NYC Department of Consumer Affairs
Office of Financial Empowerment

The New York City Department of Consumer Affairs' Comments to Docket No. R-1314 Unfair or Deceptive Acts or Practices Submitted to The Board of Governors of the Federal Reserve System

August 4, 2008

I. Introduction

The New York City Department of Consumer Affairs (DCA) appreciates the opportunity to comment on the rules the Board of Governors (the Board) has proposed in its Docket No. R-1314.

DCA recognizes the Board's commitment to improve financial industry practices with regard to credit cards and overdraft protection. Given high levels of consumer debt and recent media scrutiny concerning financial institutions' activities, the elimination of unfair or deceptive acts or practices warrants the Board's immediate attention and comprehensive solutions. DCA strongly supports the proposed amendments that would prohibit fees based on credit and debit holds, limit fees and deposits levied for the issuance of credit, broadly curtail the practice of double-cycle billing, establish a reasonable repayment period, and restrict interest rate increases on outstanding balances.

To ensure that the marketplace operates fairly and that both credit issuers and consumers act under clear and consistent practices, DCA proposes several complementary regulatory changes within the Board's rulemaking authority. Specifically, the Board should ban the practice of universal default entirely; extend the "safe harbor" reasonable repayment period to 30 days and prohibit the imposition of late fees before 30 days; require that consumers be offered the opportunity to "opt in" to new credit card terms and courtesy overdraft protection, rather than be given the burden of opting out; insist that payments be allocated automatically to the highest APR balance; mandate ATM and point of sale notification of overdrafts; extend the ban on double-cycle billing to deferred-interest balances; and provide additional context when disclosing criteria used to determine creditworthiness.

II. Background on DCA

DCA submits these comments as the agency empowered under the New York City Charter to "plan, make recommendations, conduct research and develop programs for consumer education and protection, and facilitate the exchange and dissemination of information in consultation with agencies, federal and state officials, commercial interests, private groups and others working in this field and coordinate the consumer protection activities of other city agencies."[1] Among other functions, the Charter also grants DCA the obligation to enforce all laws relating to advertising and offering goods and services, and to receive, evaluate, and investigate consumer complaints.

To ensure a fair and vibrant marketplace for consumers and businesses alike, DCA licenses 55 categories of businesses; mediates thousands of consumer complaints annually; educates consumers and businesses through press releases, press conferences, educational materials, community outreach and public hearings; and works with other city and law enforcement agencies to protect consumers from unfair and deceptive practices.

DCA enforces the City's landmark Consumer Protection Law to prevent consumers from being defrauded in the marketplace. The Department's aggressive enforcement against such industries as major wireless companies, tax preparers, electronics stores and secondhand auto dealers has ensured that consumers are protected from deceptive or misleading marketing practices and are provided with information to make meaningful market choices.

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[1] Chapter 64, Section 2203(a)

DCA's Office of Financial Empowerment (OFE) was the first initiative launched by Mayor Michael Bloomberg's Center for Economic Opportunity (CEO), an ambitious and aggressive multi-pronged anti-poverty effort. OFE is dedicated to educating, empowering and protecting New Yorkers with low incomes to help them retain income and build assets. OFE's accomplishments include: negotiating with financial institutions to develop a specialized "safe" starter account for low-income participants in CEO's OpportunityNYC program;[2] piloting asset-building savings products for EITC recipients at tax time; and conducting research on the financial behaviors and attitudes of New York City residents and employees. OFE's partnerships with non-profits and city agencies providing financial counseling and classes through the NYC Financial Education Network give it valuable insight into the impact of credit and banking products. Finally, OFE is the founder and co-chair of Cities for Financial Empowerment, a national network of municipalities working to improve financial services for low-income households. It is this broad and varied experience that informs DCA's comments.

III. Background and Context: Changes in credit card and bank practices in recent years have led to more consumer choice, but also more complex products and unfair and deceptive practices.

In recent years, the consumer credit industry has grown at a dramatic pace. According to the Federal Reserve, total consumer credit increased by 24% from 2003 to 2008—a growth of nearly one-half trillion dollars. In May, 2008, total consumer debt levels reached $2.57 trillion, of which nearly $1 trillion consisted of revolving credit.[3] Household debt service, as a percentage of disposable income, is now more than 14%, compared with 11% in 1980.[4]

Much of the growth in debt holding comes from lower-income households that were historically excluded from mainstream credit offerings. From 1998 to 2004, the number of low-income households with credit card debt increased by 18%, the largest increase of any income group.[5] DCA/OFE's own research in two low-income New York City neighborhoods found that 58% of residents surveyed have at least one credit card and 71% of residents carry a balance, averaging $2,500.[6] Even more striking, this growth in credit cards has even extended to those without bank accounts—among unbanked residents surveyed in these neighborhoods, 21% also have at least one credit card.

Greater access to credit comes at a higher cost. According to a *New York Times* article in July, 2008, even borrowers with good credit records have seen their interest rates rise from 17.7 percent in 2005 to 19.1 percent last year. Between 1994 and 2007, average late fees have nearly tripled, from less than $13 to $35, and fees for exceeding credit limits more than doubled, from $11 to $26.[7] Higher costs and debt levels have jointly caused significant financial strain for consumers. More than one-quarter of families in the lowest income quartile are now paying more than 40 percent of their income on debt payments; one-third of low-income borrowers reported in 2004 that they have difficulty making payments on time.[8] In New York City, consumer bankruptcy filings in 2007 were 69% higher than in 2006.[9]

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[2] CEO has piloted an innovative conditional cash transfer program called "OpportunityNYC." The OpportunityNYC account is a safe and affordable account which makes overdraft virtually impossible. Ten financial institutions agreed to offer this no-fee starter account for participants. To date, more than 1,500 accounts have been opened.
[3] Federal Reserve Board. "Federal Reserve Statistical Release: Consumer Credit." July 8, 2008. Available at: http://www.federalreserve.gov/releases/g19/Current/
[4] Federal Reserve Board. "Household Debt Service and Financial Obligations Ratios." Updated June 10, 2008. Available at: http://www.federalreserve.gov/releases/housedebt/default.htm
[5] Government Accountability Office. "Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers." Report GAO-06-929, September 2006.
[6] New York City Department of Consumer Affairs. "Neighborhood Financial Services Study: An Analysis of Supply and Demand in Two New York City Neighborhoods." June 2008. (Hereafter "Neighborhood Financial Services Study.") Available at www.nyc.gov/ofe
[7] Gretchen Morgenson. "Given a Shovel, Americans Dig Deeper Into Debt." *New York Times*, July 20, 2008. Article cites statistics from CardWeb.com.
[8] Matt Fellowes and Mia Mabanta. "Borrowing to Get Ahead, and Behind: The Credit Boom and Bust in Lower-Income Markets." Brookings Institution, May 2007.
[9] Tom Fredrickson. "Personal Bankruptcies Soar." *Crain's New York Business*, November 4, 2007.

Certain populations are particularly vulnerable to overwhelming solicitations for credit, including college students, senior citizens, and consumers with poor credit histories. Congressional testimony as early as 1994 acknowledged that college students may receive credit cards from major issuers without any income, credit history, or cosigner.[10] College students around the country have received initial credit limits as high as $6,000 without having any income.[11] Senior citizens and consumers with past credit problems are equally susceptible to improper underwriting.[12]

These incidents clearly reveal lax underwriting practices by lenders that threaten the well-being of both consumers and businesses in the marketplace. DCA has seen similar practices in its investigation of used auto dealers in New York City, including misrepresentations by dealers that they could automatically offer superior terms to consumers even without any type of information about the consumer.[13] Offering credit without ability to repay has established irresponsible lending practices in the consumer credit industry, where greater emphasis is placed on fee extraction than the determination of whether a loan can feasibly be repaid. This has grave implications for consumers, as well as for the safety and soundness of financial institutions that are holding loans with insufficient assessments of repayment ability.

Just as consumers are facing a squeeze on their finances from credit pressures, banks offer high-cost "courtesy" overdraft protection that facilitates overdrawing bank accounts. Again, with access comes a high cost: fees on initial overdrafts averaged $27 in New York City in 2007 and some institutions increase courtesy overdraft charges to $32-$33 for subsequent uses.[14] National research suggests that the short timeframe of overdraft protection plans translates to APRs higher than 4,000%, and that overdraft protection plans are linked to an increased number of overdrafts.[15] DCA/OFE's 2008 research found that 25% of checking account holders surveyed in a high-poverty New York City neighborhood had overdrawn their accounts at least once in the last few months; 4% reported overdrawing their accounts at least monthly. With overdraft fees averaging $30, community residents are paying upwards of $3.8 million annually just to cover overdrafts.[16]

IV. Proposed Amendments and DCA Recommendations

DCA supports a strong and robust financial services marketplace in which consumers at all income levels can access credit to meet short-term consumption or emergency needs. Yet, growing sophistication and complexity in financial products and the financial sector interest in fee-generating products have resulted in deceptive, misleading and unfair practices including courtesy overdraft protection, double-cycle billing, and universal default. A fair and thriving marketplace requires transparency and consistency. The chief role for government is to ensure that consistency and transparency exist and are properly disclosed, and that illegal, unfair or deceptive practices are prohibited.

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[10] See U.S. House of Representatives. "Kiddie Credit Cards: Hearing Before the Subcommittee on Consumer Credit and Insurance." Committee on Banking, Finance and Urban Affairs, March 10, 1994. For additional information on credit card practices toward college students, see also Creola Johnson, "Maxed Out College Students: A Call to Limit Credit Card Solicitations on College Campuses." *New York University Journal of Legislation and Public Policy*, Vol. 8, 2005.

[11] Jessica Silver-Greenberg. "College Students Majoring in Credit-Card Debt: Aggressive On-Campus Marketing By Lenders is Coming Under Fire." *BusinessWeek*, September 5, 2007. In one instance mentioned in the article, a student claimed that he was told to list the amount of his tuition bill as "income" on the credit application.

[12] For example, three weeks after having debts on ten credit cards discharged in bankruptcy proceedings, one elderly couple in New Mexico was offered a credit card with a $3,200 limit and another "platinum" card with a $10,000 limit, while their annual income was $19,000 from Social Security. For more information: National Consumer Law Center. "The Life and Debt Cycle, Part One: The Implications of Rising Credit Card Debt Among Older Consumers." July 2006. 17-18.

[13] See supra note 34.

[14] U.S. Citizens for Fair Credit Terms/Cardratings.com. "State of New York Banking Department: Bank Fees." Available at http://www.cardratings.com/bank_fee_survey/bankfees.html

[15] Marc Anthony Fusaro. "Hidden Consumer Loans: An Analysis of Implicit Interest Rates on Bounced Checks." *Journal of Family and Economic Issues*. Vol. 29 No. 2, June, 2008.

[16] New York City Department of Consumer Affairs. "Neighborhood Financial Services Study: An Analysis of Supply and Demand in Two New York City Neighborhoods." June 2008. (Hereafter "Neighborhood Financial Services Study.") This research, conducted during the summer and fall of 2007, includes mapping mainstream and alternative financial institutions, collecting on-the-street surveys of community residents, and facilitating community focus groups. For more information: www.nyc.gov/ofe.Calculations based on 2000 Census population of Jamaica, Queens and one monthly overdraft for those who reported overdrawing their account at least once per month.

The proposed regulations represent a significant step towards increasing consumer protection by restricting certain harmful and/or deceptive practices, but these regulations alone will not address all of the regrettable practices that have emerged in the credit card and consumer banking industries. In the following comments, DCA urges the Board to require credit issuers and banks to ensure that pricing and terms are clear and consistent, and will not change without the consent of the buyer and the seller. Specifically, DCA will comment on the following issues:

A. Universal default
B. Late penalties and default interest rates
C. Reasonable payment time
D. Payment allocation
E. Negative options
F. Over-the-limit fees
G. Double-cycle billing
H. Interest rate disclosure

A. Universal default: The Board should ensure that unilateral changes in credit card terms are prohibited without explicit consumer consent.

The Board proposes, in Section 227.24(b)3, that financial institutions may raise the interest rate on an outstanding balance when the consumer fails to make a minimum payment within 30 days after the due date. The only other circumstances under the Board's proposal for increasing the interest rate on an outstanding balance are fluctuations in publicly-available index rates outside the bank's control and rate changes due to the end of a promotional period. The Board also establishes minimum payment schedule standards for such balances.

DCA supports the Board's proposal to ensure that credit issuers cannot change terms and conditions of a consumer's current balance without express consent. This is especially important given the recent arbitrary changes in consumers' APRs, including one major credit-card lender that more than doubled the rates of non-default cardholders without explanation in January 2008.[17]

Establishing universal criteria for rate increases yields greater transparency and consistency for consumers. Consumers have the right to be confident that the price they pay for credit will not change arbitrarily or without their knowledge; the credit card industry should not have the ability to change the price once a good had been purchased. The fundamental precept that consumers should not be surprised by a change of terms informs DCA's local regulation. DCA requires, for example, the posting of prices and use of contracts in a variety of industries. The FTC has similarly recognized this fundamental principle in other industries, as well. For example, in 2004, it brought a case against an online advertiser that changed its privacy policy midstream.[18] This argument rests on a basic concept applicable to the credit industry - if an agreement has been made, a change must require the explicit, not implicit, agreement of both parties.

DCA also urges the Board to address rate changes on new purchases, especially with regard to universal default. This practice is commonly used by credit issuers to increase interest rates on credit cards held by customers in good standing due to changes in the consumer's credit score.[19]

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[17] Bank of America sent letters notifying some responsible cardholders that it would more than double their rates to as high as 28%, without giving an explanation for the increase, according to copies of five letters obtained by *BusinessWeek*. Robert Berner. "A Credit Card You Want to Toss." *BusinessWeek*, February 7, 2008.

[18] Press Release. "Gateway Learning Settles FTC Privacy Charges: Company Rented Customer Information It Pledged to Keep Private." Federal Trade Commission, July 7, 2004. Available at: http://www.ftc.gov/opa/2004/07/gateway.shtm

[19] In 2005, Consumer Action, a San Francisco-based advocacy organization, surveyed credit card issuers and found that 45% of banks surveyed have universal default policies. Circumstances invoking universal default included late payments to other creditors, exceeding credit limits, having too much or too little available credit, establishing new credit accounts, and auto or mortgage loan inquiries. For more information: http://www.consumer-action.org/news/articles/2005_credit_card_survey/#Topic_01

While credit issuers claim that changes in terms respond to an increased risk of default, risk can be more effectively and justifiably managed by reducing credit limits. Moreover, raising the cost of credit certainly does not enhance consumers' ability to pay. While the Board's proposal indirectly addresses the most egregious practice—increasing the interest rate on an outstanding balance to coincide with a decline in credit score or late payment to another creditor—this proposal still leaves open the possibility of universal default on new purchases. As stated in DCA's comments on Regulation Z, changes in terms without the consent of both parties are unacceptable. If credit issuers wish to change interest rates on new purchases, they must offer consumers the right to "opt in" to new terms. DCA also urges the Board to limit interest rate increases. Advocates have recommended 7-10% as a maximum rate increase.[20] DCA recommends that the Board study these proposals and develop appropriate restrictions.

B. Late penalties and default interest rates: The Board should prevent the application of both penalty interest rates and late fees before consumers' minimum payments are more than 30 days past due.

In Section 227.24(b)3, the Board proposal would ensure that default interest rates would not apply to consumers until they had failed to make a minimum payment for 30 days past the due date. The proposal does not address late charges. DCA urges the Board to ban late charges applied between the due date and the default date (30 days past due).

While DCA understands the need for fees and penalties where consumer behavior causes financial harm to creditors, payments made between the due date and default date (30 days past due) create revenue for credit card companies. Unlike closed-ended loans, revolving credit issuers charge consumers for payments made after the stated due date through finance charges. Late charges in closed-ended loans are designed to encourage the customer to remain current on their loan; for open-ended credit, the finance charge is added immediately following the due date. Allowing creditors to place an additional late charge immediately results in a double-jeopardy situation for the consumer. Moreover, issuers receive *greater* revenue if consumers pay after the due date. Late charges have a large financial impact on consumers; the average late fee increased from $13 to $29 between 1996 and 2002, and late fee revenue rose from $1.7 billion to $7.3 billion.[21] Delinquency charges should be associated with the actual costs of collecting on a defaulted account, and therefore assessed at the point the account is considered in default (30 days past the due date). Creditors should be compelled to issue credit based on expectations of repayment, rather than on revenue streams from fees and late charges.

C. Reasonable time to make payments: The Board should establish a 30-day, rather than 21-day "safe harbor" period.

Section 227.22 of the Board's proposal specifies that consumers must be provided a reasonable amount of time to make payments, and establishes a 21-day period between statement delivery and payment due date as a "safe harbor" for reasonable time.

Credit issuers have been steadily reducing the length of time consumers could be assured that they would pay no punitive fees. Until the 1990's, a 30-day repayment period before any fees would be levied was standard practice, but this "float" declined, on average, to 24 days by 1999 and 20 days today.[22] The Board's establishment of a 21-day "safe harbor" does not reflect best

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[20] Demos. "Comments Regarding Advance Notice of Proposed Rulemaking Review of the Open-End (Revolving) Credit Rules of Regulation Z, Federal Reserve System 12 CFR Part 226, Docket No. R-1217." 2005. Available at: http://www.federalreserve.gov/SECRS/2005/March/20050329/R-1217/R-1217_110_1.pdf; Correspondence from Consumers Union et al. to Sen. Robert Menendez (D-NJ) in support of the Credit Card Reform Act of 2008 (S-2753). March 12, 2008. Available at: http://www.consumersunion.org/pub/core_financial_services/005489.html

[21] Demos 2003.

[22] Testimony of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center, before the Subcommittee on Financial Institutions and Consumer Credit, Financial Services Committee, United States House of Representatives. March 13, 2008.

practice, but rather, existing industry practice. Current legislation in the House of Representatives would establish a 25-day repayment period from the date a statement is mailed.[23]

DCA urges the Board to extend the reasonable-time provision to 30 days following statement delivery, offering customers a full billing cycle to make payments. This provides greater consistency to consumers, as it is the standard practice of closed-ended loans and other common household bills. Since the earliest date at which interest rates may increase, per the Board's proposed Section 227.24(b)3, is 30 days past due, consumers should have a clear sense of their credit obligations: 30 days to make a payment without incurring a finance charge or late fee, and another 30 days to avoid default. Moreover, DCA urges the Board to require envelopes to be stamped with the date of mailing to inform consumers whether they have actually been given the appropriate amount of time to make a payment.

DCA strongly supports the requirement under the Board's Regulation Z proposal that creditors accept payments made the day after a due date if it falls on a holiday, weekend, or other day payments are not accepted, and that payments should be accepted until 5:00 p.m. local time.

D. Payment Allocation: Credit issuers should be required to allocate payments across multiple-rate balances in the manner most beneficial to the consumer.

The Board's proposal establishes criteria for allocating payments across balances with different interest rates in Section 227.23. Financial institutions are required to apply payments in excess of the minimum in one of the following three ways: highest APR first; equal among balances; or pro-rata among balances. The Board's proposal also requires treating deferred-interest balances first during the last two cycles of a promotional period

DCA supports the Board's intent to provide greater clarity regarding payment allocation. The Board's own focus groups demonstrated consumers' inability to understand payment allocation options. Existing payment allocation practices are particularly deceptive with regard to credit card cash advances, which typically carry much higher APRs and are not paid off until all other balances have been paid in full. Cash advances are frequently used by low-income households to meet short-term credit needs, as revealed by DCA/OFE research in two neighborhoods of New York City. In Jamaica and Melrose, 25% of credit card holders reported taking out a cash advance at least once every few months.[24] It is reasonable to assume that most credit card cash advance users do not fully understand that the higher interest rate paid on those balances will remain unpaid until lower interest balances are paid off.

DCA urges the Board to permit only the payment allocation method of paying the highest APR balances first, with the exception of deferred-interest balances. More than the other two methods, this method would benefit the majority of consumers and address egregious cash advance practices.

With regard to deferred-interest balances, consumers should be given the right to self-allocate payments, with the default option being that credit issuers must apply payments to deferred-interest balances first. Consumers will almost always benefit from fully paying off purchases made at promotional or "no interest" rates, even if they are carrying other balances with high rates during the repayment period. The two-month repayment period for deferred-interest balances proposed by the Board may not give consumers sufficient time to repay balances in full; moreover, they may not fully understand the implications of not paying off deferred balances. Where promotional or deferred-interest rates apply, consumers should be given clear disclosure that a portion of their credit card balance is subject to a reduced interest rate, along with the expiration date of the deferral period, the eventual interest rate that will be charged on the

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[23] H.R. 5244: Credit Card Holders Bill of Rights, sponsored by Rep. Carolyn Maloney (D-NY) and Rep. Barney Frank (D-MA).

[24] Neighborhood Financial Services Study.

balance, and a simple process for self-allocation[25] such as check-boxes on the statement allowing the consumer to write in the amounts paid to each balance category.

E. **Negative Options: The default option for credit card changes in terms and courtesy overdraft protection should be in the best interest of the consumer, not the financial institution.**

Proposed Section 227.32 mandates that consumers be given the right to "opt out" of bank payment of overdrafts and a "reasonable opportunity to exercise that right." The bank must also provide the option of opting out only for transactions at ATMs and Point-of-Sale (POS) terminals, with exceptions in cases where the transacted amount exceeds the initial authorization or where paper-based transactions took place. Section 227.24 specifies circumstances in which credit card interest rates on outstanding balances may increase. While not directly addressing consumers' right to reject interest rate increases, the Board's Regulation Z proposal suggests that such a right could exist.

DCA urges the Board to require that "courtesy" overdraft protection plans not be applied to checking accounts without the express consent of the consumer, and that ATM and Point-of-Sale terminals require consumer consent at the time s/he would overdraw the account. Similarly, credit card issuers should not be allowed to change terms without the express permission of the consumer. The "opt out" system proposed by the Board requires only tacit, rather than explicit, consumer consent. Consumers should be able to rely on regulators to require default options that are in consumers' best interest, not "negative options" that steer them toward practices they may not truly want. Empirical research has catalogued the importance of default settings; consumers often make decisions to their own detriment by not making a decision at all.[26] Regulators have not hesitated to bar "negative options" in other contexts, such as billing for cable TV services,[27] and such "options" should similarly be prohibited here given the much more extreme consequences as a result of courtesy overdraft protection and increased credit card interest rates. Further, "opt-in" systems improve competition and enhance a robust marketplace; requiring consumers to make a firm decision encourages them to reject products or services not in their best interest in favor of those that are.

The Board proposal recognizes that consumers are often enrolled in courtesy overdraft protection plans without their knowledge, despite the fact that these plans are typically more expensive than equally effective substitutes such as overdraft lines of credit or savings account transfers. Forty-two percent of consumers surveyed by DCA/OFE in Jamaica and Melrose wrongly believed that their financial institution would "call to warn [them] if [they] write a check that would overdraw [their] account."[28] The Board's own study in 2003 found that nationally, 38% of consumers surveyed answered this question incorrectly.[29] With these concerns in mind, DCA also urges the Board to facilitate instant decision-making by requiring disclosures at ATM and Point-of-Sale (POS) terminals before consumers incur overdraft fees, just as is done presently with foreign ATM fees.

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[25] New York City local rules, developed and enforced by DCA, require that when the use of the word "free" is used, terms and conditions must be clearly and conspicuously disclosed in close proximity to that word. (Rules of the City of New York, Title 6, Section 5-06(b).) Similar rules could apply to deferred-interest balances, which are often marketed as "no interest" or "no payments."

[26] Richard H. Thaler and Cass R. Sunstein. *Nudge: Improving Decisions About Health, Wealth, and Happiness*. New Haven: Yale University Press, 2008.

[27] See 47 U.S.C. Section 543(f).

[28] Neighborhood Financial Services Study.

[29] Marianne A. Hilgert, Jeanne M. Hogarth, and Sondra G. Beverly. "Household Financial Management: The Connection Between Knowledge and Behavior." *Federal Reserve Bulletin*, July 2003.

With regard to credit cards, current right-to-reject laws in several states have proven underutilized because consumers do not have sufficient time to act on changes in terms and the only option under "right-to-reject" is to pay or transfer the balance in a short time period.[30] Requiring rapid turnaround time hampers consumers' ability to respond, regardless of the disclosure given. Immediate repayment is highly unlikely given extremely high debt levels found throughout the country. A survey of low-to-middle income borrowers found average credit card debt of $6,504, or more than two months gross salary.[31] Rushed decision-making and short repayment periods effectively eliminate consumers' realistic "right-to-reject." More appropriately, if a consumer opts out of new terms, the creditor should stop extending credit, and allow the consumer to pay off the existing balance at the current interest rate over a time period dictated by the existing minimum payment schedule. Thus, a consumer would have the right to pay off the balance at the minimum payment level, as specified by the creditor, provided the consumer maintains a sound payment record over that time period.[32]

F. Over-the-limit fees: The Board should prohibit fees for exceeding credit limits if the transaction has been approved by the creditor.

In Section 227.25, the Board prohibits fees based on holds exceeding a consumer's credit limit, and proposed Section 227.32(b) prohibits debit holds that would unnecessarily cause overdrafts to occur. These are sensible and important protections, and will prevent the future incidence of an egregious and unfair practice.

Although creditors approved the transaction, they retain the right to charge consumers for exceeding their allowed credit limits. Similar to "courtesy" overdraft protection, this practice allows consumers to spend beyond their allotted credit lines, despite the fact that consumers reasonably believe that a transaction would be rejected if it exceeds the amount of credit issued. Further, creditors should be prevented from charging consumers if they lower the credit limit below the current balance. This undermines the principle of bilateral agreements to changes in terms; it is also fundamentally unfair to consumers. The Board should tighten restrictions on over-the-limit fees to ensure that they are not applied unfairly or deceptively.

G. Double-cycle billing: The prohibition on double-cycle billing is critical, and should be extended to deferred-interest balances.

Section 227.26 of the Board's proposal addresses the practice known as double-cycle billing: "A bank must not impose finance charges on balances on a consumer credit card account based on balances for days in billing cycles that precede the most recent billing cycle." The proposal provides exceptions for deferred-interest balances and for the resolution of billing disputes in the creditor's favor.

Double-cycle billing has been widely acknowledged as a practice that is unfair and confusing to consumers, making it more difficult for consumers to pay off outstanding balances by charging them interest from the date a charge was incurred, even if it was in the previous billing cycle. As a rule, if a practice is too complex to be explained to consumers in a simple disclosure, it is

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[30] In the example cited by *BusinessWeek*, Bank of America's unexpected interest rate increases required customers who wished to opt out to contact the lender by mail only (with no form or envelope provided) within a quick turnaround period: those receiving notices during the second half of January had until either February 19 or 29 to respond. In another example, consumers who wanted to reject changes in terms on a Capital One card were unable because of the limited time frame. Michael Donovan, a consumer lawyer testifying on behalf of the National Consumer Law Center and National Association of Consumer Advocates, told a U.S. Senate committee hearing in 2007 that one of his clients was given fifteen days to reject changes in terms on his Capitol One card, and missed the deadline because he had been on vacation and the mailing looked no different from Capitol One's blanket credit card solicitations. "Written Testimony of Michael D. Donovan, Partner, Donovan Searles, LLC, on behalf of National Consumer Law Center and National Association of Consumer Advocates." Committee on Banking, Housing, and Urban Affairs, United States Senate. January 25, 2007.

[31] Demos and the Center for Responsible Lending. "The Plastic Safety Net: The Reality Behind Debt in America." October 2005.

[32] An advantage to a minimum payment-linked repayment period would be that credit-issuers would be given a strong incentive to ensure that minimum payments were paying down at least some principal each month as recommend by the Board's interagency "Account Management and Loss Allowance Guidance," January 8, 2003

probably a bad practice. As Senator Carl Levin (D-MI) testified, this is also a practice that consumers may not notice or understand, but that causes additional fees to accumulate even when payments are made in full and on time.[33] DCA strongly supports the Board's proposal to require the elimination of double-cycle billing.

DCA urges the Board to reconsider its exception for deferred-interest balances, on which back interest may be levied. As mentioned in its response to the Board's proposed amendments to Regulation Z, the terms "no interest", "no payments", and other materially similar language can be highly deceptive to consumers in any circumstances in which interest may be charged. DCA urges the Board to extend its proposed ban on double-cycle billing to deferred-interest balances.

H. Interest rate disclosure: The Board's proposal to require creditworthiness evaluation criteria provides greater consumer information, but stricter requirements could ensure that consumers know the actual rate they will be offered.

The Board proposes in Section 227.28(a) that a bank offering multiple APRs and/or credit limits, or a range of APRs and/or credit limits, must disclose on the solicitation and in its advertising, generally that the actual APR or credit limit that a consumer would receive depends on the consumer's creditworthiness, and the types of criteria that would be used to evaluate that consumer's credit.

Consumers are bombarded with mail solicitations for credit. In 2004, 5.2 billion solicitations were mailed in the United States, or 47 per household.[34] More than half of credit cards held by consumers come from mail solicitation.[35] These solicitations may frequently offer an attractive low rate, while the consumer could actually be extended a much higher rate upon account opening, as long as it remains within the disclosed range. Credit issuers generally send solicitations to potential customers based on score data they have purchased from credit bureaus. Therefore, in the vast majority of solicitations, creditors could easily identify for each consumer a realistic actual range of rates for which he or she would be eligible, not merely a hypothetical range based on a broad array of credit scores. This is a classic "bait-and-switch" technique that allows credit issuers already aware of a consumer's credit profile to deceptively advertise an unattainable lower rate, depriving consumers of the truthful and accurate information that drives a fair, vibrant, and effective market.

DCA supports the Board's proposal regarding firm offers of credit, but urges that the Board take these disclosures further to ensure greater transparency and consumer awareness. In addition to disclosing the existence and type of criteria used to evaluate creditworthiness, financial institutions should be required to provide contextual information concerning the credit profiles that would enable a consumer to receive the most favorable loan terms. In cases where the consumer fails to receive the most favorable terms advertised, the credit issuer must be required to clearly state in writing the higher rate issued, along with an explanation to justify that rate and a requirement that the consumer opt into the higher rate before activating the card. Only this type of disclosure can effectively protect consumers from credit issuers' "bait-and-switch" marketing practices.

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[33] Prepared Testimony of Senator Carl Levin, Chairman, Senate Permanent Subcommittee on Investigations, on Credit Card Practices and the Need for a Legislative Remedy." House Financial Services Subcommittee on Financial Institutions and Consumer Credit, April 17, 2008.

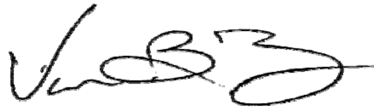
[34] Kidane/Mukerji in Financial Services Review, quoted in: Government Accountability Office. "Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts." Report GAO-08-281, January 2008. 91.

[35] Testimony of Travis B. Plunkett, Legislative Director, Consumer Federation of America, before the Committee on Banking, Housing and Urban Affairs, United States Senate. "The Effect of Current Credit Card Industry Practices on Consumers." January 25, 2007.

Conclusion

DCA acknowledges the strides that the proposed rules make towards improved practices in the credit card and banking industries, and commends the Board's thoughtful consideration of regulatory approaches that directly confront unfair and deceptive practices. At the same time, DCA emphasizes that the Board's proposals could be strengthened further in order to more adequately inform, empower, and protect consumers in the financial services marketplace. Lessons from behavioral economics can allow consumer choice to be demonstrated more clearly and accurately through "opt in" mechanisms, not "opt out". Applying credit card payments to the highest APR balances first creates more consistent rules for creditors and consumers to follow. Restricting or prohibiting fees from double-cycle billing, improper credit and debit holds, and disproportionate security deposits ensures that consumers are billed for the credit they are using, not for misleading and unclear provisions in credit card terms. Informed consumers, balanced by fair credit practices, will enhance and ensure a vibrant marketplace that benefits all.

Respectfully submitted,



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