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# THE CREDIT CARD ACT OF 2009: CREDIT CARD REFORM AND THE UNEASY CASE FOR DISCLOSURE

JOSEPH U. SCHORER

*This article begins by reviewing some of the basic terminology and features of the typical credit card agreement. It then discusses the principal provisions of the CARD Act. Finally, it will examine in greater detail the various disclosure mechanisms that Congress enacted in an effort to balance regulation with personal responsibility in the credit card arena.*

Credit cards are big business. Revolving consumer credit, consisting mainly of credit card debt,<sup>1</sup> ballooned from \$238.6 billion in September 1990 to \$770 billion in 2003 and to \$977 billion in 2008.<sup>2</sup> According to the Nilson Report, a newsletter that tracks the credit card industry, the average American household in 2007 carried \$7,753 in credit card debt, an increase from \$6,086 in 2002. By 2009, this amount increased to almost \$10,000.<sup>3</sup> In 2005, 35 percent of all active credit card accounts (about 50 million accounts) were assessed late fees and 13 percent were assessed over-the-limit fees. The average late payment fee in 2005 was \$34; the average over-the-limit fee was \$31. Ten years earlier, each of those fees averaged only \$13.<sup>4</sup> By 2007, credit card companies employed over 100,000 Americans.<sup>5</sup> Profits for the credit card industry in 2006 “were a handsome \$18.4 billion, a 45 percent jump from the year before.”<sup>6</sup>

Yet legislators and consumer advocates have repeatedly attacked many

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practices of credit card companies as unfair and abusive.<sup>7</sup> Moreover, they have complained that these practices end up squeezing the most vulnerable segments of the population.<sup>8</sup> Banks and other card issuers, on the other hand, have consistently defended their pricing practices and card terms as reasonable measures to develop risk-based pricing, whereby charges to consumers are tailored to the particular credit risk profiles of those consumers.<sup>9</sup> They pointed out that risk-based pricing facilitated a massive expansion in the availability of consumer credit in the last 20 years, to the benefit of all consumers.<sup>10</sup>

Following a final round of Senate and House hearings, intense public calls for action from President Obama<sup>11</sup> and last-minute legislative log-rolling, Congress passed the Credit Card Accountability, Responsibility and Disclosure Act of 2009 in May 2009, which this article refers to as the “CARD Act.”<sup>12</sup> The CARD Act became effective on May 22, 2009. Most of its provisions, however, only became fully effective in February 2010. As its Senate and House backers noted, the CARD Act overlaps with and accelerates changes to credit card regulations that were implemented in December 2008 by the Federal Reserve System (which this article calls the “Board”),<sup>13</sup> the Office of Thrift Supervision<sup>14</sup> and the National Credit Union Administration.<sup>15</sup> At that time these agencies enacted new rules and revised Regulation Z<sup>16</sup> promulgated pursuant to the Truth-in-Lending Act, which this article refers to as “TILA.”<sup>17</sup>

Yet the CARD Act goes far beyond the actions of the Board and other agencies and constitutes the greatest set of federal legislative enactments in history directed specifically at credit cards and the credit card industry. For that reason alone, the CARD Act merits examination for the various normative decisions it makes about unacceptable credit card activity. Beyond that, however, the CARD Act also contains an array of features that can be loosely described as efforts to improve consumer “disclosure” so that consumers, rather than legislators or regulators, can decide whether and how to use their credit cards.

This article will begin by reviewing some of the basic terminology and features of the typical credit card agreement. It then discusses the principal provisions of the CARD Act. Finally, it will examine in greater detail the various disclosure mechanisms that Congress enacted in an effort to balance regulation with personal responsibility in the credit card arena.

## BASIC CREDIT CARD TERMINOLOGY

Credit cards are issued pursuant to a contract that creates an open end consumer credit plan. The cards are “open ended,” because the card contract permits the consumer to borrow, repay and reborrow (typically although not always up to a credit limit) using the card. This differentiates the credit card from a “closed end” plan, such as a car loan, in which a fixed amount is borrowed at inception and then the consumer repays the loan (typically in installments) over time. The card issuer charges an interest rate for the money borrowed under the credit card. Pursuant to Regulation Z, the issuer must disclose, both in the credit card application and in the contract itself, the annual percentage rate, or “APR,” at which interest will be charged. Historically, the APR on a credit card was a fixed amount, which upon default under the credit card contract escalated to a higher, default rate. Nothing in federal law, however, prohibits the APR to be set up as a so-called floating rate, i.e., a rate that is a fixed percentage amount above an index (such as a bank’s announced “prime rate of interest”) that itself can move up and down from time to time.<sup>18</sup>

The relative rights of the card issuer and the cardholder are principally defined by the credit card agreement, and accordingly those rights are purely a function of the contractual terms set in the agreement. Prior to the CARD Act, most credit card regulation at the federal level was embodied in Regulation Z. Regulation Z, in turn, focuses primarily on the disclosure of the card terms to the consumer, rather than specifically limiting the card issuer’s rights or defining its substantive obligations to the consumer.

The typical credit card agreement sets up a three way arrangement among the card issuer, the cardholder and the merchant. Merchants who have entered into interchange agreements with card issuers agree that they will accept a charge on the card as payment for goods or services that they deliver to the consumer. Upon acceptance of the charge, the merchant agrees to look to the card issuer for payment. The card issuer, in turn, is obligated to the customer to pay the merchant and agrees that it will look to the customer for reimbursement of the charge it has paid the merchant. If the goods or service are defective or not supplied, the card issuer is entitled to reimbursement from the merchant, and the merchant must cancel the charge or, if already paid,

reimburse the customer. On the other hand, the card issuer, rather than the merchant, bears the credit risk of a customer's insolvency or bankruptcy.

Card companies make money in several ways. For one thing, they charge an interchange fee to the merchant for every transaction that it processes.<sup>19</sup> From the customers, there are multiple potential sources of payment. Most obviously, the card issuer collects interest on charges that are not paid in full by the end of the contractual grace period. The amount of the interest charged is set forth in the card agreement and is purely a matter of agreement. Moreover, depending on the particular terms of the card agreement, issuers can charge the customer a variety of fees, such as an annual fee for the right to use the card, a late payment fee or an over-the limit fee. Prior to the CARD Act, there was little if any federal or state regulation of these fees.

## KEY FEATURES OF THE CARD ACT

The CARD Act begins with three sections that, respectively, (a) prescribe the short title and table of contents for the legislation, (b) vest the Board with rulemaking authority to implement the CARD Act<sup>20</sup> and (c) make the CARD Act, in the absence of other direction in the bill itself for certain specific items, effective nine months after enactment (February 22, 2010).<sup>21</sup> The CARD Act then sets forth five substantive titles.<sup>22</sup> Some of the CARD Act's provisions mandate a variety of studies to be undertaken by the Comptroller General, the Board or other federal agencies.<sup>23</sup> Other provisions have little or nothing to do with credit card matters.<sup>24</sup> The bulk of the CARD Act, however, focuses on making the following 10 changes to credit card practices.

### Limitations on Retroactive Rate Increases on Existing Credit Card Balances

Cardholder agreements historically have afforded card issuers great flexibility to increase the APR charged to the holder. Rather than condition a change of APR on specifically described circumstances related to the holder's behavior with respect to its account with the issuer, such as a history of late payments, many card agreements contained so-called universal default clauses. Under a universal default clause, the issuer is entitled to increase the APR

on charges under the card based on the holder's default on any other indebtedness, such as failure to make a car payment or a payment failure on another card. Because of the pervasive and comprehensive collection of information by credit reporting agencies and the willingness of those agencies to sell holder credit information to issuers at reasonable rates, issuers have typically been able to monitor defaults by holders on unrelated debts. Moreover, some cardholder agreements contain "any time, any reason" clauses. Under these clauses, the issuer need not have *any* reason for an APR increase. Rather, increases are entirely at the issuer's discretion. Prior to the CARD Act, issuers only had to give 15-days' notice before implementing a rate increase.

Consumer advocates have long railed against universal default clauses and "any time, any reason" clauses.<sup>25</sup> Their contention was that, if the holder has performed under the cardholder agreement's terms, it is unfair for the APR on existing and new purchases to escalate based on actions that were unrelated to and did not affect the cardholder's continued compliance with the terms of the cardholder agreement. Even more offensive, according to these advocates, was the issuer's practice of increasing these interest rates on products and services that were purchased at a time when the lower APR was in effect.<sup>26</sup> As one consumer advocate testified to Congress, "There is simply no legal or economic justification for assessing a penalty interest rate to an existing balance. There is no other industry in the country that is allowed to increase the price of a product once it is purchased."<sup>27</sup> Issuers, on the other hand, contended that universal default clauses and "any time, any reason" clauses permitted adjustment of interest rates to account for risky cardholder behavior that could be viewed as a precursor to holder default under the cardholder agreement. The card issuers also noted that the presence of these clauses permitted the issuers to provide lower cost cards initially, because they knew that they had flexibility, in a change of circumstances, to change the APR accordingly.<sup>28</sup>

The CARD Act's proponents claimed that the CARD Act achieved a compromise by banning universal default and "any time, any reason" clauses with respect to existing balances, i.e., purchases that had occurred but remained unpaid at the time of the proposed rate increase.<sup>29</sup> As the Senate Report stated in support of S. 414 (the Senate version of the bill that eventually became the CARD Act), "The CARD Act will prohibit retroactive

interest rate increases, and require that interest rate increases apply only to future debts.”<sup>30</sup> For their part, opponents of the CARD Act warned that, in “limiting credit card issuers’ ability to price for risk, Congress needs to avoid overacting by forcing responsible card-holders to subsidize irresponsible ones through higher fees and fewer rewards.”<sup>31</sup>

Careful examination of Section 101(b) of the CARD Act reveals both the reach and the limits of the changes it made with respect to rate increases that issuers can impose on cardholders. As the Senate Report noted, the CARD Act created a new § 171(a) to the TILA that creates a general rule prohibiting APR or similar rate increases on “outstanding balances” on credit cards. New § 171(d) of the TILA defines “outstanding balances” as, essentially, any charges occurring prior to and outstanding as of the fourteenth day after the issuer provides notice of a rate increase.<sup>32</sup> For example, suppose that an issuer provides notice on September 1 that it is increasing the rate on the card. The general rule in § 171(a) of the TILA prohibits the imposition of the new rate on any purchases or other charges incurred on or before September 15, even if the consumer is otherwise in actual default under some actual provision of the cardholder agreement or even if the cardholder agreement has a universal default or “any time, any reason” clause that permits the imposition of higher rates. Perhaps in an effort to express the legislators’ intent, the section heading for this part of the CARD Act labels this section as “Retroactive Increase and Universal Default Prohibited.”

There are significant limitations, however, in the scope of this provision. For one thing, and notwithstanding the heading that proclaims that “Universal Default [is] Prohibited,” this change to TILA only applies to “outstanding obligations.” Therefore, issuers may impose higher rates on purchases and other charges that are not “outstanding obligations” — e.g., in the example above, goods or services purchased after September 15 — under a universal default clause or an “any time, any reason” clause.

Moreover, new § 171(b) of the TILA creates four statutory exceptions to the general prohibition on rate increases, even for outstanding balances. First, the interest rate on the credit card may not be a fixed percentage. Instead, it may be a so-called floating rate. A floating rate is an interest rate that is a fixed percentage amount above an index that is calculated and reset from time to time (as frequently as daily). For instance, the *Wall Street Journal* publishes



a daily quotation of a “prime rate,” which is calculated with reference to quotations of specified rates by various lending institutions. Depending on the calculations, this prime rate can change daily. The CARD Act therefore permits a card agreement specifying the interest rate as being *x* percent above the index to change the interest rate on outstanding balances automatically with changes in the index rate, so long as the index “is not under the control of the creditor and is available to the general public.”<sup>33</sup>

Second, issuers sometimes enter into workout agreements with cardholders as a result of temporary hardships that the cardholders are facing. These workouts may include an interest rate decrease as a temporary accommodation to the cardholder. New Section 171(b)(3) to TILA permits the issuer to reinstate the former, higher APR at the conclusion of the workout or upon the default of the holder under the workout, so long as the issuer gave the holder, prior to commencement of the workout, “clear and conspicuous disclosure of the terms of the arrangement.”

Third, if the holder fails to make a minimum payment within 60 days of the payment’s due date under the card, the issuer may increase the APR, even on existing obligations, as long as the issuer notifies the holder at the time of the increase in a “clear and conspicuous written statement” of the reason for the increase and of the holder’s right to revert to the pre-existing interest rate after six months if the holder makes “the required minimum payments on time during that period.”<sup>34</sup> The CARD Act, however, does not specify the size of the minimum payment, nor does it limit the amount of the APR increase during this probationary period.

These first three exceptions were in various forms of the CARD Act when it was being considered by the responsible Senate and House committees in the months leading up to passage of the CARD Act. A fourth exception, however, has a potentially greater reach. New § 171(b)(1) of the TILA permits the issuer to increase the APR under the card in an unlimited amount, for any reason or no reason at all, “upon the expiration of a specified period of time,” so long as (a) prior to the commencement of the period the issuer notifies the holder “in a clear and conspicuous manner” of the APR increase that would apply “after expiration of the period,” (b) the increased APR does not exceed the amount notified to the holder and (c) the increased APR does not apply to transactions that occurred “prior to commencement of the pe-

riod.”<sup>35</sup> Thus, as drafted, this exemption is not limited as to the reason for the increase and permits rate increases on goods or services purchased after the beginning of the notice period rather than after the end.

The breadth of the exemption in new § 171(b)(1) of the TILA substantially undercuts one of the evident purposes of new § 171(a), which sets up a principle that “existing obligations” — i.e., goods and services purchased within the first 14 days after a notice of a rate increase — cannot be subjected on short notice to a higher APR so that cardholders can modify their actions and card usage accordingly.<sup>36</sup> In fact, the statute may create a perverse incentive for issuers, in that they may notify the holder of a rate increase in the relatively distant future (giving the holder the impression that the holder has a substantial period of time to make purchases under the old rate or to shop for a new card) while, in fact, imposing the higher APR immediately after giving notice. The House and Senate reports lack an indication that Congress intended these results.<sup>37</sup>

### **Forty-Five Day Notice of Rate Increases**

Consumer advocates repeatedly complained to Congress that TILA only required 15-days’ notice by issuers of rate increases, which they could impose unilaterally. Quoting a federal trial judge, one witness told a House subcommittee in 2007 that this short notice period put consumers in “an Orwellian nightmare, trapped in agreements that can be amended unilaterally in ways they never envisioned.”<sup>38</sup>

The CARD Act alters this rule by requiring 45-days’ written notice to implement a rate change, accompanied by a notice in a “clear and conspicuous manner” of the cardholder’s right to cancel the holder’s account. Issuers are prohibited from responding to cancellation by demanding immediate payment of outstanding obligations or imposing penalties for closing the account. Moreover, the Board is empowered to specify other “significant change[s]” to card terms as to which issuers must give 45-days’ notice.<sup>39</sup> Unlike most other provisions of the CARD Act, this requirement became effective August 20, 2009, only 90 days after enactment.<sup>40</sup>

There is, however, a significant set of exemptions from this rule. New § 127(i)(1) of the TILA does not apply to most of the APR increases that

are also exempted from the prohibition on interest rate increases on existing obligations under new § 171 of the TILA, which was discussed in the preceding section of this article.<sup>41</sup> As the discussion in the preceding section indicates, new § 171(b)(1) of the TILA sets up an alternative notification system for APR increases. That notification system does not impose a 45-day minimum, or any minimum for that matter, on the amount of notice needed to impose an interest rate increase, so long as the issuer sends the notice to the cardholder. The breadth of new § 171(b)(1) of the TILA potentially eviscerates most if not all of the impact of the 45-day notice prescribed by new § 127(i)(1) of the TILA.<sup>42</sup>

### **Additional Limits on APR Increases**

The CARD Act implements several other restrictions on rate increases. The bill requires promotional rates (a term to be defined by the Board and generally referred to as a teaser rate) to stay in effect for at least six months after account opening.<sup>43</sup> In part this provision reflected complaints of “unfair teasers” that “downplay[] permanent interest rates in advertisements and solicitations and ... trumpet[] temporary rates as ‘fixed rates.’”<sup>44</sup> In addition, the bill prohibits rate increases for the first year after account opening, other than interest rate increases permitted under new § 171(b) of the TILA.<sup>45</sup>

Moreover, effective August 22, 2010, the CARD Act amends the TILA to require issuers to review APR increases every six months to determine if the rate should be decreased. Issuers are required to consider such factors as “the credit risk of the obligor [and] market conditions,” although the statute does not give more specific guidance on the nature of this issuer evaluation, the relative weighting of these factors or the specific action the issuer must take in light of this evaluation. For that matter, the CARD Act directs that this change to the TILA “shall not be construed to require a reduction in any specific amount.”<sup>46</sup>

### **Double Cycle Billing**

In its 2006 report on credit card practices, the Government Accountability Office determined that two out of six surveyed card issuers used double

cycle billing.<sup>47</sup> Under double cycle billing, a “consumer who begins with no balance and pays off most but not all of the purchases he or she makes in the first months would still be charged interest for the entire amount of the balance in the second month.”<sup>48</sup> The effect of this practice is that consumers end up paying interest on charges incurred, and paid off, in the interest-free period between the charge date and the immediately following due date under the card. The Government Accountability Office concluded that this balance computation method “can increase cardholder costs.”<sup>49</sup>

Although this practice had its defenders,<sup>50</sup> consumer advocates excoriated double cycle billing. Harvard Law School Professor Elizabeth Warren charged that this practice “serve[s] no purpose except to mislead customers.... [Double-cycle billing] is used to collect interest on money that the customer has already repaid.”<sup>51</sup> As the founder and chief executive officer of CardWeb.com, an on-line publication on the credit card industry, observed with respect to double-cycle billing, “No one, even lawmakers, could understand how that thing worked.”<sup>52</sup> As a result, with limited exceptions, the CARD Act amends the TILA to ban double cycle billing.<sup>53</sup>

### Over the Limit Practices

Over the limit features to cards are highly controversial. Under cards with an over the limit feature, a cardholder charge that puts the total amount of outstanding credit on the card above the card limit does not automatically get rejected. Instead, the issuer agrees to honor the charge. The issuer, however, then imposes a transaction charge for exceeding the limit. Moreover, many issuers engage in a practice whereby each card purchase above the card limit incurs an additional over the limit transaction charge. Some issuers have gone so far as to impose charges every month that the account exceeds its limit, even for a single purchase over the limit, until the excess purchase is repaid.<sup>54</sup>

Although congressional testimony of card issuers generally defended some form of over the limit practice,<sup>55</sup> consumer advocates challenged this practice as unrelated to the real credit risk of the consumer and a device to multiply fees. Rather than charge a fee, these witnesses argued, the issuer should simply enforce the credit limit on the card and refuse to authorize the transaction.<sup>56</sup>

Section 102(a) of the CARD Act limits this practice without banning it. The CARD Act requires the issuer to set up its systems to refuse credit card charges that go over the limit, thereby preventing the consumer from incurring an extra charge. If the consumer wants an over-the-limit capacity, the issuer must first explain the features and the consumer must affirmatively request this capacity. Moreover, over limit fees can only be charged once a billing cycle, even if there were multiple charges during the cycle that put or kept the consumer over the credit limit. In addition, the holder may only be charged for going over the limit for three consecutive cycles, even if the charge taking the holder over the limit remains outstanding for more than three cycles.

### **Other Limits on Card Fees**

A variety of other fee practices came under attack before Congress over the last several years. For one thing, consumer advocates complained that penalty fees, even if appropriately assessed, increasingly bore no relation to the real cost or risk to issuers. They noted, for instance, that the fixed amount added to the index rate in setting default rates tended to rise when the issuer's cost of funds declined, rather than changing in response to changes in the credit profile of the holder himself.<sup>57</sup> They also attacked the practice of imposing fees on low-credit consumers that consumed a significant portion of the total credit available on the card. This practice, they complained, effectively misled the consumer as to the actual credit available under the card and saddled the consumer with high fees out of proportion to the real benefit available to the consumer under the card.<sup>58</sup> Other complaints attacked "junk fees," such as fees for cash advances, balance transfer and for paying with a wire transfer rather than with a check.<sup>59</sup>

Sections 102 and 105 of the CARD Act attack many of these practices. They generally prohibit fees for paying by phone, over the Internet or by some means other than the mail. The major exception to this principle is that the issuer may impose a fee if the consumer requests that payment be credited within a time frame that requires the issuer to use an expedited service.<sup>60</sup> To deal with fees that consume a disproportionate share of the total credit availability on a card, the CARD Act prohibits the consumer from using the credit

card to pay any fee, if the total fees during the first year of the card (other than late fees, over the limit fees and fees for paying with a bounced check) exceed 25 percent of the card's credit limit.<sup>61</sup> Unlike most of the other provisions of the CARD Act, this provision limits consumer activity, rather than issuer activity. The CARD Act itself does not specify a measure for enforcing this provision. As one congressional witness explained, "Consumers would remain free to choose the high-cost credit of subprime cards; issuers would be free to earn the profits from such customers. The bill's focus on upfront fees merely requires consumers to bear the cost of obtaining a card before it is issued. Such a rule would ensure that consumers understand the full cost of subprime costs."<sup>62</sup>

Most provocatively, the CARD Act decrees that by August 2010 penalty fees must be "reasonable and proportional" to the omission or violation of the cardholder agreement that the penalty is meant to redress. The CARD Act directed the Federal Reserve Board to issue rules by February 2010 that give guidance to issuers on this limitation.<sup>63</sup> In March 2010 the Federal Reserve Board issued proposed rules to address this situation. Among other things, these proposed rules, according to the Federal Reserve Board:

- "Prohibit credit card issuers from charging penalty fees (including late payment fees and fees for exceeding the credit limit) that exceed the dollar amount associated with the consumer's violation of the account terms. For example, card issuers would no longer be permitted to charge a \$39 fee when a consumer is late making a \$20 minimum payment. Instead, the fee could not exceed \$20;
- Ban inactivity fees, such as fees based on the consumer's failure to use the account to make new purchases; and
- Prevent issuers from charging multiple penalty fees based on a single late payment or other violation of the account terms."<sup>64</sup>

### **Payment Practices**

The CARD Act also takes aim at payment practices that Congress determined were unfair to consumers. One practice at which consumer advocates directed withering scorn in congressional testimony concerned the order in

which payments are applied. As these advocates explained, issuers frequently bragged that certain types of charges on their cards were charged a lower interest rate — e.g., for grocery purchases — than other types of charges — e.g., for purchase of airplane tickets. This feature, according to the issuers, made it especially advantageous for consumers to use their cards. As the advocates noted, however, issuers regularly engaged in the practice of applying monthly card payments to the lowest interest charges first. As a 2009 Senate report explained, this method of allocation prevented consumers from receiving “the full benefit of lower promotional interest rates because a consumer can never take full advantage of lower promotional rates while still using the card.”<sup>65</sup> While not denying that this allocation method led to results that were inconsistent with consumer expectations about the benefits of differential interest rates on card purchases, card issuers candidly acknowledged that applying payments in a way that complied with consumer expectation “would make insufficient returns” for the banks. “Banks would eliminate the 0% offer or increase rates for standard use of cards.”<sup>66</sup> Through its creation of a new § 164 to the TILA, Section 104 of the CARD Act changes this practice by requiring payments to be credited to the highest interest balance first, and then to be applied to lower interest balances thereafter. In doing so, Congress went beyond the demands of some consumer advocates, who backed proposals that payments be allocated pro rata across all items in the periodic statement, thereby applying some of the payments to the low interest rate charges.<sup>67</sup>

Another payment practice drawing attention related to payment dates. Some issuers notoriously delayed their monthly statement to customers until a few days before the issuer’s self-selected due date. By the time the customer received the statement, there was no realistic time for the customers to pay their statements on time. As a result, the customers were saddled with late payment fees and default interest rates.<sup>68</sup> The CARD Act addressed these complaints in two ways. First, it requires payments to be due on the same day of the month, which is automatically extended to the issuer’s next business day if the chosen payment date is an issuer holiday.<sup>69</sup> Second, the CARD Act requires the periodic statements to be sent at least 21 days before the payment’s due date.<sup>70</sup> This latter provision is one of the few parts of the CARD Act that became effective on August 20, 2009, rather than at the later effective dates for most other parts of the CARD Act.<sup>71</sup>

## Enhanced Disclosure

Consumer advocates consistently complained that consumers frequently do not understand, or lack an easy way to determine, the consequences of payment practices permitted under the card agreement. For example, card agreements permit customers to pay only a minimum balance every month. Although this practice permits the customer in the short term to avoid a large payment obligation, the remaining balance accrues finance charges, often at high rates. Over a period of time, the consumer can end up paying large amounts, especially if the APR on the consumer's card is relatively high.<sup>72</sup> This practice is highly lucrative for the card issuers and not necessarily in the consumer's best interest.<sup>73</sup> Advocates demanded that card statements inform the consumer of the total interest costs the consumer will pay and the length of time, in months and years, for full payment, if the consumer makes only the minimum payment. Defenders of the current practices derided this suggestion as a costly imposition on issuers that will benefit about four per cent of all consumers.<sup>74</sup> Likewise, consumer advocates demanded more explicit statements that late payment charges would attach, as well as description of the amount of those charges, for payments not received by plainly identified due date.<sup>75</sup> Representatives of card issuers themselves acknowledged the importance of consumer understanding of payment mechanics.<sup>76</sup>

The CARD Act responded to both points. It amends Section 127(b)(11) of the TILA by mandating that monthly statements contain the following notice:

“Minimum Payment Warning: Making only the minimum payment will increase the amount of interest you pay and the time it takes to repay your balance”

or a similar phrase prescribed by the Federal Reserve Board. It also requires the statement to contain a variety of other disclosures about the costs to the consumer of paying its balance over time, rather than by the time of the initial due date of a charge. These disclosures include information about the number of months to pay the entire amount of the balance if only the minimum balance is paid every month, the total cost to the consumer of paying only the minimum balance and the minimum monthly payment necessary to



pay the charge in 36 months. This information must be set forth in a table under a format that the Federal Reserve Board has prescribed through detailed regulations.<sup>77</sup> With respect to late payments, the CARD Act amends Section 127(b)(12) of the TILA to require an express statement of the exact date by which payment is due and, in close proximity to that date, a statement as to the interest rate that will take effect if the payment misses this due date.<sup>78</sup>

## **Marketing Practices**

Congress also used the CARD Act as a means to target certain marketing practices that it found were abusive.

### **Generally**

An important component in the determination of an interest rate that consumers will be charged, whether on a credit card or another type of consumer credit transaction, is the consumer's credit score. In fact, there is no one single "credit score." Rather, different organizations create scores for consumers based on their own algorithms. The best-known and most frequently used credit score is the FICO® score, named for Fair Isaac's Corporation, which developed the algorithm for generating this score.<sup>79</sup>

These scores, in turn, derive from masses of financial data that are gathered by credit reporting companies. There are three principal credit reporting services: Transunion, Experian, and Equifax. The data they gather about a consumer's spending and payment practices is critical in computing the consumer's credit score. Moreover, employers, landlords and other prospective creditors of consumers are entitled, for a fee, to purchase credit reports for consumers. These report purchasers thereby get a valuable, granular window into the consumer's financial history that goes back many years. These credit reports, therefore, are an important part of the modern American consumer's financial profile.

It is no secret that credit reports can contain errors. Credit reporting agencies, therefore, must correct errors in the reports that consumers bring to their attention.<sup>80</sup> To bring the errors to the agencies' attention, however, the consumers must see the reports. Typically, agencies charge for access to

the reports. Several years ago, however, Congress mandated that each of the three agencies make the report available for free to the consumer once a year.<sup>81</sup> To make it easier for consumers to get the reports, moreover, a special web site — [www.annualcreditreport.com](http://www.annualcreditreport.com) — was created. Consumers who access that web site will find a user-friendly system for getting a free copy of the consumer's credit report from each of the three agencies.

In the past few years, however, several private companies have developed their own web sites. With appealing advertising they have marketed themselves on television and radio as places at which consumers can obtain "free" credit reports. Congressional researchers, however, determined that the consumer could only get a credit report free from a credit reporting agency through the marketed web site if the consumer signed up for a monthly additional service for a fee. Experian, for example, created a web site called [www.freecreditreport.com](http://www.freecreditreport.com).

To access the consumer's credit report from any of the reporting agencies, the consumer had to work through a series of screens that ended up enrolling in a service for approximately \$15 a month. Unless the consumer took additional steps outside the enrollment process within a short period of time, the consumer ended up paying approximately \$180 a year for a "free" report.

The CARD Act does not ban this site or other similar sites purporting to market "free" credit reports. Instead, the CARD Act requires that "any advertisement for a free credit report in any medium shall prominently disclose in such advertisement that free credit reports are available under Federal law at: 'AnnualCreditReport.com' (or such other source as may be authorized under Federal law)."<sup>82</sup> In March 2010, the Federal Trade Commission proposed regulations, effective in April 2010, to implement the CARD Act's mandates on these "free" credit reports.<sup>83</sup>

Congress's action on this point is noteworthy in the context of this bill for a couple of reasons. First, it is not directed at credit card companies or credit card practices. It is directed rather at the marketing for the credit reporting system, which operates independently of (although it collects information from) credit card issuers. Second, this marketing practice received little if any commentary in the many Senate and House congressional hearings that led to enactment of the CARD Act.

### ***Protection of Young Consumers***

Congressional testimony noted that young consumers have become a prime target market for card issuers. Between 1989 and 2004, the average credit card debt held by young adults ages 18 to 24 grew by 22 percent. In 2004, more than three quarters of undergraduate students started the school year with a credit card, but only 21 percent of college students paid off their entire balance each month.<sup>84</sup> Consumer advocates complained that young consumers, while lacking resources to pay credit card charges, often are seduced into getting credit cards by underwriting techniques that require less credit scrutiny of the young consumer than of older adults.<sup>85</sup> *Maxed Out*,<sup>86</sup> a prize-winning documentary released in 2007, contained compelling stories of college students who, unable to manage their consumer debt, committed suicide when their obligations overwhelmed them. The documentary also caught marketers in candid moments on campus using a variety of enticements to encourage freshmen to sign up for new cards.

The CARD Act addressed this situation in several different ways. First, it limits the underwriting process itself by prohibiting the issuance of credit cards to consumers under 21 unless either (a) the consumer's parents or another co-signer over 21 agrees in writing to be liable for debts accumulated on the card or (b) the consumer demonstrates that the consumer has "independent means of repaying any obligations arising from the proposed extension of credit in connection with the account."<sup>87</sup> The Federal Reserve Board subsequently created new regulations to determine if the underage consumer is able to pay his credit card bills. A minimum requirement is that the issuer consider at least one of the following items: ratio of debt obligations to income, ratio of debt obligations to assets, or income the consumer will have after paying debt obligations<sup>88</sup> A related provision of the CARD Act prohibits increases to a card's limit for holders under 21 unless the co-signer (such as a parent or guardian) also approves the increase in writing and assumes liability for increase.<sup>89</sup>

Second, Congress limited (but did not prohibit) marketing to college students by prohibiting issuers, on or near the college campus or at a school-sponsored event, from offering "tangible items" (such as free t-shirts, drinks or gift cards) to prospective card applicants.<sup>90</sup> Third, it mandated more disclosure, to the public generally and to the Federal Reserve Board in particular,

regarding credit card marketing and underwriting practices. The bill aims for this disclosure to come from both the colleges and the issuers. It requires colleges and universities to disclose “publicly” their contracts “or other agreement[s] made with a card issuer or creditor for the purpose of marketing a credit card.”<sup>91</sup> The bill also urges, although does not require, colleges and universities to limit the number of places on campus at which issuers can market their cards and to offer credit card and debt education and counseling sessions as a regular part of their new student orientation programs.<sup>92</sup> As for issuers, the CARD Act adds a new section to the TILA requiring each creditor to

“submit an annual report to the [Federal Reserve] Board containing the terms and conditions of all business, marketing, and promotional agreements and college affinity card agreements with an institution of higher education, or an alumni organization or foundation affiliated with or related to such institution, with respect to any college student credit card issued to a college student at such institution.”

Included in the report must be information about payments that the school received and the accounts opened by students during the period covered by the report.<sup>93</sup>

## **Underwriting Standards**

In the two years leading up to enactment of the CARD Act, congressmen, consumer advocates and representatives of the credit card industry all noted, with varying degrees of condemnation, lapses in underwriting standards that have led to the issuance of cards to consumers who were plainly unable to pay the charges they incurred with the cards.<sup>94</sup> Notwithstanding this criticism, congressional witnesses noted the vast expansion of access to credit that credit cards have afforded consumers. While imposing a variety of other regulations, including regulations designed to inform prospective account holders as to the terms of their cards, the CARD Act imposes few restrictions on the underwriting process itself. As noted above, it curbs the ability of issuers to sign up holders under the age of 21 in the absence of a

co-signer or a demonstrable ability to pay debts created with the card.

The only other limitation on the underwriting process imposed by the CARD Act is an additional requirement in the TILA that issuing a new card, or increasing the credit limit under an existing card, “unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.”<sup>95</sup> The Federal Reserve Board subsequently implemented rules requiring issuers “to establish and maintain reasonable written policies and procedures to consider a consumer’s income or assets and current obligations.”<sup>96</sup> These rules, however, do not mandate any particular review process, nor do they carry any express enforcement mechanism. Future events, therefore, will determine the extent to which this new underwriting requirement has any practical impact on card issuance.

## THE UNEASY CASE OF DISCLOSURE

The discussion above indicates that the CARD Act regulates the credit card industry through two primary techniques: substantive regulation of credit card terms and behavior, and regulation designed to improve disclosure to consumers. With respect to substantive requirements, among other things, it bans double cycle billing and the use of universal default clauses to increase interest rates on goods or services that have been purchased at the time of the fee announcement, and it requires card payments to be allocated to purchases in the descending order of the amount of the interest rates or finance charges related to the purchases. Substantive regulation, however, was a highly controversial aspect of this legislation. Witnesses repeatedly pointed out to legislators that credit cards have become much more accessible to consumers over the last 20 years because of, among other things, the ability of card issuers to engage in risk-based pricing.<sup>97</sup> By risk-based pricing, these witnesses explained, issuers are able to offer cards to a consumer with interest rates and fees that match the consumer’s risk profile.<sup>98</sup> Substantive regulation that impedes the ability of issuers to match cards to their holders inevitably leads issuers to raise interest rates to all consumers or to deny access to credit to those consumers whose risk profile is, from the issuer’s perspective, marginal.<sup>99</sup> The dissenting views in the House report on the House legislation that became the CARD Act summed up the issue this way:

[E]ven the best policy cannot substitute for personal responsibility and may end up both raising the price of credit for some and unfairly limiting access to credit to others.<sup>100</sup>

Not surprisingly, then, much of the CARD Act focuses on reforms designed to improve consumer choice through better disclosure, rather than actively regulating consumer or issuer behavior. This focus on consumer choice reflects a premise that consumers that are properly educated as to credit card features will more efficiently shape the credit card market, by their selection of those cards and features that they are willing, and unwilling, to purchase, than can be achieved through legislative or regulatory directions. This emphasis on consumer disclosure leads to four related questions: (1) how effectively has disclosure worked for credit card regulation, (2) what types of disclosure does the CARD Act propose, (3) what are the prospects that these disclosures will remedy perceived weaknesses in the existing disclosure regime, and (4) are there regulatory alternatives to a disclosure regime that nonetheless permit risk-based pricing and both require and permit consumers to take an appropriate level of personal responsibility for their credit decisions.

### **Effectiveness of Pre-CARD Act Disclosure Practices**

At the federal level, credit card disclosures — and, in fact, prior to the CARD Act, most credit card regulation — has proceeded primarily under the auspices of the TILA and its related Regulation Z.<sup>101</sup> These disclosures cover a vast array of topics, such as the format of card solicitations and the form of billing statements. Yet, while witnesses before congressional committees in the two years leading up to enactment of the CARD Act disagreed on most other points, they universally condemned the existing disclosure regime as inadequate. In May 2007, the chief executive officer for Chase Card Services testified before the Senate Permanent Subcommittee on Investigations that “everyone is in agreement that the volume and types of disclosures mandated ... by federal and state laws have not led to greater understanding. Our customers are telling us that today’s disclosure lacks sufficient clarity.”<sup>102</sup> The president and chief executive officer of the American Bankers Association similarly testified that “disclosures have not kept up with the complexity of

payment cards.”<sup>103</sup> Consumer advocates likewise begged for an improved disclosure regime.<sup>104</sup> The Government Accountability Office also released a detailed report in September 2006 that noted a plethora of features with credit card disclosures that, while complying with existing regulations under TILA, nevertheless failed “usability and readability best practices.”<sup>105</sup>

## **Disclosures Under the CARD Act**

The CARD Act embraces disclosure as an important means for enhancing credit card regulation. In doing so, it adopts essentially three different approaches to disclosure that might be labeled (a) generalized information disclosure, (b) opt-out specific disclosure and (c) opt-in specific disclosure.

### ***Generalized Information Disclosure***

One approach that the CARD Act supports is to gather raw information generally about credit cards and to make that information readily available to consumers that are interested in educating themselves. This approach is embodied in Section 204 of the CARD Act. Under that provision, which adds a new subsection (d) to Section 122 of the TILA, card issuers must create a web site on which they shall “post the written agreement between the creditor and the consumer for each credit card account.” Issuers are required to send these agreements in electronic format to the Federal Reserve Board, which will in turn post all agreements received from all issuers on a Federal Reserve Board web site. Neither the Senate nor the House reports accompanying the legislation explain this provision. The evident purpose of this provision, however, is to create a sort of card agreement shopping center, in which consumers theoretically can review and compare different card agreements to determine those provisions in a proposed card agreement for a consumer that are better or worse than similar provisions under an alternative agreement.

### ***Opt-out Specific Disclosures***

A second approach of the CARD Act is to require that issuers better explain card features, or changes in card features, to consumers. This approach then reasons that that consumer, once informed of these changes, can make

a reasoned choice as to whether to reject the consumer's current or proposed card in favor of another card. Most of the CARD Act's disclosure reforms adopt this model. It can be found in the provisions that require 45-days' notice of changes of terms, of notices that have to be sent for increasing interest rates on new balances, of the requirement for reasonable and proportional fees and penalties, of more specific disclosures of finance charges and of marketing reforms for college students.

For example, the CARD Act does not prohibit issuers from raising interest rates on cards, even under a universal default clause, for new balances. It does require, however, that holders be given a certain minimum amount of notice before imposing the higher rate. The evident theory of this process is that the consumer, confronted with the proposed change of circumstances (i.e., a new, higher rate) can then make a conscious choice as to whether to continue using the card at the new higher rate or to seek a different card that has more favorable terms. In the absence of consumer action, the new rate goes into effect. Therefore, the opt-out system of disclosure requires the consumer to take some action in order to prevent the change of terms from occurring.

### ***Opt-in Specific Disclosures***

The CARD Act also employs a third disclosure approach. This approach is found in its treatment of over-the-limit fees. Faced with conflicting demands from witnesses to ban the fees and to leave the fees untouched, Congress chose a different approach. It prohibits card issuers from offering over-the-limit protection unless the holder affirmatively requests this product. Thus, rather than putting the onus on the card holder to take the initiative to disclaim a practice that consumer advocates found objectionable, Congress statutorily presumed that the consumer, properly informed, would not be interested in the feature and its attendant fees. It offers the consumer the chance to choose otherwise, however, by permitting consumers to opt into an over-the-limit program so long as the consumers are given reasonable and meaningful disclosures that explain the option to them. The virtue of this system is that, on the one hand, it creates as the presumptive rule of operation — what might be called a “default rule” — a healthy consumer credit practice, i.e., a practice in which the consumer is banned from spending over the consumer's credit limit. On the other hand, the consumer himself gets



to determine whether to accept that default rule. If the consumer determines that, for his spending purposes the ability to charge over his credit limit (in exchange for paying over-the-limit fees) is advantageous, the consumer can elect that practice by making an active choice.

### **Prospects for the CARD Act's Disclosure Regime**

The different approaches to disclosure contained in the CARD Act demonstrate Congress's intent to increase consumer understanding of these complicated products. In its adoption of opt-in specific disclosures for over-the-limit fees, moreover, Congress demonstrated its determination to balance concepts of free choice and consumer responsibility, on the one hand, with a realistic grasp of consumer behavior. Yet past experience with disclosure practices raises substantial doubt as to whether the disclosure regime implemented by the CARD Act will be sufficient to make a significant change in consumers' understanding of credit card products.

Although witnesses uniformly criticized the current disclosure regime, they had vastly different, and to some extent conflicting, recommendations for reform. Some industry representatives suggested that disclosures had gotten too detailed and complicated and should be shortened and simplified.<sup>106</sup> The chief executive officer of the American Bankers Association recommended giving consumers a credit card users' manual to assist them in understanding credit card terms and credit card offers.<sup>107</sup> Consumer representatives, on the other hand, argued that critical information too frequently is missing from disclosures and so demanded that the amount and type of disclosure be increased. For example, one witness urged Congress to require a

“‘Schumer box’ disclosure table in all cardholder agreements containing personalized information about the terms of the card granted. The box should include the APR, the credit limit, and the amount of all fees, such as late charges, cash advance fees, over limit fees and any other applicable miscellaneous fees.”<sup>108</sup>

More fundamentally, other witnesses challenged the sufficiency of “improved” or “increased” disclosures to benefit consumers. Their point was that provid-

ing a consumer with a mass of data about the consumer's legal rights and the specific terms of a credit card does not necessarily equip the consumer with ability to understand the data or even to retain the data as it makes a decision whether to purchase or use a credit card. Noted Professor Katherine Porter from the University of Iowa:

“Disclosure suffers from several well-documented problems. Consumers may not read the disclosures. If they do, they may not alter their behavior in light of the disclosures. Serious cognitive barriers hinder consumers from making effective use of disclosures, including a tendency to underestimate the likelihood that they will encounter a penalty under the contract.”<sup>109</sup>

The Government Accountability Office, in its September 2006 report on credit card reporting, came to a similar conclusion. It noted that, historically, disclosures have often buried consumers in data. Supplying this information to the consumer, however, has not effectively enhanced the readability of the disclosures or assured that the consumers understood the information they were receiving.<sup>110</sup>

As noted above, the CARD Act takes a number of steps to increase the volume of information provided to consumers. To the extent that consumers need not only to be exposed to this information but need also to grasp the significance of this information so that they can understand these disclosures, however, the CARD Act's approach to disclosure fails to take significant steps to remedy many of these flaws. Both the program of generalized information disclosure and opt-out specific disclosure, in the end, rely heavily on consumers to study data delivered to them, to understand that data, to be able to assess alternative credit card choices in light of these disclosures and to be able to make reasoned decisions based on this analysis. As witnesses before the congressional committees noted, however, these requirements too often do not comport with the environment in which consumers shop for cards. As one witness noted:

- “Consumers lack equal access to information — most consumers will not have the knowledge to understand the legal consequences of the terms of credit.

- Consumers lack equal bargaining power — no consumer has the market power to call up a credit card company and negotiate either the basic terms or those in the adhesion contract.
- The credit card market does not provide real choices. With the increasing consolidation of credit card providers, the industry guarantees *less* meaningful competition.”<sup>111</sup>

Moreover, the nature of these types of disclosure does not condition the consumer’s use of credit on the consumer’s active absorption of the information that is disclosed. For example, although the TILA, as amended by the CARD Act, requires disclosures to the consumers about a variety of legal obligations of the consumer once it purchases the card, such as the APR, the annual fee (if any), and various penalty fees, the CARD Act assumes that consumers understand and appreciate the significance of these provisions without conditioning the consumer’s access to credit on a demonstrated understanding of these types of items.

Thus, the CARD Act’s approach to TILA disclosures does not differ in kind from the approach that operated prior to the CARD Act’s effectiveness. Rather, the CARD Act, for the most part, simply expands the disclosures given to consumers in connection with their purchases of credit cards and in connection with their ongoing use of those cards. There are several reasons to believe that the continuation of this disclosure program will not significantly enhance consumers’ understanding of their card terms, their intelligent purchase of those cards or their avoidance of unhealthy consumer practices.

*First*, the passive disclosure practices of the TILA too frequently separate the consequences of unhealthy credit practices from the practice itself. For example, consumers typically must pay hefty penalty fees for being even one day late on their monthly card payments. The consumer, however, is not even confronted with this fee until he gets his billing statement, which will occur days or weeks after the fee is assessed. In other words, the cost of the unhealthy practice (paying a late payment fee) is separated from the practice itself (failing to pay the minimum amount on the credit card bill on time). Moreover, the feedback from this unhealthy practice is delayed.<sup>112</sup> While the disclosures of the Schumer Box and the credit card billing statements alert the consumer at the time of purchase, and inform the consumer in retrospect, of

the consequences of this choice, disclosure itself does not address the ramification of separating the consumer decision from the payment consequence.

*Second*, the multiplicity of financial features of credit cards and the complex tradeoffs that a card selection may require are not resolved by disclosure. Thus, a consumer trying to decide between different credit cards may, thanks to the TILA, be given complete information as to the non-default and default APRs, the teaser rate, the annual fee, the balance transfer fees and a host of other features of the various cards. The TILA, however, does not provide an easy or sensible way for a consumer to determine, for instance, whether it is in the consumer's interest to select a card with a high APR and no annual fee over a card with a \$50 annual fee and an APR that is five percent lower than the alternative.

*Third*, market forces cannot be relied on to create cards that support or encourage healthy consumer credit practices. If anything, the combination of confused consumers, the presence of money on the table and the opportunity to make money off of unhealthy consumer practices incentivize card issuers to create cards that take advantage of, rather than drive consumers away from, unwise credit choices. For example, given the very high interest rates that virtually all credit cards charge on unpaid balances, it is unlikely that a consumer is making a wise investment decision to carry balances from month to month, as opposed to paying his/her balances in full by the end of the monthly grace period. The TILA disclosures and Schumer Box on a cardholder's card application explain these interest rates. Nonetheless, the credit card itself is set up to permit the consumer to carry those balances from month to month. Market forces do not incentivize the card issuers to highlight to consumers, beyond the strict requirements of the TILA disclosures the adverse consequences of this behavior. Industry representatives themselves acknowledged that the current disclosure regime does not incentivize issuers to generate meaningful disclosures. As the chief administrative officer of Citi Cards told a House subcommittee in April 2008, "The industry cannot solve this problem itself because there is no incentive for companies with poor practices to have clear disclosures. In fact, quite the opposite is true."<sup>113</sup> Another witness explained,

"[N]o particular issuer has an incentive to disclose if other issuers will not follow. That issuer may fear that it will put itself at a competitive

disadvantage, attract negative publicity, or become a target for regulatory intervention.”<sup>114</sup>

*Fourth*, the tendency of consumers, as a matter of inertia, to follow the cues that are given to them in their card statements leads card issuers to set up “default rules” for credit cards that encourage consumers to engage in unhealthy practices, because those default rules also are profitable for the issuers. For example, credit cards require consumers to make a minimum monthly payment, but card issuers learned during the 1990s that setting a low minimum monthly payment created a herd mentality among consumers to make only that payment, and nothing more.<sup>115</sup> As a result consumers tend to carry substantial amounts of debt from month to month, thereby leading to massive interest income for card issuers.<sup>116</sup> Enhanced disclosures will inform consumers of these consequences, but they do not address the behavioral phenomenon itself.

*Fifth*, the disclosure structure of the TILA is generally not designed to be consumer friendly. TILA disclosures tend to give consumers disclosures in undifferentiated text. Even the Schumer Box carries massive amounts of data in fine print disclosure. This type of disclosure does not give immediate visual cues to consumers that assist them in intelligently comparing credit card choices. For example, the Schumer Box may tell the consumer that the non-default APR on a card is 14.99%. It is not obvious from this disclosure, however, whether that is a “good” or “bad” interest rate, or how that interest rate compares with rates of other cards.

*Sixth*, the TILA disclosure structure itself does not compare cards to each other, or to cards generally held by consumers, on some sort of normalized basis, so that consumers will be able to determine the various card features across credit cards so that, in shopping for a card, a consumer can compare “apples to apples.” This situation can be contrasted with, for example, disclosures required by the Environmental Protection Agency on automobiles, which have been recently enhanced to make comparisons and consumer shopping easier.<sup>117</sup> Private sites exist that, to some extent, permit comparison shopping, such as [www.cardtrak.com](http://www.cardtrak.com) or [www.smartmoney.com](http://www.smartmoney.com), but the CARD Act’s disclosure process does not lead consumers to these sites.

## **Regulatory Alternatives to a Disclosure Regime**

The foregoing discussion does not demonstrate that a disclosure regime is pointless or meritless. The TILA's virtue as a regulatory lens is that it attempts to put consumers in a position to make intelligent credit choices, rather than engaging in command-and-control pricing for credit cards. As industry witnesses noted in their congressional testimony preceding enactment of the CARD Act, risk-based pricing permits market forces rather than governmental regulators to determine APRs and fees for credit cards.

What, then, are the features of a regulatory system that can take advantage of the market-friendly principles of the TILA disclosure system while avoiding the features of that system that, as described in the previous section of this article, permit inertia to develop for credit card terms that result in consumer credit practices that most people, whether representatives of industry or consumer advocates, would view as unhealthy? There are at least three key characteristics of a regulatory scheme that could build on the TILA structure.

### ***Active Learning Disclosure***

As noted above, the generalized disclosure and opt-out disclosure system that the CARD Act embraces assumes that consumers will be motivated to investigate and learn the items that are covered by that disclosure. This assumption, however, does not comport with either human nature or actual experience. For example, Regulation Z requires credit card solicitations and credit card applications to include a Schumer Box. Yet there is little if any evidence to demonstrate that potential card holders understand the key terms contained in the Schumer Box or the implications of those terms. Rather, it seems to be the case that the Schumer Box disclosure, containing not only a summary of the card's significant terms but also fine print qualifications written in highly technical language, is just one more piece of paper that a credit card applicant throws away while moving expeditiously to start using the card.

This situation results, because neither the card holder nor the issuer is given an incentive for the card holder to understand the specific points contained in the Schumer Box. Accordingly, a system should be designed to create such an incentive. Fortunately, the credit card industry may have

developed the technology that would facilitate such a change in incentives without doing violence to the basic solicitation process. Almost every credit card currently requires an applicant to call the issuer's toll free number to activate the card. This activation process takes advantage of modern digital technology by requiring the consumer to key in the number for the new credit card. (Issuers frequently use this same telephone process as an opportunity to market additional credit card products.) Regulators could adopt and adapt this system by requiring additional steps before card activation. For example, on the same call in which the credit card number is keyed in, the telephone system might also pose a series of multiple-choice questions to the potential card holder. These questions could require the consumer to key in answers based on the disclosures in the Schumer Box or on other matters regarding healthy consumer credit practices, all of which information would be set forth on inserts in the same envelope containing the consumer's new credit card. For example, the questions could ask the consumer to identify the non-default APR on the card, the default APR, the fee that the consumer would be charged if it fails to make the minimum payment by the due date and such other questions as the regulators, based on industry input, determine will bring the key features of the card to the consumer's attention. If the consumer correctly answers a minimum number of questions, the card will activate. If the consumer fails this test, the card will not activate until he/she answers another set of questions. This system does not prevent consumers from acquiring credit cards containing pricing that issuers have determined is risk-based. Rather it incentivizes consumers and issuers both to have a vested interest in the consumers' understanding of their credit cards, inasmuch as the cards only activate (a benefit to both issuers and cardholders) upon consumers demonstrating knowledge of card terms.

### ***Presumptive (but Not Mandatory) Card Terms That Are Consumer-Healthy***

As the testimony leading to the enactment of the CARD Act demonstrated, many of the highly profitable features of credit cards make money for issuers because consumers engage in credit practices that are generally unwise, although those practices may, in individual circumstances, make sense. Examples of these features are late payment fees (resulting from con-

sumer failure to make timely payments), very high default rates (resulting from non-payment or late payment), high monthly finance charges (resulting from making only a minimum payment) or balance transfer fees (resulting from consumers' attempts to "rate surf" between credit cards). Regulation Z assumes that consumers that buy credit cards and then become subject to these charges or fees, having been told of these provisions, have made an active decision to purchase a card with these features or otherwise to engage in these practices.

Testimony of various consumers before Congress in the hearings leading to enactment of the CARD Act, however, demonstrated that consumers frequently did not understand that these features existed, were not particularly interested in having cards with these features and did not purchase cards so that they could engage in these practices. Instead, these features were the "default options" on their cards, meaning that the cards carried these features automatically. Once these cards were purchased, consumers had to engage in self-policing to prevent themselves from engaging in practices that caused them to be subject to these fees or rates.

An alternative system might change these default options. For example, credit card regulation might require that the minimum payment on credit cards be the full unpaid amount of the card as of the statement closing date, rather than a very low amount. These regulations, however, might permit consumers to designate, at the time that they purchased the credit card, that the minimum payment might be some lower amount (such as 50% or some other percentage) of the card balance (subject at all times to a minimum payment amount or percentage designated by the card issuer). This system would therefore mean that the presumption under the credit card, and the inertia created at the time of card issuance, is for consumers to engage in the healthy card practice of paying the card balance in full.<sup>118</sup> At the same time, consumers would not be prevented from choosing a different minimum payment based on their individual needs. A variation would allow card issuers to vary the APRs and late fees on the cards based on the minimum payments elected by the consumers. This system would permit *both* consumers and issuers to engage in risk-based pricing while encouraging (but not requiring) consumers to engage in the healthy practice of paying their card balances in full each month.



Other possibilities come to mind. The key point is that these regulations would not assume, as does the TILA, that consumers will at all times police themselves into engaging in healthy credit practices. Instead, regulations will create or empower healthy credit practices as the operative assumption for credit cards, while permitting consumers and issuers to opt out of those practices based on their individual choices. This system, in fact, is the fundamental premise for the CARD Act's regulation of over-the-limit fees.

### ***Risk-based Pricing for Fees and APRs***

The CARD Act empowers the Board to determine fees and charges that are "reasonable and proportional."<sup>119</sup> The CARD Act also provides generalized factors for the Federal Reserve to consider in setting these fees. Consistent with that mandate, the Board enacted rules in 2010 setting limits on various fees, such as a safe harbor rule limiting a late payment fee to \$25 for the first violation and the subsequent fee to \$35 for violations of a similar type within the following six billing cycles. At the same time, it rejected for the time being the demands of consumer advocates for regulations that limit penalty rates that issuers can attach to the interest charges or finance charges for violation of card terms.<sup>120</sup>

The Board's adopting regulation betrayed considerable uncertainty as to the precedents on which it should rely and the correct way to translate these precedents and the statutory language into specific pricing terms where it was setting limits on fees.<sup>121</sup> This uncertainty is understandable. As a principled matter, it is difficult to determine that, on any particular card for any particular creditor and its issuer, a standardized fee set in a regulation will be "reasonable" and "proportional." Those concepts will depend on a complicated assessment of risks and rewards based on the cardholder's particular circumstances.

The effects of these regulations are yet to be fully understood. In the days leading up to the implementation of these regulations in August 2010, some reports surfaced indicating that issuers were responding by increasing rates and fees on other terms not yet subject to governmental regulation.<sup>122</sup>

An alternative regulatory approach, however, might reject these regulatory choices, especially if some of the other concepts discussed above are

implemented. For example, if a cardholder demonstrates at the time of card acquisition a knowledge of the late payment fee and of the due date of its payments, the card issuer has a compelling case for arguing that the holder who nonetheless purchased this card has himself made a determination that this fee is reasonable and proportional. Permitting issuers to set those fees at whatever level they determine is appropriate, in other words, permits those issuers to engage in the type of risk-based pricing that even consumer advocates in debates about credit card reform acknowledged as legitimate.<sup>123</sup>

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These limitations on the generalized disclosures and opt-out specific disclosures of the CARD Act indicate that its disclosure system, like the TILA's disclosure structure generally, are likely to be inadequate to confront or remedy credit practices that attracted criticisms by consumer advocates and the majority of congressional proponents for the CARD Act.<sup>124</sup> Likewise, given the observations by witnesses at the CARD Act hearings, including testimony by representatives themselves of credit card issuers, it is likely that, as long as the disclosure regime is focused on delivery of information to consumers rather than on consumer *understanding* of the information that they are receiving, the effectiveness of the federal disclosure regime in causing consumers to make reasoned decisions in purchasing or using cards will be speculative.

## CONCLUSION

Congress embraced credit card reform in the CARD Act through far-reaching changes on a number of fronts. Many of these changes altered the substantive rules of the road for issuers and consumers. Other changes focused on improving disclosures to consumers. Until Congress develops a more comprehensive disclosure model that gives both consumers and issuers an incentive to make sure that consumers *understand* the terms of credit card offerings that changes the default rules for credit cards in a way that deters (but does not prohibit) unhealthy consumer practices, and that permits risk-based pricing for those consumers who demonstrate an affirmatively under-

stood and specifically chosen determination to engage in those practices, the federal disclosure system underlying the credit card business will continue to be an uncertain mechanism for assuring that credit card users will shop for consumer credit intelligently.

## NOTES

<sup>1</sup> Revolving consumer credit generally involves credit extended to consumers that, under the applicable contract terms, can be repeatedly borrowed and repaid. Credit cards constitute one type of revolving consumer credit in the current American economy; overdraft lines of credit on bank accounts constitute another form of revolving consumer credit. See Government Accountability Office, "Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers" (September 2006) ("GAO Report"), at 1 n.2.

<sup>2</sup> Senate Report No. 111-16, May 4, 2009 ("Senate Report"), at 3, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_reports&docid=f:sr016.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr016.111.pdf).

<sup>3</sup> Senate Report at 4.

<sup>4</sup> GAO Report at 5.

<sup>5</sup> Statement of Sen. Norm Coleman (R-MN), Senate Permanent Subcomm. On Investigations of the Senate Comm. on Homeland Sec. and Governmental Affairs, "Credit Card Practices: Fees, Interest Rates, and Grace Periods," March 7, 2007 ("Senate March 2007 Hearings"), available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=4d942d56-9759-4974-927e-6fe390eed683](http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=4d942d56-9759-4974-927e-6fe390eed683).

<sup>6</sup> Written testimony of Prof. Elizabeth Warren before the Sub-Committee on Financial Institutions and Consumer Credit of the Committee on Fin. Services, at 5, citing to Jeffrey Green, *Bankcard Profitability 2007*, Cards & Payments at 27 (May 2007), available at <http://financialservices.house.gov/hearing110/warren031308.pdf>.

<sup>7</sup> See, e.g., testimony of Travis B. Plunkett, Legislative Director, Consumer Federation of Am., on February 12, 2009 at hearings before the Senate Comm. on Banking, Housing & Urban Affairs, "Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections" ("Senate 2009 Hearings"), available at [http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=33c569e7-82d6-432f-a1c7-c055219dd557](http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=33c569e7-82d6-432f-a1c7-c055219dd557); opening statement of Senator Dodd, Senate 2009 Hearings, available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=034b0e5e-0e6f-4e05-920b-2a3f078f06c4](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=034b0e5e-0e6f-4e05-920b-2a3f078f06c4).

<sup>8</sup> See written testimony of Alys Cohen, National Consumer Law Ctr., Senate March 2007 Hearings, available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=74961ef6-5599-4660-ad6e-37a71f5e0a4d](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=74961ef6-5599-4660-ad6e-37a71f5e0a4d).

<sup>9</sup> See, e.g., statement of Richard Srednicki, Chase Card Services, Senate March 2007 Hearings, at 3, available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=89c98ac8-663c-4ead-8f87-8a6cee7e4577](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=89c98ac8-663c-4ead-8f87-8a6cee7e4577).

<sup>10</sup> See, e.g., written testimony of Vikram A. Atal, chief executive officer of Citi Cards, Senate March 2007 Hearings, at 1-2, available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=648aae8f-8e6c-4ebb-b3f2-280251d06d1a](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=648aae8f-8e6c-4ebb-b3f2-280251d06d1a).

<sup>11</sup> See, e.g., <http://www.cbsnews.com/blogs/2009/05/14/politics/politicalhotsheet/entry5013796.shtml> (“Obama Calls for Credit Card Bill by Memorial Day”).

<sup>12</sup> Pub. L. No. 111-24, 123 Stat. 1734 (codified at 15 U.S.C. § 1601-1666 and other places).

<sup>13</sup> The Board is the federal agency with primary authority for regulating credit card issuers that are state chartered banks that are members of the Federal Reserve System.

<sup>14</sup> The Office of Thrift Supervision is the federal agency with primary authority for regulating credit card issuers that are federal savings and loan associations.

<sup>15</sup> The National Credit Union Administration is the federal agency with primary authority for regulating credit card issuers that are federal credit unions.

<sup>16</sup> 12 C.F.R. Part 226.

<sup>17</sup> 15 U.S.C. §§ 1601-1667f (“TILA”). Under TILA, the Board is responsible for “creating and enforcing requirements relating to the disclosure of terms and conditions of consumer credit, including those applicable to credit cards.” See GAO Report at 2.

<sup>18</sup> A concise description of the nature of open-end credit and of credit cards in operation can be found in the statement of Bruce Hammonds, President of Card Services, Bank of America, Senate March 2007 Hearings, at 5-9, available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=a49ec129-d045-4c44-83da-9435fbe50301](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=a49ec129-d045-4c44-83da-9435fbe50301).

<sup>19</sup> For a description of legislative changes that may impact these fees in the debt card transactions, see [http://online.wsj.com/article/SB10001424052748704256304575321162658897880.html?mod=WSJ\\_hps\\_SECONDTopStories](http://online.wsj.com/article/SB10001424052748704256304575321162658897880.html?mod=WSJ_hps_SECONDTopStories).

<sup>20</sup> The discussion that follows focuses mainly on the text of the statute and its related legislative history. Effective February 22, 2010, the Federal Reserve Board enacted regulations expanding on the provisions of the CARD Act and implementing regulations in response to specific directives contained within the CARD Act. Although this article will refer at certain points to these regulations and the Federal

Reserve Board's adopting release, a detailed review of those regulations is beyond the scope of this article. The adopting release is available at <http://edocket.access.gpo.gov/2010/pdf/2010-624.pdf>.

<sup>21</sup> See Sections 1, 2 and 3 of the CARD Act.

<sup>22</sup> In the discussion that follows, sections labeled "sec." refer to sections in one of these five substantive titles. Sections labeled "§" refer to sections in other federal laws that the CARD Act amends or creates.

<sup>23</sup> For example, Sec. 501 required the Comptroller General, by November 22, 2009, to deliver a report to specified committees of the House and Senate on the "use of credit by consumers, interchange fees, and their effects on consumers and merchants." The report can be found at <http://www.gao.gov/new.items/d1045.pdf>.

<sup>24</sup> For example, article IV imposes regulations on gift cards, such as a requirement that gift cards and general pre-paid cards remain active for at least five years. Sec. 508 of the CARD Act requires the Federal Trade Commission to study the feasibility of requiring automated teller machines to have 9-1-1 capacity. In a matter that attracted national notoriety as a compromise that was necessary to win enough votes for passage of the CARD Act, Sec. 512 requires the Secretary of the Interior to permit guns in national parks and national wildlife refuges. See Illis, "Senate Approves Coburn Gun Amendment ... in Credit Card Bill," <http://washingtonindependent.com/42641/senate-approves-coburn-gun-amendment> (May 12, 2009).

<sup>25</sup> See, e.g., written testimony of Prof. Elizabeth Warren, *supra* n.6, at 3 (commenting that these practices constitute "violations of the basic principles of contract law").

<sup>26</sup> See, e.g., testimony of Alys Cohen, House March 2007 Hearings, *supra* n.8, at 3-4.

<sup>27</sup> Written testimony of Travis B. Plunkett, Legislative Director, Consumer Federation of America, Senate 2009 Hearings, at 25, available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=4d3c178e-8ee6-4800-8f47-9ccf0fb246ed](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=4d3c178e-8ee6-4800-8f47-9ccf0fb246ed).

<sup>28</sup> See Senate Report at 5; written testimony of Bruce Hammonds, President, Bank of America Card Services in hearings before the Senate Permanent Subcommittee on Investigations, "Credit Card Practices: Unfair Interest Rate Increases," December 4, 2007, at 5-6 (re-pricing based on perceived riskier customer behavior applies to existing as well as new balances "because it is the whole balance that is at risk for the bank"), available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=c950576f-46ab-4579-bc1f-7efe36009a0b](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c950576f-46ab-4579-bc1f-7efe36009a0b).

<sup>29</sup> See *id.*; also see comments of Senator Shelby in archive webcast of Senate 2009 Hearings, available at [http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=33c569e7-82d6-432f-a1c7-c055219dd557](http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=33c569e7-82d6-432f-a1c7-c055219dd557).

<sup>30</sup> Senate Report at 5.

<sup>31</sup> House Report 111-88, Committee on Fin. Services, April 27, 2009 (“House 2009 Report”), at 34 (dissenting views of seven House members). In 2007 a Bank of America representative testified that it did not use universal default clauses. *See* written testimony of Bruce Hammonds, *supra* n.18, at 25.

<sup>32</sup> § 171(d) measures this 14-day period from the date on which the issuer gives notice of the rate increases “in accordance with [TILA] section 127(i).” Sec. 101(a) of the CARD Act creates new § 127(i) of TILA. The reference to § 127(i) in new § 171(d) is confusing, because, as will be discussed below, § 127(i)(1) exempts most of § 171 from its reach.

<sup>33</sup> TILA § 171(b)(2).

<sup>34</sup> *See* TILA § 171(b)(4)(B). Note that this disclosure must be in writing, unlike the disclosure at the end of a workout period that is covered by TILA § 171(b)(3).

<sup>35</sup> TILA § 171(b)(1)(C).

<sup>36</sup> New § 171(b)(1) may not be incompatible with the concept of “existing obligations” in new § 171(d), because that concept derives its measurement of a 14-day notice period from notices issued pursuant to new § 127(i) of the TILA. As discussed below, new § 127(i)(1) in turn exempts from its applicability notices given under this fourth exception to the general rule in new § 171 of the TILA.

<sup>37</sup> *See, e.g.*, Senate Report at 9 (rate increases limited to “the expiration of a specified promotional period provided that the higher rate was disclosed at account opening”).

<sup>38</sup> Statement of Alys Cohen, Senate March 2007 Hearings, *supra* n.8, at 5, quoting from *Perry v. FleetBoston Financial Corp.*, 2004 WL 1508518 at \*4 n.5 (E.D. Pa. July 6, 2004).

<sup>39</sup> *See* Sec. 101(a)(1), creating new § 127(i) of the TILA.

<sup>40</sup> Sec. 101(a)(2).

<sup>41</sup> § 127(i)(1) applies to the increases described in new § 171(b)(1), (2) and (3) of the TILA. For reasons unexplained in the legislative history, new § 127(i)(1) does not exempt increases covered by § 171(b)(4), which covers increases resulting from failure to make minimum payments.

<sup>42</sup> Even giving effect to new § 171(b)(4) of the TILA, the 45-day notice in new § 127(i) may still be read to cover cases in which a holder has no “existing obligations” at the time of the notice of the proposed APR increase; in that situation new § 171(a) itself may be inapplicable, and therefore the exemption to § 171(a) contained in § 171(b)(4) will be irrelevant. Even that construction of new § 127(i), however, may give it greater breadth than a literal reading of its language permits.

<sup>43</sup> Sec.101(d), creating new § 172(b) of the TILA.

<sup>44</sup> Written testimony of Linda Sherry, Director, National Priorities, Consumer Action, “Credit Card Practices: Current Consumer and Regulatory Issues,” Hearings before Financial Institutions and Consumer Credit, House Financial Services Committee,

April 26, 2007 (“House April 2007 Hearings”), available at <http://financialservices.house.gov/hearing110/htsherry042607.pdf>, at 17.

<sup>45</sup> Sec. 101(d), creating new § 172(a) of the TILA. New § 172(a) does not expressly permit an increase in interest rates after the end of the six-month promotional period contemplated by § 172(b) of the TILA, but it is hard to believe that Congress meant to block a reversion to a “normal” rate after the end of the promotional period.

<sup>46</sup> See sec. 101(c) adding new § 148(d) to the TILA.

<sup>47</sup> GAO Report at 28.

<sup>48</sup> Written testimony of Travis B. Plunkett, *supra* n.27, at 28. See also written testimony of Richard Srednicki, *supra* n.9, at 10.

<sup>49</sup> GAO Report at 27.

<sup>50</sup> See, e.g., written testimony of Oliver I. Ireland, House April 2007 Hearings, at 7, available at <http://financialservices.house.gov/hearing110/htireland042607.pdf>; written testimony of Gregory Baer, Bank of America, House March 2008 Hearings, at 8-9, available at <http://financialservices.house.gov/hearing110/baer031308.pdf>.

<sup>51</sup> Written testimony of Elizabeth Warren, *supra* n.6, at 2-3.

<sup>52</sup> Transcript of interview on National Public Radio, Sept. 17, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=112909450>.

<sup>53</sup> Sec. 102(a) creating new § 127(j) of the TILA.

<sup>54</sup> See written testimony of Katherine Porter, University of Iowa College of Law, House 2008 Hearings, at 2-3, available at <http://financialservices.house.gov/hearing110/porter031308.pdf>. See also written testimony at Alys Cohen, *supra* n.8 at 14.

<sup>55</sup> See, e.g., written testimony of Larry Sharnak, American Express Company, “The Credit Cardholders’ Bill of Rights: Providing New Protections for Consumers,” Hearings before the Financial Subcommittee, April 17, 2008 (“House April 2008 Hearings”), available at <http://financialservices.house.gov/hearing110/sharnak041708.pdf>, at 7-8 (identifying differences in American Express’s over the limit policy from policies of other issuers); written testimony of Carlos Minetti, Discover Financial Services, House April 2008 Hearings, at 18-19, available at <http://financialservices.house.gov/hearing110/minetti041708.pdf>.

<sup>56</sup> See written testimony of Travis B. Plunkett, Consumers Union, *supra* n.27, at 22-23. See also written testimony of Elizabeth Warren, *supra* n.6, at 2.

<sup>57</sup> Written testimony of Travis Plunkett, *supra* n.27, at 33.

<sup>58</sup> *Id.* at 36-37. See also written testimony of Prof. Katherine Porter, “The Credit Cardholders’ Bill of Rights: Providing New Protections for Consumers,” *supra* n.54, at 4.

<sup>59</sup> Written testimony of James C. Sturdevant, Senate 2009 Hearings, at 7, available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=852067dd-50fe-4602-8cda-d30b1a35cd90](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=852067dd-50fe-4602-8cda-d30b1a35cd90). See also *id.* at 12-13 (describing

Providian practice regarding credit protection insurance).

<sup>60</sup> Sec. 102(a) of the CARD Act, creating new § 127(l) of the TILA.

<sup>61</sup> Sec. 105, enacting new § 127(n) of the TILA.

<sup>62</sup> See written testimony of Prof. Katherine Porter, *supra* n.54, at 4.

<sup>63</sup> Sec. 102(b), enacting new § 149 of the TILA.

<sup>64</sup> See Federal Register, March 15, 2010, starting at p. 12334, available at <http://edocket.access.gpo.gov/2010/pdf/2010-4859.pdf>.

<sup>65</sup> Senate Report at 6, *supra* n.2. See also written testimony of Cindy Zeldin, Fed. Affairs Coordinator, Demos (a nonprofit, nonpartisan research and public policy organization), at 17, House April 2007 Hearings, available at <http://financialservices.house.gov/hearing110/htzeldin042607.pdf>.

<sup>66</sup> Written testimony of Bruce Hammonds at 17, *supra* n.18.

<sup>67</sup> See, e.g., written testimony of Prof. Elizabeth Warren, *supra* n.6, at 2.

<sup>68</sup> See, e.g., written testimony of Linda Sherry, *supra* n.44, at 6-7 for discussion of “shrinking due dates.” See also written testimony of Travis B. Plunkett, Legislative Director, on behalf of Consumers Union and The Consumer Federation of America, at 8-9, House April 2008 Hearings, available at <http://financialservices.house.gov/hearing110/plunkett041708.pdf>, at 22.

<sup>69</sup> Sec. 106(a) of the CARD Act, creating new § 127(o) of the TILA.

<sup>70</sup> Sec. 106(b)(1) of the CARD Act, creating new § 163 of the TILA.

<sup>71</sup> Sec. 106(b)(2) of the CARD Act.

<sup>72</sup> See written testimony of Travis B. Plunkett, *supra* n.27 at 8-9.

<sup>73</sup> See Interview with Andrew Kahr, credit card industry consultant, “The Secret History of the Credit Card,” *Frontline*, November 2004.

<sup>74</sup> See written testimony of Prof. Todd Zywicki, at 28, House April 2007 Hearings, available at <http://financialservices.house.gov/hearing110/htzywicki042607.pdf>.

<sup>75</sup> See written testimony of Alys Cohen, *supra* n.8, at 17.

<sup>76</sup> See written testimony of Richard Srednicki, *supra* n.9 at 4 (Chase offers consumers option to select an unchanging payment date so that consumer understands the date on which payment is due).

<sup>77</sup> Sec. 201(a) of the CARD Act. See 12 C.F.R. § 226.7(b)(12) and related form Samples G-18(C)(1), G-18(C)(2) and G-18(C)(3) in Appendix G, as applicable, available at <http://edocket.access.gpo.gov/2010/pdf/2010-624.pdf>.

<sup>78</sup> Sec. 202 of the CARD Act.

<sup>79</sup> See [www.fico.com](http://www.fico.com) for background information on Fair Isaacs Corporation and the development of the FICO score.

<sup>80</sup> See Fair Credit Reporting Act (“FCRA”), § 611, 15 U.S.C. § 1681i.

<sup>81</sup> See FCRA § 612(a)(1).

<sup>82</sup> Sec. 205(a) of the CARD Act, amending § 612 of the FCRA to a new Section (g)



(1).

<sup>83</sup> See <http://edocket.access.gpo.gov/2010/pdf/2010-4273.pdf> for the adopting release and related regulations. The CARD Act contains a peculiar distinction for implementing this rule. As a general rule, it requires advertisements to direct viewers specifically to the URL [www.annualcreditreport.com](http://www.annualcreditreport.com), at which the viewer can obtain the free credit report from each of the three major credit reporting agencies. With respect to radio and television, however, the disclosure is different. In those circumstances, pursuant to new section 612(g)(2) of the FCRA, “the disclosure required under paragraph (1) shall consist only of the following: ‘This is not the free credit report provided for by Federal law’.” New section 612(g)(2) requires the television advertisement to contain this statement both graphically and in the audio portion of the advertisement. Thus, the disclosure for radio and television only advises the viewer as to what the disclosure is not; it does not explicitly direct the viewer to the site where the consumer can get a free credit report. Feeling its hands tied by the specific words in the CARD Act, the FTC implemented rules requiring this disclosure for television and radio. In the context of the broader disclosure mandated for Internet and print advertising, however, the FTC found the statutory language for television and radio advertising, to be confusing and modified it for those media. See <http://edocket.access.gpo.gov/2010/pdf/2010-4273.pdf> at 9735-38.

<sup>84</sup> See written testimony of Martin J. Gruenberg, vice chairman, FTC, before the Subcomm. of Fin. Institutions and Consumer Credit of the House Financial Services Committee, April 17, 2008, House 2008 Hearings, at 3, available at <http://financialservices.house.gov/hearing110/gruenberg041708.pdf>.

<sup>85</sup> See written testimony of Linda Sherry, *supra* n.44, at 16; written testimony of Travis B. Plunkett, *supra* at n.27, at 23, written testimony of Travis B. Plunkett at 43, at Senate 2009 hearings, *supra* n.7.

<sup>86</sup> Distributed by Magnolia Home Entertainment, [www.magpictures.com](http://www.magpictures.com).

<sup>87</sup> Sec. 301 of the CARD Act, enacting § 127(c)(8) of the TILA.

<sup>88</sup> See 12 C.F.R. §§ 226.51(a)(1)(ii) and 226.51(b). See also the Federal Reserve Board’s adopting release for a discussion of the comments and considerations that led to the development of this regulation, p. 7660, available at <http://edocket.access.gpo.gov/2010/pdf/2010-624.pdf>.

<sup>89</sup> Sec. 303 of the CARD Act, enacting § 127(p) of the TILA.

<sup>90</sup> Sec. 304 of the CARD Act, enacting § 140(f)(2) of the TILA.

<sup>91</sup> Sec. 304 of the CARD Act, enacting § 140(f)(1) of the TILA.

<sup>92</sup> Sec. 304 of the CARD Act, enacting § 140(f)(3) of the TILA.

<sup>93</sup> Sec. 305(a) of the CARD Act.

<sup>94</sup> See, e.g., written testimony of Travis Plunkett, *supra* n.27, at 20.

<sup>95</sup> Sec. 109(a) of the CARD Act, adding a new § 150 to the TILA.

<sup>96</sup> 12 C.F.R. § 226(a)(1)(ii). The Official Staff Interpretation accompanying the adoption of this regulation indicates that the issuer may also consider consumer reports and credit scores, and it discusses a broad range of items that may be considered in determining the consumer's "current income." See 75 Fed. Reg. 7900 (Feb. 22, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-624.pdf>.

<sup>97</sup> See, e.g., written testimony of Edward L. Yingling on behalf of the American Bankers Association, at 6-15, House 2007 Hearings, available at <http://financialservices.house.gov/hearing110/htyingling042607.pdf>; written testimony of Bruce Hammonds, at 3, *supra* n.18

<sup>98</sup> See written testimony of Roger C. Hochschild, president and chief operating officer of Discover Financial Services, December 2007 Senate Hearings, at 3, available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=d9f070b1-7b2f-49f4-b9cf-6478d9d1e0d8](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=d9f070b1-7b2f-49f4-b9cf-6478d9d1e0d8).

<sup>99</sup> See written testimony of Prof. Todd Zywicki, *supra* n.74, at 23 (any "regulatory efforts to cap or otherwise regulate late fees, overlimit fees, and the like, would therefore almost certainly lead to increased interest rates for all consumers, or other offsetting adjustments in credit contract terms").

<sup>100</sup> House 2009 Report, at 34.

<sup>101</sup> See written testimony of Oliver I. Ireland (former associate general counsel for the Federal Reserve Board), at 3, *supra* n.50 ("TILA established comprehensive, cradle-to-grave disclosures and other requirements for credit cards."); written testimony of Prof. Katherine Porter at 5 and sources cited therein, *supra* n.58.

<sup>102</sup> Written testimony of Richard Srednicki, *supra* n.9 at 7.

<sup>103</sup> Written testimony of Edward L. Yingling, *supra* n.97, at 15.

<sup>104</sup> See, e.g., written testimony of Alys Cohen, at 7, *supra* n.8; written testimony of Travis B. Plunkett and Edmund Mierzwinski, Subcomm. on Fin. Institutions and Consumer Credit of the House Comm. on Fin. Services, March 19, 2009, at 34, available at [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/consumergrouptestimony19mar09\\_hr627\\_hr1456.doc](http://www.house.gov/apps/list/hearing/financialsvcs_dem/consumergrouptestimony19mar09_hr627_hr1456.doc).

<sup>105</sup> See GAO Report, summary page, *supra* n.1.

<sup>106</sup> See testimony of Bruce Hammonds, at 31-32, *supra* n.18.

<sup>107</sup> See written testimony of Edward L. Yingling, at 17, *supra* n.97.

<sup>108</sup> See written testimony of Alys Cohen at 17, *supra* n.8.

<sup>109</sup> See written testimony of Prof. Porter at 5, *supra* n.54. See also written testimony of James C. Sturdevant on behalf of the National Association of Consumer Advocates, before the Senate Committee on Banking, Housing, and Urban Affairs, Feb. 12, 2009, at 16-17 (arguing that more disclosure will be ineffective until consumers have a better legal understanding of the consequences of the credit card terms, have more bargaining power and have more choice), available at <http://banking.senate>.

gov/public/index.cfm?FuseAction=Files.View&FileStore\_id=852067dd-50fe-4602-8cda-d30b1a35cd90.

<sup>110</sup> GAO Report at 33-56.

<sup>111</sup> Written testimony of Alys Cohen at 13, *supra* n.8

<sup>112</sup> For a discussion of fraught choices in which costs of consumer decisions are separated from the decisions themselves, *see* Thaler and Sunstein, *Nudge* at 73-75 (Yale University Press 2008).

<sup>113</sup> Written testimony of John P. Carey, at 8, House 2008 Hearings, at <http://financialservices.house.gov/hearing110/carey041708.pdf>.

<sup>114</sup> Written testimony of Prof. Katherine Porter at 7, *supra* n.54.

<sup>115</sup> *See supra* n.73 and related text.

<sup>116</sup> A recent study determined that about 115 million Americans carry debt on their cards from month to month, at an average of over \$8000 a month per card. *See* Draut & Silva, "Borrowing to Make Ends Meet: The Rise of Credit Card Debt in the '90s," Demos web site, 2003. [http://www.demos.org/pubs/borrowing\\_to\\_make\\_ends\\_meet.pdf](http://www.demos.org/pubs/borrowing_to_make_ends_meet.pdf).

<sup>117</sup> *See* Thaler and Sunstein, *supra* n.112, at 191-93.

<sup>118</sup> In *Nudge*, Thaler and Sunstein offer a variation on this proposal in which the card issuer must give the consumer the option to designate that the full card balance be withdrawn from the consumer's checking account by the due date. *See id.* at 144.

<sup>119</sup> Sec. 102(b).

<sup>120</sup> *See* Truth-in-Lending Act; Final Rule, 75 Fed. Reg. 37526, at 37527 (June 29, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-14717.pdf>.

<sup>121</sup> *See id.* at 37531-34.

<sup>122</sup> *See, e.g.*, Saha-Bubna, "Card Firms Gird for Cut to Late Fees," *The Wall Street Journal*, Aug. 21, 2010, at B3.

<sup>123</sup> *See, e.g.*, testimony of C. Zeldin, *supra* n.65, at 9 (criticizing certain fees because they did *not* comport with consumers' risk profile).

<sup>124</sup> The basic problem is that the old Truth-in-Lending Act is now hopelessly inadequate." *See* Thaler and Sunstein, *supra* n.112, at 137.