Comments of the

National Consumer Law Center
(On behalf of its Low-Income Clients)
and
Consumers Union
U.S. Public Interest Research Group

Regarding

Advance Notice of Proposed Rulemaking
Implementation of the Bankruptcy Act Amendments
To Truth in Lending

Federal Reserve System
12 CFR Part 226

Docket No. R-1217

These comments are submitted by the National Consumer Law Center (on behalf of its low income clients),[1] Consumers Union,[2] and U.S. Public Interest Research Group[3] concerning the Federal Reserve Board's advance notice of proposed rulemaking to implement the amendments of the 2005 Bankruptcy Act to the Truth in Lending Act[4] ("2005 Amendments). These 2005 Amendments impose a number of new disclosure requirements on creditors regarding minimum payments, teaser rates, Internet solicitations and applications, and late

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

[2] **Consumers Union**, the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

[3] The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

[4] Pub. L. No. 109-8, §§ 1301-1309.

payment fees. Our comments focus on the questions the Board has asked regarding minimum payment disclosures (Section I), introductory rate disclosures (Section II), prompt crediting of payments (Section III), Internet disclosures (Section IV), and disclosures for home secured loans that exceed the home's fair market value (Section V).

I. MINIMUM PAYMENT DISCLOSURES

Section 1301 of the 2005 Amendments added 15 U.S.C. § 1637(b)(11), which requires that certain written disclosures be given to consumers on periodic statements regarding the effect of paying the minimum monthly payment. It also requires that creditors (or a third party on behalf of the creditor) and, in certain circumstances, the Board or the Federal Trade Commission (FTC) maintain a toll-free telephone number which will provide an estimate of the time it would take the particular consumer to repay her balance.

The Board has asked a number of specific questions, which are answered below.

A. Exemptions Should Be Very Limited in Number and Scope.

The Board's first set of questions asks if there should be certain exemptions from the minimum payment disclosures for certain types of open-end credit. There should not be any exceptions to the minimum payment disclosures. (If there are to be exceptions, which we oppose, any exceptions must be narrowly drawn and clearly defined.) Instead of exemptions for certain products, such as home equity lines of credit, there should be alternate disclosures that are tailored to the product at issue but equally informative and effective.

Questions 59 and 63: Minimum Payment Disclosures for Home Equity Lines of Credit (HELOCs)

In **Question 59**, the Board asks whether there should be an exception for HELOCs that have fixed repayment periods. The Board should not grant an exemption for fixed-term HELOCs or any other HELOC products. However, it would be appropriate for the Board to customize the minimum payment disclosures to reflect the special features of HELOCs.

For HELOCs with defined fixed repayment periods, it is important to have a minimum payment disclosure. Paying more than the required monthly payment will result in paying off the loan earlier than the date of final payment and will save the consumer in finance charges. Therefore, these loans should not be exempted. Instead, the Board should develop a special warning for these loans such as:

> Minimum Payment Warning: You can pay your balance down faster and save on finance charges by paying more than the minimum monthly payment required. For example, if your minimum monthly payment is $107 on a balance of $10,000 at 10% APR over 15 years - you could cut down the repayment period by 4 years and 4 months by paying an extra $20 per month.

The Board also asks in **Question 63** whether the hypothetical example of the effect of making minimum payments should be revised for HELOCs. We agree that, for HELOCs, the hypothetical example should use an interest rate, a balance, and a minimum payment that are more typical of HELOCs. However, since the hypothetical example is of limited use to consumers, the Board should require creditors to disclose the actual number of months, or at least encourage them to do so by making this alternative as simple and cost-effective as possible.

Aside from the issues raised in this ANPR, the disclosure requirements for HELOCs need to be improved in many respects. We will be making a number of additional recommendations when the Board moves to HELOCs in its review of Regulation Z. The Board should coordinate the development of the HELOC minimum payment disclosure with its comprehensive examination of other HELOC disclosures.

Question 60: There Should Not Be an Exemption for Non-Revolvers or Other Consumers Who Pay More than the Minimum

Question 60 asks whether the Board should exempt non-revolvers or consumers who pay more than the minimum on a regular basis. There should NOT be such an exemption, as it would have only negative effects. It is hard to imagine what purpose would be served by not informing these consumers of the risks of ceasing their positive current behavior. If anything, the Board should want to let these consumers know about the benefits of their responsible behavior, and the downsides of changing it. Furthermore, a consumer who pays more than the minimum but less than the full balance may only exceed the minimum by a few dollars. These consumers still may be making payments that will result in long repayment periods and accumulate significant finance charges. The minimum payment warning will give them a suggestion that the more they pay down, the more they save.

In addition, a consumer may not always be a non-revolver or someone who pays more than the minimum. A job loss, illness, or divorce may suddenly reduce a consumer's income. Faced with new constraints on resources, the knowledge of the negative consequences of reducing credit card payments to the minimum would be an important piece of information in the consumer's decision-making process. A consumer might choose to continue to pay more than the minimum and reduce expenditures on other items as opposed to making only the minimum while cutting back less.

Granting such an exemption would harm this subset of consumers while providing little or no benefit to the consumer credit industry. It would reduce the uniformity that the consumer credit industry prizes. Creditors would have to distinguish between different categories of customers, and would have different disclosure requirements and different documents for different categories. The Board would have the difficult job of defining when a consumer becomes a "non-revolver," and when the consumer loses that status. The time and effort to determine that a consumer is a non-revolver or pays more than the minimum on a "regular basis" would run against the increasing trend toward automating account servicing. In short, an exemption would have great costs and few benefits, and should not be granted.

B. The Minimum Payment Disclosures Should Be As Accurate As Possible.

The ANPR asks a number of questions about what assumptions should be used in the automated systems for estimates accessed by the toll-free numbers maintained by the Board, FTC or creditors. The Board should not allow the use of assumptions except for the most minor variables. Instead, the Board should require the estimates to be based on the consumer's actual balance, interest rates, the balance to which each interest rate applies, the payment allocation formula, and the minimum payment formula.

Creditors should be required to provide this critical information so that consumers can obtain accurate estimates of their repayment periods through the toll-free number. However, creditors should be offered the alternative of simply disclosing the actual number of months for repayment on the periodic statement (as proposed in **Question 82**), and providing the data upon which the repayment period is based at a website or toll-free number. It is likely that many creditors will take this alternative if offered, which would mean a much simpler provision of useful information to consumers. It would be even better if the Board used its authority under U.S.C. § 1605(a) to simply require periodic statements to state the actual number of months it would take the consumer to repay the current balance at minimum payments.

Questions 65 to 68 and 70 to 76. Ensuring Accurate Estimates from the Automated Systems at the Toll-Free Numbers

1. Creditors should be required to disclose all of the data items necessary for consumers to obtain accurate estimates from the toll-free numbers.

Under the 2005 Amendments, creditors are required to maintain toll-free numbers from which consumers can get an estimate of their repayment period. In order for consumers to obtain estimates from the creditor's toll-free numbers that are accurate and close to reality, consumers must have the following information to input. Thus creditors should be required to disclose to consumers:

- Their APRs (already required under § 1637(b)(5))
- Balance calculation method (already required under § 1637(b)(2))
- What portion of the balance each of the APRs applies to (**Question 73**)
- How payments are allocated (**Question 75**)
- The minimum payment formula **(Questions 66 to 68)**

This information should be provided on the periodic statement. While some of this information should also be disclosed in or after the Schumer box, disclosing it on the periodic statement is critical. The Schumer box might not be provided in a form the consumer can keep (under Reg. Z. 12 C.F.R. § 226.5(a)(1), n.8). The information certainly cannot be disclosed only in the initial disclosure, which is often unintelligible to most consumers as we discussed in our March 2005 comments. Furthermore, some of this information may change during the life of an account, and change-in-terms notices are not required for some of this information. Even if change-in-terms notices were required for all of this information, they have significant

deficiencies as discussed in our March 2005 comments. Finally, the information about what portion of the consumer's balance is subject to which APR is not static and can ***only*** be disclosed on a periodic statement.

Furthermore, this information should be highlighted and an explanation provided, such as a title "Information You Need to Use the Toll-Free Number to Calculate the Number of Months It Will Take To Pay Off Your Current Balance."

This information is essential for consumers to be able to obtain accurate estimates using the toll-free numbers provided for in §§ 1637(b)(11)(E) and (G). Without knowing which part of their balance is subject to what APR, and how payments are applied, consumers would be entering incorrect information when using the automated system accessed at the toll-free number.

2. Creditors should be required to input actual information from their cardholder's accounts into the automated systems accessed by the toll-free numbers

For toll-free numbers maintained by a creditor, they should be required to input all the information from their own systems that is required to produce an accurate statement of the number of months it will take to repay the balance at the minimum payment. (This is option (3) discussed at 70 Fed. Reg. 60239.) This data should include information on minimum payment formulas (**Questions 68**) and what portion of the consumer's balance is subject to which APR (**Question 74**). They should not be permitted to use a "typical" minimum payment formula (**Questions 66 and 67**) or use a single APR for accounts that are subject to multiple APRs (**Question 71 and 72**).

After all, it is the creditors who are in the best position to provide this information. They have all this information in their computer systems, making input into an automated system much simpler. If consumers are required to input the information, there is the risk of them entering the wrong piece of information or transposing numbers when entering data. Consumers with limited educational levels may become confused.

Thus, we think requiring creditors to supply actual information is the best option. However, if the Board does not require creditors to input the information, creditors should then be required to develop a system where in consumers can input actual information from their periodic statements to obtain accurate estimates (similar to the system proposed below for the FTC/Board's toll-free numbers).

The absolutely worst option would be to allow creditors to input or use a set of assumptions that would be inaccurate for some consumers. This option would permit creditors to provide erroneous information to consumers.

The Board should also allow creditors to dispense with the toll-free number system by simply stating, on each periodic statement, the number of months it will take to repay the balance at minimum payments. Creditors who opt for this alternative should be required to post the data at a toll-free number or on a website, as set forth in # 4 below.

3. For repayment estimates provided by the Board or FTC, the periodic statement must disclose the data necessary for an accurate estimate.

The automated systems operated by the FTC and the Board should provide estimates that are as accurate as possible and use real, actual information. This means creditors who rely on the FTC or Board automated systems must be required to disclose all of the information discussed in the five-bullet list in subsection 1 above. In addition, the FTC/Board's automated systems must be able to handle the input of all of this information, i.e., multiple APRs, multiple balances subject to those APRs, actual minimum payment formulas, and actual payment allocation formulas. (**Questions 66 to 68, 71 to 73**)

It also means that the FTC/Board automated systems should not use a single APR to estimate repayment periods for accounts with multiple APRs (**Question 71**) or provide a range of estimates using different APRs applied to the entire balance (**Question 72**). Instead, the automated system must ask "what is the first APR listed", allow for input of that APR, ask "how much of the balance is being charged that APR" and allow for input of that amount - and do this for all of the multiple APRs.

This also means the FTC/Board automated systems must use real minimum payment formulas used by the consumer's creditor, or a formula as close as possible, and not assume a "typical" repayment formula. (**Questions 66 and 67**). To deal with the difficulty of inputting information over the telephone, the Board should collect minimum payment formulas from creditors, categorize them, and require the creditor to include a code assigned by the Board along with the disclosure of the formula itself. (If the Board finds that many creditors use the same minimum payment formula, it could assign a single code to a formula that many creditors use. In the alternative, if there are many variations among formulas, the Board might create creditor-specific codes, e.g. Chase-1, Chase-2, etc.). Then the automated system would simply prompt the consumer to enter the code. In the alternative, the automated system could describe several options and then have the consumer choose a selection as close as possible (e.g., "Choose '1' if your minimum payment formula requires you to pay all finance charges, late fees, and other fees imposed that month; choose '2' if it is only a percentage, etc."), but this approach would be more cumbersome, less accurate, and more prone to data entry errors by consumers.

The FTC/Board should not assume a payment allocation order with multiple APRs (**Question 75**). To assume that the creditor applies the payment first to the portion of the balance that carries the lowest APR would be an implicit endorsement of this unfair and deceptive method. Instead, the Board/FTC system should use the same system as for minimum payment formulas, *i.e.*, classify the various payment allocation methods, assign each one a code, and require the creditor to disclose both the method and the code on the periodic statement.

Finally, a website calculator might be able to handle multiple and complex pieces of information (such as balances with different APRs or minimum payment formulas). The Board or FTC could consider setting up a website, and informing consumers on the toll-free number that it is available. While a toll-free number that generates estimates would still be necessary for the significant number of consumers who do not have Internet access, it might be an easier

method of obtaining accurate estimates using real information for those who are on-line. Any website calculator should useable without the necessity of inputting the consumer's credit card number into the website, given that many consumers are concerned about the security of providing their credit card numbers on-line, especially for those who will be accessing a website calculator from a public computer (e.g., at a library or school).

4. <u>All of the repayment variables should be available at a toll-free number or on a website whether or not creditors input it into their automated systems or disclose an actual estimate.</u>

Even if creditors disclose the actual repayment period on the periodic statement, or input information from their own computers into their automated systems, they still should be required to provide all of the information discussed above in the five bullet list on a website. First, consumers need the information in order to be able to check the estimates provided by the creditors' systems. The ability for consumers to double-check the creditor's estimate is quite likely, given the widespread availability of website "calculators" that allow consumers to estimate various information, including their repayment period or how large a mortgage they can afford.

Second, it will be useful for consumers to have this information available independent of getting an estimate of their repayment periods. As we discussed in our March 2005 comments, one of the abuses perpetrated by credit card issuers concerns payment allocation. Creditors regularly apply payments to the balances with low APRs so that the higher APR balances will remain, generating hefty finance charges for the creditors. Such conduct, contrary common accounting practices such as "first in, first out," is arguably unfair under the FTC Act and state UDAP statutes.

Creditors should be required to maintain the information at their toll-free numbers or on their websites for a one-year period. In other words, the consumer should be able to access not just the most recent data, but the data for any periodic statement during the previous twelve months. Allowing access to historical data is essential for consumers to check and monitor the accuracy of the minimum payment disclosures. If consumers are unable to check the disclosures, creditors will have much less of an incentive to provide them accurately. We also suggest that the Board require creditors to provide the same data to the Board and to their banking regulators so that the Board and regulators can monitor the accuracy of creditors' disclosures. The Board could also use the information to determine the prevalence of various formulas, payment allocation methods, and other variables.

Questions 69 and 76: Negative Amortization and Explaining Assumptions

Creditors should not be permitted to set minimum payment formulas so that a credit card account negatively amortizes.[5] However, if there is negative amortization and an estimated repayment period cannot be generated because of that fact, the consumer should be informed of

[5] Federal banking regulators have discouraged minimum payments that cause negative amortization. Federal Financial Institutions Examination Council, *Credit Card Lending Account Management and Loss Allowance Guidance* (January 2003).

it, consistent with the key principles of accuracy and reality. It is absolutely critical for a consumer to know if her account will negatively amortize if she only makes minimum payments. That information is probably the most important piece of information that could be provided under the 2005 amendments. Thus, it would be positively harmful to consumers for the Board to use, or permit creditors to use, another minimum payment formula that results in positive amortization if the reality is that the consumer's account will negatively amortize. The Board cannot allow a consumer to think she is paying off her balance when she is not. It is deceptive, and it could have devastating consequences. Being truthfully told about negative amortization (i.e., being told "if you make only minimum payments, you will never pay off your balance"), on the other hand, may result in an extremely beneficial and positive changes in behavior by the consumer.

Finally, we believe that the assumptions about repayment (i.e., no new purchases, no late or overlimit fees) should be disclosed to consumers when they receive the information on their repayment periods either from the toll-free number or on their periodic statement. Disclosure of these assumptions is most salient and important when the consumer actually receives the information about the repayment period.

Questions 77 to 79 and 82: Providing the Actual Repayment Period

Section 1637(b)(11) (K) as added by the 2005 Amendments gives creditors the option of providing the "actual" number of months for repayment when consumers call the toll-free number. The Board should also provide creditors with the option of providing the actual repayment period ***on the periodic statement itself***, and thus forego providing the toll-free number system. (**Question 82**) This would save creditors the expense of setting up and maintaining a toll-free number and the automated system to provide estimates. It would permit the standardization and automation that the industry prefers.

The Consumer Credit Committee of the Consumer Advisory Council discussed the minimum payment disclosure requirement at its October 2005 meeting. The creditor representatives present at that discussion uniformly agreed that, if they were faced with the choice of disclosing all the variables on the periodic statement or simply disclosing the number of months, they would disclose the actual number of months. They did not express concern about the difficulty of gathering or inputting the data to calculate the actual number of months. Whether the number of months is printed on the periodic statement or is accessible through a toll-free number should not make any difference in terms of the burden of generating the information. The discussion at the committee meeting demonstrates that creditors can generate such information without undue burden. (**Question 79**)

If the creditor chooses to provide the actual repayment period on the periodic statement, the consumer must be given enough information to verify the accuracy of the disclosure by being provided with information discussed in the five bullet list in subsection 1 above. However, if an actual payment period were provided on the periodic statement, the underlying information could be provided using an alternate channel of a toll-free number and a website.

If a creditor instead chooses to provide actual repayment periods through a toll-free number, the creditor must use the actual and accurate terms of the account, *i.e.*, APRs, portion of balances to which each APR applies, payment allocation order, balance calculation method, minimum payment formula, grace period. The Board should not permit the creditors to make ***any*** assumptions if the information is supposed to be the ***actual*** repayment period. (**Question 77**) Furthermore, the disclosure should be accurate to at least within two months if it is being called the "actual" repayment period. (**Question 78**)

Finally, it is unfortunate that the statutory language informing consumers that they can call the toll-free number for the actual repayment period makes no mention of the very thing the consumer is calling for, *i.e.*, the actual repayment period. The Board should amend this oversight by regulation to have the mandatory language on the periodic statement read:

> "'Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For PERSONALIZED INFORMATION ON HOW LONG IT WILL TAKE YOU TO REPAY THIS BALANCE MAKING ONLY MINIMUM PAYMENTS, call this toll-free number: __________."

The Board has the authority to require this change to the statutory language given its authority to issue regulations defining what is a "clear and conspicuous" disclosure under Section 1309 of the 2005 Amendments. Without the proposed change, the above disclosure would not be "clear," but would be confusing and uninformative.

C. Questions 62 and 63: The Hypothetical Should Be As Accurate As Possible and Reflect Reality

Questions 62 and 63 ask whether the Board should readjust the assumptions in the hypothetical to lower the APR for credit card accounts, or to use different assumptions for other products such as HELOCs. We believe that the hypotheticals should reflect reality as close as possible. They should be calculated using the most common actual minimum payment formulas in use. Furthermore, the Board should fix the calculation errors created by Congress in the hypotheticals.

1. The Board's Authority to Alter The Statutorily Mandated Hypothetical

If the Board is willing to consider lowering the APR, it means the Board believes it has the authority to change the hypothetical, which is written into the statute. This would appear to be correct given that new § 1637(b)(11)(E) requires the Board to "periodically recalculate, as necessary, the interest rate and *repayment period*" (emphasis added) for the hypotheticals. By requiring the Board to recalculate the "repayment period," Congress has given the Board authority to revise the assumptions that generate the repayment period figure. The Board should not make changes which only benefit the credit card industry, *e.g.*, use a lower APR so the credit does not look more expensive, as the Board suggests in Question 62. The Board should also make changes which reflect reality, but that might or might not result in disclosing a longer repayment period. In general, the Board should review and update the hypotheticals on a regularly scheduled basis, such as every 3 years.

2. Fixing the Declining Balance Error

As we discussed in comments we sent to the Board on July 11, 2005 on the 2005 Amendments (attached as Appendix 1), both of the examples prescribed by Congress appear to be based on the assumption that the creditor calculates the dollar amount of the minimum payment based on the balance at the outset of the transaction, with that payment amount remaining constant until the balance is fully repaid. In fact, however, all of the credit card disclosure statements and change of term notices we reviewed calculated the minimum payment in a different way. The minimum payment was calculated as a percentage of the *declining* balance. Thus, if the consumer's original balance was $1000 and the minimum payment was 2% of the balance, the payment amount would be $20 in the first month. But in the second month, after the consumer paid $20, the balance would be reduced to $980 and the minimum payment would be 2% of that ($19.60).

The Board should use the most common actual minimum payment formulas to recalculate the hypothetical. Otherwise, consumers will receive inaccurate, misleading information on their periodic statements.

Note that requiring use of actual payment formulas might not result in a longer repayment period or a problem. The disclosures of minimum payment formulas we reviewed for the March 2005 comments all provided a minimum amount, such as $15, that the consumer would have to pay regardless of the percentage calculation.[6] This would also prevent the residual payment issue.

D. Questions 83 and 84: Formatting and Model Forms

Questions 83 and 84 ask about the clear and conspicuous guidance and model disclosures with respect to the minimum payment disclosure. It is important to note that section 1637(b)(11) of TILA, as added by the 2005 Amendments, already prescribes some of the formatting for the minimum payment hypotheticals by requiring that they be clearly and conspicuously made on the front of the periodic statement in a "prominent location."

Given the requirement that the minimum payment disclosures be "prominent," the Board should require that the minimum payment disclosures be segregated in order to be "clear and conspicuous." This segregation could be accomplished by using a box, shading the area of the disclosure, or using symbols such as asterisks. With respect to type size, the Board should require that the minimum payment disclosure be made using the largest size type of text (excluding logos or graphics) on the periodic statement, but no smaller than 10 point type. Finally, the Board should require that the disclosures be placed on the front of the ***first*** page of the periodic statement in order to ensure that they are in a "prominent location."

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[6] In fact, the Board appears to attempt to address the declining balance error by assuming that the minimum amount is the first minimum payment calculated using a percentage formula (*i.e.*, that for the first example, the minimum amount is $20, which just happens to be the first minimum payment if the formula is 2%. While that is a convenient fix, we note that the most common minimum amount is $10 or $15 for the top ten issuers, according to a recent survey. *See* Linda Sherry, *Annual Credit Card Survey 2005*, Consumer Action (July 2005).

The Board should issue a model disclosure to be placed on periodic statements, and the model should be a segregated disclosure.[7] There should be model disclosures for all of the different hypotheticals (for 2% or less minimums; for 5% or above minimums; for HELOCs) and for disclosure of the actual repayment period.

There is an additional "clear and conspicuous" issue with respect to "call here for the actual repayment period" language. Unlike the mandatory hypotheticals, the statutory language does not require this disclosure to be on the ***front*** of the periodic statement. However, the Board should require by regulation that this disclosure be placed on the front of the billing statement.

There is no way that this disclosure can be considered "conspicuous" if it is placed on the back of the periodic statement. It will not be drawn to the consumer's attention. It will be overlooked as boilerplate. Creditors should not be permitted to play "hide the ball" with this disclosure. Congress thought that this information was critical for consumers to have, and permitting creditors to have an avenue to bury this information would be contrary to the intent of this legislation.

II. INTRODUCTORY RATE DISCLOSURES

Section 1303 of the Bankruptcy Amendments adds 15 U.S.C. § 1637(c)(6), imposing certain requirements when teaser rates are listed in credit card applications, solicitations, and promotional materials. These new requirements apply to references to teaser rates that are outside the Schumer box.[8]

The Board has asked a number of specific questions, which are answered below.[9] We conclude with comments on several topics not raised by the Board's questions.

A. Answers to Questions Listed in ANPR

Question 85: The Board Should Give General Guidance on the Meaning of Clear and Conspicuous, Plus Require a Minimum Type Size.

Section 1309 of the 2005 Amendments requires the Board to adopt regulations to provide guidance as to the meaning of "clear and conspicuous" as applied to the ending date of the teaser rate and the rate that will apply thereafter. Question 85 asks what guidance the Board should issue on the meaning of the clear and conspicuous requirement regarding the teaser rate disclosures.

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[7] We note the Board has not issued a model form for periodic statements. Given that this is the document a consumer is probably most likely to read, a model form showing critical information might be helpful to both consumers and creditors.
[8] 15 U.S.C. § 1637(c)(6)(A).
[9] Question 92, regarding electronic disclosures, is not answered separately in this section of these Comments. Instead, our answers to Question 92 are encompassed by Section V of our comments.

First, the Board should adopt a general definition of "clear". This definition should state that a disclosure is not clear if it is capable of more than one plausible interpretation. The Board should also adopt a general definition of "conspicuous" that requires the disclosure to draw the consumer's attention. This standard is consistent with court decisions interpreting the "clear and conspicuous standard" in § 1632(a).[10]

Second, for these specific disclosures, the Board should require that the permanent rate be disclosed in at least the same type size and with at least the same highlighting as the teaser rate. This topic is discussed in more detail in the response to Question 87.

Third, the Board should require that the permanent rate be disclosed in at least 12-point type and printed in a color that is in clear contrast with its background, regardless of the font size in which the teaser rate is printed. Such a requirement is consistent with the general approach of the Truth in Lending Act of requiring disclosures, particularly those relating to the APR, to be made clearly and conspicuously. A requirement of 12-point type and clear contrast would prevent the use of an unreadable font, and would call the permanent rate to the consumer's attention.

Question 86: The Board Should Require "Introductory" to Appear Either Immediately Before or Immediately After the Teaser APR.

The 2005 Amendments require the word "introductory" to appear in "immediate proximity" to each listing of the introductory APR. Question 86 asks where the word "introductory" should appear in relation to the APR. We agree with the Board's suggestion that it is sufficient if the word "introductory" appears either immediately before or immediately after the APR.

The 2005 Amendments also require that the word "introductory" appear "clearly and conspicuously." The Board should require that the word "introductory" be in at least as large a typeface, and highlighted at least as prominently, as the numerical figure for the APR.

Question 87: The Board Should Require the Permanent Rate Disclosures to Be Closely Proximate to the Most Prominent Mention of the Teaser Rate.

New 15 U.S.C. § 1637(c)(6)(A) requires the permanent rate disclosures to appear in close proximity to the "first listing" of the temporary rate. Question 87 asks what standards the Board should use to identify the "first listing" of the introductory rate.

The dictionary definition of "first" is "preceding all others in time, order, or importance."[11] In accord with this definition, the Board should interpret the term "first listing" as the most important or prominent reference to the temporary rate. To interpret the "first listing" as the one closest to the top of the page would invite creditors to add a reference to the teaser rate in tiny type at the top of the page so that the permanent rate was also disclosed in tiny type.

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[10] National Consumer Law Center, Truth In Lending §§ 4.2.4 and 5.3.2 (5th ed. 2003 & Supp.).
[11] Merriam-Webster Online Dictionary.

In the alternative, virtually the same result can be achieved through the definition of "clear and conspicuous." The Board should require that the permanent rate be disclosed in at least the same font, color, and contrast, and with the same highlighting, as the document's most conspicuous non-Schumer box disclosure of the temporary rate. Adopting this rule would mean that, if a creditor printed the teaser rate in tiny type at the top of a page, and then in large type in the middle of the document, it would still have to print the permanent rate in at least the large font used in the middle of the document. In addition, as noted above, the Board should require that the permanent rate be disclosed in at least 12-point type and contrasting color, regardless of the font size in which the teaser rate is printed.

Question 88: The Board Should Require the Permanent Rate To Be Disclosed In Each Document In a Solicitation That Mentions the Introductory Rate.

In Question 88 the Board asks whether it should require the permanent rate to be disclosed on all promotional materials in a packet, or just one that is determined to contain the "first listing" of the teaser rate. Requiring the permanent rate to be disclosed in *all* promotional materials that mention the teaser rate is the only interpretation consistent with the statute and fair disclosure.

The requirements of the 2005 Amendments regarding teaser rates apply to "an application or solicitation to open a credit card and *all promotional materials* accompanying such application or solicitation."[12] The Board should require the permanent rate to be disclosed in each document that accompanies the application or solicitation and that refers to the teaser rate. This interpretation is the only one consistent with the statutory reference to "all promotional materials." In addition, while creditors may believe that consumers refer primarily to one particular item amongst all of the promotion materials in a solicitation, such as the letter, they would not include the other materials unless they thought at least some consumers read them and were influenced by them. To allow the permanent rate disclosure to be omitted from some of the promotional materials that listed the teaser rate would invite creditors to evade the law by placing the permanent rate disclosure only on a relatively obscure item in the promotional packet.

A rule that did not require the permanent rate to be disclosed in any document that mentioned the teaser rate would be unworkable. To try to define the one document on which the permanent rate must be mentioned would be a wild goose chase. Should it be the letter? If so, what if the creditor does not include a letter in the solicitation? Should it be the item on the top when the envelope is opened? If so, what if the top item is a smaller sheet or insert? It is clear why Congress specified that all promotional materials that list the teaser rate must also disclose the permanent rate. Trying to specify a single document would invite solicitations that were cleverly designed to minimize the disclosure of the permanent rate.

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[12] 15 U.S.C. § 1637(c)(6)(A) (emphasis added). By virtue of a cross-reference to 15 U.S.C. § 1637(c)(1), the requirements apply only if the application or solicitation is of a type for which TILA disclosures are required in general.

Question 89: The Board Should Require the Permanent Rate To Appear Either Side-by-Side With Or Immediately Above Or Below the Teaser Rate.

The 2005 Amendments require the permanent rate to be disclosed "closely proximate" to the first listing of the teaser rate. Question 89 asks how this requirement should be interpreted.

The Board should interpret "closely proximate" to require that the permanent rate appear *either side-by-side with or immediately under or above* the most prominent statement of the teaser rate. "Closely proximate" should not be defined in a way that would allow the creditor to disclose the permanent rate only in the body of a document when the teaser rate was disclosed at the top or in a prominent sidebar.

Question 90: The Board Should Not Allow Creditors to Disclose Several Possible Permanent APRs, Without Committing to Offer Any One of Them.

Question 90 asks: "Some credit card issuers' offers list several possible permanent APRs, and consumer qualification for any particular rate is subsequently determined by information gathered as part of the application process. What guidance should the Board provide on how to disclose the "go-to" APR in the solicitation when the permanent APR is set using risk-based pricing?"

We submit that the Board has asked the wrong question. The Board's question assumes that a creditor may comply with TILA's disclosure requirements without ever telling the consumer what permanent rate will apply. As a result, the consumer applies for the card without knowing what the terms of the transaction will be. Such a result empties disclosures of meaning and invites bait-and-switch tactics.

Rather than providing guidance on how a credit card issuer should disclose multiple alternate permanent rates, the Board should require that the creditor disclose a single rate, not a range of rates, that will apply at the end of the introductory period. The 2005 Amendments require the creditor to disclose "*the* annual percentage rate that *will* apply at the end of the introductory period."[13] Disclosure of a range of rates is not a clear disclosure of the rate that will apply.

Question 91: The Board Should Require Specificity in the Disclosure of the Circumstances that May Result in Revocation of the Introductory Rate.

New 15 U.S.C. § 1637(c)(6)(C) requires credit card issuers to disclose the circumstances that may result in the revocation of the introductory rate. Question 91 asks what rules the Board should adopt to guide this disclosure.

The Board should ensure that this disclosure is meaningful by requiring specificity in the disclosures regarding these triggers and by prohibiting "catchall" disclosures. Allowing a catchall disclosure would make the disclosure requirement meaningless. For example, creditors should not be allowed to disclose that the introductory rate may be revoked "upon events to be

[13] 15 U.S.C. § 1637(c)(6)(A)(ii) (emphasis added).

determined by us," but should be required to disclose that the teaser rate will be revoked "if you fail to make a payment, if you are late in making a payment, or if you make a transaction over your credit limit."

B. Additional Recommendations Regarding Teaser Rate Disclosures

1. The Teaser Rate Disclosures Should be Required For All Teaser Rates.

The teaser rate disclosure provisions of the 2005 Amendments apply when an introductory rate is "less than an annual percentage rate that was in effect within 60 days before the date of mailing to application or solicitation."[14] This language raises the question of what rate the introductory rate should be compared to. In these comments, we urge the Board to adopt a specific interpretation of this language, but we also urge the Board to go beyond the requirements of the Bankruptcy Amendments and require the teaser rate disclosures in additional circumstances as well.

In interpreting the new statutory language quoted above, the Board should require the teaser rate disclosures to be made whenever the teaser rate is less than *the highest non-penalty rate in effect for the same product* during the previous 60 days. Otherwise, an unscrupulous creditor could choose an artificially low rate as the comparison measure, and escape the requirements of the new disclosure completely. The requirement that the comparison rate be the highest rate in use *for the same product* is critical. To allow the creditor to compare the teaser rate to its overall average periodic rate for all customers, or to the rate for a different product, would enable it to avoid making the teaser rate disclosures for many credit cards where in fact there will be a significant increase in the periodic rate after an introductory period. This effect would be particularly pronounced for subprime credit cards, since for a subprime card the teaser rate might be higher than the permanent rate for prime borrowers.

On a related note, we would be strongly opposed to pegging the comparison rate to a prime rate, or an index rate plus margin. If a creditor could use a prime rate as the measure of comparison to a subprime introductory rate, it could offer a teaser rate that was the prime rate, and then increase it to a subprime rate within a year. If the creditor is launching a new credit card, and cannot compare the teaser rate to the highest non-penalty rate for *that product*, the comparison should be to the highest non-penalty rate for any of that creditor's credit card products during the past 60 days.

While the foregoing suggestions represent, in our view, the best interpretation of the language of the 2005 Amendments, we also urge the Board to go beyond those requirements and require the teaser rate disclosures whenever a creditor offers a temporary rate that is going to increase after a set period of time, regardless of the comparison to a previous rate. This is currently the approach used for the teaser rate disclosure in the Schumer box at 12 C.F.R. § 226.5a(b)(1). The Board has broad authority under 15 U.S.C. § 1637(c)(5) to require disclosures in credit card applications and solicitations beyond those mandated by the statute. A requirement that the teaser rate disclosures be made whenever a temporary rate is scheduled to jump would not only give consumers more information, but would also simplify creditor compliance because

[14] 15 U.S.C. § 1637(c)(6)(D)(i).

it would be consistent with the disclosure within the Schumer box and it would not depend on comparison of the teaser rate to another rate.

2. <u>The Teaser Rate Disclosures Should Not Be Confined to APRs for Purchases.</u>

APRs for purchases were the most common APRs that creditors highlighted in the credit card applications and solicitations we reviewed as part of our March 2005 comments in response to the first ANPR on the open-end credit rule. However, the 2005 Amendments are not limited to APRs for purchases, but apply to any introductory APR that is offered in an application or solicitation or accompanying promotional materials.[15] The Board's regulations should make it clear that the requirement of disclosure of the permanent rate applies to all teaser rates, not just teaser rates for purchases.

3. <u>The Board Should Base the Disclosure of a Permanent Variable Rate on a Rate in Effect for the Same Product.</u>

If the permanent rate is a variable rate, the 2005 Amendments require the creditor to disclose the permanent rate, "based on an annual percentage rate that was in effect within 60 days before the date of mailing of the application or solicitation."[16] The Board should require this rate to reflect the actual index that the credit card will use, applied to market conditions in effect within the 60-day period. In the alternative, the Board could require disclosure of a permanent rate that was in effect within the previous 60 days for the same product with the same index. This alternative would not be workable if the application or solicitation is for a new product, however.

III. CREDITING OF PAYMENTS

In Question 99, the Board asks whether it should adopt a rule that payments must be credited on the date received. We applaud the Board for considering taking action on this important issue.

One reason for the high level of consumer frustration about cut-off times is the sense of consumer helplessness. Consumers lose control of the timing of their payment once they deposit the check in the mail. The length of time the postal service takes to deliver the check to the creditor may vary significantly and unpredictably. Once the check reaches the creditor's mailbox, it may arrive early in the morning or late in the afternoon - again all beyond the consumer's control. The creditor's automated processing system may reject the check, requiring more time-consuming hand processing, because the check became wrinkled in the mail or similar factors that are beyond the consumer's control. Furthermore, creditors usually charge for quicker methods of payments such as authorizing a bank debit by telephone.

The Board should adopt a rule that requires creditors to credit the payment to the consumer's account as of the postmark date on the payment. The postmark date is a reliable and fair measure of when the payment was made. Using the postmark date would mean that

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[15] 15 U.S.C. § 1637(c)(6)(A).
[16] 15 U.S.C. § 1637(c)(6)(A)(iii).

consumers were not penalized by circumstances beyond their control. The Internal Revenue Service accepts the postmark date as the date of payment for taxes, so it should be acceptable for credit card payments as well.[17]

In the alternative, we strongly urge the Board to adopt a rule that payments must be credited on the date received. The rule should define the date received as the date the payment was delivered to a post office box or other physical location controlled by the creditor or the creditor's payment processor. Otherwise, creditors could evade the rule by emptying their post office boxes only once a day, very early in the morning.

If the Board adopted a rule that required payments to be credited as of the date received, this would not require creditors to process all payments on the date received. It would simply mean that, regardless of the date the creditor processed a payment, it would have to be credited to the consumer's account as of the date received. For example, if a consumer's check was rejected by the creditor's automated processing equipment because it became wrinkled in the mail, processing it manually might require an additional work day. Once it was manually processed, it would be credited to the account as of the date received, not as of the date the manual processing was completed.

IVV. INTERNET DISCLOSURES (Questions 93 to 96)

Questions 93 to 96 all relate to the standards to be used to supply required disclosures in solicitations and applications for open end credit over the Internet. Generally, the questions seek input on the issues relating to: whether the standards should be the same for Internet solicitations and applications (Question 93); how to make to disclosures provided over the Internet clearly and conspicuously (Question 94); how to make the disclosures "readily accessible" – relating to the issue of links to other web pages (Question 95); and what requirements should be applicable to reflect the law's requirement that the internet disclosures be updated regularly (Question 96). However, before addressing these questions, it is necessary to describe the importance of ensuring that the electronic disclosures are provided in a way that consumers can actually access and retain them.

The Interim Rules[18] – which are not even mandatory – do little to address these issues in their general application to electronic disclosures required by Truth in Lending. But they are particularly unhelpful in their application to disclosures required for the solicitation and application of open end credit, because the Board[19] exempted these disclosures from the requirement to obtain electronic consent pursuant to E-Sign.[20]

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[17] *See* Internal Revenue Service, Publication 17, *available at* www.irs.gov/pub/irs-pdf/p17.pdf.
[18] 66 Fed. Reg. 17329 (Mar.30, 2001).

[19] 12 CFR § 226.36(c).

[20] Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001, *et seq.*

First, the Board should state explicitly that electronic disclosures are only permitted when the transaction is *not* a face to face transaction. If pre-application disclosures are limited to the situation where consumers are actually shopping on-line, there is little risk that electronic disclosures will be used as a mechanism to avoid actually providing disclosures to consumers in a form they can keep. However, by allowing pre-application disclosures to be visually displayed on a computer screen to a consumer standing in a store applying for credit, we are inviting problems. That consumer might apply electronically, using the store's computer equipment, and consent electronically, also using the store's computer equipment to go to the store's website and click at the appropriate places. The consumer then leaves the store with no paper documents indicating the terms of the credit just entered into, and no information about the website, or how to access and download the disclosures. Even if the consumer wants to retain the pre-application disclosures, how would this be accomplished? The Interim Rule does not require any method of retention for these disclosures.[21] The Board should address this problem in the context of this review of open-end disclosures.

When disclosures are provided electronically, consumers must be assured that they will have a way of keeping those disclosures for future reference. Also, the disclosures must be provided in a manner that allows consumers to use the electronic record containing them to prove the terms of the disclosures in court, if necessary.

To accomplish this, any disclosure required under TILA to be in writing must be provided to the consumer in a form which the consumer can retain. Providing a disclosure to a consumer in a face-to-face transaction, after the consumer consents using the creditor's equipment, by posting it on a website, and requiring the consumer to then go to another Internet access computer to find the appropriate link in the right website and download the disclosures does not meet these requirements. The visual display of TILA disclosures without a viable method at that moment and express instruction for the consumer to download or print the disclosures is not providing the consumer an electronic record which is "capable of being retained."

The electronic disclosure must be provided in a form which the consumer can use to accurately reproduce the disclosure to prove the terms at a later time. These new rules should require that when open-end disclosures in solicitations and application are provided electronically, they must be in a form which the consumer can retain at the same time the disclosure is provided.

Thus, if the consumer is in a face-to-face transaction, the disclosure must be either: 1) downloaded to a device operated by the consumer; 2) printed immediately by the creditor and the paper copy handed to the consumer; or 3) emailed to the consumer at a pre-existing email address, which the consumer has supplied for this express purposes and which she can access prior to proceeding with the transaction. Simply allowing the disclosure to be posted to a website for future downloading – if ever – by the consumer, does not provide the consumer with a viable opportunity to retain the disclosure in a form which the consumer can later use to resolve a dispute.

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[21] § 226.36(d)(3).

If the consumer is indeed shopping for credit electronically, the Board should mandate that all TILA disclosures be provided in a manner which can be 1) printed easily; 2) downloaded in text form onto a computer; and 3) emailed to oneself and others.

Question 93 Treatment of Solicitations Versus Applications

Question 93 asks whether Internet applications and Internet solicitations should be treated the same. We see no reason to treat disclosures provided in solicitations any differently than those for applications, especially when these disclosures are provided electronically. All of these disclosures need to be timely, provided in clear and conspicuous manner, and provided in a way that is downloadable and printable.

Question 94: Clear and Conspicuous Disclosure

Question 94 asks what guidance the Board should provide on the clear and conspicuous standard for Internet disclosures. The Board should articulate the requirement that electronic disclosures of information should be very difficult to miss on the web page. The consumer should be required to click through a screen with all of the required information on it. Indeed, it would be preferable if the consumer were required to click through several essential points on the screen – each one disclosing separate pieces of required TILA disclosures.

As discussed in the response to Question 85, the Board should develop general standards for what is "clear" and "what is conspicuous."

Question 95: Disclosures Should Be Made Using a 'Click-Thru' Screen

Question 95 asks how the Board should define the requirement that disclosures be readily accessible to consumers in close proximity to an Internet solicitation. See answer to Question 94, and introductory information in this section.

Question 96: Timeliness of Information

Question 96 asks how often the Board should require on-line disclosures to be updated. The advantage of information provided on the Internet is that it can be provided in real time. There is no reason that any information relating to a solicitation or an application for open-end credit should remain on a website sponsored by the creditor once the terms become obsolete. Other than an attempt to mislead consumers into applying for credit which is not actually available, what can the justification possibly be for providing disclosures for credit which is not really offered to consumers – other than a bait and switch situation? The Board should specifically require that all Internet solicitation or application disclosures be timely. There is no reason for a creditor to withdraw a product from the market one day and wait 30 days to update the web site.

V. DISCLOSURES FOR HOME-SECURED LOANS THAT MAY EXCEED THE DWELLING'S FAIR MARKET VALUE (Questions 102 to 105)

Loans which exceed the value of the home are very dangerous to the homeowner. These loans lead to a heightened risk of foreclosure, difficulty in selling the home, or filing bankruptcy, and generally an inappropriate or unwise use of credit.

The borrower in a loan in excess of market value of the home is prevented from refinancing on more favorable terms – thereby creating a dynamic in which an unscrupulous lender knows that the homeowner can be locked into a loan with exploitive terms. These types of loans typically move unsecured credit debt, such as credit card debt, into a thirty-year mortgage secured by the borrower's home. This practice is exceedingly costly because of the added interest expenses of borrowing money over a much longer term. However, when there are not even any tax benefits to the practice – as is the case when the LTV is greater than 100%, this type of lending is so dangerous and expensive that policymakers should outlaw it altogether. By definition there are no tax deductions for that portion of the interest on a loan which exceeds the value of the home. Thus, even for those borrowers who are fully aware of the tax implications of such a loan, the long term costs rarely justify the risks.

If the homeowner ever becomes unable to make the payments, which is an inevitability in many high cost loans, bankruptcy is no longer an option, unless the borrower is willing to give up the home. Indeed, after such a loan is made, even if the homeowner is able to sell the home, in order to provide clear title, the homeowner must bring money to the closing table.

The Board should do everything within its legal purview to provide a clear and consistent message to homeowners that such borrowing is dangerous, is unlikely to provide sufficient tax benefits to justify the risks, and is an unwise use of credit.

In fact, we strongly recommend that the Board use its authority under Regulation AA to define and prohibit unfair activities for financial institutions to address this situation. Specifically the Board should declare it an unfair practice for a financial institution to make a loan secured by the home when that loan may cause the total credit secured by the home to exceed the fair market value of the property.

Question 102: The Disclosures Should Be Required Whenever a Consumer Is 'Underwater'

Question 102 asks how the Board should define when an extension of credit may exceed the fair market value of the dwelling. The disclosures should always be required when the new credit extended will cause the combined credit secured by the consumer's home to exceed the fair market value of the home. The danger is that the consumer will be "underwater" – owe more on the home than the home is worth. To the extent that disclosures will do some good, they should be required to be provided often and clearly and conspicuously – in the hope that some homeowners will be dissuaded from engaging in this dangerous form of credit.

Question 103:Negatively Amortizing Loans

Question 103 asks how a negatively amortizing loan should be treated. As an initial matter, negatively amortizing loans should be prohibited. With respect to this disclosure, it should be made if negative amortization is permitted under the terms of the extension of credit, or the credit contract contemplates another situation where the loan to value ratio of the home may change in a direction where there will be less equity in the home (other than a change in the underlying value of the home).

This is particularly important because of the lack of sophistication of most borrowers about the implications of negative amortization and similar equity-eating loan terms. Very few borrowers understand how loan amortizations work, how valuable the equity in their home is, or how by not paying interest, the equity in one's home is depleted. These are complex mathematical concepts. Borrowers should not be expected to understand them and appreciate their technicalities and their dangers. It is the responsibility of the regulators – in this case the Federal Reserve Board – to ensure that borrowers are properly protected from the dangers of these types of loans. While disclosures only provide minimal protections, they do provide some. Subject to one caveat, these disclosures should be provided in every loan in which the potential exists for the equity to be depleted. The important caveat, the one exception we would recommend that the Board make to this universal rule, is that depletion of equity which results from non-payment of the loan, i.e., default or delinquency, need not have this disclosure.

Question 104: Clear and Conspicuous Disclosures

Question 104 asks what guidance the Board should provide on how to make the disclosures clear and conspicuous. The notice regarding the risk of these over 100% LTV products should be provided in such a way that a consumer cannot help but see it and read it, and at a point in the application for the credit when the consumer can still turn back. It is insufficient to provide this disclosure at the closing table, or even 3 days before closing. The disclosure should also be prominently provided – in a separate and distinct manner from all other disclosures – at application, or within 3 days afterwards.

Question 105: Timing of Disclosures

Question 105 asks about the timing of the disclosures. It would be good for separate disclosures to be made both at application for these types of loans, as well as three days prior to the closing. The disclosures should be provided in the manner most likely to alert consumers to the fact that both Congress and the Federal Reserve Board view these products as dangerous to consumers. Just as the Food and Drug Administration provides various levels of alerts for drugs with known risks, the same kind of disclosure alert should be applied to these loans.

Dated: December 16, 2005

APPENDIX 1

COMMENTS OF THE NATIONAL CONSUMER LAW CENTER
REGARDING DISCLOSURES REQUIRED BY THE 2005 BANKRUPTCY AMENDMENTS

The 2005 Bankruptcy Amendments[22] impose a number of new disclosure requirements on creditors, and require the Board to issue regulations implementing these requirements. Several of the new requirements relate to matters that were also raised by the Board's Advance Notice of Proposed Rulemaking regarding Regulation Z,[23] so were discussed in at least a general way in comments filed in response to that notice. Nonetheless, there are a number of specific issues regarding interpretation of the Bankruptcy Amendments that those comments could not have anticipated. The National Consumer Law Center submits these comments on behalf of its low-income clients to address certain issues regarding the interpretation of the minimum payment and teaser rate requirements of the Bankruptcy Amendments.

I. Disclosure of Effect of Minimum Payment

Section 1301 of the Bankruptcy Amendments amends 15 U.S.C. § 1637(b) to require periodic statements to contain a warning about the effect of making only the minimum payment. It also adds 15 U.S.C. § 1637(b)(11)(H), which requires the Board to create a detailed table illustrating the approximate number of months that it would take to repay an outstanding balance if the consumer makes only the minimum payments. The information in this table is to be made available to consumers who call a toll-free number. Section 1301(c) of the Bankruptcy Amendments allows the Board to conduct a study of various issues regarding minimum payments and consumer awareness of them.

A. The Minimum Payment Disclosure Applies to All Open-End Credit Plans and the Board's Regulation Should So State.

While the effect of making only minimum payments has received most press coverage in the context of credit cards, the Bankruptcy Amendments apply to any "open end credit plan."[24] "Open end credit plan" is defined by 15 U.S.C. § 1602(i) as any plan in which the creditor reasonably contemplates repeated transactions, which prescribes the form of such transactions, and which provides for a finance charge which may be computed from time to time on the unpaid balance. This definition includes all types of open-end credit, including home equity lines of credit, not just credit cards.[25] The regulations adopted by the Board to implement the minimum payment disclosure requirement should explicitly state that the requirement applies to all open-end credit.

B. The Detailed Table Illustrating the Effect of Making the Minimum Payment Should Be Based on Actual Samples of Minimum Payment Formulas.

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[22] Pub. L. No. 109-8, §§ 1301-1309.
[23] 69 Fed. Reg. 70925 (Dec. 8, 2004).
[24] 15 U.S.C. § 1637(b)(11)(A).
[25] *See* 12 C.F.R. § 226.5b (referring to home equity lines of credit as "open end credit plans" that are secured by the consumer's dwelling).

The Bankruptcy Amendments require periodic statements to give a specific example of the effect of making minimum payments, using language prescribed by Congress.[26] Both of the examples prescribed by Congress appear to be based on the assumption that the creditor calculates the dollar amount of the minimum payment based on the balance at the outset of the transaction, with that payment amount remaining constant until the balance is fully repaid.[27]

In fact, however, all of the credit card disclosure statements and change of term notices we reviewed for our comments in response to the recent ANPR calculated the minimum payment in a different way. The minimum payment was calculated as a percentage of the *declining* balance. Thus, if the consumer's original balance was $1000 and the minimum payment was 2% of the balance, the payment amount would be $20 in the first month. But in the second month, after the consumer paid $20, the balance would be reduced to $980 and the minimum payment would be 2% of that ($19.60). In addition, the disclosures of minimum payment formulas we reviewed all provided a minimum amount, such as $15, that the consumer would have to pay regardless of the percentage calculation.

The Board should use **actual** *minimum payment formulas to prepare its table of the effect of making minimum payments.* Otherwise, consumers who call the toll-free number will receive inaccurate, misleading information. While the language that must appear on periodic statements uses simplified examples, the Board is to assemble more detailed, specific information in its table. Because Congress contemplated that the Board's tables would include greater detail than the simplified examples that are to be printed on the periodic statement, it is appropriate for the Board's table to reflect actual minimum payment formulas.

In our comments in response to the ANPR we urged the Board to require creditors to disclose the minimum payment formula to consumers. We believe it is even more critical for consumers to have the formula with these new disclosure requirements under the Bankruptcy Amendments, and we believe the Board has the statutory authority to require this disclosure under § 1301(b) of those Amendments. If consumers are given this information, they will be able to plug the actual minimum payment formulas applicable to their open-end credit plans into the Board's table.

In preparing the table, the Board should first require the industry to provide it with the minimum payment formulas currently in use. While the calculation of the length of time necessary to repay an extension of credit using actual creditor formulas is somewhat more complicated than assuming that the payment amount remains the same until the balance is fully

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[26] 15 U.S.C. § 1637(b)(11)(A), (B).

[27] The example set forth at 15 U.S.C. § 1637(b)(11)(A) is that, with a minimum monthly payment of 2% of the balance, it would take 88 months to repay a $1000 balance at 17% interest. A payment of 2% of $1000 is $20. If that payment remains constant until the balance is fuly repaid, the consumer would fully repay the debt after 88 payments. (The 88th payment would be approximately $13 instead of $20).

The example at 15 U.S.C. § 1637(b)(11)(B) is that, with a monthly payment of 5% of the balance, it would take 24 months to repay a $300 balance at 17% interest. A payment of 5% of $300 is $15. If that payment remains constant until the balance is fully repaid, the consumer would fully repay the debt after 24 payments. (The 24th payment is approximately $10 instead of $15).

repaid, the calculation can be handled through a very simple computer program. The calculation should be based on the assumption that the consumer makes the minimum payment on time each month, without incurring late charges, overlimit fees, or other fees, so long as it is true that consumers would not incur any of these fees if the consumer pays the minimum amount due on a timely basis. If by paying the minimum amount only, it is likely that the consumer would incur these fees, they should also be included in the calculations – as well as the resulting changes in interest and principal, and thus payments required.

C. The Board Should Engage Experts in Survey Technique If It Conducts the Study Allowed by Section 1301(c).

Section 1301(c) of the Bankruptcy Amendments allows the Board to conduct a study of the extent to which consumers are aware of their existing payment obligations when they take on new credit, the extent to which they are aware of the effect of making only minimum payments, and several other matters. While these issues require expertise in economics, they also require the expertise of social scientists familiar with consumer survey techniques. If the Board chooses to conduct such a study, we urge it to employ not only economists but also social scientists who have expertise in consumer survey technique. In addition, whatever their specialty, the Board should employ independent experts without industry connections. It should also use independent data, and not rely solely on industry data. The Board should issue a public call for potential partners in this effort and include consumer representatives among the groups with whom it consults.

II. Teaser Rate Disclosures

Section 1303 of the Bankruptcy Amendments adds 15 U.S.C. § 1637(c)(6), imposing certain requirements when teaser rates are listed in credit card applications, solicitations, and promotional materials. These new requirements apply only to references to teaser rates that are outside the Schumer box.[28]

A. Teaser Rate Disclosures Should be Required For All Teaser Rates.

The teaser rate disclosure provisions of the Bankruptcy Amendments apply when an introductory rate is "less than an annual percentage rate that was in effect within 60 days before the date of mailing to application or solicitation."[29] This language raises the question of what rate the introductory rate should be compared to. In these comments we urge the Board to adopt a specific interpretation of this language, but we also urge the Board to go beyond the requirements of the Bankruptcy Amendments and require the teaser rate disclosures in additional circumstances as well.

In interpreting the Bankruptcy Amendments language quoted above, the Board should require the teaser rate disclosures to be made whenever the teaser rate is less than *the highest non-penalty rate in effect for the same product* during the previous 60 days. Otherwise, an unscrupulous creditor could choose an artificially low rate as the comparison measure, and

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[28] 15 U.S.C. § 1637(c)(6)(A).
[29] 15 U.S.C. § 1637(c)(6)(D)(i).

escape the requirements of the new disclosure completely. . The requirement that the comparison rate be the highest rate in use *for the same product* is critical. To allow the creditor to compare the teaser rate to its overall average periodic rate for all customers, or to the rate for a different product, would enable it to avoid making the teaser rate disclosures for many credit cards where in fact there will be a significant increase in the periodic rate after an introductory period. This effect would be particularly pronounced for subprime credit cards, since for a subprime card the teaser rate might be higher than the permanent rate for prime borrowers.

On a related note, we would be strongly opposed to pegging the comparison rate to a prime rate, or an index rate plus margin. If a creditor could use a prime rate as the measure of comparison to a subprime introductory rate, it could offer a teaser rate that was the prime rate, and then increase it to a subprime rate within a year. Furthermore, if the creditor is launching a new credit card, so cannot compare the teaser rate to the highest non-penalty rate for *that product*, the comparison should be to the highest non-penalty rate for any of that creditor's credit card products during the past 60 days.

While the foregoing suggestions represent, in our view, the best interpretation of the language of the Bankruptcy Amendments, we also urge the Board to go beyond those requirements and require the teaser rate disclosures whenever a creditor offers a temporary rate that is going to increase after a set period of time, regardless of the comparison to a previous rate. This is currently the approach used for the teaser rate disclosure in the Schumer box at 12 C.F.R. § 226.5a(b)(1). The Board has broad authority under 15 U.S.C. § 1637(c)(5) to require disclosures in credit card applications and solicitations beyond those mandated by the statute. A requirement that the teaser rate disclosures be made whenever a temporary rate is scheduled to jump would not only give consumers more information, but would also simplify creditor compliance because it would be consistent with the disclosure within the Schumer box and it would not depend on comparison of the teaser rate to another rate.

B. The Board Should Require A Meaningful Description of the Circumstances Under Which the Creditor May Revoke the Introductory Rate.

New 15 U.S.C. § 1637(c)(6)(C) requires credit card issuers to disclose the circumstances that may result in the revocation of the introductory rate. The Board should ensure that this disclosure is meaningful by requiring specificity in the disclosures regarding these triggers and by prohibiting "catchall" disclosures. Allowing a catchall disclosure would make the disclosure requirement meaningless. For example, creditors should not be allowed to disclose that the introductory rate may be revoked "upon events to be determined by us," but should be required to disclose that the teaser rate will be revoked "if you fail to make a payment, if you are late in making a payment, or if you make a transaction over your credit limit"

C. The Board Should Ensure That the Disclosure of the Permanent Rate is Clear and Conspicuous.

New 15 U.S.C. § 1637(c)(6)(A) requires the permanent rate disclosures to appear in close proximity to the "first listing" of the temporary rate. The dictionary definition of "first" is

"preceding all others in time, order, or importance."[30] In accord with this definition, the Board should interpret the term "first listing" as the most important or prominent reference to the temporary rate. To interpret the "first listing" as the one closest to the top of the page would invite creditors to add a reference to the teaser rate in tiny type at the top of the page so that the permanent rate was also disclosed in tiny type.

In the alternative, virtually the same result can be achieved through the definition of "clear and conspicuous." The Board should require that the permanent rate be disclosed in at least the same font, and with the same highlighting, as the document's most conspicuous non-Schumer box disclosure of the temporary rate. Adopting this rule would mean that, if a creditor printed the teaser rate in tiny type at the top of a page, and then in large type in the middle of the document, it would still have to print the permanent rate in at least the large font used in the middle of the document. In addition, the Board should require that the permanent rate be disclosed in at least 12-point type, regardless of the font size in which the teaser rate is printed. Such a requirement is consistent with the general approach of the Truth in Lending Act of requiring disclosures to be made clearly and conspicuously, and would call the permanent rate to the consumer's attention.

In addition to these requirements regarding font size and highlighting, the Board should require that the disclosure of the permanent rate appear *either side-by-side with or immediately under or above* the most prominent statement of the teaser rate. "Closely proximate" should not be defined in a way that would allow the creditor to disclose the permanent rate only in the body of a document when the teaser rate was disclosed at the top or in a prominent sidebar.

Finally, the Board should require that the creditor disclose a single rate, not a range of rates, that will apply at the end of the introductory period. The Bankruptcy Amendments require the creditor to disclose "*the* annual percentage rate that *will* apply at the end of the introductory period."[31] Disclosure of a range of rates is not a clear disclosure of the rate that will apply. In addition, allowing disclosure of a range of rates invites bait-and-switch tactics.

D. The Board Should Base the Disclosure of a Permanent Variable Rate on a Rate in Effect for the Same Product.

If the permanent rate is a variable rate, the Bankruptcy Amendments require the creditor to disclose the permanent rate, "based on an annual percentage rate that was in effect within 60 days before the date of mailing of the application or solicitation."[32] The Board should require this rate to reflect the actual index that the credit card will use, applied to market conditions in effect within the 60-day period.[33]

[30] Merriam-Webster Online Dictionary.
[31] 15 U.S.C. § 1637(c)(6)(A)(ii) (emphasis added).
[32] 15 U.S.C. § 1637(c)(6)(A)(iii).
[33] Another way to reach virtually the same result is to require the creditor to disclose 1) a permanent rate that was in effect within the previous 60 days for the same product with the same index, or 2) if the application or solicitation is for a new product, the rate obtained by applying the index to the market conditions during the 60-day period.

E. The Board Should Require the Permanent Rate To Be Disclosed on *All* Materials in Applications and Solicitations that State the Teaser Rate.

The Bankruptcy Amendment requirements regarding teaser rates apply to "an application or solicitation to open a credit card and *all promotional materials* accompanying such application or solicitation."[34] The Board should require the permanent rate to be disclosed in each document that accompanies the application or solicitation and that refers to the teaser rate. This interpretation is the only one consistent with the statutory reference to "all promotional materials." In addition, while creditors may believe that consumers refer primarily one particular item, such as the letter, in a credit card solicitation, they would not include the other materials unless they thought at least some consumers read them and were influenced by them. To allow the permanent rate disclosure to be omitted from some of the promotional materials that listed the teaser rate would invite creditors to evade the law by placing the permanent rate disclosure only on a relatively obscure item in the promotional packet.

F. The Bankruptcy Amendment Disclosure Requirements Should Be Applied to All Teaser Rates.

APRs for purchases were the most common APR that creditors highlighted in the credit card applications and solicitations we reviewed as part of our response to the recent ANPR. However, the Bankruptcy Amendments are not limited to APRs for purchases, but apply to any introductory APR that is offered in an application or solicitation or accompanying promotional materials.[35] The Board's regulations should make it clear that the requirement of disclosure of the permanent rate applies to all teaser rates, not just teaser rates for purchases.

III. Internet Disclosures

The Bankruptcy Amendments also require that any solicitation to open a credit card account using the Internet must clearly and conspicuously disclose certain information.[36] The disclosures must be readily accessible to consumers in close proximity to the solicitation itself and updated regularly.[37] It is also essential that the consumer be able to download and print the disclosures, so the that consumer has the ability to keep a copy of the promises made when the solicitation is made.[38]

To meet the "close proximity" requirement, the Board should require that the disclosures be on the same page as the solicitation, so that the consumer does not have to link to another page to view them. The Board should also require that the disclosures be placed on the page so that they are visible on a typical computer screen without the need to scroll down.

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[34] 15 U.S.C. § 1637(c)(6)(A) (emphasis added). By virtue of a cross-reference to 15 U.S.C. § 1637(c)(1), the requirements apply only if the application or solicitation is of a type for which TILA disclosures are required in general.

[35] 15 U.S.C. § 1637(c)(6)(A).

[36] 15 U.S.C. § 1637(c)(7).

[37] 15 U.S.C. § 1637(c)(7)(B).

[38] Although the Board did not apply E-Sign's requirement that disclosures be retainable to the consumer for advertisements, there is no reason that should not be required now given the technological advances. Indeed any Internet site which is not downloadable needs to be specially programmed to achieve that feature. .

Regarding the requirement that disclosures be updated regularly, the Board should require that the disclosures be accurate when they appear. There is no reason that creditors cannot update this information on a real time basis. Because of the change of terms rules, there is a delay in the effective date of most credit card terms. This delay gives creditors enough lead time to update the disclosures on their websites.

Thank you for considering these comments.

Dated: July 11, 2005