandate the requirement for all issuers. We question why, month after month, a cardholder who pays on time and a majority of his or her balance would need to see these disclosures in a manner suggesting that they are more important than other information on the billing statement.

The Board states that it has grouped the “payment” information together based on consumer preferences expressed during consumer testing. Although we believe the consumer testing can be helpful in designing disclosures, it must be relied upon judiciously. As we noted above, it is not as though consumers, Congress, or even the so-called consumer groups, for that matter have expressed consternation over the format or presentation of periodic statements. It may be that consumers intuitively prefer all payment information to be grouped together. But the Board already recognizes that not all payment information offered by a card issuer will be grouped together. For example, if a card issuer were to disclose how to pay, the cost associated with certain payment methods, the effect of a late payment on a consumer’s credit score, the hours by which a consumer can make a payment other than by mail, or any other payment-related information the Board is not suggesting it must be included in the Payment Information Box. In other words, the Board appears to place disproportionate (and we believe undeserved) importance on the late payment disclosure and the minimum payment disclosure.\(^6\) We believe

\(^6\) It may be worth noting that Congress created several disclosure requirements, including the late payment disclosure requirement, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (“Bankruptcy Act”). For at least the “generic” minimum payment disclosure, Congress specified that it must appear on the front of the billing statement. It did not impose a similar location requirement regarding the more specific minimum payment disclosure, nor for the late payment disclosure, suggesting that Congress did not intend to require such a placement.
such disclosures can be made as clearly and conspicuously as other important disclosures not required to appear on the first page of the statement.

With respect to the minimum payment disclosure, we commend the Board for recognizing that the disclosure is unnecessary for at least a portion of the cardholding population. We ask the Board, however, to revise the minimum payment disclosure so that the disclosure is required for those cardholders who have a behavior pattern suggesting that the disclosure may have some applicability to their situation. We believe the disclosure should be required for consumers who have made minimum payments for at least three consecutive months.

AFSA appreciates the flexibility the Board has provided with respect to the ways in which the minimum payment disclosure may be provided. We believe that each of the options will be appealing to various issuers depending on the circumstances. The Board specifically requests comment in the Proposed Rule on how to encourage issuers to provide the more tailored minimum payment information. We believe that allowing a card issuer to provide the disclosure less often or clearly and conspicuously anywhere with the periodic disclosure would be appealing incentives for some issuers.

*Change-in-Terms and Penalty Pricing Disclosures*

Our comments on these disclosures are consolidated in the discussion of “Subsequent Disclosure Requirements” below.

*Effective APR and Year-to-Date Totals*

The Proposed Rule includes two alternatives regarding the disclosure of the effective APR on the periodic statement: (i) deleting the requirement; or (ii) significantly revising it. AFSA strongly urges the Board to eliminate the requirement for a creditor to provide the effective APR disclosures as such disclosures are inherently inaccurate, misleading, and unhelpful to consumers. The Board’s own consumer testing has demonstrated how difficult it is to provide an effective APR disclosure in a manner that can be considered even remotely useful.

The Supplementary Information to the Proposed Rule explains the inherent deficiencies in the effective APR disclosures. They are inaccurate, they have no bearing on the future cost of credit, they cannot be used to compare costs from one account to another, and consumers do not understand them. Although consumer groups allege that the disclosures “shock” the consumer regarding the cost of certain transactions, AFSA hesitates to consider this an argument in support of retention of the effective APR disclosure requirement. Shocking consumers with inherently inaccurate, confusing, and useless disclosures would not appear to advance any of the goals of TILA or consumer protection.

We also do not believe it is necessary to provide “year-to-date” totals for interest and other costs associated with a credit card account. We believe periodic statements provide consumers with an effective communication of the costs associated with month-to-month use of the account. Furthermore, like the effective APR, the year-to-date totals do not necessarily provide information to consumers in the appropriate context—simply because an account has a
higher or lower year-to-date total does not communicate to the consumer the relative value of the account because it does not take into account the benefits provided. To the extent the Board believes it is important to provide consumers with disclosures regarding the cost of credit, we believe the Board’s proposed requirement to provide “year-to-date” cost totals on periodic statements is preferable to an effective APR disclosure. Although the disclosure has weaknesses, it would appear to be a more accurate and understandable disclosure for purposes of informing consumers of the “effective” cost of their credit card account than the effective APR.

**Subsequent Disclosure Requirements**

*Convenience Checks*

The Board proposes to require an issuer to include certain disclosures “on the front of the page containing” convenience checks if such checks are provided more than 30 days after the account-opening disclosures. The disclosures relate to applicable APRs, transaction fees, and grace periods. The APR disclosure must be accurate as of the time they are given, and a variable APR would be accurate if it was in effect within 30 days of when the disclosures were given.

We request the Board to reconsider this requirement. The premise of the Board’s requirement appears to be that consumers would not otherwise know the terms applicable to convenience checks. However, as a result of the Board’s other revisions, consumers will have received fulsome tabular disclosures regarding these terms, in most instances at least twice, prior to receipt of the convenience checks. These disclosures are certainly sufficient for purposes of informing cardholders about the terms relating to other features of a credit card plan, including those pertaining to purchases, cash advances, and balance transfers. In other words, it does not appear as though the Board believes issuers must compensate for a deficiency relating to cost disclosures for other features of a credit card account that may not be used within 30 days of opening the account. It is not clear why the same disclosures are apparently deficient for purposes of terms applicable to convenience checks.

If the Board retains this disclosure requirement, we ask the Board for additional flexibility. The Board appears to assume that all convenience checks are now provided, and always will be provided, in a manner that allows the proposed disclosures to be provided on the front page containing the convenience checks. This may not be the case, such as if the checks are provided in a mini-book or a single check is provided as a stand-alone insert in a mailing. Regardless, we believe issuers should be permitted to disclose the terms relating to a convenience check in a clear and conspicuous manner on or with the checks themselves.

*Change in Terms Notices: 45-Day Notice*

The Board proposes to require a card issuer to provide a cardholder with a notice at least 45 days prior to many types of changes in terms (“CITs”). We urge the Board to reconsider this requirement in light of its potential impact on cardholders.

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7 The Proposed Rule appears to also preclude use or development of electronic convenience checks for use at an Internet merchant that may not accept the consumer’s credit card brand.
A card issuer may need to change account terms for a variety of reasons, such as changing economic conditions or a change in a cardholder’s overall risk profile. The ability of a card issuer to change terms is critical for the issuer to offer consumers lower prices than would otherwise be necessary if the issuer had to factor in future interest rate or credit risk when pricing an account. The ability of a card issuer to change terms is clearly disclosed to cardholders as part of their account agreement, and consumers already receive CIT notices under Regulation Z and any applicable state law.

The Board’s proposal to require a 45-day notice for a CIT would have a significant impact on card issuers to price for market or risk conditions. In order to comply with the 45-day requirement, issuers report that they may not be able to change terms for up to 90 days depending on when the determination is made and how changes are implemented. For example, if an issuer determines the need to change terms on day 1 of a consumer’s billing cycle, that notice may not be sent for another thirty days in order for it to coincide with an existing mailing, such as the periodic statement. The expiration of the 45-day period would fall in the middle of the billing cycle beginning after the notice was sent (i.e., 75 days after the determination was made). For many changes, the issuer must wait for the beginning of a new billing cycle, meaning the “waiting period” could be up to 90 days.

By paralyzing a card issuer for up to 90 days in the face of rapidly changing economics or credit risk, the Board could require card issuers to reprice all accounts at the outset to hedge for the risk that may be associated with only a small fraction of accounts. AFSA questions whether consumers benefit in such circumstances, especially if consumers whose credit risk profile does not deteriorate must subsidize the inability of a card issuer to efficiently change terms for those consumers whose profiles do deteriorate.

If the Board retains this provision, we ask that card issuers have more flexibility to implement a change in terms than provided by the Proposed Rule. For example, no change in the CIT notice requirement should be necessary if the CIT does not affect an existing balance, or if the change is only a prospective change to fees. Additionally, a card issuer should be able to give 15 days notice if it allows the cardholder to close the account and repay the existing balances under the existing terms. In the unlikely event that the cardholder has no other available credit card accounts open, the cardholder has sufficient time to apply for another account without having to rely on a balance transfer or other mechanism to avoid the changed terms applying to the existing balance. In other circumstances, the Board could require no more than a notice that can take effect after one full billing cycle for CITs.

**Penalty Pricing Notices: 45-Day Notice**

AFSA is also concerned about the 45-day notice requirement pertaining to penalty pricing. In addition to the concerns described above relating to the CIT requirement, which apply equally in the context of penalty pricing, we believe that this provision could have additional, significant unintended consequences.

As an initial matter, we note that consumers will be well aware of the circumstances that may cause an account to be repriced based on “on us” behaviors. These items will be disclosed
in the application and solicitation disclosures, the account-opening disclosures, the account agreement itself, and at least one of the possible “triggers” is proposed to be included on the periodic statement every month. AFSA believes that consumers will be well informed regarding the actions that may result in penalty pricing. To the extent the Board believes that consumers need additional notice, perhaps a card issuer could include (i) an annual reminder on or with the periodic statement of the terms of the agreement relating to penalty pricing; or (ii) a preprinted reminder on the back of periodic statements outlining the penalty pricing triggers. It is also important to note that consumers agree, as part of the account agreement, to the penalty pricing terms just as they agree to any other portion of the contract between the issuer and the cardholder. We are unaware of evidence suggesting that this portion of the contract—unlike any other portion of the contract—requires specific notifications and lead time before one party invokes a pertinent and legal contractual provision.

As we discuss above with respect to the effect of the CIT notification requirements, we believe this provision will result in issuers shifting costs to consumers who abide by account agreements in order to compensate for the risk posed by those who do not. Additionally, the Board’s proposal presents a risk that card issuers may simply avoid penalty pricing as a practice and omit such provisions from an account agreement and the required disclosures under Regulation Z. By creating a structure that provides virtually no benefits to disclosing certain terms initially and including them in the account agreement, the Board may be providing incentives for issuers to rely more on CITs than penalty pricing. We question whether this result is the one intended by the Board.

If the Board retains a requirement to provide notice of a change in pricing described in the account disclosures and account agreement, and such notice must be provided a certain period of time prior to the contract provision becoming effective, we ask the Board to consider circumstances in which an issuer does not reserve the right to impose penalty pricing until a consumer trips two or more “triggers.” Specifically, if an issuer were to impose penalty pricing but only upon two late payments, for example, the issuer should be permitted to provide the required notice after the first late payment that a second late payment will trigger the altered pricing. The 45-day clock, as proposed by the Board, would start as of that initial notice, allowing the issuer to implement the pricing change after the later of 45 days or the second late payment. We believe that without such flexibility, issuers that currently offer the leeway of two defaults before an account is repriced may determine that they can no longer afford to do so if they must wait 45 days after the second default before implementing risk mitigation strategies.

Change in Terms and Penalty Pricing Notices: Format Requirements

The Proposed Rule includes formatting requirements for the CIT notice and for the penalty pricing notice. We believe that the Board’s formatting requirements could be revised to assist consumer understanding regarding the notices, as well as to allow issuers to integrate them into periodic statements in a more customized manner.

We note that the CIT notice states at the outset that the revised terms included in the proposed tabular disclosure are “a summary of changes that are being made” to the account. This is not necessarily the case in many circumstances, as a CIT can involve a variety of terms
that may not necessarily appear in the tabular disclosure. In such cases the tabular disclosure may not be a summary of the entire CIT. Furthermore, even the few provisions that may be included in the tabular disclosure may or may not be of the type worthy of the prominence proposed by the Board. For example, it is not clear that a change in the APR for a cardholder who has never revolved balances on the account should automatically be more prominent than other important information in the periodic statement. For these reasons, we believe it would be more appropriate to allow an issuer to include a clear and conspicuous CIT notice in a periodic statement without a requirement to “summarize” it in a box on the front of the statement. If the Board retains the concept of an “alert” on the front of the statement, it should be something as simple as “This billing summary includes important information about a change in your account terms. Please review the changes located at the end of this document.”

With respect to the penalty pricing disclosure, we do not believe that the Board should mandate a tabular disclosure above the transaction summary of the periodic statement. Consumers will be aware of when they incur penalty pricing regardless of the notice because they generally know when they engage in the types of behavior triggering the repricing, such as by making a late payment. Furthermore, it is possible to provide such a notice clearly and conspicuously in a manner the consumer can easily see and understand without mandating a specific location or format.

**Account Termination**

Section 127(h) of TILA includes a provision enacted as part of the Bankruptcy Act that prohibits a creditor on an open-end consumer credit plan from terminating an account “prior to its expiration date solely because the consumer has not incurred finance charges on the account.” Nothing in this provision prohibits a creditor from terminating an account for inactivity in three or more consecutive months.

The Board proposes to implement this provision in a manner substantively similar to the statute. We support this approach, and urge that it be retained in the Final Rule. We ask that the proposed Commentary, however, be revised to more accurately reflect the statutory language. The proposed Commentary states that “[c]reditors that offer accounts with no stated expiration date are prohibited from terminating those accounts solely because a consumer uses the account and does not incur a finance charge.” We note that neither the statute nor the Proposed Rule make reference to the use of the account as a factor in determining whether to terminate the account. We do not believe, therefore, that such a reference is appropriate in the Commentary. AFSA encourages the Board to retain the other portions of the Proposed Rule implementing section 127(h) of TILA.

**Billing Error Provisions**

*Third-Party Intermediaries*

Generally speaking, a cardholder may assert billing errors against a card issuer under § 226.13(a)(3) for an extension of credit for property or services not accepted by the consumer or the consumer’s designee, or not delivered to the consumer or the consumer’s designee as agreed.
The Proposed Rule includes a “clarification” in the Commentary that a consumer may assert a billing error against a card issuer relating to “goods and services that are purchased using a third-party payment intermediary…funded through use of a consumer’s open-end credit plan when the goods or services are not accepted by the consumer or not delivered to the consumer as agreed.” The Board further notes that “[u]nder these circumstances, the property or service for which the extension of credit is made is not the payment service, but rather the good or service that the consumer has purchased using the payment service.”

AFSA respectfully notes that this is not a clarification, but a potentially significant change in billing error requirements under Regulation Z. Today, in order for a card issuer to be held responsible, even indirectly, for the actions of a merchant, the card issuer must be extending credit for purposes of the consumer’s transaction with that merchant. The Board, however, is proposing to make the card issuer indirectly liable for the merchant’s action despite the fact that: (i) the issuer’s card is not accepted by the merchant; (ii) the merchant has not been vetted by another participant in the payment system in which the issuer is participating; (iii) the issuer has no direct or indirect mechanism to protect itself against rogue or untrustworthy merchants accepting payments through third-party intermediaries; and (iv) the third-party payment system is in a better position to provide the consumer protections advocated by the Board. Indeed, given the breadth of the Board’s proposed revision, it would appear that it apply to a consumer’s use of a credit card to fund transfer performed by any money transmitter for purposes of paying for a good or service. It is not clear why a card issuer should be put in the position of handling a billing error if the recipient of the wire transfer—funded by the credit card but handled by a third-party intermediary—did not deliver goods as promised. The Board’s interpretation appears to be nearly the equivalent of holding a card issuer responsible for the purchase of goods made at a “bricks and mortar” merchant with funds obtained through a cash advance. Although this would appear to be an unusual requirement, the Board has not provided any rationale that would distinguish the logic of its proposed revision to the Commentary from the logic extending the protection to the cash advance. In other words, it is not clear why the Board proposes a protection contingent whether the funds obtained from an extension of credit on a credit card account were obtained and then delivered electronically by a money transmitter or obtained and then delivered in person by the cardholder him or herself. For the reasons that extending such protections in connection with the cash advance example are unworkable and not justified, we urge the Board to delete this proposed change.

To the extent the Board determines that it is appropriate to require a card issuer to vouch for merchants that do not accept the issuer’s card, but who do accept funds that are directly and indisputably traceable to an extension of credit on a credit card account, we believe the requirement should be limited to those circumstances in which the purchase transaction can be traced to a specific funding transaction involving the issuer’s card and the third-party intermediary. For example, it is our understanding that at least one payment card network has a system in place in which a major third-party intermediary will transmit information through the payment card network associating a specific purchase with a specific transaction funding the

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8 With respect to the last point, the obligation to provide such a consumer protection should fall squarely on the third-party intermediary. To the extent the Board cannot impose such a requirement, it would be something that could be required by Congress if such a protection were deemed appropriate.
consumer’s account with that intermediary. In these circumstances, it is at least possible to trace a consumer dispute to a specific funding activity mitigating some concerns.

**Timeframe to Resolve Billing Errors**

Section 161 of TILA governs billing errors. Among other things, section 161 states that a card issuer must resolve a billing error within “two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the billing error notice.”\(^9\) Section 161(c) states that a “creditor who fails to comply with the requirements of this section…forfeits any right to collect from the obligor the amount indicated by the obligor [as a billing error] and any finance charges thereon, except that the amount required to be forfeited under this subsection may not exceed $50.” Therefore, it appears that Congress established the timeframe in which a card issuer must resolve billing errors. Congress also stated that if a creditor did not meet its obligations, including those relating to the timeframe in which the billing error must be resolved, the creditor must forfeit to the consumer any right to collect the challenged amount *with a cap of $50*.

The proposed revision to the Commentary would appear to require a creditor to forfeit its right to collect from a cardholder if a billing error investigation exceeded the allotted time. In so doing, the Commentary would read out of the statute the provision capping the forfeiture to $50. The Board suggests that this change in the Commentary is a “clarification” to the existing law. Yet, it is AFSA’s understanding that virtually all creditors have relied on the forfeiture cap provided in 161(c) if a billing error investigation exceeds the statutorily allotted time without criticism from the Board or any other regulatory body. Indeed, this forfeiture cap has been affirmed in case law. Furthermore, given the strong statutory support for the $50 liability cap, we believe that the proposed change in the Commentary appears to be more of a substantive change to Regulation Z than a “clarification” of existing interpretations.

We urge the Board to reconsider this revision to the Commentary. As a threshold matter, we are unaware of widespread consumer complaints about lack of diligence regarding billing errors or having investigations unnecessarily drawn out to the disadvantage of a cardholder. Aside from the fact that we are unaware of a consumer harm being addressed by this provision, AFSA fears that such a revision may open card issuers up to complicated fraud schemes designed to be difficult to investigate. Such schemes would result in criminals defrauding card issuers with card issuers having little recourse to collect from the criminals if the investigation exceeds two complete billing cycles. A regulatory result leaving card issuers more vulnerable to fraud may lead to cost increases on all cardholders to compensate card issuers for increased losses.

**Advertising**

\(^9\) The Commentary, which the Board does not propose to revise, states that “two complete billing cycles means 2 actual billing cycles occurring after receipt of the billing error notice, not a measure of time equal to 2 billing cycles.” The Supplementary Information to the Proposed Rule states, however, that “the creditor must complete its investigation within the time period represented by two billing cycles.” We assume the Commentary is correct, but would like clarification if we are incorrect in this assumption.
Minimum Monthly Payments

The Board proposes to use its authority to require, if an advertisement for credit to finance the purchase of specific goods or services states a minimum monthly payment, the advertisement to state the total of payments and the time period to repay the obligation, assuming that the consumer makes only the minimum payments. These disclosures must be as equally prominent as the statement of the minimum monthly payment. For a variety of reasons, AFSA urges the Board reject this proposed change in the Final Rule.

The Proposed Rule would have a significant impact on advertising promotional offers to finance the purchase of goods, especially through use of co-brand or private-label credit plans. By requiring a minimum payment disclosure of equal prominence to the minimum payment itself, the Board is attempting to create disclosures for these open-end transactions advertised generally similar to the disclosures required in a transaction-specific, closed-end environment. This would result in cumbersome disclosures that may have little applicability to the consumer depending on the terms offered to the consumer and the consumer’s repayment intentions. We also note that the Board would need to provide creditors with the necessary assumptions for use in the creditors’ calculations of total payments and repayment period. For example, in addition to the assumptions the Board provides in connection with the minimum payment disclosures required in § 226.7, the Board would need to provide other assumptions upon which creditors could rely, such as the account terms to use when several could apply (e.g., if an account could have one of several APRs depending on the consumer’s credit profile).

AFSA is also concerned that the proposed requirement is ambiguous and it may not be possible for the Board to provide sufficient precision. For example, it is not clear what a “specific” product or service would be. Would the disclosure apply only if the minimum payment applied to a specific model of dishwasher? Specific brand? Dishwashers in general? Any product in the store? It is also not clear whether the disclosure requirement would apply if only the true minimum payment as determined under the terms of an applicable credit plan were advertised, or if any payment amount were advertised no matter its relation to the price of the product. We also assume the Board does not intend to interfere with “no payment” credit promotions by requiring the disclosure of other triggered terms and suggest that doing so would provide a disincentive for issuers and retail partners to provide these valuable benefits to consumers.

We believe that if the Board retains this disclosure requirement, many creditors may determine they cannot provide important information to consumers on a limited budget (i.e., whether they can afford an item making only minimum payments). One possible mitigant may be to require a disclosure of only the time period it would take to repay the balance making only the minimum payments, assuming the Board provides the necessary assumptions and safe harbor to make such a calculation. Regardless of terms of the account, all consumers making only minimum payments will likely make close to the same number of payments to pay the balance. However, the total cost disclosure would not necessarily take into account the fact that the consumer’s total cost could vary depending on the terms of the account. Because the total cost disclosure could be significantly inaccurate for many, or even, most consumers regardless of the assumptions permitted by the Board, it should be deleted.
Definition of “Open-End Credit”

Subaccounts

The Proposed Rule attempts to clarify the definition of “open-end credit” under Regulation Z. The Supplementary Information notes that the Board believes some products currently treated as “open-end credit” would be more appropriately treated as closed-end transactions. For example, the Board notes that closed-end disclosures are more appropriate than open-end disclosures when the credit being extended is individual loans that are individually underwritten. The Board expresses specific concern about credit plans where each individual credit transaction is separately evaluated.

In an effort to address these concerns, the Board proposes to revise the Commentary. We commend the Board for noting that an open-end account may have “subaccounts” with different terms, and that such “subaccounts” may also be deemed to be open-end. We note that the proposed revision to the Commentary suggests that the subaccounts must generally have a replenishing line of credit to the extent they are repaid. This may be true of portions of a plan that are intended to be something other than promotional, but we caution the Board against suggesting that a promotional feature to an account is not open-end credit simply because the line of credit may not replenish at the promotional terms offered. For example, an open-end credit account may offer a consumer with a temporary introductory rate for a specific transaction, such as a specific purchase or a balance transfer. The consumer may make payments credited to this “subaccount” with a lower APR, and the creditor may replenish the overall line of credit without necessarily making the same discounted APR available for other transactions. We do not believe that such arrangements are of the type the Board seeks to redefine, but we ask the Board to clarify its intentions in this regard.

Effective Date

The Proposed Rule does not include a proposed effective date for the Final Rule. AFSA strongly urges the Board to adopt an effective date of two years from the date the Final Rule is published in the Federal Register. A minimum of two years is necessary for creditors to review the Final Rule, develop compliance programs, and effectuate those programs. As the Board is undoubtedly keenly aware, the Proposed Rule is extremely complicated and comprehensive. We expect the same of the Final Rule. The result is likely to require significant review by business, compliance, and legal personnel before compliance programs can be developed. Furthermore, it will take several months (if not a year or more) to design, reprogram, and test systems for compliance with the Final Rule. As an example, we have been told that one major vendor has informed creditors that it will take the vendor almost a year—after the vendor receives the business requirements—to make the necessary programming changes for disclosures on a scope similar to that proposed by the Board. We believe a two-year timeframe time is necessary due to the scope of these revisions, and the lead time necessary to make the necessary technological changes.

10 If the Board requires year-to-date disclosures to be disclosed on periodic statements, the requirement should be effective beginning January 1 no less than two years after the date the rule is published.
We also ask the Board to exempt accounts that are closed to future advances from the changes in Regulation Z. Given the enormity of the effort creditors will undertake once the Final Rule is issued, we do not believe that it is appropriate to require creditors to dedicate scarce resources to overhaul the disclosures for account types that are scheduled to liquidate or terminate. We believe it would overly burdensome to require such wholesale changes for accounts that will not be in existence for long.

Closing

Again, AFSA appreciates the opportunity to comment on the Proposed Rule. Our member companies are committed to providing consumers with useful disclosures under Regulation Z. We would like to be a resource for the Board, as needed, for purposes of crafting a Final Rule. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this rulemaking, please do not hesitate to contact me at (952) 922-6500 or (202) 412-3504.

Sincerely,

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