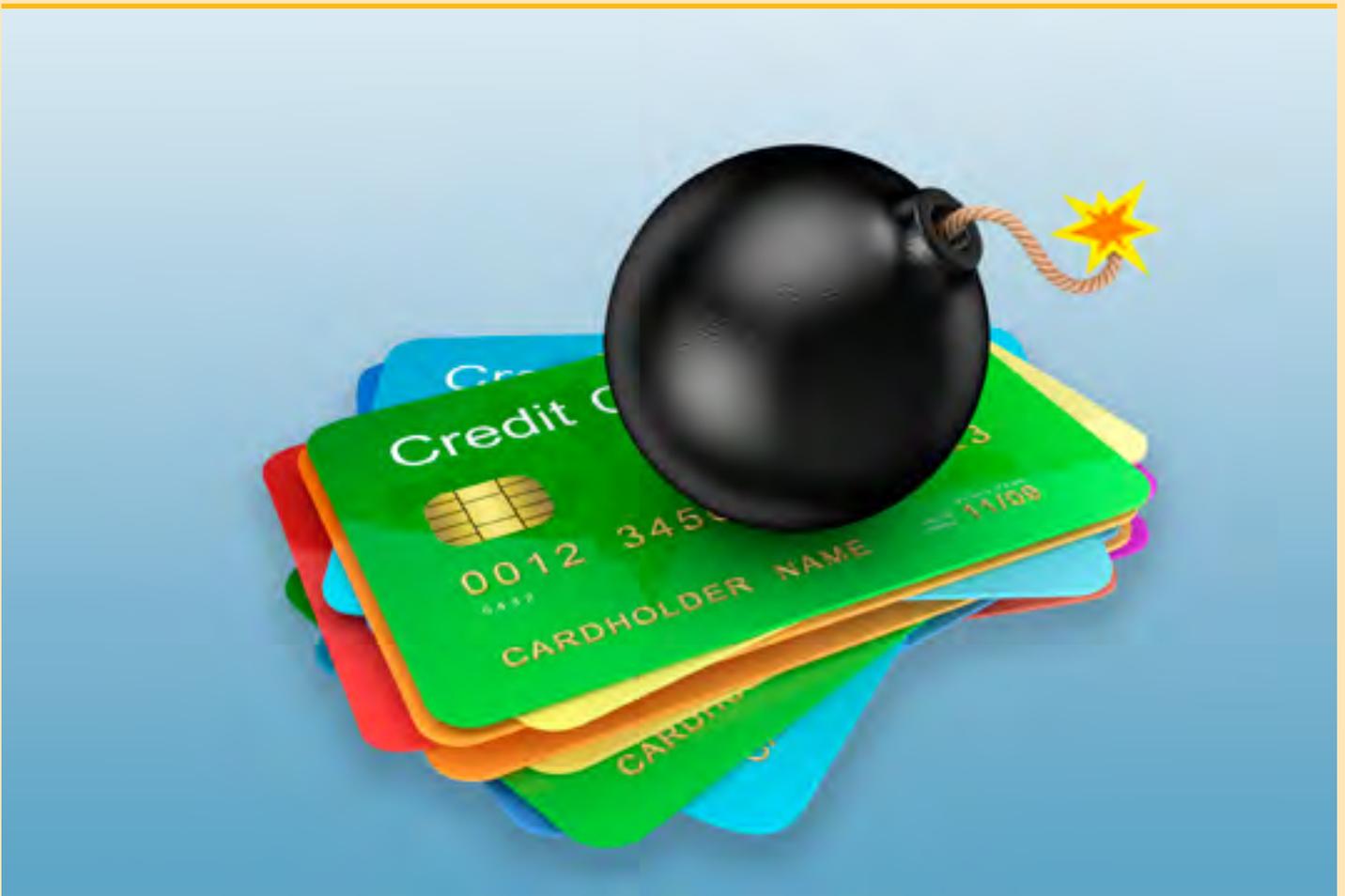


ATTACHMENT A

DECEPTIVE BARGAIN

THE HIDDEN TIME BOMB OF DEFERRED INTEREST CREDIT CARDS



December 2015

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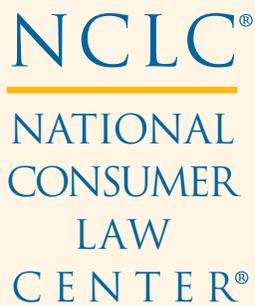
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ABOUT THE AUTHOR

Chi Chi Wu is a staff attorney at the National Consumer Law Center. She is an expert on consumer credit issues, including credit cards, tax-time financial products (refund anticipation loans and checks), credit reporting, and medical debt. She is co-author of the legal manuals *Fair Credit Reporting Act* and *Collection Actions*, and a contributing author to *Consumer Credit Regulation* and *Truth in Lending*. Wu frequently serves as a resource for policymakers and the media on consumer credit issues. Previously, Wu worked in the Consumer Protection Division at the Massachusetts Attorney General's office and the Asian Outreach Unit of Greater Boston Legal Services.

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Since 1969, the nonprofit National Consumer Law Center[®] (NCLC[®]) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

DECEPTIVE BARGAIN

THE HIDDEN TIME BOMB OF DEFERRED INTEREST CREDIT CARDS

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EXECUTIVE SUMMARY

“Deferred interest” promotions on credit cards are a trap for the unwary. They lure consumers with promises of “no interest” or “0% interest” for a promotional time period, but there is a debt time bomb at the end: Consumers who don’t pay off the entire balance before the promotional period ends will be charged interest retroactively back to the date that they bought the item, even on amounts that have been paid off. For example, if a consumer buys a \$2,500 living room set on January 2, 2016 using a one-year 24% deferred interest plan, then pays off all but \$100 by January 2, 2017, the lender will retroactively charge nearly \$400 interest on the entire \$2,500 dating back one year.

The two leading providers of deferred interest credit cards are Synchrony Bank (formerly known as G.E. Capital) and Citibank. Both lenders offer deferred interest credit card plans through retailers, such as Walmart, Sears, J.C. Penney, Macy’s, Best Buy, Home Depot, and Staples, where the cards are used to sell big-ticket items such as electronics or appliances. One third of large retailers surveyed by the website CardHub offer these plans. PayPal also offers deferred interest credit financing through PayPal Credit (formerly BillMeLater), which it promotes through online retailers that offer PayPal as a payment option.

More troubling, both Synchrony and Citibank offer deferred interest credit cards through healthcare providers to pay for dental and medical bills, often for optional procedures. Synchrony’s credit card, called CareCredit, has been the subject of enforcement by the Consumer Financial Protection Bureau (CFPB) and the New York Attorney General.

Pitfalls of deferred interest plans include:

- **Inherent deception** Many consumers do not understand that they can be charged interest retroactively for the entire deferred interest period if they do not pay off the balance by the end of the period. The complexity of these plans makes it almost impossible to formulate a short, simple disclosure necessary to prevent consumers from being deceived.
- **“Life Happens”** Even consumers who do understand the nature of deferred interest plans can get trapped. Consumers may expect to be able to pay the balance in full by the end of the promotional period, but for a variety of reasons (such as job loss or other financial emergency) find that they cannot. Or, consumers may forget or miscalculate the critical date for payoff, especially if the end of the promotional period does not coincide with the payment due date for that month.
- **High APRs** Deferred interest credit cards typically carry very high interest rates, with an average of 24% and as high as 29.99%. These rates can be almost twice as much as the APR for a mainstream, prime credit card. To illustrate the impact of deferred interest, we have provided a [link](http://bit.ly/1OxWnMc) (see <http://bit.ly/1OxWnMc>) to an online calculator provided by the Finance Buff that compares the costs of a deferred interest plan to a mainstream credit card when the entire balance is not paid off by the end of the promotional period.

- **Balloon interest charges and interest on interest** For consumers hit with deferred interest, those charges come in one big lump sum at the expiration of the promotional period. Interest charges that might have been manageable in small pieces can result in the outstanding balance on a card increasing dramatically. Consumers who cannot pay off that huge interest charge at once then start paying interest on the back interest.
- **Impact on the most vulnerable** A Consumer Financial Protection Bureau (CFPB) study found that for consumers with subprime credit scores – who are more likely to be financially vulnerable – over 40% were unable to pay off the balance by the end of the deferred interest period. These consumers were likely socked with lump sum retroactive interest charges. While most of the consumers who used deferred interest plans were able to pay off the balances without paying interest, the consumers who benefited the most were superprime consumers. Thus, better-off consumers get the benefit of interest-free financing, while credit card lenders make their profits off of financially constrained consumers.
- **Minimum payments don't pay off the balance** Lenders generally set the minimum payment as less than the amount that would pay off the balance during the deferred interest period. Thus, consumers who make only the minimum payment – often thinking they are doing what they need to do to avoid interest – will inevitably be hit with retroactively assessed interest at the end of the deferred interest period.
- **Difficulty allocating payments to successfully avoid retroactive interest** If a consumer makes additional purchases that either do not have deferred interest or have different promotional periods, problems can arise with allocating payments to ensure that the deferred interest balance is paid off. Payment allocation is extremely complex and fraught with pitfalls, and it can be nearly impossible to pay off a deferred interest balance while minimizing interest charges.

Deferred interest promotions are one of the biggest abuses that remain after the passage of the Credit Card, Accountability, Responsibility and Disclosures (CARD) Act of 2009. In fact, the Federal Reserve Board actually banned these plans in 2009 because of their deceptive nature, but then reversed itself. While the Credit CARD Act does not explicitly ban deferred interest, these promotions technically violate two provisions of the Credit CARD Act. However, the Federal Reserve carved out an exception, asserting that Congress intended to preserve these plans.

As one of the few tricks and traps left after the Credit CARD Act, the use of deferred interest promotions is growing. These promotions are inherently unfair, as their profits depend on trapping consumers either by confusion or because the consumer cannot pay due to financial problems, thus imposing a huge lump sum retroactive interest charge on those least able to handle it. The simplest, most effective, and best step that the CFPB could take to protect consumers from the trap of deferred interest is to ban these promotions. While there are other steps the CFPB could take to lessen the harm caused by these debt time bombs, it is time to simply get rid of deceptive deferred interest promotions.

I. INTRODUCTION

“Deferred interest” promotions are a trap for the unwary, a debt time bomb in essence. Credit card issuers heavily promote terms such as “no interest for 12 months” or “0% interest until January 2017.” The catch with these plans is that they are not truly interest-free. The consumer must pay off the entire purchase by the time the promotional period ends. If the consumer does not, the lender will impose interest retroactively back to the date that the consumer bought the item. Thus, if a consumer buys a \$2,500 living room set on January 2, 2016, and pays off \$2,400 by the end of the promotional period one year later, the consumer would be charged interest on the entire \$2,500 dating back to January 2016 when he or she bought the living room set.

Deferred interest promotions for credit cards are often pitched to consumers purchasing big-ticket items, such as electronics or appliances. The promotions are popular with retailers during the holiday shopping months.

Most troubling, deferred interest promotions on credit cards are heavily marketed to pay for healthcare expenses, particularly dental work. The CareCredit card, offered by Synchrony (formerly GE Capital Bank), is promoted by dentists and other healthcare providers specifically as “interest free” financing. CareCredit has been the subject of enforcement actions by the Consumer Financial Protection Bureau (CFPB) and the New York Attorney General.

Deferred interest promotions on credit cards are heavily marketed to pay for healthcare expenses, particularly dental work.

Another variation of a deferred interest plan is PayPal Credit (formerly BillMeLater), which is an open-end line of credit offered through PayPal for online purchases. It is effectively an online credit card. PayPal Credit has also been the subject of a CFPB enforcement action.

Deferred interest promotions are one of the biggest abuses that remain after the passage of the Credit Card, Accountability, Responsibility and Disclosures (CARD) Act of 2009. The CFPB has noted that deferred interest is an area of concern for the Bureau, which has characterized the promotions as “the most glaring exception to the general post-CARD Act trend towards upfront credit card pricing.”¹ The CFPB noted that the plans “can end up costing a significant segment of vulnerable consumers a sizable amount of money.”²

A sample of consumer complaints from the CFPB’s complaint database and other sources reveal the confusion and misleading nature of deferred interest promotions. Note that the CFPB “scrubs” certain information in its complaints narratives to avoid identification of consumers, replacing information with X’s or {rounded dollar amount}. Throughout this report, we have reproduced the complaints as they are found in the CFPB database.

Consumer Complaint: Even Lawyers Get Snared

J.K. is a twenty-something year old lawyer who bought a diamond engagement ring at Lux Bond & Green, a New England area jewelry chain, for his fiancée. Lured by the promise of 0% interest, he signed up for a G.E. Capital credit card to pay for the \$6,000 ring on May 14, 2013. The GE Capital Credit Card had a one year deferred interest promotion. However, while J.K. was told by the sales staff that after one year the interest rate would kick in and that the rate would be pretty high, he was not made aware that he would have to pay retroactive interest if he did not pay off the entire \$6,000 in full.

In June 2014, he was chagrined to see that \$1,760 in deferred interest had been retroactively charged to his account, at an APR of 29.99%. By that point, he had paid off \$5,000 out of the \$6,000, so the retroactively imposed interest payment was higher than the outstanding principal remaining.

Note: Complaint as told to the author of this report.

II. THE PITFALLS

A. Inherent deception in the nature of the product

Many consumers do not understand that deferred interest promotions can result in retroactive interest charges for the entire deferred interest period, even on amounts already paid, if they do not pay off the balance by the end of the period. The complexity of these plans makes it almost impossible to formulate a short, simple disclosure necessary to prevent consumers from being deceived. The CFPB has noted that “there are significant indications that the lack of transparency in this market contributes to avoidable consumer costs.”³

At one point, the Federal Reserve Board actually banned these plans, noting “disclosure may not provide an effective means for consumers to avoid the harm caused by these plans.”⁴ Currently, lenders are required to make the following disclosure for deferred interest plans:

“(i) Interest will be charged from the purchase date if the balance is not paid in full within the deferred interest period.”⁵

Even read in isolation, this disclosure requires a reading grade level ability of 10th to 11th grade, according to the Flesch-Kincaid system. Moreover, the disclosure is just part of the fine print that consumers are encouraged to ignore, and deferred interest promotions are often offered at the last minute to a consumer who is distracting by evaluating and making a purchase of a product.

In addition to consumer complaints, another indication that consumers are confused by deferred interest promotions is the fact that one-third of those who are socked with deferred interest then proceed to pay off the entire amount owed within two billing cycles. Consumers who have the ability to pay off their balances would likely have done so earlier and avoided huge interest charges if they had understood how the plans work. The CFPB has noted that this fact “call[s] into serious question the notion that consumers understand the way in which the product works. A significant share of consumers appear to be acting in a way that strongly suggests that they do not have that understanding.”⁶

B. *Payoff date is not the same as the payment due date*

Even if some consumers realize that they must pay the balance in full by a certain date they may still get trapped by these schemes. Consumers may forget or miscalculate the critical date for payoff, especially if the end of the promotional period might not coincide with the payment due date for that month.

C. *“Life Happens”*

Deferred interest plans also take advantage of the phenomenon of “hyperbolic discounting,” or more colloquially, “Life Happens.” Consumers overvalue the immediate benefits of something and under-value the potential for future costs. Thus, consumers may expect to be able to pay the balance in full but for a variety of reasons (such as job loss or other financial emergency) find that they cannot. In any of these circumstances, the consumer is hit with an enormous, retroactive application of interest, at a time when s/he is least able to afford it. This is something that lenders count on in making deferred interest offers.

The CFPB found a high correlation between a consumer’s failure to avoid deferred interest and whether s/he was assessed a late fee. This led the Bureau to observe that “this high correlation, even controlling for credit risk, could suggest that some consumers who fail to pay before the end of the promotional period may have experienced an exogenous shock that caused late payments and undermined their ability to pay the promotion on time.”⁷

D. *High costs*

Deferred interest credit cards typically carry very high interest rates, with an average of 24% APR,⁸ and examples of up to 29.99%. These rates can be almost twice as much as the APR for a mainstream, prime credit card. One study found that if a consumer pays off a deferred interest plan one month past the end of the specific date, it could increase the consumer’s cost for that credit more than 27 times.⁹ Chart 1 compares the interest that a consumer will pay if she uses a deferred interest plan and pays off all but 4% of the entire purchase during a one-year promotional period, versus a general purpose credit card with a prime rate of 14% APR.

Consumer Complaint: Deception at the Dentist’s Office

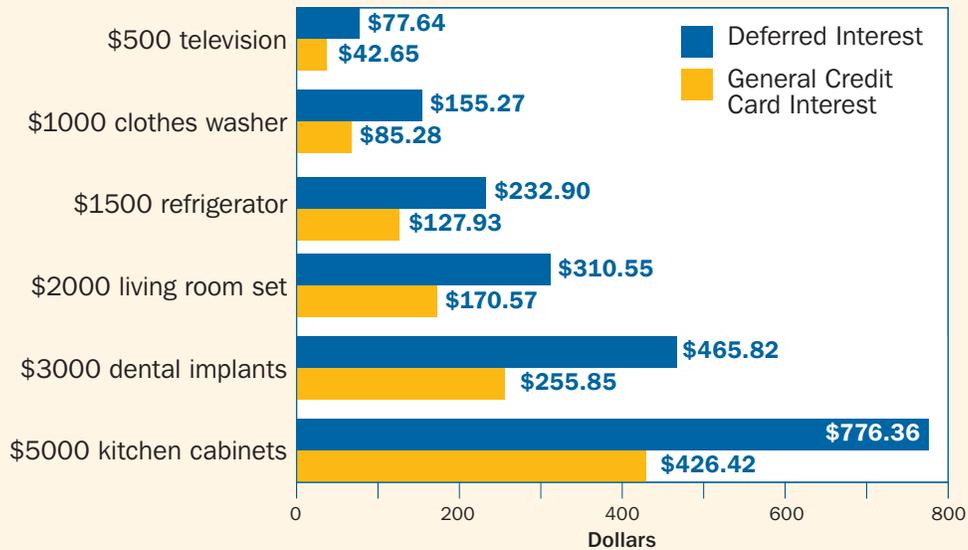
“A year ago, I signed up for a CareCredit/GE Capital Retail Bank to pay for emergency dental treatment at XXXX XXXX in XXXX XXXX. After making payments for a whole year, I am very upset to receive my latest statement dated XX/XX/XXXX, which shows that my interest rate suddenly jumped from 0 % to 26.99 %. All of the sudden, my total interest charges increased from {\$0.00} to {\$530.00}. As a result, my balance increased from {\$1000.00} to {\$1400.00}. Nobody at my dentist ‘s office ever told me when I signed up for CareCredit that the rate would suddenly increase from 0 % to 26.99 % or that the interest would accrue during a promotional period. Nobody even gave me a copy of the credit card agreement.

. . . If I had known the truth about CareCredit ‘s deceptive practices last year, I never would have signed up for this card.”

Source: CFPB Complaint No. 1405477, filed June 4, 2015.

CHART 1

Comparison of Interest Paid for One-Year Deferred Interest Promotion at 24% APR versus General Credit Card at 14% APR



Assumes a monthly payment of 8% (or 96% of the total) of the original purchase.

In addition to the high APRs, another difference between mainstream credit cards and deferred interest plans is that deferred interest charges come in one big lump sum at the expiration of the promotional period. Thus, interest charges that might have been manageable in small pieces can result in the outstanding balance on a card increasing dramatically. Consumers who cannot pay off that huge interest charge at once then start paying interest on the back interest.

To help illustrate the impact of deferred interest, we have provided a [link](http://bit.ly/1OxWnMc) (see <http://bit.ly/1OxWnMc>) to an online calculator provided by the Finance Buff that compares the costs of a deferred interest promotion to a mainstream credit card when the entire balance is not paid off by the end of the promotional period.

In addition to the risks posed by the deferred interest plan itself, merchants have been known to inflate the purchase price of goods financed with these plans.¹⁰

E. Impact on vulnerable consumers

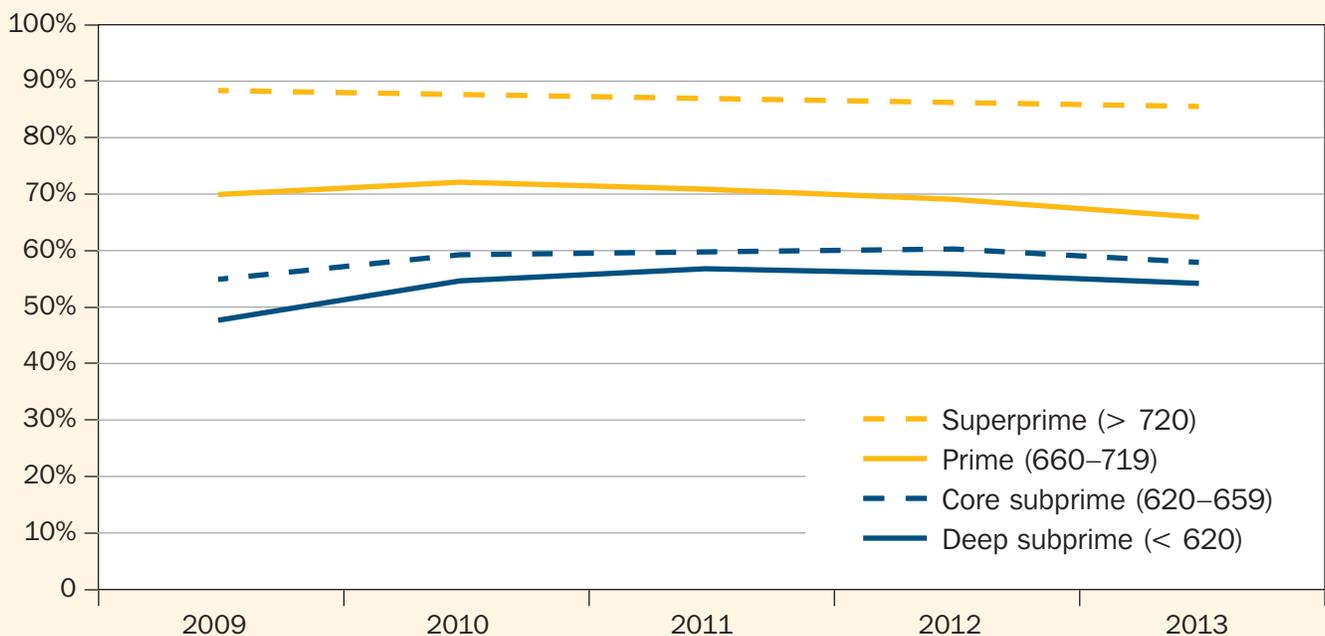
According to the CFPB, deferred interest promotions are “not working equally for all consumers.”¹¹ Subprime consumers are particularly vulnerable to the debt time bomb of deferred interest. They are more likely to be unable to pay within the deferred interest period and thus become burdened by retroactive interest charges. Subprime consumers are more likely to be experiencing some sort of financial distress and thus more economically vulnerable.

A CFPB study of credit cards found that among consumers with subprime credit scores (under 620) more than 40% were unable to pay off the balance by the end of the deferred interest period and thus incurred lump sum retroactive interest charges.¹² These huge charges hit the consumers who are least able to handle them.

The CFPB study did find that about 75% of consumers who used deferred interest promotions were able to pay off their balances in time to avoid interest charges.¹³ But the consumers who benefitted most from deferred interest promotions were superprime consumers, with nearly 90% receiving interest-free financing. Even among prime consumers (score of 660-719), about 30% end up being assessed deferred interest.¹⁴ Thus excluding superprime consumers, the average would be below 75%. Chart 2 shows payoff rates of different categories of consumers.¹⁵

Superprime consumers are generally more well off. These consumers get the benefit of interest-free financing, while the credit card lenders make their profits off of more financially constrained consumers. In other words, more vulnerable consumers are subsidizing the credit card benefits of better-off consumers. This was a frequent critique generally of the abuses committed by credit card issuers prior to the Credit CARD Act.

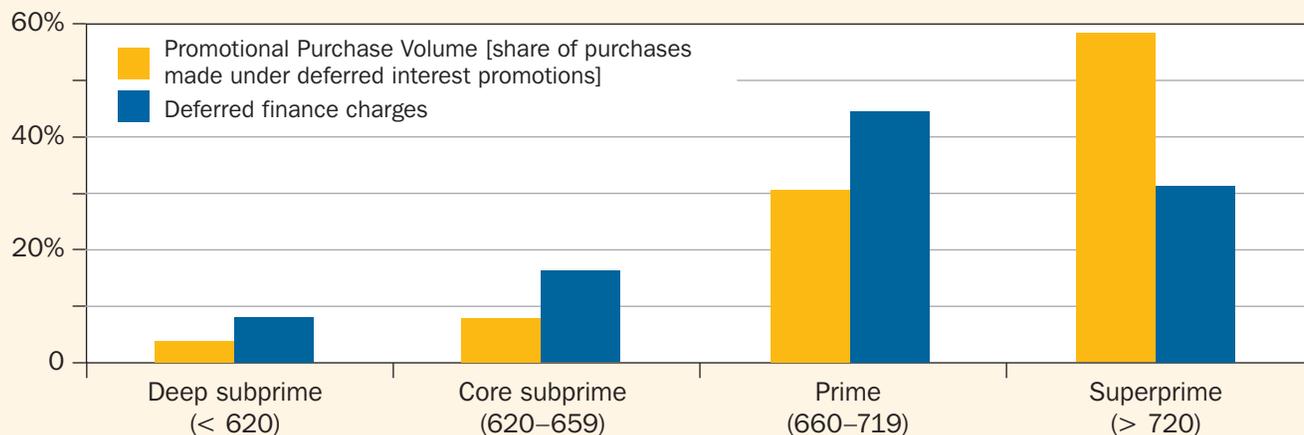
CHART 2
**Promotion Payoff Rates by Consumer Credit Score
 for Deferred Interest Loans with
 Promotional Periods from Six to 17 Months**



Source: Consumer Financial Protection Bureau, Consumer Credit Card Market Report, Dec. 2015, p. 167 (Figure 8)

CHART 3

**Share of Promotional Spending and Deferred Interest Charges
by Consumer Credit Score, 2009–2013**



Source: Consumer Financial Protection Bureau, Consumer Credit Card Market Report, Dec. 2015, p. 197 (Figure 30)

**Consumer Complaint:
Preying on the Cash-Strapped**

“I was told that I should apply for a carecredit card by my surgery facility in order to pay for my surgery and that many patients have done it before and are happy with the decision. My surgery was in the summer of 2013 and costed {\$3000.00} but now since it is past the promotional period that I was not made aware of, the interest I pay on it monthly is 26%. That is insanely high in my opinion. So now I have almost XXXX dollars to pay and if I continue paying the minimum payment, I’ll pay it off by 2020. I feel like I was fooled into believing that this would help me pay for surgery yet it has cost me so much more money than I can afford. I’m a college student and can barely make it financially as is, but to have this kind of financial stress on me every month is too much. 26% interest is a crime!”

Source: CFPB Complaint No. 1473436, filed July 18, 2015.

In fact, this cross-subsidization becomes more obvious when we observe the portion of deferred interest charges paid by subprime consumers, and even prime consumers, versus their share of purchase volume.¹⁶

As seen in Chart 3, superprime consumers make up nearly two-thirds of deferred interest purchases, yet only pay less than one-third of the interest charges imposed by these promotions. Meanwhile, deep and core subprime consumers only make up a combined 11% of purchase volume, but pay 24% of the interest charges. And even prime consumers pay more—they make up only 30% of purchase volume, but pay nearly half (44%) of the interest charges.

An example of a vulnerable consumer is a senior who used a CareCredit deferred interest promotion and complained to the CFPB “I would not have accepted this loan if I knew the interest was above 26%. I live on social security and their payment and my HUD subsidized rent exceed my entire income.”¹⁷

F. Minimum payments

Another problem with deferred interest promotions is that the lenders generally set the minimum payment as less than the amount that would pay off the balance during the deferred interest period.¹⁸ Many deferred interest lenders do not calculate the impact of deferred interest in the minimum payment, thus setting the minimum payment amounts even lower than those for general purpose credit cards.¹⁹

Thus, a consumer making only the minimum payment will inevitably be assessed retroactive interest on the entire balance for the entire deferred interest period. The CFPB has noted that “consumers who pay only the minimum payment during a deferred interest promotional period can end the promotional period with debt that exceeds the amount of the promotional purchase, even if the card has not been used for any other purchases.”²⁰ (And, as discussed under payment allocation, if the card has been used for other purchases, it is also extremely difficult to make sure that extra payments are applied to the right balance.)

The CFPB’s focus group research revealed that most consumers did understand that paying the minimum payment amount would not be sufficient to pay off the deferred interest balance in full before the end of the promotional period. However, there were indications that some consumers wrongly believed that the minimum payment would suffice for this purpose.²¹

Another problem with deferred interest promotions is that the consumer’s ability to repay²² is assessed on the minimum payment.²³ It is not based on the larger payment required on a monthly basis to pay off the entire balance before the end of the promotional period. Some consumers might have the ability to pay based on the minimum payment and will be approved for a credit card but will not have enough income or assets to pay the larger payoff amount during the promotional period; these consumers are likely to be snared by deferred interest. For example, the CFPB noted that a consumer need only have the ability to pay \$350 in total for a six month period to pay the minimum on a \$2,000 purchase with a six month deferred interest promotion, but she would need to pay nearly six times that amount to pay off the purchase in full and avoid deferred interest.²⁴

Consumer Complaint: Minimum Deception

The following is an example of a consumer who was misled into believing that the minimum payment would pay off the deferred interest balance.

“I applied for a ge/care credit card to pay for my son XXXX. At the time I applied I was told interest would not be added to this account during the promotional period which would have allowed me to pay the entire balance off as long as I made my minimum payments (just as I did before). Before the promotional period was over ge capital retail bank/care credit added an estimated {\$1000.00} of interest to this account. I was shocked and stunned when they sent me a statement with this interest dade I then called and spoke to several reps. Trying to resolve the matter they felt it was not right but they could not take the interest off so I therefore attempted to make several more payments until I could not anymore. I knew this was not right and at the time I did not know who to turn to for help about the matter who governed this type of misrepresentation and or fraud from credit card companies. They added interest and will not accurately report to the credit bureau they have me owing XXXX of dollars in which I was almost done paying them until they pulled they stunt and they continued adding interest every month thereafter after the lump sum amount of an estimated {\$1000.00}.”

Source: CFPB Complaint No. 1505892, filed Aug. 6, 2015.

G. Inability to allocate payments to minimize interest

The majority of consumers who have deferred interest promotions also use their credit cards to make other purchases. Those subsequent purchases may not have a deferred interest promotion or may have a different promotional period. Thus, these consumers carry multiple balances on their accounts with different rules and their payments need to be allocated among those balances. It is nearly impossible to do so in a way that both helps the consumer to pay off the deferred interest balance in time and minimizes interest charges overall.

Synchrony has reported that holders of their retail cards made an average of more than 12 purchases per account. A substantial majority—69%—of CareCredit transactions are from existing customers re-using their cards for other medical expenses.²⁵ The CFPB found that “just under a quarter of accounts in the data we reviewed had overlapping promotional and non-promotional balances at least once during our data period. Around 40% of the accounts had overlapping promotional balances at least once in the data period.”²⁶ In those situations, how a consumer’s payments are allocated to different purchases is critically important.

The Credit CARD Act has a complicated rule that attempts to give consumers the benefit of an interest-free period while also enabling the consumer to pay off the deferred interest balance before the end of the promotional period. The CARD Act provides that payments in excess of the minimum must be applied to a higher rate balance, which generally is not the deferred interest balance, until the last two months of the promotional period.

GRAPHIC 1

Payment Allocation Example for Deferred Interest Promotion

This graphic illustrates how a \$100 payment above the minimum would be credited during a twelve-month deferred interest promotion for two purchases, only one of which (television) is subject to deferred interest. Many consumers will not be aware that the \$100 is applied solely to the non-promotional purchase (headphones) and will not help them reduce the deferred interest television balance.



The purpose is to enable the consumer to pay off a balance that is generating interest ahead of one that is not. For example, assume that a consumer buys a \$1,000 television using a deferred interest promotion on a credit card with a 24% interest rate, and then later spends \$500 on headphones, a purchase that does accrue interest. If the consumer makes a payment that is \$100 above the minimum, that \$100 is allocated to reduce the \$500 headphones balance in order to reduce the balance on which the consumer is paying interest. None of the excess payment is allocated to the \$1,000 deferred interest balance.

This rule cannot be applied indefinitely, however, because otherwise consumers who carry other balances would not be able to pay off the deferred interest balance before the end of the promotional period. Therefore, under the CARD Act, during the last two months, payments above the minimum are applied to the deferred interest balance (see Graphic 1).

The problem is that this rule frustrates consumers who are trying to make additional payments toward the deferred interest balance before the last two months in order to ensure that the balance is paid off in time. The consumer will find that the payment is applied to other balances. In addition, the rule essentially forces the consumer to pay the entire deferred interest balance in the last two months, which some consumers will find difficult to do even if they understand the payment allocation rules.

There is an option under the regulations implementing the Credit CARD Act that allow a card issuer to honor a consumer's request to apply a payment to the deferred interest balance even before the last two months. However, some issuers refuse to honor such consumer requests.²⁷ In May 2015, the CFPB took enforcement action against PayPal for telling consumers that it would honor such requests, but when consumers tried to make such requests, they could not reach a customer-service agent at all to make

Consumer Complaint: Misleading Representations about Payment Allocation

Email from L.R., a consumer advocate to the National Consumer Law Center, February 20, 2013:

"I have a Macy's credit card which is on an installment basis. I made a "special events" purchase about 10 months ago and was told by the sales representative that if I made payments above my minimum payment amount, the extra funds would be applied to the "special events" purchase. This is significant because if I do not pay off the "special events" purchase within a year from my purchase date, I will have to pay interest on the original purchase amount. That means that about \$300.00 in interest would be added to my bill. Well, as you can imagine, my payments in excess of the minimum payment amount were not applied to the "special events" purchase.

Today, I called Macy's to ask why the additional payments I made were not applied toward the "special events" purchase. By my allocations, I paid off the "special events" purchase several months ago. The customer service representative with whom I spoke told me that as per the Credit CARD Act, Macy's is obligated by law to apply all of my payments to the installment loan portion of my bill. They told me that they could not apply any "overage" toward the "special events" purchase since the "special events" purchase was not interest-bearing. They instead must apply any overages toward the portion of my bill that is interest-bearing. The only amount of my payment that they could apply toward the "special events" account is the minimum payment for the "special events" purchase."

Consumer Complaint: Paying the Newest First

“I got a Care Credit card at my children’s dentist office, we were told that we had a certain time to pay off and if it was n’t paid off in a certain time then we would have to start paying interest. I ended up using the card again for other medical bills, and later found out that the money I was paying was going toward the most recent transaction instead of the oldest, so I started getting billed interest. So now I was paying on bills and interest that I should have never had to pay. I actually called a few times and customer service put my payments on the old transactions for me and actually told me that was what I would need to do in order to have my payments go toward the right transactions. And I actually found out that I was still paying on a bill for XXXX years ago that should have been paid off long before now. So basically since this company is making sure that it can charge interest from its customers even if they are never late and pay over the minimum payment. I also found out today that I was charged {\$700.00} interest.”

Source: CFPB Complaint 1456751, filed July 8, 2015.

a request or their requests were ignored.²⁸ Moreover, many consumers do not even understand how their payments are being applied or the option to ask for the payments to be applied differently. Lenders and retailers have admitted that, for deferred interest promotions, “a high share of the complaints they received focus on payment allocation issues.”²⁹

The combination of a deferred interest balance and a regular balance can also cause consumers to lose their grace periods. Consumers who normally pay their entire credit card balance every month cannot carry a deferred interest balance without losing the benefit of a grace period for other transactions. Any additional purchases the consumer makes with the credit card may incur interest charges right away.³⁰

Another complaint involving payment allocation is that, when there are two separate deferred interest balances, some deferred interest card issuers will apply payments to the later balance. This will cause the earlier balance to be paid down more slowly or not at all, triggering the application of deferred interest.³¹

In general, overlapping deferred interest and non-promotional balances will result in a much greater costs to the consumers. The CFPB found that, in more than half of the cases where consumers with other non-promotional balances failed to pay off the deferred interest purchase, the consumer had made payments that exceeded the original amount of the purchase.³² Pay off rates are generally higher for consumers whose promotional purchases have no overlap with non-promotional balances.³³

H. Charging for work not completed

Medical credit cards can be especially problematic when providers charge for treatments that have not yet taken place. This can be a problem if the consumer does not wish to go forward with further treatment, perhaps because she is unsatisfied with the provider’s care. The N.Y Attorney General’s settlement with Synchrony noted this issue, stating: “Prepayment of large fees for services before they are rendered continues to be at the core of many of the OAG complaints concerning CareCredit.”³⁴ The CFPB’s consent order with Synchrony required that the bank, in its contracts with providers, prohibit charges for services not yet rendered, with limited exceptions.³⁵

I. Problems posed by electronic statements

Some of the complaints filed with the CFPB involved consumers who were surprised by deferred interest because they only received electronic statements. Banks and other lenders have aggressively pushed consumers into electronic statements because it saves them the cost of postage and processing required by paper statements. Some providers, like PayPal Credit, require electronic communications and do not give consumers the option of paper statements or notices. However, purely electronic communications can present a pitfall because they can be overlooked in email overload and the statements take more effort for consumers to log in and access them. Thus, consumers may be less likely to review them. Electronic transactions may also only be available for the past several months and consumers who discover a problem may have difficulty reviewing older transactions. In addition, the complaints suggest that at least one consumer may have been involuntarily signed up for electronic statements without his/her knowledge.

J. Not necessary or not affordable

One of the arguments made by lenders and retailers offering deferred interest promotions is that they serve as an “important tool for consumers to purchase necessities” and “as a crucial lifeline . . . when appliances fail.”³⁶ However, the CFPB has noted that “this picture is not generally an accurate description of deferred interest use” because many of the consumers who accept a deferred interest offer have prime credit scores that make them eligible for other credit. Even many subprime cardholders have general-purpose credit cards.³⁷ To the extent that a subprime consumer is ineligible for a general-purpose card, these are the consumers likely to be socked by deferred interest, as discussed in Section II.E.

Consumer Complaint: Pet problems

“I had a sick pet XXXX at the XXXX animal hospital in XXXX XXXX. The XXXX suggested I could pay for the procedure with Care Credit 18 month interest free. Having no money for the procedure it sounded like my only option at the time so I signed up. I set up my payment plan and started making monthly payments. I continued to pay on a monthly basis and thought I would be paid off by the time interest would start to accrue and it would be minimal at the end of 18 months. In the mean time follow up visits to the vet were necessary and paid for on care credit. I continued to pay monthly payments for roughly 3 years. My statements were electronic and I set up automatic withdrawal from my bank account. Thinking I was close to paying off my debt I went on to the care credit website and intended to pay the remaining balance in full. I was shocked. I now owed more than my original balance. I owed even more than my entire credit limit with them. The customer website was no help. I can log in, make a payment, and see my balance, however it is unclear what I am actually paying for and there is no history of my original transactions. I found it odd that the account history was not available save that I made my regular payments for the last few months.”

Source: CFPB Complaint No. 1327885, filed April 13, 2015.

Consumer Complaint: “Everything was Done Online”

“When I applied for the care credit at the dental office, they did not inform me that there is a 6 months dead line and after that if I didn’t pay the balance, I would have to pay a high interest rate@26.99 %. Everything was done online and I was never given a brochure or contract to read my terms.”

Source: CFPB Complaint No. 1325915, filed April 10, 2015.

Indeed, retailers have argued that deferred interest promotions are important because they enable the retailers to sell products “that likely would have been unaffordable to consumers living on a budget.”³⁸ We would argue that enticing consumers to purchase “unaffordable” goods that are not within their budget is a very bad idea, especially because it involves exposing them to the time bomb of being hit with a large lump sum of retroactive interest at the end of the promotional period.

Furthermore, deferred interest promotions are often offered during the holiday shopping season or when consumers buy optional items, such as a newer model television. In those cases, deferred interest is not being used for a necessity.

III. THE INDUSTRY

The use of deferred interest promotions is growing, with a nearly 21% increase in deferred interest purchases from 2010 to 2013.

Source: CFPB, December 2015.

Deferred interest promotions are quite prevalent. A survey by the website CardHub of 49 major retailers found that 73% offered financing options and, of those, 47% offered deferred interest promotions (for a total of over one-third of these retailers offering deferred interest promotions).³⁹ The CFPB found that deferred interest promotions comprised about a quarter of all spending on retail credit cards.⁴⁰ Furthermore, the use of deferred interest promotions is growing, with a nearly 21% increase in deferred interest purchases from 2010 to 2013.⁴¹

The largest credit card lenders for deferred interest cards are Synchrony Bank, which issues 29% of these cards as measured by number of retailers, and Citibank, which issues 35% of them.⁴²

A. Synchrony Bank

Synchrony Bank was formerly part of GE Capital Bank. Its primary product lines are retail-branded credit cards, private label cards, installment loans, and medical credit cards. It earned gross revenue of \$11.3 billion in interest and fees in 2013.⁴³ About one-third of Synchrony Bank’s lending is concentrated in four states:

- Texas (10.1%);
- California (9.6%),
- Florida (7.5%) and
- New York (5.8%).⁴⁴

In 2013, Synchrony was the top issuer of retail credit cards, with \$41.7 billion in outstanding loans.⁴⁵ It had 62 million active credit card accounts and processed 47 million applications in 2013.⁴⁶ Almost 51 million of those accounts are retail card accounts.⁴⁷ About 75% of Synchrony’s credit cards are “private label,” and of those, one-third are subject to a promotional offer.⁴⁸ Thus, it appears that deferred interest cards make up a significant volume of Synchrony’s credit card offerings.

Synchrony's retail credit card business is highly concentrated with a handful of retailers. Its ten largest partnerships with retail chains accounted for nearly 60% of its revenue for that product line. The five largest partners (Gap, J.C. Penney, Lowe's, Sam's Club, and Wal-Mart) accounted for nearly 48% of its revenue. Thus, Synchrony is heavily dependent on these retailers, which might provide one explanation why it needs to offer deferred interest, *i.e.*, to be competitive in attracting and retaining retail partners.⁴⁹ The "no interest" promotion attracts customers, drives higher sales,⁵⁰ and is critical to enticing consumers to purchase "big-ticket" items.⁵¹ These features offer a benefit to Synchrony's retail partners. Retaining retail partners is critical to Synchrony's success, because: "[a] significant percentage of [Synchrony's] platform revenue comes from relationships with a small number of Retail Card partners, and the loss of any of these Retail Card partners could adversely affect our business and results of operations."⁵²

In addition, Synchrony notes:

*Our partners generally accept most major credit cards and various other forms of payment, and therefore our success depends on their active and effective promotion of our products to their customers. We depend on our partners to integrate the use of our credit products into their store culture by training their sales associates about our products, having their sales associates encourage their customers to apply for, and use, our products and otherwise effectively marketing our products.*⁵³

Thus, Synchrony offers deferred interest to differentiate itself from the other, general purpose credit cards that its retail partners accept.

Furthermore, Synchrony does not charge or earn interchange fees from its retail partners for private label credit card products.⁵⁴ To the contrary, Synchrony actually pays these partners to promote its cards, to the tune of \$2.4 billion in 2013.⁵⁵ However, Synchrony does receive a fee from a merchant for providing a deferred interest promotion.⁵⁶ The longer the deferred interest period, the greater the fee.⁵⁷ And we assume that a true 0% interest promotion would cost the merchant more than a deferred interest promotion, making the true 0% financing much less popular to retailers.

Synchrony Bank is regulated by the CFPB and the Office of Comptroller of Currency.⁵⁸ The CFPB has taken two enforcement actions against Synchrony, discussed in Section V.A.

B. Citibank

After Synchrony, Citibank is the second largest issuer of store-branded credit cards.⁵⁹ Citibank is also the second largest issuer of credit cards in general (after JP Morgan Chase).⁶⁰ Because it has partnerships with a greater number of larger retailers, Citibank is the largest issuer of deferred interest credit cards as measured by number of retailers, comprising 35% of such retailers in a survey by CardHub.⁶¹ Citibank is the credit card issuer for Sears, Home Depot, Staples, Best Buy, The Children's Place, and a number of other retailers.⁶² In addition, Citibank owns Department Stores National Bank, making it the issuer for Macy's and Bloomingdales store cards.⁶³ Most of these credit cards offer deferred interest promotions.

Citibank had \$30 billion of private label credit card transactions in 2013.⁶⁴ It has 90 million accounts as part of its Retail Services division, with over 600 million transactions.⁶⁵ Citibank boasts that with its co-branded credit cards, “Retailers Can . . . Increase retail sales and margins from your valued customers.”⁶⁶

C. Medical credit cards

A particularly problematic subset of deferred interest promotions on credit cards are those offered by healthcare providers to pay for medical and dental expenses. Healthcare providers who steer patients to specific lenders have an inherent conflict of interest.⁶⁷ For providers, the advantages of getting patients to pay their medical bills with

credit cards are obvious: Providers get their money right away, while offloading the burden of pursuing payments to third parties, and the cards are also a way to convince a patient to go ahead with a treatment not covered by insurance. Medical credit cards are sometimes used for optional procedures. In addition, some credit card lenders pay “rebates” to providers when the providers steer patients to those credit cards.⁶⁸ Patients tend to trust their healthcare providers and may follow their recommendations to sign up for financial products with unfavorable terms.

Consumers who are sold medical credit cards are also more vulnerable. First, their medical condition, e.g., severe pain or discomfort, could impact their ability to make financial decisions. There have even been examples of consumers signed up for credit cards under the influence of sedation.

Second, consumers of medical credit cards appear to be experiencing more financial issues than other cardholders. Synchrony has reported that the average FICO score for CareCredit cardholders is 684, which is lower than the average FICO score of 718 for its

retail card customers.⁶⁹ A score of 684 is not that far above the subprime cutoff score of 660.⁷⁰ Since this is an average FICO score, a significant number of CareCredit consumers are likely to be subprime and thus potentially financially struggling.

Synchrony also reports that almost all of the credit extended on CareCredit cards is subject to promotional financing,⁷¹ which suggests that the vast majority of CareCredit customers have deferred interest plans. In December 2013, the CFPB took enforcement action against CareCredit, which is discussed further in Section V.A.

Consumer Complaint: Signed up Under Sedation

“I went in XXXX 2013 to have XXXX surgery. During the setup for the surgery when i was filling our paperwork they gave me a sedative for the surgery. They offered me a pay later form of payment and had me fill out the paperwork. I was never explained what deferred interest was or that there was any pertaining to the paperwork. I made payments for the next years and then in XXXX saw a huge spike in my payments and balance. I went back through my emails and saw the balance go from {\$1400.00} approx to {\$3200.00} approx (more than the initial surgery in full) I called to figure out what was going on and they told me that since i had not paid the balance in full all the interest would be applied to the full amount and not only that. The interest that was applied would now be accruing interest along with the previous balance.”

Source: CFPB Complaint No. 1474496, filed July 18, 2015.

As with deferred interest cards offered by retail stores, Synchrony and Citibank are two of the biggest issuers of medical credit cards. In addition, Wells Fargo offers a medical credit card with a deferred interest feature.

Promoters of medical credit cards might argue that banning deferred interest promotions would deprive consumers of their only option to finance healthcare expenses not covered by insurance. However, there are several medical credit card or other loan programs that do not appear to offer deferred interest, including AccessOne MedCard, CarePayment, iCare Financial, and Medkey Healthcare Finance.⁷² Consumer Action has published an in-depth guide on medical credit cards.⁷³

Furthermore, Synchrony has admitted that its research shows a significant number of its cardholders would postpone or forego a healthcare procedure if credit was not available.⁷⁴ It might be preferable for a consumer to forgo an optional procedure or postpone it rather than incur debt at 24% APR.

IV. A COMPLICATED LEGAL HISTORY

Deferred interest promotions technically violate more than one provision of the Credit CARD Act. They exist in part because there is an exception for these plans in Regulation Z, which implements the Truth in Lending Act (of which the Credit CARD Act is a part).

A. Deferred interest banned by regulators in 2009 as inherently deceptive

An ironic fact about the regulation of deferred interest is that, at one point, federal regulators were so concerned about the practice that they banned it. In January 2009, the Federal Reserve Board (FRB), Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) made the decision to ban deferred interest plans as part of their efforts to reform the credit card market. In doing so, the FRB, OTS and NCUA stated:

*[Assessment of deferred interest] is precisely the type of surprise increase in the cost of completed transactions that §___.24 is intended to prevent. As noted by the commenters, the assessment of accrued interest causes substantial injury to consumers. In addition, for the same reasons that consumers cannot, as a general matter, reasonably avoid rate increases as a result of a violation of the account terms, consumers cannot, as a general matter, reasonably avoid assessment of deferred interest as a result of a violation of the account terms or the failure to pay the balance in full prior to expiration of the deferred interest period. For example, just as illness or unemployment may reasonably prevent some consumers from paying on time, these conditions may reasonably prevent some consumers from paying the deferred interest balance in full prior to expiration. **In addition, as noted by the commenters, disclosure may not provide an effective means for consumers to avoid the harm caused by these plans.***

*Finally, although deferred interest plans provide some consumers with substantial benefits in the form of an interest-free advance if the balance is paid in full prior to expiration, the Agencies conclude that these benefits do not outweigh the substantial injury to consumers. As discussed above, deferred interest plans are typically marketed as “interest free” products but many consumers fail to receive that benefit and are instead charged interest retroactively. Accordingly, as with the prohibitions on other repricing practices discussed above, prohibiting the assessment of deferred interest will improve transparency and enable consumers to make more informed decisions regarding the cost of using credit. Accordingly, the Agencies conclude that an exception to the general prohibition on rate increases is not warranted for the assessment of deferred interest.*⁷⁵

A few months later, the Federal Reserve Board and banking regulators reversed themselves and permitted deferred interest plans under Regulation AA.⁷⁶ This reversal appears to be the result of heavy lobbying by retailers, including arguments that deferred interest offers are “a critical driver of sales” and were “particularly important in the current economic environment [i.e. the Great Recession] and should be encouraged.”⁷⁷ In fact, one retailer, Sears, engaged in a campaign urging its store managers to send comments to the FRB using themes of “Protecting Jobs” and “Preserving Main Street Retail.” Some of the sample comments offered by Sears executives included:⁷⁸

- “Consumers are feeling the effects of a slumping economy and need financing options for purchasing big-ticket items, especially household appliances that sometimes need replacement regardless of whether or not they have the cash to pay for it at the time.”
- “One of the worst economies in decades has already resulted in widespread job loss and store closures. Being able to continue to offer varied promotional options on expensive products will help me keep my store open and my employees on the job.
- “My Hometown store in (enter city, state) offers a wide-range of trusted Sears appliances and products. Hometown stores are typically located in smaller communities where you are not likely to find large department stores. They carry primarily large-ticket items—many of which are offered along with deferred-interest financing offers to ease the financial burden.”

B. How deferred interest violates the Credit CARD Act

In May 2009, Congress passed the Credit CARD Act, which addressed many of the abuses in the credit card market that consumers had complained about for years. The CARD Act does not explicitly ban deferred interest. However, two of the Credit CARD Act’s provisions technically prohibit deferred interest. The first provision is Section 102(a) of the Act, which states:

*a creditor may not impose any finance charge on a credit card account under an open end consumer credit plan as a result of the loss of any time period provided by the creditor within which the obligor may repay any portion of the credit extended without incurring a finance charge, with respect to— (A) any balances for days in billing cycles that precede the most recent billing cycle.*⁷⁹

This provision in the law prohibits double-cycle billing.* However, the language also prohibits deferred interest plans, because such plans also impose a finance charge based on balances from prior billing cycles if the consumer does not repay the entire balance within the specified time period (which would qualify as “the loss of any time period within which the consumer may repay a balance without incurring a finance charge”). Indeed, when the Credit CARD Act was passed, one of abuses cited was a double cycle billing example that appears very similar to a deferred interest plan. Senator Carl Levin complained of the practice in which “[i]f I charge \$5,000 and pay off \$2,500 by the due date ...I will still be charged interest on the full \$5,000 balance, starting with the first day of the billing period.”⁸⁰

The second provision of the Credit CARD Act that prohibits deferred interest is Section 101(b). The Section, which is codified at 15 U.S.C. § 1666i-1, prohibits the retroactive application of an interest rate increase. Deferred interest plans also violate that prohibition.

The Credit CARD Act does specifically mention deferred interest in another section, the payment allocation provision. Section 104 states:

“CLARIFICATION RELATING TO CERTAIN DEFERRED INTEREST ARRANGEMENTS—A creditor shall allocate the entire amount paid by the consumer in excess of the minimum payment amount to a balance on which interest is deferred during the last 2 billing cycles immediately preceding the expiration of the period during which interest is deferred.”⁸¹

The FRB relied on this provision to assert that the Credit CARD Act explicitly permits deferred interest plans.⁸² The FRB relied on the provision to create the exceptions to the above prohibitions in order to allow credit card lenders to offer the plans. The Credit CARD Act would otherwise ban them if not for the exceptions that the FRB carved out to permit them.

However, despite the FRB’s belief, Section 104 does not expressly mandate or even authorize deferred interest plans; the provision merely sets the rules for payment allocation if such plans exist. Furthermore, Section 104 does not expressly state what *kind* of deferred interest plan it is referring to. It does not endorse deferred interest plans that permit retroactive imposition of interest even for amounts that have been paid off. Section 104’s reference could be to plans in which interest is only retroactively imposed on the remaining unpaid balance. For example, a deferred interest plan could provide that if a consumer makes a \$1,000 purchase and pays off \$800, then the accrued deferred interest for *only the remaining \$200 will be imposed*.

* Double cycle billing occurs when a consumer who has carried a balance from one month to the next then pays off the entire balance. Despite paying the full balance shown on the statement, the consumer would still be charged interest for that month because the lender would assess interest based on the account balance for the past *two* billing cycles.

Instead of substantive protections for deferred interest plans, Regulation Z requires special disclosures for deferred interest programs. These include:

- Special disclosures for advertisements.⁸³
- Disclosure of the deferred interest APR, not a 0% APR, in the application/solicitation table or “Schumer Box.”⁸⁴
- Disclosure for monthly statements of the deferred interest APR, balance, and accrued interest.⁸⁵
- A mandatory warning for periodic statements.⁸⁶

V. ENFORCEMENT AND REGULATORY ACTIONS

A. Synchrony/CareCredit

In December 2013, the CFPB brought an enforcement action against Synchrony over the CareCredit card.⁸⁷ The CFPB alleged that some health care providers had misled patients by not clearly explaining the terms of the deferred interest program when the patients signed up and by not giving patients the legally required credit card disclosures. Furthermore, the CFPB alleged it was Synchrony’s lack of oversight and monitoring that allowed this deception.

Synchrony settled the case by agreeing to provide enhanced disclosures to consumers and to implement a training program for providers who offer the CareCredit Card.⁸⁸ Furthermore, the bank agreed to contact new applicants within 72 hours to explain the product over the phone, and to require any consumer submitting an application for dental services over \$1000 to apply directly with CareCredit instead of with the provider’s staff.⁸⁹ Synchrony also promised in its contracts with providers to prohibit charges for services not yet rendered, with limited exceptions.⁹⁰ The bank agreed to pay up to \$34.1 million in restitution to injured consumers.⁹¹

In addition to the CareCredit enforcement action, the CFPB took a separate enforcement action against Synchrony for (1) deceptive marketing of debt cancellation or suspension products; and (2) discriminating against Hispanic consumers by excluding consumers who primarily spoke Spanish and Puerto Rico residents from receiving special debt relief offers.⁹²

However, problems remain with the CareCredit card, as indicated by complaints filed with the CFPB since December 2013.

B. PayPal

The CFPB brought an enforcement action against PayPal Credit (formerly known as BillMeLater) for, among other violations, abuses in its deferred interest program. The abuses specifically involved payments allocation. When consumers made payments large enough to pay off an expiring promotion, PayPal allocated the payments in a way that resulted in consumers incurring deferred interest.⁹³ PayPal also represented to

consumers that they could request that payments be allocated to specific balances, but many consumers could not reach a customer-service agent at all to make a request or when they did, PayPal ignored the request.⁹⁴

C. CFPB bulletin on marketing of credit card promotional APR offers

As discussed in Section II.G, consumers who normally pay their entire credit card balance every month cannot accept a deferred interest offer without losing the benefit of a grace period for other transactions. If they have a deferred interest balance, any additional purchases the consumer makes with the credit card may incur interest charges right away. In 2014, the CFPB issued a bulletin highlighting its concerns regarding the impact of deferred interest and other promotional annual percentage rate (APR) offers (balance transfers, convenience checks) on grace periods.⁹⁵

VI. RECOMMENDATIONS

A. Ban deferred interest

The simplest, most effective step that the CFPB can take to protect consumers from the trap of deferred interest is to ban deferred interest plans. As the FRB and banking regulators concluded over half a decade ago, deferred interest “causes substantial injury to consumers” and “disclosure may not provide an effective means for consumers to avoid the harm caused by these plans.” It is time to ban the product.

The CFPB clearly has the authority to ban deferred interest. As discussed in Section IV.B, the prohibitions against double cycling billing and retroactive application of interest rate increases in the Credit CARD Act already proscribe the imposition of deferred interest. It is only the fact that Regulation Z carves out exceptions to these prohibitions for deferred interest that permit the existence of these plans. To eliminate deferred interest, the CFPB can simply remove those exceptions.

B. Other reforms

While less than optimal, the CFPB could take other actions to reduce the harm imposed by deferred interest, including:

1. Permit deferred interest only on unpaid balances

Nothing in the Credit CARD Act provides any indication that Congress intended to permit retroactive interest on the portion of a balance that has been paid off. The CFPB could revise and narrow the definition of “deferred interest” under Regulation Z to be limited to plans in which retroactively accrued interest is imposed only on unpaid amounts. Regulation Z could provide that only these plans that are exempted from the Credit CARD Act’s prohibitions against double cycling billing and retroactive application of interest rate increases.

2. Require higher minimum payments

The CFPB should require lenders to set the minimum payment for deferred interest plans at an amount that will pay off the deferred interest balance during the promotional period. In addition, the consumer's ability-to-pay should be assessed based on this higher minimum payment.

3. Prohibit using deferred interest balances to eliminate grace periods

For consumers who are carrying a deferred interest balance and make subsequent purchases, the CFPB should require credit card issuers to give consumers the full benefit of a no-interest grace period if the subsequent purchases are paid off in full. Otherwise, it is unfair, deceptive, and abusive to use a supposedly no-interest promotion as a trick to generate interest on purchases that should also be interest free.

4. Require issuers to solicit and follow consumer requests on payment allocation

As discussed in Section II.G, the payment allocation rules for deferred interest plans are quite complex. Some consumers will prefer to make regular progress in paying off a deferred interest balance, and others will prefer to minimize interest-bearing balances and then to pay off the deferred interest balance in a lump sum at the end of the promotional period. No matter what camp they are in, consumers will likely be confused by the rules and not realize that they have the right to direct their payments to the appropriate balance.

GRAPHIC 2 Sample Payment Form

Minimum payment:	\$25
Additional payment towards deferred interest balance:	\$ _____
Additional payment towards 24% interest balance:	\$ _____
Total payment:	\$ _____

Important Note: You can minimize your interest charges by designating payments above the minimum to your 24% interest balance. However, if you do so, you must be sure to pay off your entire deferred interest balance by January 1, 2017 if you wish to avoid back interest. If you do not pay off your **entire** deferred interest balance by that date, you will be assessed \$457 interest on your January 2017 statement.

Some of this confusion will be eliminated by preserving grace periods, as previously discussed. For consumers who do carry other balances month to month, the payment form should ask the consumer how she wishes to allocate the balance and inform her about the consequences of different choices as illustrated. Issuers should solicit the consumer's preferences on the payment stub for paper statements, and should require the blanks to be filled out for consumers who pay online (see Graphic 2: Sample Payment Form).

However, the complexity of this notice illustrates why the far better approach is simply to ban deferred interest. It may not be possible to develop a simple disclosure that helps consumers to minimize interest in both the short and long run. (And a disclosure does nothing to help consumers who have an unforeseen difficulty paying off their balance.)

In addition, Regulation Z should also be clarified to require the lender to allocate the payment as the consumer requests. Finally, when there are two or more deferred interest balances, Regulation Z should require that the payment above the minimum be allocated to the oldest such balance.

5. Require a warning 60 days before the end of the promotional period.

Lenders should be required to give consumers a warning 60 days before the end of the promotional period specifying the amount of interest that will be charged if they do not pay off the balance. This warning should be prominent, in a place consumers cannot miss. It should be mentioned in the subject line of any email sent to consumers who receive notice of electronic statements and on the front page of any mailed statement.

VII. CONCLUSION

In 2009, Congress passed the Credit CARD Act in order to eliminate “tricks and traps” from the credit card market. For the most part, it succeeded, and has saved consumers an estimated \$16 billion in credit card fees.⁹⁶ Deferred interest promotions, however, are an unfortunate exception. As one of the worse remaining abuses on the market, the use of these promotions is growing.

It is time to simply get rid of deferred interest promotions. A product that makes a profit only due to consumer confusion or inability to pay due to financial problems is one that is inherently unfair, deceptive, and abusive. The Federal Reserve Board did the right thing when it initially banned deferred interest in 2009. The CFPB’s recent study on the credit card market confirms that the abuses of these promotions continue unabated and are growing. The next logical step is to eliminate the debt time bomb of deferred interest promotions altogether.

ENDNOTES

1. Consumer Financial Protection Bureau, Consumer Credit Card Market Report 10 (Dec. 3, 2015), available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf [hereinafter “CFPB 2015 Credit Card Report”]
2. Consumer Financial Protection Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 81 (Oct. 1, 2013), available at http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf [hereinafter “CFPB 2013 CARD Act Report”].
3. CFPB 2015 Credit Card Report at 10.
4. 74 Fed. Reg. 5498, 5528 (Jan. 9, 2009).
5. Regulation Z, 12 C.F.R. § 1026.16(h)(4).
6. CFPB 2015 Credit Card Report at 200.
7. CFPB 2015 Credit Card Report at 178.
8. *Id.* at 148.
9. Alina Comoreanu, 2015 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Cardhub.com, available at <http://www.cardhub.com/edu/deferred-interest-study/>.
10. *See, e.g.,* Villaseñor v. American Signature, Inc., 2007 WL 2025739 (N.D. Ill. July 9, 2007) (merchant charged \$705 more for customers who paid using deferred interest plan).
11. CFPB 2015 Credit Card Report at 7.
12. CFPB 2015 Credit Card Report at 167 (Figure 8).
13. *Id.* at 166.
14. *Id.* at 167 (Figure 8).
15. *Id.*
16. *Id.* at 197.
17. *Source:* CFPB Complaint No. 1519539, filed Aug. 14, 2015.
18. At one point, some deferred interest cards did not require any minimum payment during the deferred interest period, and were promoted as “no payment” programs. In 2009, federal regulators required banks under their supervision to have minimum payments for credit card accounts, including for deferred interest plans. Timothy Ward, Deputy Director of Examinations, Supervision and Consumer Protection, Office of Thrift Supervision, Memorandum for Chief Executive Officers re: “No Interest, No Payment” Credit Card Programs (Sept. 24, 2009), available at www.occ.gov/static/news-issuances/ots/ceo-memos/ots-ceo-memo-321.pdf.
19. CFPB 2015 Credit Card Report at 150.
20. *Id.*
21. *Id.* at 204.
22. Lenders are required by the Credit CARD Act to assess a consumer’s ability to pay a credit card debt. 15 U.S.C. § 1665e
23. The ability to pay is not based the minimum payment consisting just of the purchase amount, but on a somewhat higher minimum payment that does include deferred interest. CFPB 2015 Credit Card Report at 205.
24. CFPB 2015 Credit Card Report at 206.
25. Synchrony Financial, Form S-1: Registration Statement under the Securities Act of 1933, March 13, 2014, at 4 [hereinafter “Synchrony Prospectus”].
26. CFPB 2015 Credit Card Report at 187.

27. See Fred O. Williams, How to avoid big costs of deferred-interest financing deals: Banks don't have to allocate payments the way you request, www.creditcards.com, Sept. 25, 2105, at <http://www.creditcards.com/credit-card-news/allocate-payments-deferred-interest-1282.php>.
28. Complaint, Consumer Financial Protection Bureau v. PayPal Inc., Civ. Ac. No. 1:15-cv-1426 (D. Md. May 18, 2015), ¶ 38, available at http://files.consumerfinance.gov/f/201505_cfpb_complaint-paypal.pdf.
29. CFPB 2015 Credit Card Report at 190.
30. There is evidence that issuers have been aware of consumer confusion over this issue. See *Murr v. Capital One*, 28 F. Supp.2d 575, 584-95 (E.D. Va. 2014) (permitting fraud, breach of contract, TILA and UDAP claims against convenience check offers that resulted in loss of grace period for purchases). Discovery documents in this case "revealed that defendant was aware of a steady stream of complaints from consumers who lost their grace periods after accepting the Offer despite paying off their purchase balances in full," and that the issuer "adopted a less-than-forthcoming approach to obvious consumer confusion." *Id.* at 586.
31. Fred O. Williams, How to avoid big costs of deferred-interest financing deals: Banks don't have to allocate payments the way you request, www.creditcards.com, Sept. 25, 2105, at <http://www.creditcards.com/credit-card-news/allocate-payments-deferred-interest-1282.php>.
32. CFPB 2015 Credit Card Report at 190.
33. *Id.* at 193.
34. In the Matter of GE Capital Retail Bank and CareCredit, LLC, Assurance No. 12-103 Assurance Of Discontinuance Under New York Executive Law Section 63, Subdivision 15, June 3, 2013.
35. See Consent Order, In the Matter of GE Capital Retail Bank, CareCredit L.L.C., No. 2013-CFPB-0009, ¶ 31 (Consumer Fin. Prot. Bureau Dec. 10, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_consent-order_ge-carecredit.pdf.
36. CFPB 2015 Credit Card Report at 159 (quoting comment letters from the Retail Industry Leaders Association (RILA), Consumer Bankers Association, and Financial Services Roundtable).
37. *Id.* at 207 ("while 18% of U.S. credit cardholders with subprime scores have private label but no general purpose cards, some 38% have one or more private label cards *and also one or more general purpose cards*. (The remainder have only general purpose cards.)") (emphasis in the original).
38. *Id.* at 155 (quoting RILA comment letter).
39. Alina Comoreanu, 2015 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Cardhub.com, available at <http://www.cardhub.com/edu/deferred-interest-study/> (providing retailer-by-retailer list of which companies offered deferred interest plans, and whether their disclosures were transparent).
40. CFPB 2015 Credit Card Report at 148.
41. *Id.* at 154.
42. *Id.*
43. Synchrony Prospectus at F-3.
44. *Id.* at 93.
45. Adrian Goffinet & Alison Williams, Bloomberg, Synchrony, Citigroup Lead U.S. Private Label Card Share: Primer, Feb. 17, 2015.
46. Synchrony Prospectus at 4, 5.
47. *Id.* at 4.
48. *Id.* at 126.

49. *Id.* at 20.
50. See *id.* at 112 (“average sales per customer in these platforms are higher for customers who use our cards compared to consumers who do not”).
51. *Id.*
52. *Id.* at 20.
53. *Id.* at 21.
54. *Id.* at 31. Synchrony does earn some interchange income from its cards that can be used as general-purpose credit cards. But that amount — \$325 million in 2013—pales in comparison to the \$11.3 billion in interest income that same year. *Id.* at 78, 86.
55. *Id.* at 78.
56. *Id.* at 126.
57. *Id.*
58. *Id.* at 9.
59. Adrian Goffinet & Alison Williams, Bloomberg, Synchrony, Citigroup Lead U.S. Private Label Card Share: Primer, Feb. 17, 2015.
60. Alison Williams, Bloomberg, Consolidation Has Further Concentrated Credit-Card Share: Primer, Jan. 13, 2015.
61. Alina Comoreanu, 2015 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Cardhub.com, available at <http://www.cardhub.com/edu/deferred-interest-study>.
62. Research obtained by searching the CFPB Credit Card Agreement Database, www.consumerfinance.gov/credit-cards/agreements/, visited November 24, 2015.
63. Consent Order, In the Matter of: Citibank, N.A.; Department Stores National Bank; and Citicorp Credit Services, Inc. (USA), Administrative Proceeding File No. 2015-CFPB-0015, ¶¶ 51-57 (CFPB July 21, 2015), available at http://files.consumerfinance.gov/f/201507_cfpb_consent-order-citibank-na-department-stores-national-bank-and-citicorp-credit-services-inc-usa.pdf.
64. Adrian Goffinet & Alison Williams, Bloomberg, Synchrony, Citigroup Lead U.S. Private Label Card Share: Primer, Feb. 17, 2015.
65. Citibank Retail Services, About Us, at <https://www.citiretailservices.com/aboutus/> (visited Nov. 24, 2015).
66. Citibank Retail Services, Advantages, at <https://www.citiretailservices.com/advantages/> (visited Nov. 24, 2015).
67. See Jim Hawkins, Doctors As Bankers: Evidence from Fertility Markets, 84 Tulane L. Rev. 841 (Mar. 2010).
68. See In the Matter of GE Capital Retail Bank and CareCredit, LLC, Assurance No. 12-103 Assurance Of Discontinuance Under New York Executive Law Section 63, Subdivision 15, June 3, 2013. The CFPB’s Consent Order against CareCredit prohibits the bank from paying rebates to providers.
69. Synchrony Prospectus at 2.
70. CFPB 2013 CARD Act Report at 96.
71. Synchrony Prospectus at 3.
72. See Consumer Action, Medical Credit Card Survey, Summer 2014, available at www.consumer-action.org/downloads/english/summer_2014_medCCs.pdf.
73. *Id.*
74. Synchrony Prospectus at 3.
75. 74 Fed. Reg., 5498, 5528 (January 9, 2009). [emphasis added]
76. 74 Fed. Reg. 20804 (May 5, 2009).
77. Letter from Lowe’s Inc. to Federal Reserve Board, May 29, 2009 (on file with the author).

78. Memo From: Sears Hometown Store, Mark Stockman, Subject: Truth in Lending–Version 3 (undated)(on file with the author).
79. Codified at 15 U.S.C. § 1637(j).
80. See 155 Congr. Rec. S5318 (May 11, 2009) (statement of Sen. Levin).
81. Codified at 15 U.S.C. § 1666c(b)(2).
82. 74 Fed. Reg. 36,077 (July 22, 2009).
83. Regulation Z, 12 C.F.R. § 1026.16(h); See National Consumer Law Center, Truth in Lending § 6.4.6 (9th ed. 2015), updated at www.nclc.org/library.
84. Official Interpretations to Regulation Z, 12 C.F.R. § 1026.60(b)(1)-9.
85. Official Interpretations to Regulation Z, 12 C.F.R. § 1026.7(b)-1.
86. Regulation Z, 12 C.F.R. § 1026.12(b)(14).
87. Press Release, Consumer Fin. Prot. Bureau, CFPB Orders GE CareCredit to Refund \$34.1 Million for Deceptive Health-Care Credit Card Enrollment (Dec. 10, 2013), available at www.consumerfinance.gov/newsroom/cfpb-orders-ge-carecredit-to-refund-34-1-million-for-deceptive-health-care-credit-card-enrollment.
88. Consent Order, In the Matter of GE Capital Retail Bank, CareCredit L.L.C., No. 2013-CFPB-0009 (Consumer Fin. Prot. Bureau Dec. 10, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_consent-order_ge-carecredit.pdf.
89. *Id.* at ¶¶ 32, 36.
90. *Id.* at ¶ 31.
91. *Id.* at ¶ 7.
92. Consent Order, In the Matter of Synchrony Bank, f/k/a GE Capital Retail Bank, Administrative Proceeding File No. 2014-CFPB-0007 (C.F.P.B. June 19, 2014), available at http://files.consumerfinance.gov/f/201406_cfpb_consent-order_synchrony-bank.pdf.
93. Complaint, Consumer Financial Protection Bureau v. PayPal Inc., Civ. Ac. No. 1:15-cv-1426 (D. Md. May 19, 2015), ¶ 35, available at http://files.consumerfinance.gov/f/201505_cfpb_complaint-paypal.pdf.
94. *Id.* at ¶ 38. The CFPB did not take action against these practices under TILA, but instead alleged that they were deceptive in violation of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5536(a)(1)(B) (prohibition against engaging in unfair, deceptive, or abusive acts or practices).
95. Consumer Financial Protection Bureau, CFPB Bulletin 2014-02, Marketing of Credit Card Promotional APR Offers (Sept. 3, 2014), available at http://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-apr-offers.pdf.
96. CFPB 2015 Credit Card Report at 10.

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Advancing Fairness
in the Marketplace for All

Boston Headquarters:
7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028
www.nclc.org

Washington Office:
1001 Connecticut Ave, NW
Suite 510
Washington, DC, 20036
Phone: 202/452-6252
Fax: 202/463-9462

ATTACHMENT B

Paper Statements: An Important Consumer Protection

March 2016

By

**Chi Chi Wu and Lauren Saunders
National Consumer Law Center[®]**

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ABOUT THE AUTHOR

Chi Chi Wu is a staff attorney at the National Consumer Law Center (NCLC) with a focus on consumer credit issues at NCLC, including legislative, administrative, and other advocacy. Her specialties include fair credit reporting, credit cards, refund anticipation loans, and medical debt. Before joining NCLC, Chi Chi worked in the Consumer Protection Division at the Massachusetts Attorney General's office and the Asian Outreach Unit of Greater Boston Legal Services. Chi Chi is a graduate of Harvard Law School and The Johns Hopkins University. She is co-author of the legal manuals [Fair Credit Reporting](#) and [Collection Actions](#), and a contributing author to [Consumer Credit Regulation](#) and [Truth in Lending](#).

Lauren Saunders is Associate Director at the National Consumer Law Center and manages the Washington, DC office, where she directs NCLC's federal legislative and regulatory work. Lauren is a recognized expert in various areas, including prepaid cards, electronic payments, small dollar loans, credit cards, bank accounts, and consumer protection regulation. She contributes to NCLC legal treatises, including [Consumer Banking and Payments Law](#), [Consumer Credit Regulation](#), and [Fair Credit Reporting](#), and has authored several reports and white papers. She previously directed the Federal Rights Project of the National Senior Citizens Law Center; was Deputy Director of Litigation at Bet Tzedek Legal Services; and was an associate at Hall & Phillips. She graduated magna cum laude from Harvard Law School and was an Executive Editor of the Harvard Law Review, and holds a Masters in Public Policy from Harvard's Kennedy School of Government and a B.A., Phi Beta Kappa, from Stanford University.

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ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

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INTRODUCTION

Electronic statements sound eco-friendly, but they are not for everyone. Bank account, credit card and mortgage statements provide important information and serve a critical consumer protection function. Consumers must have the right to receive that information in the manner that works for them. For many consumers, from those without regular broadband Internet access to the most computer savvy, paper is a more reliable way of ensuring that the consumer actually sees the information and can retain important records. Paper statements must be available for free for consumers who want them, and consumers should not be coerced into electronic statements or steered into them by default if paper is the consumer's first choice.

WHY ARE STATEMENTS IMPORTANT?

Bank account statements serve several important purposes. They provide a record of the consumer's transactions and enable the consumer to check for unauthorized charges or errors. Statements reveal the fees that the consumer has been charged, with monthly and year-to-date summaries displayed prominently on the top. Consumers can check statements to ensure that they received proper credit for an item returned or disputed. Statements help consumers balance their accounts and keep track of their finances. They provide a permanent record of the consumer's income, expenses, transactions and fees. Statements are used to qualify consumers for a mortgage or other forms of credit. Statements are important when preparing tax returns and when looking for a record of a payment.

Statements for credit cards and other types of credit lines serve all of these functions and more. Most critically, they let the consumer know the payment that is due and start the clock running for the due date. Credit card statements also summarize the charges that month and for the year-to-date.

Mortgage statements are also important. For variable rate mortgages, consumers need to see payment changes and also should be aware of when the interest rate changes. If funds for taxes or insurance are escrowed, the escrow amounts can change. A consumer who makes an incomplete payment after the escrow has increased can incur late fees and even be at risk of foreclosure. Mortgage statements also can reveal if a consumer has been enrolled in expensive force-placed insurance.

Statements are not only important for day-to-day reasons. They also help deter unscrupulous conduct. Consumers who see their statements are more likely to notice if

they have been subject to fees or charges they did not authorize or expect, or that were far more expensive than anticipated.

For all of these reasons, it is important that consumers be able to receive statements in the form that is most convenient for them. The important functions of statements should not be sacrificed by pushing consumers into electronic statements if that means that they are less likely to see or be able to easily access the information they need.

WHY DON'T ELECTRONIC STATEMENTS WORK FOR MANY CONSUMERS?

Digital Divide and Limited Internet Resources

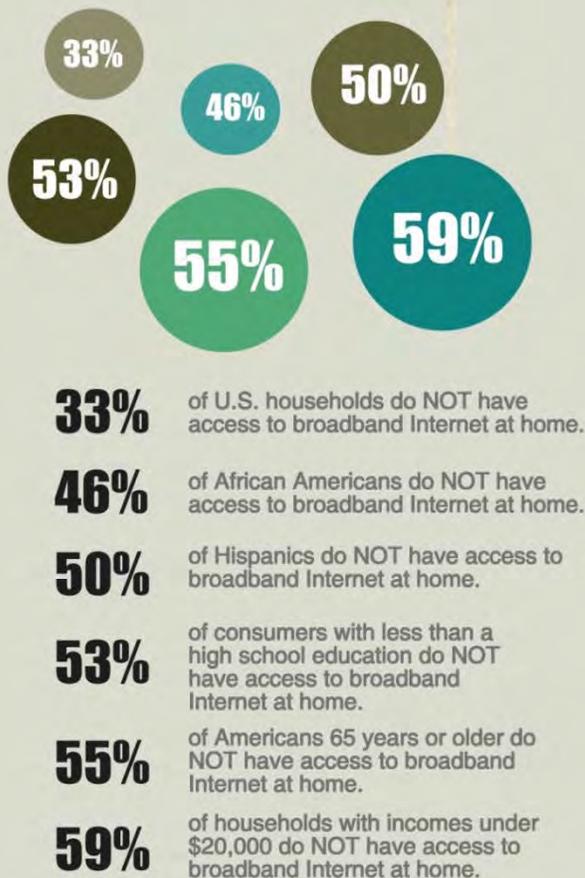
Millions of Americans are on the other side of the “digital divide”: They lack meaningful access to broadband Internet at home (see graphic on page 3; an infographic version may be found at: <http://www.easel.ly/browserEasel/3338437>). According to a December 2015 report by the Pew Research Center¹:

- Over half (53%) of consumers with less than a high school education do not have home broadband connections.
- Lower-income households lack access at nearly twice the rate of the general population - 59% of households with incomes below \$20,000 do not have access to broadband Internet at home, compared to one-third (33%) of all households.
- About half of Hispanics (50%) and African Americans (46%) do not have access to broadband Internet at home.
- Over half (55%) of Americans 65 years or older do not have access to broadband Internet at home.
- Most troubling, the percentage of homes with broadband Internet has actually declined in the last two years by 3% (from 70% to 67% of all households). The declines are greater for low-income and minority households: A 5% decrease for households under \$20,000 income; a 6% decrease for Hispanics and a startling 8% decrease for African Americans. The main reason cited for the decline in home broadband Internet? Cost.

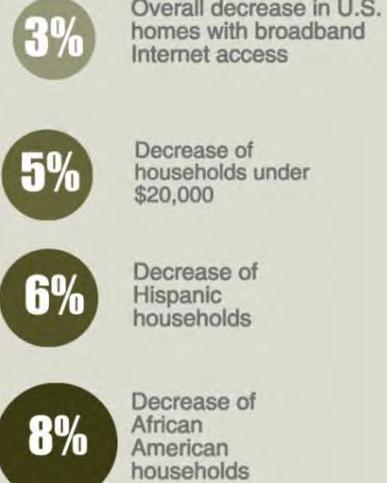
The Digital Divide in U.S. Home Broadband

Digital exclusion falls hardest on the most vulnerable households. Pushing consumers to electronic bank and credit card statements will disproportionately harm these vulnerable groups.

DEMOGRAPHICS



DECLINE IN HOME BROADBAND ACCESS FROM 2013 - 2015



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Source: Pew Research Center, Home Broadband 2015, Dec. 21, 2015.

Consumers without home Internet may have an email address that theoretically shows that they have the ability to receive electronic statement notifications. But that access may be more theoretical than real.

Some consumers are able to get on the Internet at a library or a friend's computer. But that type of access is not the same as complete access on a home computer. Imagine not being able to receive mail at home, but instead being required to go to a special place to receive, open it and read it, and being forced to pay or get permission for a permanent copy (e.g., by printing at a public library). Consumers who do not have computers at home may not have a simple method to print or retain their statements. Even consumers who have Internet access at work may not have permission or time to do personal business at work

With busy lives, it is hard enough to find time to manage one's finances. Not being able to get fast and easy access to a computer whenever it is convenient can inhibit consumers from paying close attention to their accounts.

Mobile Access is Not Sufficient

If the only Internet access that a consumer has or regularly uses is a mobile device, it is not a sufficient method to provide monthly statements. Merely because a consumer has a mobile device or even has accessed an account through that device does not mean that the consumer has regular Internet access or is comfortable monitoring the account online or on a mobile device.

Consumers will inevitably miss important information if they are limited to tiny text produced on a three- to five-inch screen. The ability to see a few recent transactions at a time on a mobile device is not the same thing as being able to sit down and carefully review an entire statement. Transaction histories also do not display all of the same information that is available on a statement, including the summary of fees and charges at the top.

Bills that only come through in email may also be overlooked or more difficult to pay if the consumer's only email access is through a mobile device. Bills and statements get buried in all the subsequent emails. It is more difficult to access email folders and find saved emails on a mobile device than on a computer. Since the statements themselves are usually not emailed, but must be downloaded in PDF, mobile devices do not provide a record the consumer can keep.

It is also difficult to pay a credit card bill by paper check if the statement only comes by email. The consumer would not receive an envelope or payment stub to make payment accurate and easy.

Lower-Income Families Face Special Barriers

Lower income families are less likely to have home broadband Internet in the first place – cost is a significant barrier. Those who have computers at home may have older computers or slow connection speeds that make accessing the Internet cumbersome. They may not have a printer or be able to afford the expensive ink to print their statements. They are likely to have only one computer, with the resources shared between other adults in the household and children doing homework.

Access to the Internet through a mobile device also presents special issues for low-income consumers. Data is expensive, and consumers may be reluctant to use scarce data to review their accounts.

Many lower-income consumers also have prepaid mobile plans and may have gaps in coverage. If they run out of data and do not have the time or money to immediately buy more, they will have no access to statements at all.

Even the Computer-Savvy May Prefer Paper

Even computer-savvy consumers who have ample and convenient Internet access may prefer paper for some types of communications. Consumers are often barraged by a flood of email solicitations that cost nothing to send but bury important messages. We have all had the experience of losing emails in the information overload. Paper statements are simply more likely to be seen and are easier to set aside in a “to do” stack.

Paper is especially important for something like a credit card that requires a monthly payment. An analysis of customer records from a major East Coast utility found:

91 percent of customers chose to receive their bills by mail despite a clear preference to pay bills online. Even among the utility’s newest customers – those expected to be more digitally savvy – an average of 89 percent opted to have their bills mailed to them.²

Similarly, another study found that consumers were less likely to adopt paperless options for accounts where a payment is due upon receipt of the statement than for

other types of accounts.³ The Consumer Financial Protection Bureau (CFPB) has reported that only about a quarter of active credit card accounts have opted for electronic statements.⁴

Consumers value the physical mail piece as a record-keeping tool and reminder to pay. That reflects a conscious choice of consumers: they prefer the paper reminder to pay on time. Without that reminder, even computer savvy-consumers can end up missing payments, with significant harm.

Case Study: How Electronic Statements Can Cause Significant Consumer Harm

A.B. is a consumer advocate and attorney who received electronic statements for a credit card account that she used infrequently. She signed up for electronic statements in an effort to keep closer track of her account. In the spring of 2015, the card was used for two consecutive months for an automatic charge of \$25. A.B. did not receive paper statements, but only email notifications about the availability of her statement and separate emails that her payment was due. The emails got buried in her inbox and she did not make these payments. After she became 60 days late, she no longer received emails that her card was due and received only two further emails indicating that her statement was available. She never received an email indicating that her account was past due. The credit card lender never called or sent mail to identify the problem. Without further notice the account was closed by the credit card lender. It was only several months later when A.B. tried to use the card that A.B. learned that the account had been closed and that the late payments and closing of the account had damaged her credit score. Despite having no debt beyond a mortgage that had always been current, she ended up with a credit score in the low 600s –which is considered subprime - and was denied another credit card.

With the constant news of data breaches, many consumers are also reluctant to access sensitive financial accounts or make payments online. Consumers should not be forced to access accounts electronically if they do not want to.

Paper Makes it More Likely that Consumers Will See Critical Information

Electronic statements create “friction” or barriers for consumers to access vital information. It takes more effort for consumers to locate their statement on a website, remember their password, and have access to a computer and time on their hands when they are thinking about it. It is much easier to be prompted when the mail arrives to simply rip open the envelope and review the document. There is a serious danger that pushing everyone into electronic statements as the default method will have the end result of ensuring that fewer people get the information they need.

As with a mobile device, consumers who access their accounts on a computer may only look at recent transactions, not the full statement. The disclosures required in monthly statements have been carefully crafted to deliver critical information, but such information will be missed if consumers are more apt to overlook statements provided electronically.

A study by the CFPB found that more than half of the consumers who opted to receive electronic credit card statements are not opening or reviewing these statements.⁵ The CFPB concluded alarmingly that consumers who are “opt-outs [of paper statements] are for the most part opting out of reviewing their statements entirely.”⁶

If consumers are not reviewing their statements, they are missing critical information, such as disclosures about the effect of only making the minimum payment. Electronic statements aid and abet the problems caused by controversial practices, such as deferred interest promotions,⁶ because consumers do not realize they have been the victim of these practices until it is too late.

The CFPB concluded alarmingly that consumers who are “opt-outs [of paper statements] are for the most part opting out of reviewing their statements entirely.

Source: CFPB, *Consumer Credit Card*

Market Report, 2015

Case Study: How Electronic Statements Enable Deferred Interest Deception

“I had a sick pet XXXX at the XXXX animal hospital in XXXX XXXX. The XXXX suggested I could pay for the procedure with Care Credit 18 month interest free. Having no money for the procedure it sounded like my only option at the time so I signed up. I set up my payment plan and started making monthly payments. I continued to pay on a monthly basis and thought I would be paid off by the time interest would start to accrue and it would be minimal at the end of 18 months. In the meantime follow up visits to the vet were necessary and paid for on care credit. I continued to pay monthly payments for roughly 3 years. My statements were electronic and I set up automatic withdrawal from my bank account. Thinking I was close to paying off my debt I went on to the care credit website and intended to pay the remaining balance in full. I was shocked. I now owed more than my original balance. I owed even more than my entire credit limit with them. The customer website was no help. I can log in, make a payment, and see my balance, however it is unclear what I am actually paying for and there is no history of my original transactions. I found it odd that the account history was not available save that I made my regular payments for the last few months.”

Paper Provides a More Permanent Record

One of the strongest benefits of a paper statement is its concrete form. Paper provides a permanent record by its nature, for several reasons:

- A paper writing is tangible. Once handed to a person, a paper writing will not disappear unless lost or destroyed by the recipient.
- The printed matter on the paper writing will not change each time someone views it. The writing can be used at a later time to prove its contents.
- Computers crash or become outdated. Consumers who have downloaded statements and saved them on a computer may find that they can no longer access them, or that software changes make them unreadable.
- It is easier to simply put a paper statement in a file than to remember to log in, download and save an electronic statement each month for each of the consumer's accounts.
- Banks may not retain records as long as consumers will need them. Banks may merge and the new bank may not retain the full back records of the acquired bank. If a consumer has a tax return that is audited, is searching for proof of purchase for a warranty claim, or needs to show deposit records for a mortgage application, the records available from the bank may not be enough.

- It can be important for a consumer facing collection of an old debt to be able to review statements from many years go to see if the amount of the debt is correct, or if they even owe the debt. This is especially true with the rise of debt buyers, which often purchase and seek to collect “zombie” debts, *i.e.*, debts that are decades old. These debts could even be originally owed to companies that have gone out of business.

Case Study: Paper Prevents a Tax Penalty

L.S. is 86 years old. He had bought stock in Company X in 1990. In 2013, L.S. sold the stock. When it came time to prepare his tax return, he could not easily find out the basis. L.S. had changed brokers several times since he purchased the stock and the stock had also been acquired by other companies and split numerous times over the years. L.S. believed that he had not made any money on the sale and therefore did not report any capital gain on his tax return.

The I.R.S. audited L.S. and insisted that, unless L.S. could show what the basis was, he would be taxed on the entire sale price, resulting in several thousand dollars of additional tax. L.S. went back through more than 20 years’ worth of paper records and was able to trace the stock back to the original company he bought and the original purchase price. He was able to show that the purchase price was more than the sale price, so that he did not need to report any capital gain and did not owe any tax. L.S. would not have been able to track down this original purchase price if he didn't have the paper statements from all those years.

Paper is Important for Older Consumers and Their Families

Paper statements are especially important for older consumers. Older consumers are less likely to be completely comfortable online even if they have computer access. Receiving paper statements in the mail can be critical to helping older Americans keep on top of their finances.

For those older consumers who have declining cognitive abilities, it may be more difficult to remember passwords, to keep on top of email, to know when a bill is due, and even to operate a computer. Paper is a concrete reminder that is simple to access and easy to see. Even while an older person is still handling her own finances, when family members visit they can more easily glance through the mail and make sure that

the consumer is not missing due dates or being hit with payment scams or other unauthorized charges.

An unintended consequence of pushing older consumers to access accounts online is to make them more vulnerable to scammers. They could be confused between legitimate and scam websites, and thus unwittingly provide sensitive financial information to scammers. Email phishing scams that purport to come from a bank could instead lead the consumer into the hands of a fraudster. We should not push vulnerable older consumers into accessing accounts electronically.

If a consumer's competence begins to slip – which may not always be obvious – or the consumer becomes incapacitated or deceased, paper statements can be critical for family members who are trying to piece together financial records. Family members may not know all of the accounts that their parent has or may not know that the parent has been missing bills. Family members may not know electronic passwords or have any idea which accounts need to be monitored. Electronic records can be a disaster for the aging and their families.

THE CFPB NEEDS TO PROTECT CONSUMERS WHO WANT TO KEEP PAPER

Unfortunately, some financial institutions are aggressively pushing consumers into electronic statements, using tactics that are questionable and arguably illegal. Financial institutions have an incentive to convert consumers into electronic statements to save on the costs of printing and postage. The CFPB needs to act to ensure that consumers not are coerced into electronic statements. While electronic statements can be a fine option for consumers who choose them, paper should be available for those who do not.

Federal Consumer Laws Require Financial Institutions to Provide Paper Statements

A number of important consumer protection laws require written (*i.e.*, paper) disclosures. In particular, financial institutions must provide “periodic” (usually monthly) statements in writing for:

- Credit card accounts
- Bank accounts if accessible by ATM, debit card or other electronic transactions
- Mortgage accounts

Written statements are not required for all financial products, particularly newer products such as prepaid cards and mobile apps like money transfer apps. Whether the law should be changed to require financial institutions to send written statements for some of these products is not the subject of this paper.

Financial institutions can substitute electronic statements for paper statements, but only in compliance with the Electronic Signatures in Global and National Commerce Act (E-Sign) Act. If the law requires that a statement or other disclosure be made in writing, the E-Sign Act requires that:⁷

- The consumer must affirmatively consent to electronic delivery.
- The financial institution must make certain disclosures to the consumer.
- The consumer's consent must demonstrate that he or she has access to the equipment and programs necessary to receive, open, and read the relevant electronic documents.
- The consumer must be given notice of the right to withdraw consent for electronic delivery.

One of the most important E-Sign disclosures is the right to withdraw consent to electronic disclosures. The right to opt out of electronic statements is critical to ensuring that consumers can receive paper disclosures if they find that electronic disclosure is not sufficient for their needs.

Another important protection of the E-Sign Act is that it does not require any person to agree to use or accept electronic records or electronic signatures.

Electronic Statements Cannot be a Default Choice

Recent research has shown the power of default settings. Several studies have found that if an option is made the default, only a small percentage of consumers actively “opt out” of that option. Thus, the CFPB should prohibit financial institutions from making electronic statements the default choice. In fact, the E-Sign Act does not permit electronic statements to be the default, because the statute requires active consumer consent to allow financial institutions to provide electronic statements.

Despite this, some financial institutions appear to be requiring in fine print that the consumer consent to electronic statements as part of the application process. The consumer may not have the choice to withdraw consent without closing the account. For example, PayPal Credit (formerly known as Bill Me Later), which is a credit product

subject to the Truth and Lending Act (TILA), automatically assumes consumer consent to electronic statements.⁸

Electronic Statements Cannot be a Condition of the Product

The E-Sign Act does not permit financial institutions to compel consumers to consent to electronic statements by making it a condition of a product. Otherwise, the consumer consent protections of the E-Sign Act would be meaningless, as institutions could make E-Sign a condition for all of their products.

Indeed, if the consumer could be compelled to give consent, then the E-Sign Act's requirement that the consumer must be informed of her right to withdraw consent and the procedures for doing so would be meaningless.

Financial Institutions Should Not be Allowed to Charge a Fee for Paper Statements

The CFPB should clarify that financial institutions cannot charge a fee for written statements when such statements are required by federal law. Financial institutions should not, and indeed we would argue cannot legally cannot, charge a fee for providing something they are mandated by law to provide.

Yet many banks are coercing consumers into opting in to electronic statements by charging them for paper statements. Analysis from the banking analytics firm Novantas found that 25 percent of banks that offer paper statements charge a fee for them.⁹

Even a small fee can discourage consumers from getting information in the way that works for them. An informal survey of National Consumer Law Center (NCLC) employees found that 65 percent who receive paper statements were unwilling to pay anything to continue receiving paper statements, 22 percent were willing to pay \$1, and only 13 percent were willing to pay \$2-\$3. Over half (56 percent) of the respondents who said that paper statements were important to them were also unwilling to pay to continue receiving paper statements. That is, even a small fee would discourage these consumers from continuing to receive paper statements despite their discomfort at monitoring their accounts online. The coercive impact of a fee is likely to be even greater among lower income consumers than NCLC employees.

Fees should not be used to push consumers into signing up for electronic statements – and evading the legal requirement to offer paper statements – if the consumer is

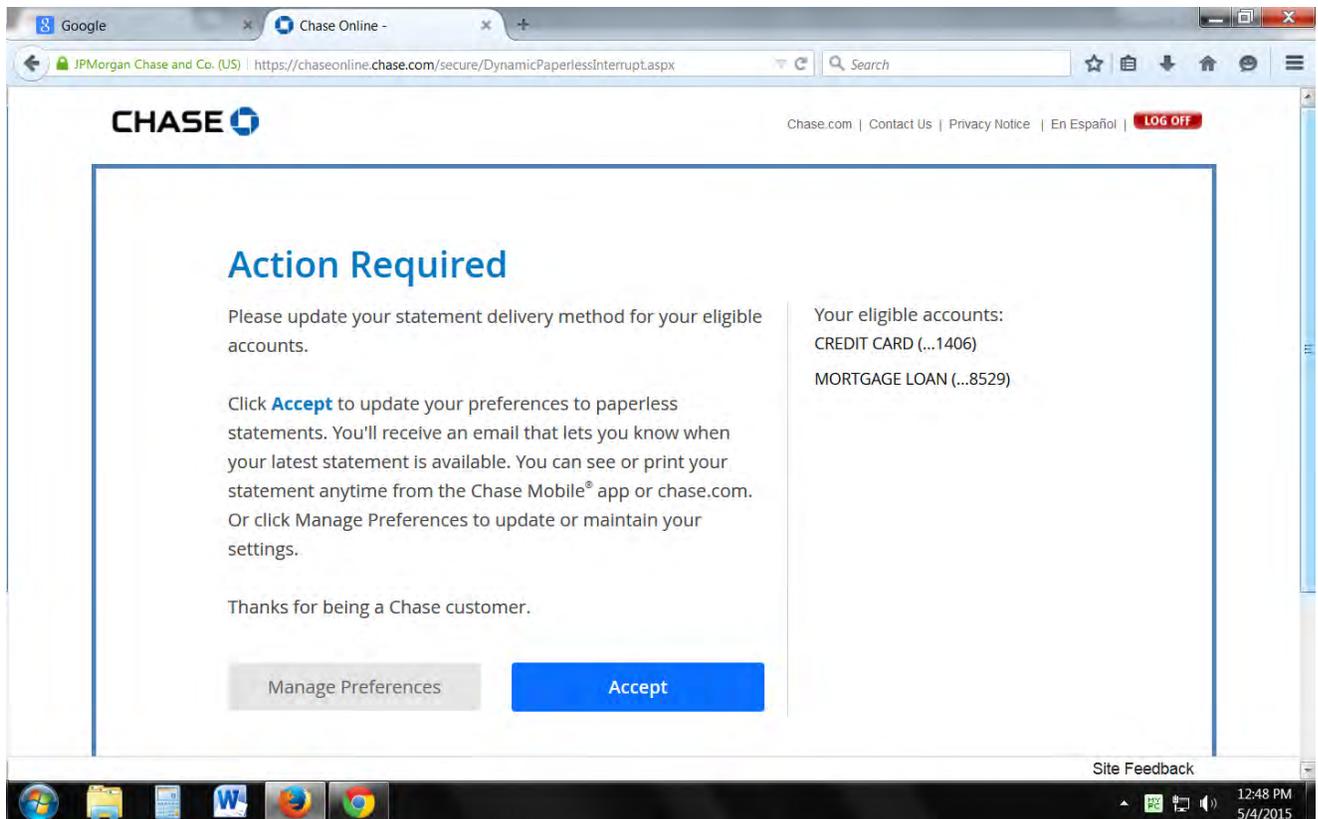
unable to or unlikely to use them. Even a small fee, such as \$1 per month, will deter consumers.

Financial Institutions Should Not Use Deceptive Measures to Force Consumers to “Choose” Electronic Statements

Knowing that the E-Sign Act requires giving consumers a choice, some financial institutions are becoming more and more aggressive about obtaining “opt-in” from consumers. For the reasons described above, just because a consumer accesses an account online does not mean that the consumer wants to receive statements electronically. Many consumers make a conscious choice to reject electronic statements.

Yet some financial institutions are going beyond frequent requests to “go green” and are creating web pages that make it appear that the consumer has to consent to electronic statements. Some have very deceptive messaging that leads consumers to click on a button not realizing that it means the consumer will be dis-enrolled from paper statements. The “no thanks” button can be hidden in a place where it is barely visible.

For example, in mid-2015, when consumers logged into their credit card accounts online, JPMorgan Chase displayed the following pop-up in order to solicit consent for electronic statements. This solicitation was highly misleading because it stated “Action Required” yet there was absolutely no action required of cardholders if they wanted to continue to receive their paper statements. Furthermore, the pop-up only had only buttons for “Accept” and “Manage my Preferences.” There was no button for “Decline.”



Wells Fargo Bank also requires any consumer who wants to access their credit card account online to sign an E-Sign consent form that gives the bank the unilateral right to send all information, including statements, electronically. The bank claims that signing the form will not eliminate paper statements – for now at least – but the form gives the bank the right to do so.

The Carrot is Better than the Stick

Rather than coercing consumers who want paper statements to relinquish them, banks and other companies could offer options to encourage consumers to make that choice voluntarily. Possibilities include offering:

- Selective opt-out and not all or nothing. Some consumers may be happy to give up written privacy notices and even statements in some circumstances, but will want a more conspicuous paper notice or a paper statement if the price or other material term of an account changes or if a bill is late.
- Discounts or incentives for opting out, rather than fees for receiving paper.

- More information online – at least four years back – and at least ten years of records upon request.
- Annual paper statements for those who want a permanent record but are comfortable with electronic statements on a monthly basis.

These options will not be an adequate substitute for everyone, but they may provide a better option for those willing to consider electronic statements.

CONCLUSION: CONSUMERS SHOULD HAVE THE UNFETTERED CHOICE OF PAPER OR ELECTRONIC STATEMENTS

As mobile devices and electronic interfaces become more sophisticated and widely used, Baby Boomers age, and Millennials take up a greater share of the population, more consumers may voluntarily choose electronic statements. But paper statements will remain important for many consumers. Paper versus electronic should be the result of free choice and not coercion.

ENDNOTES

¹ John B. Horrigan and Maeve Duggan, Pew Research Center, *Home Broadband 2015*, Dec. 21, 2015, at <http://www.pewinternet.org/2015/12/21/home-broadband-2015/>.

² U.S. Post Office, Office of Inspector General, *Will the Check Be in the Mail? An Examination of Paper and Electronic Transactional Mail*, Report Number RARC-WP-15-006 (Feb. 9, 2015), https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-15-006_0.pdf.

³ Emmett Higdon, eBusiness & Channel Strategy Professionals, “Paperless Plight: Growing Resistance Outpaces Adoption Among US Bank Account Holders” at 2 (Nov. 1, 2010).

⁴ Consumer Financial Protection Bureau, *Consumer Credit Card Market Report 133* (Dec. 3, 2015), available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf

⁵ Consumer Financial Protection Bureau, *Consumer Credit Card Market Report 134* (Dec. 3, 2015), available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf

⁶ See Chi Chi Wu, National Consumer Law Center, *Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards*, Dec. 2015, available at <https://www.nclc.org/issues/deceptive-bargain.html> (discussing the abuses and deceptive nature of deferred interest promotions).

⁷ 15 U.S.C. § 7101(c)(1).

⁸ <https://creditapply.paypal.com/apply?guid=ZM1LV5J9&assetId=PPCMICRO#accountAgreement> (last visited February 1, 2016) (Terms & Conditions stating “By checking the ‘I agree to have the Terms and Conditions presented electronically’, which you hereby adopt as your electronic signature, you consent and agree that: ...We can provide disclosures required by law and other information about your legal rights and duties to you electronically.”)

⁹ Rob Rubin, Novantas, *Will Consumers Ditch Paper Statements to Dodge Banking Fees?*, The Financial Brand (Sept. 9, 2014), at <http://thefinancialbrand.com/42031/banking-checking-account-estatements/>.

Boston Headquarters:
7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028
www.nclc.org

NCLC[®]

NATIONAL
CONSUMER
LAW
CENTER[®]

Advancing Fairness
in the Marketplace for All

Washington Office:
1001 Connecticut Ave, NW
Suite 510
Washington, DC 20036
Phone: 202/452-6252
Fax: 202/296-4062

ATTACHMENT C

First Set of Comments

to the

Bureau of Consumer Financial Protection

Docket No. CFPB-2015-0007

80 Fed. Reg. 14,365

Request for Information Regarding the Credit Card Market

Submitted by the

National Consumer Law Center

on behalf of its low-income clients

May 18, 2015

The National Consumer Law Center¹ is pleased to submit the following comments on behalf of our low-income clients to the CFPB's Request for Information Regarding the Credit Card Market. The CFPB's request for information is pursuant to the Credit Card Accountability, Responsibility and Disclosure (CARD) Act of 2009. The Credit CARD Act has been an enormous benefit to consumers and to responsible credit card issuers. However, there are still abuses and problems in the credit card marketplace that the CFPB should address. In particular, we believe the CFPB should:

- Ban deferred interest products.
- Re-promulgate the provision applying the 25% fee-harvester cap to pre-account opening fees using its new, greater Truth in Lending Act (TILA) authority to establish "additional requirements" or its authority to prevent unfair, deceptive or abusive acts or practices.
- Establish stricter ability-to-pay standards by basing them on a five-year amortization and requiring a residual income analysis that includes household expenses.
- Improve the cost of credit disclosures in credit cards by
 - mandating an Annual Percentage Rate (APR) disclosure that includes the impact of fees on the cost of credit.
 - requiring disclosure of specific APRs, not ranges of APRs or multiple APRs, at least in pre-screened offers and whenever else possible.
- Protect the rights and ability of consumers to receive paper statements.
- Regulate when issuers can revoke credit card rewards as a penalty.
- Establish guidelines that mandate simple, consistent grace periods and rules for when interest accrues that do not lead to unexpected interest charges.

¹ The National Consumer Law Center (www.nclc.org) is a nonprofit organization specializing in consumer issues affecting of low-income and elderly people. NCLC publishes twenty practice treatises, most of which are updated annually and which describe the law currently applicable to all types of consumer transactions. These comments are filed on behalf of our low-income clients and written by NCLC attorneys Chi Chi Wu, Lauren Saunders, and Carolyn Carter. Jean Ann Fox and Tom Feltner of Consumer Federation of America assisted with the examples in Section 4.

1. Deferred Interest Products (Request (j))

The CFPB asks about the impact of deferred interest products. As the Bureau knows, deferred interest credit cards promise no interest in the promotional period but contain a hidden trap: If the consumer does not pay off the entire balance by the end of the period, she will be hit with a huge retroactive interest charge for the entire balance, including amounts that have been paid. We once again urge the Bureau to ban these deferred interest products, because they are inherently unfair, deceptive and abusive. The consumers who fall into the trap of getting hit with deferred interest can end up paying hundreds more than they had simply used a mainstream credit card. For an example of such a consumer, see Exhibit A. This consumer ending up being charged \$1,760 on a \$6,000 purchase based on a 29.99% APR. If he or she had used a mainstream credit card with a 13% APR, s/he would have been charged less than \$800.

We recognize that the CFPB's October 2013 study found that majority of consumers obtain interest-free financing through these programs. But like so many of the abuses by the Credit CARD Act (e.g., balance transfers & payment allocation; back-end pricing), it may be a minority who are harmed, while a majority benefit. But this minority consists of the most vulnerable, economically challenged members of our society. As the CFPB's October 2013 study noted, 43% of consumers with subprime credit scores ended up being charged retroactive, lump sum deferred interest, while only 12% of superprime consumers were similarly charged.² Thus, the majority who benefit are the wealthier, better off segments of society. In short, the poor subsidize the well-off. The CFPB should not hesitate to act just because more consumers benefit than are harmed, because the harm can put a low-income family into financial distress.

A discussion of the evolution of the rules for deferred interest products is instructive. It is especially important to note that in January 29, 2009, ***federal regulators actually banned deferred interest products because of their abuses***. The Federal Reserve Board (FRB), Office of Thrift Supervision, and NCUA decided to ban deferred interest plans as part of their credit card rulemaking pursuant their powers under the Federal Trade Commission Act. Specifically, the Commentary to Regulation AA, 12 C.F.R. 24(b)(1)-1.iii states that the prohibition against contingent retroactive rate increases would ban deferred interest plans. In doing so, the FRB, OTS and NCUA stated:

[Assessment of deferred interest] is precisely the type of surprise increase in the cost of completed transactions that §__.24 is intended to prevent. As noted by the commenters, the assessment of accrued interest causes substantial injury to consumers. In addition, for the same reasons that consumers cannot, as a general matter, reasonably avoid rate increases as a result of a violation of the account terms, consumers cannot, as a general matter, reasonably avoid assessment of deferred interest as a result of a violation of the account terms or the failure to pay the balance in full prior to expiration of the deferred interest period. For example, just as illness or unemployment may reasonably prevent some consumers from paying on time, these conditions may reasonably prevent some consumers from paying the deferred interest balance in full prior to expiration. ***In addition, as noted by the commenters, disclosure may not provide an effective means for consumers to avoid the harm caused by these plans.***

Finally, although deferred interest plans provide some consumers with substantial benefits in the form of an interest-free advance if the balance is paid in full prior to expiration, the Agencies conclude that these benefits do not outweigh the substantial injury to consumers. As discussed above, deferred interest plans are typically marketed as “interest free” products but many consumers fail to receive that benefit and are instead charged interest retroactively. Accordingly,

² Consumer Financial Protection Bureau, CARD Act Report: A review of the impact of the CARD Act on the consumer credit card market, Oct. 1, 2013, at 80, available at http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

as with the prohibitions on other repricing practices discussed above, prohibiting the assessment of deferred interest will improve transparency and enable consumers to make more informed decisions regarding the cost of using credit. Accordingly, the Agencies conclude that an exception to the general prohibition on rate increases is not warranted for the assessment of deferred interest.

74 Fed. Reg., 5498, 5528 (January 9, 2009). [emphasis added]

However, a few months later, the regulators reversed themselves, and permitted deferred interest plans. They did so after pressure from retailers. They substituted disclosures instead, even though they previously recognized that disclosures may not effectively prevent the abuses of these plans.³

Shortly after that, Congress passed the Credit CARD Act, which among many other provisions, adds Section 164(b)(2) to TILA, 15 U.S.C. § 1666c(b)(2). Section 164(b)(2) provides with respect to payment allocation that:

“CLARIFICATION RELATING TO CERTAIN DEFERRED INTEREST ARRANGEMENTS -
A creditor shall allocate the entire amount paid by the consumer in excess of the minimum payment amount to a balance on which interest is deferred during the last 2 billing cycles immediately preceding the expiration of the period during which interest is deferred.”

The FRB took the position that this provision specifically permitted deferred interest.⁴ However, this provision is merely a clarification that if deferred interest should exist, there is an exception to the payment allocation rules in such cases. It does not explicitly mandate authorizing deferred interest.

Moreover, even if Section 164 implicitly authorizes deferred interest plans, it does not expressly state what *kind* of deferred interest plan is permissible, and certainly does not permit unfair, deceptive, and abusive features in these plans. In particular, Section 164 does not specify deferred interest plans that permit retroactive imposition of interest all the way back to the transaction date for the entire balance are permissible. Section 164’s reference could be to plans that are structured to defer interest during the deferred interest period, and then retroactively impose interest only on any remaining unpaid balance. For example, a deferred interest plan could provide that if a consumer makes a \$1,000 purchase and pays off \$800, then the creditor can impose accrued deferred interest only for the remaining \$200.

Furthermore, the Credit CARD Act also added Section 127(j) to TILA, 15 U.S.C. § 1637(j), which states:

a creditor may not impose any finance charge on a credit card account under an open end consumer credit plan as a result of the loss of any time period provided by the creditor within which the obligor may repay any portion of the credit extended without incurring a finance charge, with respect to— (A) any balances for days in billing cycles that precede the most recent billing cycle

This is the prohibition against double-cycle billing. But this language also literally and specifically prohibits deferred interest plans, because they impose a finance charge based on balances from prior billing cycles if the consumer does not repay the entire balance within the specified time period (which

³ 74 Fed. Reg. 20804 (May 5, 2009).

⁴ 74 Fed. Reg. 36,077 (July 22, 2009)(noting in the Supplementary Information that the FRB had determined that the Credit CARD Act permits deferred interest plans).

would qualify as “the loss of any time period within which the consumer may repay a balance without incurring a finance charge”).

Thus, the CFPB clearly has authority to ban deferred interest under the Credit CARD Act/TILA. Alternatively, the CFPB could ban deferred interest plans under its UDAAP authority, much as the federal banking regulators originally did in their Regulation AA rulemaking in 2009.

2. Fee-Harvester Cards (Request (i))

The CFPB has asked for information about fee-harvester practices, particularly with respect to account opening fees. As the Bureau knows, the biggest loophole to the CARD Act’s protections against excessive fees is the issuer’s ability to charge pre-account opening fees without regard to the Act’s limit on fees to 25% of the credit line. In 2013, the CFPB withdrew the rule that required pre-account opening fees to be included in the calculation of fees for purposes of the 25% cap. Thus, credit card lenders such as First Premier are permitted to charge a “processing fee” of \$95 in addition to a \$75 annual fee on a credit line of \$300. We know of at least one other subprime credit card, the Total Visa from Mid America Bank & Trust Co., that charges an \$89 pre-account opening “processing” fee on top of a \$75 annual fee for a \$300 credit line.⁵

We recognize that the CFPB withdrew the rule regarding pre-account opening fees after the adverse decision in *First Premier Bank v. United States Consumer Fin. Prot. Bureau*, 819 F.Supp.2d 906 (D.S.D. 2011). However, we urge the Bureau to re-issue the rule using the CFPB’s own authority under TILA and, if necessary, its UDAAP authority. A re-promulgated rule should be more resistant to legal challenge given that the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) actually expanded the CFPB’s authority to issue TILA regulations.

Section 1100A(4) of Dodd-Frank added the words “additional requirements” to the authority in Section 105(a) of TILA, *i.e.*, the revised text reads:

The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 that apply to a mortgage referred to in section 1602(aa), such regulations may contain such *additional requirements*, classifications, differentiations, or other provisions,...

15 U.S.C. § 1604(a)(emphasis added).

Thus, Dodd-Frank added even greater authority for the CFPB to issue regulations, in that it can now do so by creating new requirements not explicitly provided for in TILA. This new authority should entitle the CFPB to even greater deference than the FRB in issuing TILA regulations that establish new mandates on creditors. The CFPB should re-promulgate the provision applying the 25% cap to pre-account opening fees using this new, greater TILA authority to establish “additional requirements.”

Another avenue is to re-promulgate the current rule using the CFPB’s authority under Section 1031 of Dodd-Frank, 12 U.S.C. § 5531, which permits the CFPB to write rules to prevent unfair, deceptive, or abusive acts or practices (UDAAP authority) in connection with a consumer financial product or service. The CFPB could decree it to be an unfair or abusive practice to attempt to evade the fee harvester provision’s 25% cap, and to distort the APR and the amount of net credit provided, by charging fees prior to account opening.

⁵ See https://totalcardvisa.com/pdf/M12_rates_fees_costs_and_limitations.pdf.

Indeed, there is ample precedent for the use of such authority to rein in abusive fees. In January 2009, the FRB and other bank regulators banned fees that exceeded 50% of the credit limit using their authority under the Federal Trade Commission Act, 15 U.S.C. § 57a(f), to prohibit unfair or deceptive acts or practices.

The CFPB could even justify prohibiting pre-account opening fees altogether. For instance, the Federal Trade Commission Telemarketing Sales Rule prohibits telemarketers from receiving an advance fee before credit is obtained for the consumer. 16 C.F.R. § 310.4(a)(4). The FTC Telemarketing Sales Rule does not apply to banks because the FTC does not have authority over banks, but the CFPB does not have the same limitation in its authority, and also does not need to tie the rule to telemarketing.

Furthermore, in its role as a supervisor, the CFPB should examine fee-harvester card issuers under its jurisdiction for violations of the ability-to-pay requirements of the CARD Act, as well as for potential deceptive, abusive, or unfair practices. The Bureau should urge the relevant regulators for those fee-harvester issuers not under CFPB supervision to examine their supervisees for the same. Given that 40% to 50% of First Premier Bank's cardholders default,⁶ there are serious questions as to that bank's compliance with the ability-to-pay requirements.

The CFPB and other regulators should also scrutinize fee harvester card issuers for other unfair, deceptive or abusive practices. For example, while the Credit CARD Act only limits fees in the first year, that does not mean that it is not a deceptive bait-and-switch practice to radically increase fees the second year. We suspect that many consumers do not realize that their fees will be significantly increasing the next year, and overlook the minimal disclosures they receive.

3. Ability to Pay (Request I)

The CFPB asks for information on how issuers are handling determinations of ability to pay (ATP), including credit line increases. The Bureau also asks how ATP standards have affected consumer access to credit and consumer outcomes.

With respect to credit line increases, issuers appear to be aggressively seeking ATP information. For example, issuers have been asking cardholders for updated income information when they log-in to their online portals (see Exhibit B). In fact, these requests do not explicitly inform consumer as to why this information is requested, *i.e.*, to grant a credit line increase, and could be arguably deceptive by failing to clearly disclose the purpose of the request.

There appears to be no need to weaken the ATP requirements for credit line increases, as issuers have found a way to fulfill them. Given the importance of the ATP requirements, and the dangers posed by granting credit line increases that consumers cannot repay, such a weakening would present significant harms to consumers.

As for consumer outcomes, unfortunately the ATP requirements do not appear to have alleviated one of the biggest remaining problems with credit cards - unmanageable debt. One of the most seductive aspects

⁶ The CEO of First Premier disclosed under oath that 40% of the fees, charges, and interest owed to First Premier are never paid. See Affidavit of Miles K. Beacom, CEO of Premier Bankcard, First Premier Bank v. United States Consumer Fin. Prot. Bureau, Case No. 4:11-cv-04103 (D.S.D. Aug 4, 2011). An industry insider calculated that the full default rate is over 50%. See Andrew Kahr, "CFPB Replaces Fed's Illegal Regulation with Its Own Illegal Regulation," American Banker (Apr. 16, 2012), available at [/www.americanbanker.com/bankthink/CFPB-Card-Act-First-Premier-Fed-1048401-1.html](http://www.americanbanker.com/bankthink/CFPB-Card-Act-First-Premier-Fed-1048401-1.html).

of credit cards is their small payments and long repayment period. It can take a consumer 20 years or longer to pay off credit card debt if the minimum payment is made each month. Regular payments do little to chip away at the debt. Most of the payments go to cover interest, so that in the end the consumer will have paid vastly more in interest than the original debt. Even after the Credit CARD Act, it is still too easy to take on high debt and too hard to get out.

In order to prevent this, the ability to pay requirements should be tightened. Currently, Regulation Z does not mandate any particular ATP analysis but simply requires the issuer to select amongst several methods: (1) debt to income ratio; (2) debt to assets ratio; or (3) income after debt repayment. Furthermore, Regulation Z does not specify a minimum ratio for any of these methods. Finally, and perhaps most importantly, the issuer is only required to analyze the consumer's ability to repay the minimum payment, which leads to the trap of endless debt.

To avoid this trap, the CFPB should base ATP on a five year amortization of the credit card debt, *i.e.*, ATP should be assessed based on payments that result in the debt being repaid in no more than five years. That is the period that banking regulators have long used for credit card workout programs.

Furthermore, the CFPB should require a residual income analysis to determine ability to pay, *i.e.*, an analysis that involves examination of income remaining after both debt service and payment of household expenses. Currently, Regulation Z does not require consideration of obligations not reflected in a consumer report,⁷ which would include most household expenses. Without consideration of household expenses, a consumer could have an acceptable debt-to-income ratio but still not have enough income at the end of the month to pay the credit card bill. This is especially true in high cost areas of the country, where expenses such as rent, childcare, transportation, and groceries (none of which are reflected on a consumer report) can consume almost all the consumer's income.

Finally, the CFPB should monitor default rates for the issuers under its supervision to determine whether they are satisfying the ATP requirements of the CARD Act. If a credit card program has unusually high default rates in comparison to a cohort of similar programs, the CFPB should find that the issuer has violated the ATP requirements.

4. The Effectiveness of Disclosure of the Cost of Credit for Credit Card Plans (Request (b))

The CFPB asks how effective are the current required disclosures of rates, fees, and other costs terms in conveying to consumers the costs of a credit card plan. Many of the disclosure rules for credit card plans were greatly improved by the FRB's wholesale revamping of TILA disclosures for credit cards, which became effective July 2010. However, a few of the FRB's changes weakened the robustness of the disclosures, especially the ability of the Annual Percentage Rate (APR) to adequately convey the true cost of credit for credit card accounts. In particular, the FRB:

- Eliminated the APR disclosure that includes the impact of fees on the cost of credit.
- Gave issuers the ability to disclose multiple APRs or a range of APRs, for "pre-approved" credit card solicitations.

These changes seriously undermined the effectiveness of APR disclosures for credit card accounts, and the CFPB should reverse them.

⁷ See Official Interpretations to Regulation Z, 12 C.F.R. § 1026.51(a)(1)(i)-7 (allowing issuers to consider consumer's obligations based on a consumer report).

Restore a Fee Inclusive APR Price Tag for Credit Cards

The CFPB should mandate an APR disclosure that includes the impact of fees on the cost of credit. Currently, the only APR disclosure required for credit cards and other open-end credit under Regulation Z is an APR consisting solely of periodic interest. 12 C.F.R. § 1026.14(b). This APR does not include the impact of any fees, whether they be finance charges or not, on the cost of credit for a credit card.

The exclusion of fees from the APR for open-end credit is a result of changes to Regulation Z's credit card disclosures made by the FRB effective July 2010. While most of these changes were positive, the FRB made one change that consumer advocates vehemently objected to – eliminating the fee-inclusive or “effective” APR required by TILA at 15 U.S.C. § 1606.

Eliminating the effective APR abandoned a core principle of the Truth in Lending Act. It was contrary to one of the fundamental reasons that Congress enacted TILA, *i.e.*, to create a standard disclosure of the cost of credit that would promote informed shopping. The effective APR was the only disclosure in open-end credit that reflected the price imposed by fees and non-periodic interest finance charges. Its existence and calculation are specifically mandated by TILA for open-end credit. By eliminating it, the FRB contravened the explicit requirements of TILA.

The FRB eliminated the effective APR because its focus group testing found that consumers were confused by it and did not understand it. But if consumers were confused by the effective APR, the proper response would have been to improve the disclosure, not eliminate it.⁸ The solution should have been to improve the price tag, not tear it off. Indeed, in the October 2013 study, the CFPB developed a measure somewhat similar to the effective APR for its own research purposes, a “Total Cost of Credit.”⁹ This measure attempts to capture an “all-in cost of credit.” A similar measure could be developed for credit card disclosures.

For example, the CFPB could require an effective APR for periodic statements that consists of a rolling 12-month average of the calculation in 15 U.S.C. § 1606(a)(2). A rolling average would address the phenomenon of a high effective APR in the month that a fee is imposed, which is what sometimes led to consumer confusion. For a credit card that was been opened for less than 12 months, this rolling effective APR could be pro-rated.

The CFPB should also explore a fee-inclusive APR for applications and solicitations, such as a “typical APR” that consists of an average of historical effective APRs for a certain time period in a certain credit card portfolio. Or it could develop an “Energy Star” type rating that is similarly based on the average of historical effective APRs. The CFPB could limit the requirement for a “typical APR” to certain categories of credit cards, such as those requiring the special fee-harvester disclosure in their applications and solicitations per 12 C.F.R. § 1026.60(b)(14).

Restoring the effective APR would make TILA disclosures more meaningful and truthful for high-cost fee-harvester credit cards. For example, the effective APR could include the \$95 pre-account opening fee

⁸ Indeed, it is no wonder that consumers were confused by the effective APR – in its comments to the Board's 2005 Advanced Notice of Proposed Rulemaking, the Center for Responsible Lending noted the confusion generated by inconsistent terminology around both the rate-only APR (the “corresponding” or “nominal APR or “corresponding nominal APR”) and the fee-inclusive APR, which could also be labeled with different adjectives, such as “effective APR” or “historic APR” or “actual APR.”

⁹ Consumer Financial Protection Bureau, CARD Act Report: A review of the impact of the CARD Act on the consumer credit card market, Oct. 1, 2013, at 19, 32-33, *available at* http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

charged by First Premier, which would be 416% as calculated under 15 U.S.C. § 1606(a)(2) based full use of the \$300 credit line and the 36% periodic APR.¹⁰

Restoring the effective APR would also remove incentives for payday lenders and other high cost lenders to convert their predatory loan products into open-end credit. It would require a more meaningful and truthful APR disclosure for products such as:

- Payday lender Advance America attempted to offer an open-end line of credit in Pennsylvania that carried a “participation fee” of \$149.95 per month for a credit limit of \$500 and a 5.98% periodic APR. This translated into an effective APR of over 350%.¹¹
- First Virginia Financial Services offers a line of credit in Virginia which discloses a 264% APR.¹² However, this APR does not include the extra 20% processing fee imposed on each advance after the first one. If combined, the monthly cost of a \$100 cash advance would be \$42 or an effective APR of over 500% for a one-month billing cycle.
- Allied Cash Advance Line of Credit Agreement and Plan in Virginia displays a 360% APR. However, that does not include the \$50 monthly participation fee.¹³ For a credit line of \$360, assuming full utilization, that translates into an effective APR of 527%.
- Enova CashNetUSA.com offers an Online Line of Credit in several states. In Utah, CashNetUSA discloses an APR of 299%.¹⁴ However, this does not include the \$25 per \$100 “Transaction Fee” imposed each time a borrower obtains a cash advance. Combining the Transaction Fee with the periodic interest translated into an effective APR of 599% for a \$100 advance.

The CFPB Should Require Disclosure of Specific APRs, Not Ranges of APRs or Multiple APRs, in At Least Pre-Screened Offers and Whenever Else Possible

One of the fundamental problems with credit card disclosures is that they simply do not provide adequate information about the APR for consumers who are comparison shopping. The CFPB itself has noted the difficulties that consumers experience in comparing prices across credit card products or evaluating the competitiveness of a particular offer, noting that “[m]ost issuers’ websites, for example, display APRs in broad ranges (e.g., from 12.99 percent to 20.99 percent) based on credit quality segments. Thus, a consumer is left to guess what the ultimate price might be.”¹⁵

However, it is not just websites that display broad ranges of APRs – many credit card application and solicitations also display broad ranges of APRs. While disclosure of a broad range of APRs might be unavoidable for advertisements of a general nature, it can certainly be addressed when applications are sent by direct mail to a consumer, especially if prescreening is involved. Similarly, if a consumer receives an online or email advertisement as a result of an analysis of the consumer’s individualized data,

¹⁰ It would be even higher if the effective APR included the \$75 annual fee, which is currently not considered a finance charge under Regulation Z. If the \$75 were to be included, the effective APR for the month in which the account was opened would be 955%.

¹¹ Pa. Dept. of Banking v. NCAS of Del., LLC, 948 A.2d 752 (Pa. 2008).

¹² www.firstvirginaloans.com/loan-options.

¹³ Based on a 2011 contract, on file with the authors.

¹⁴ <https://www.cashnetusa.com/rates-and-terms.html>.

¹⁵ Consumer Financial Protection Bureau, Semi-Annual Report of the Consumer Financial Protection Bureau July 21 - December 31, 2011, at 44 (Jan. 20, 2012), available at http://files.consumerfinance.gov/f/2012/01/Congressional_Report_Jan2012.pdf.

it may be possible to offer a more precise APR. We urge the CFPB to address this problem by requiring the disclosure of the actual APR being offered to the consumer whenever possible.

Ironically, this problem with disclosure of broad ranges of APRs was caused by the FRB's own revisions to Regulation Z. In its revisions effective July 2010, the FRB amended the APR disclosures in credit card applications and solicitations to permit issuers to disclose a range of APRs or multiple APRs, so that they can make a post-application review to assign an APR. Issuers are permitted to delay disclosure of the actual APR that they are offering until the consumer receives the account opening disclosures (often along with the credit card itself).

However, allowing issuers to disclose a range of APRs has deprived the consumer of critical information in shopping for credit. For example, one of the CFPB's own model disclosures for credit card applications (Model Form G-10(B)) discloses an APR of 8.99% to 19.99%. This simply does not tell the consumer what he or she is applying for, as there is an 11% spread in these rates, which is a huge difference. On balance of just \$1,000, that is an annual difference of over \$100 in interest.

Permitting creditors to disclose a range of APRs is especially problematic for balance transfers. The FRB permitted creditors to disclose a range of APRs, then assign the real APR *after* the consumer has initiated the balance transfer, so long as the creditor provides the APR in time for the consumer to cancel the transfer (usually 10 days).¹⁶ With balance transfers, consumers often move balances of hundreds or thousands of dollars, thus committing themselves to significant liability under the terms of the account. Consumers should not be forced to make the decision to transfer hundreds or thousands of dollars in debt blindly. A 10-day period to cancel the balance transfer is not adequate, since some consumers may be absent during that period, overlook the account opening disclosures, or simply fail to cancel the transfer due to default effects.

Thus, we encourage the CFPB to require disclosure of a single APR, not a range of APRs or multiple APRs, when it is feasible to do so. We recognize in some cases, such as Internet or "take one" solicitations made available to the general public, offering a specific APR would not be possible. However, issuers should be required to offer a specific APR in direct mail solicitations where the issuer has "pre-screened" the consumer, *i.e.*, the issuer has obtained the consumer's credit score pursuant to its ability to do so under the Fair Credit Reporting Act to make a "firm offer of credit."

For applications over the Internet or mobile applications, issuers should be required to provide a pop-up after the consumer submits his or her personal information, but before the application is approved, that provides APR information, *i.e.*, a pop-up that says: "Your APR will be 19.9%. Do you wish to accept this offer?" Moreover, any Internet or mobile offers that are made based on the individualized creditworthiness data of the particular consumer should also disclose a specific APR.

5. Impact of the Credit CARD Act on Cost and Availability of Credit (Request (d))

The CFPB asks whether implementation of the Credit CARD Act has affected the cost and availability of credit, particular with respect to non-prime borrowers. We believe it has not. The American Banker reported that 1.7 million new subprime credit cards were issued in the first quarter of 2014, representing a 62% growth.¹⁷ Clearly, this recent growth in subprime credit cards indicates that the Great Recession was more responsible for the decline in subprime cards in the last few years than was the Credit CARD Act. And the CFPB's own October 2013 study found that the Credit CARD Act did not result in any reduction

¹⁶ Official Interpretations to Regulation Z, 12 C.F.R. § 1026.5(b)(1)(i)-5.

¹⁷ Kevin Wack, Subprime Credit Cards Are Making a Comeback: ABA, American Banker, Sept. 30, 2014.

to access to credit,¹⁸ as did a study from economists at several academic institutions and the Office of Comptroller of Currency.¹⁹

Furthermore, as discussed in our comments to the CFPB's Request for Information leading up to the October 2013 study, it is important not to assume that tighter access to credit is necessarily a bad thing. For many consumers, bad credit is worse than no credit. To the extent that ability-to-pay requirements and prohibitions on deceptive and abusive practices pushed bad credit out of the market, the CARD Act fulfilled its intent. After all, Congress was driven to reform the credit card market in part because of the realization that millions of consumers had been lured into incurring excessive credit card debts far above their means with no way to escape short of bankruptcy.

Restricting the ability to incur unaffordable debt is the far better choice than blindly preserving "access to credit," including dangerous or unaffordable credit. Credit is not a sustainable method to bridge the gap when a consumer does not have enough income to meet expenses. Consumers with restricted access to credit use a variety of methods to deal with a mismatch between income and expenses, including saving, budgeting, doing without, selling or pawning items, and borrowing from friends or family.²⁰ Those methods are usually safer in the long run, and are more beneficial for our society than using credit mask the hole in family budgets created by stagnant wages and rising housing and healthcare costs.

The same is true of young consumers. Some of the most heart-wrenching stories came from students who gobbled up gifts and easy credit only to find themselves way over their heads. Congress appropriately decided that credit card issuers should not be pushing credit card on vulnerable young people unless the student, or someone else responsible for the bill, has the means to pay. It may well be that access to credit for young consumers has been restricted. That is a good thing and a purpose of the Act.

6. Online Disclosures (Request (e))

The CFPB has noted that some consumers who make online payments do not access their monthly statements and instead use online information which does not contain certain important disclosures. The Bureau asks how to ensure that consumers using different channels receive effective disclosures.

Online account portals are normally set up in a way that discourages consumers from accessing their actual statements. While it is possible to open the pdf of the statement, the more prominent link is to recent transaction history, which also typically loads faster than a pdf document and is more functional, with sorting functions by date, merchant, and amount. Many consumers would have no reason to think about accessing the pdf statement itself, when they can see all of their transactions for the billing cycle in the transaction history.

¹⁸ Consumer Financial Protection Bureau, CARD Act Report: A review of the impact of the CARD Act on the consumer credit card market, Oct. 1, 2013, at 61, *available at* http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf ("Except as noted below [i.e., younger consumers], nothing in the evidence reviewed suggests that the CARD Act was responsible for the reduction in credit access – which largely preceded the Act's enactment – or that the CARD Act has retarded the pace of the recovery.")

¹⁹ Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johanenes Stroubel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 Quarterly Journal of Economics 111, 115 (2015) ("we estimate that the CARD Act had a precise zero effect on credit limits and ADB [average daily balances]. We also estimate a zero effect on the number of new accounts.")

²⁰ See The Pew Charitable Trusts, Who Borrows, Where They Borrow, and Why at 16 (July 19, 2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Payday_Lending_Report.pdf.

However, when consumers access their account history in that fashion, they miss the important disclosures required to be on periodic statements. The answer is to require that online information contain the same disclosures as monthly statements. The online portals should be required to be formatted similarly to periodic statements required under TILA. However, there are certain changes required because of the format of the electronic account history. In particular, it is important that the total of fees and interest for the period be prominently displayed at the *top*, before the list of transactions. This is because some consumers will simply access the most recent transactions and not the transactions for a complete statement period. However, items like the opening and closing balance would be less relevant. In addition, the table of the year-to-date totals required on the statement should also be prominently displayed.

Another option is to require a click-through of certain important elements of an electronic statement before a consumer can pay online. Again, measures to ensure that the consumer must see the fees and interest incurred are especially important, as well as the minimum payment warning.

Both the amount and the APR for cash advance and other high rate balances should be easily seen whenever a consumer looks at account histories. Similarly, deferred interest or promotional rate balances that must be paid by a certain date in order to avoid interest should also be prominently displayed along with the end of the deferred or promotional period.

In addition, both online and paper statements should do a better job of displaying payment options for making progress on a deferred interest balances. (However, as discussed above, deferred interest should be banned. It is extremely complex to explain to a consumer the options for making progress on a deferred interest balance and the consequences of doing so or not doing so. Our suggestions below are not fully satisfactory. These are additional reasons to simply ban the practice.)

The CARD Act mandates the default rules: payments in excess of the minimum should be allocated to the highest rate balance, except in the last two months before the end of a deferred interest period. For a consumer who is attempting to minimize interest charges and does not expect to have difficulty paying off a deferred balance before the end of the period, those are the appropriate defaults.

However, consumers at risk of being hit with retroactive deferred interest might actually pay less interest if they paid off their deferred interest balances earlier, even though they will pay more interest in the short run on their other balance. Even if the consumer understands when the deferred period ends, she might not have the available funds in the last two months to pay off that balance.

When logging online onto a payment page, the consumer should see each of the balances, the rate that applies to each, and the end date of any promotional/deferred period. She should have the option of paying off each balance separately and also of making an extra payment above the minimum. When paying more than the minimum, but less than last statement total, there should be a pop-up page informing the consumer where the above-the-minimum payment will be allocated and asking the consumer if she wishes to allocate it to a different balance, with a short and simple explanation of the consequences of different allocations.

While paper statements are not as interactive as online account histories, they can also be improved to help consumers pay off different balances. The statement should contain a prominent warning about the consequences of not paying off a deferred interest balance and a phone number that the consumer can call if she wishes to allocate a partial payment above the minimum to a deferred interest balance.

Another important step that the CFPB can take is to ensure that consumers always have the right to free paper statements, as is their right under TILA, so that they can access their monthly statements easily without having to go online. The CFPB should clarify that financial institutions cannot charge a fee for written statements when such statements are required by federal law, such as TILA's requirement for periodic statements for open-end credit accounts.

Financial institutions should not, and indeed we would argue cannot legally cannot, charge a fee for providing something they are mandated by law to provide. Yet some credit card lenders have charged for paper statements, in order to coerce consumers into opting in to electronic statements.²¹ Also, as the CFPB knows of course, Continental Finance automatically charged \$4.95 per month for paper statements, a practice that the Bureau cited in its February 2015 enforcement action against that lender.²²

The CFPB also needs to take steps to prevent lenders from engaging in unfair or deceptive practices when soliciting consumers to opt in to electronic statements. Lenders are making overly aggressive efforts to get consumers to opt into electronic statements, arguably crossing the line into misleading or unfair tactics. For example, Chase has been using a pop-up when consumers log into their accounts online that solicits them to opt into electronic statements. This solicitation is misleading because it states "Action Required." As the Bureau knows, there is absolutely no action required of cardholders if they want to continue to receive their statements in paper as required by TILA. Furthermore, the pop-up only has only buttons for "Accept" and "Manage my Preferences." There is no button for "Decline." A copy of this pop-up solicitation is attached as Exhibit C to this comment.

It is important for the CFPB to protect the right of consumers to paper statements, to ensure that they receive and view the mandatory disclosures required by TILA. Paper statements can be more easily accessed by certain consumers than electronic statements in a number of ways. For one thing, consumers experience more "friction" or barriers when they review their statements electronically. It takes more effort for consumers to locate their statements on a website, remember their passwords, and have access to a computer and time on their hands when they are thinking about it. Even when online, currently consumers may see a list of transactions but not the full periodic statement, because that takes several additional "clicks." This is exactly the problem noted by the CFPB in its October 2013 study.

It is much easier to be prompted when the mail arrives to simply open the envelope and review the document. There is a serious danger that pushing everyone into electronic statements as the default method will have the end result of ensuring that fewer people get the information they need.

Furthermore, even when consumers *pay* bills online, they prefer to *receive* those bills in the mail. A study by the U.S. Post Office found that despite a preference to pay bills online, 91 percent of customers prefer receiving their bills by mail.²³ The study concluded that consumer prefer to have a physical document as a reminder to pay and as a record-keeping tool.

²¹ At one point, World Financial Network Bank (now known as Comenity Bank) imposed paper statement fees for their store-branded cards. <http://consumerist.com/2010/01/13/whole-bunch-of-store-credit-cards-add-1-paper-statement-fee/>.

²² Consent Order, In the Matter of Continental Finance, L.L.C., File No. 2015-CFPB-0003 (C.F.P.B. Feb. 4, 2015), available at http://files.consumerfinance.gov/f/201502_cfpb_consent-order_continental-finance.pdf.

²³ Office of the Inspector General, United States Postal Service, Will the Check Be in the Mail? An Examination of Paper and Electronic Transactional Mail, Report Number RARC-WP-15-006, Feb. 9, 2015, available at www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-15-006.pdf.

7. Rewards Products (Request (f))

As the CFPB's prior October 2013 study noted, credit card lenders now often compete on the basis of reward programs instead of the pricing of credit on an account.²⁴ This trend may be on the upswing after the Credit CARD Act. Requirements such as a minimum six-month period for promotional rates and allocation of payments to the highest rate balance have limited the ability of lenders to engage in bait & switch tactics such as offering a low or 0% APRs, then suddenly increasing the APR or using payment allocation to reduce the value of the promotional rate.

Despite the fact that consumers now select credit cards on the basis of rewards, rewards are not governed by the Credit CARD Act or Regulation Z, with limited exceptions.²⁵ Thus, Regulation Z does not prohibit lenders from engaging in practices such as revoking rewards worth hundreds of dollars for minor infractions such as being a day late, or for no reason at all – whereas similar practices would be prohibited if they involved the APR or other covered pricing terms. Thus, issuers are permitted to freeze or hold rewards for being late a single time, as Wells Fargo does.²⁶ They are permitted to cancel rewards from being late twice in a row, with no opportunity for reinstatement, as in the case of the Sam's Club MasterCard.²⁷ American Express, Citibank and other issuers eliminate reward points for months when the consumer pays late.²⁸ Issuers also reserve the right to cancel rewards if they close an account, which their agreements permit them to do for any reason or no reason at all.

The CFPB asks what further improvements in disclosures regarding reward programs would benefit consumers. However, we think simply requiring improved disclosures is not adequate to protect consumers with respect to practices involving reward programs. Rewards should be regulated as a term of the credit card account, much like any other pricing term. For example, a revocation of a reward should be treated much in the same way as a retroactive rate increase. Issuers should not be permitted to revoke the rewards accumulated over several months simply because the consumer is a few days late on a single payment. Alternatively, a revocation of rewards should be treated as a penalty fee. Thus, the value of any revoked reward should be included in Regulation Z's caps on penalty fees.

8. Grace Periods (Request (g))

The CFPB has noted that disclosing the complex rules governing the availability of a grace period is quite challenging. It asks what improvements in disclosures would benefit consumers.

Most consumers understand that if they pay their credit card balances in full each month, they will not be assessed any interest. The Credit CARD Act stopped certain confusing practices that deprived consumers of grace periods. However, credit card issuers still engage in practices that can deprive consumers of their grace periods or subject them to unexpected interest charges when they pay in full. For example:

²⁴ Consumer Financial Protection Bureau, CARD Act Report: A review of the impact of the CARD Act on the consumer credit card market, Oct. 1, 2013, at 82, available at http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

²⁵ These exceptions include (1) the protection against terminating benefits for paying late if a billing statement is not sent 21 days before the due date, and (2) the protection against cessation of waivers or rebates, which applies to cash rewards that can be applied to the account as credits, if they are promoted as such. See National Consumer Law Center, Truth in Lending §§ 6.7.2.2.3, 7.2.3.2.5 (8th ed. 2012).

²⁶ <https://www.wellsfargo.com/credit-cards/rewards/terms/>.

²⁷ http://www.samsclub.com/sams/images/MasterCard_CashBack.pdf.

²⁸ https://secure.cmax.americanexpress.com/Internet/UDAP/CardMemberAgreementsOnline/US_en/CMA_DetailsPage/PersonalCards/BlueCash/BlueCashAECB.pdf; Citibank, CITI® Double Cash Card Reward Program Information, undated.

1. Consumers who take out cash advances on their credit cards, or use their cards for other cash-like transactions, may be surprised to learn that those advances accrue interest immediately, with no grace period.
2. Issuers entice consumers into certain programs that cause consumers to lose their grace period, and incur interest from the date of purchase, even if they paid their previous bill in full. For example, the consumer will lose the grace period for purchases if she uses a balance transfer or convenience check, unless she pays off the entire transferred amount or check amount by the first payment due date after the transfer or advance.²⁹
3. If a consumer who has been carrying a balance then pays it in full, most credit cards will surprise the consumer with “trailing interest” on the next statement (covering the time between the statement date and the payment date) after the consumer thinks the slate is wiped clean. In some cases, new interest charges will continue for months even after repeated attempts to pay the balance in full.

We recognize that the CFPB has mandated a new disclosure for the second situation above. However, a disclosure is simply not sufficient to prevent consumer confusion with respect to these issues. Like payment allocation practices, it is simply too complex and difficult to explain to consumers the problems with these grace period practices.

Credit cards should have simple, consistent grace periods and rules for when interest accrues that do not lead to unexpected interest charges.

- *No differing grace periods.* Credit cards should have the same grace period rules for all types of transactions.
- *No complicated rules for obtaining or losing grace periods.* Grace periods should not be granted or eliminated unexpectedly for purchases— either the consumer has one or she does not.
- *No trailing interest the next month.* Once the consumer pays the balance in full, there should be no further interest charges the next month.

²⁹ See, e.g. *Murr v. Capital One*, 28 F. Supp.2d 575 (E.D. Va. 2014) (permitting fraud, breach of contract, TILA and UDAP claims to proceed). The court in *Murr* also noted that Capital One knew of the problem of consumer confusion regarding this issue, as evidence by “[d]ocuments uncovered in discovery revealed that defendant was aware of a steady stream of complaints from consumers who lost their grace periods after accepting the Offer despite paying off their purchase balances in full,” and that customer service representatives and their managers “indicate[d] that defendant adopted a less-than-forthcoming approach to obvious consumer confusion.” *Id.* at 581, 586. In fact, one Capital One employee wrote “I think we would be stupid to tell customers[about the loss of the grace period] without them asking about it. Clearly we wouldn’t want to lie, but I don’t think we need to be overt about it.” *Id.*

ATTACHMENT D

0%
Promotional APR
for 18 months

Check # 49881

Date

Amount

Pay to

Check must post by
August 7, 2016

0%
Promotional APR
for 18 months

Check # 49882

Date

Amount

Pay to

Check must post by
August 7, 2016

ed Questions

z the enclosed checks?
sure any transactions you make with this
unt before the "post by" date listed on the
re you receive the great rate that comes

! balances can I transfer?

about any kind of balance, including personal
retail store credit cards, auto loans and home
r, balances cannot be transferred to this account
card issued by Capital One®, including, but not
ded with Kohls, Sony, GM, BuyPower Card,
ster Privilege. (Call the number on the back of
sure of the issuing bank on the account.)

rate apply to purchases made with my

. apply to purchases made with these checks.

or one of these checks to post to my account?

as take 7-14 days to post to your Capital One
s based on how quickly your check is deposited
are interested in accepting this offer but are
s won't post to your account before the offer
ating a balance transfer online to expedite

will I be opening a new credit card account?

ffer is for the credit card account you already have
ceive another credit card if you accept this offer.
ly have more than one Capital One credit card
for the last four digits of your account number
g. This offer is for that account only.

credit limit can I use with this offer?

not sure how much credit is available to you, please check your
account online before taking advantage of this offer.

**Q. If I transfer a balance from another lender, do I still need to
continue to pay that lender?**

A. Yes. Until your transferred balance posts to your Capital One
account and appears on your other lender's billing statement, it's
important you make at least the minimum payment to your other lender.
This will ensure you avoid paying late and being penalized
with past due fees.

Q. What if I have AutoPay set to pay my balance in full each month?

A. Your AutoPay amount will include the balance transfer. To avoid
paying off that balance transfer in full, sign in to your account and
update your settings under the Payments tab.

Q. Can I avoid interest on new purchases after I accept this offer?

A. Yes you can! Pay your *Interest Saver Payment* (the minimum payment
plus all your non-promotional balances, including purchases,
cash advances, fees and finance charges) by the due date each
month, and you won't pay interest on new purchases.

Q. What happens when this promotional period expires?

A. After this promotional period expires, the remaining amount of any
balance resulting from this offer will be added to your purchase
balance and will begin accruing interest at your purchase APR.

Q. How are my payments applied?

A. We generally apply payments up to your minimum payment first to
the balance with the lowest APR (including 0% APR), and then to
balances with higher APRs. We may apply any part of your payment
above your minimum payment to the balance with the highest APR,
then to balances with lower APRs.

Q. Do I still need to make a minimum payment after accepting this offer?

A. Yes. Your statement will provide your minimum payment each

Transfer. Save. Pay down.

Transfer your balance and get a **0% APR for 18 months!**

Avoid paying interest on new purchases. If you accept this offer, you can avoid interest on new
purchases by paying the *Interest Saver Payment* each month by the due date. The *Interest
Saver Payment* includes your minimum payment plus all non-promotional balances, including
purchases, cash advances fees and finance charges.

Interest and Fee Information	
APR for Check Transactions and Transferred Balances	0% for 18 months beginning with the first transfer. After that, you will be charged the APR for Purchases, 18.24%. This APR will vary with the market based on the Prime Rate, as previously disclosed.
Use-by-Date	These checks must post to your account by August 7, 2016 for the promotional APR to apply. If you use the checks after that date, we may still honor the checks but you may not receive the promotional APR. Instead, the APR for Purchases may apply.
Fee	2% of each transaction.
Paying Interest	We will begin charging 0% interest on these checks and transfers on the transaction date.

These rates, fees and terms also apply to any other checks numbered 49881 through 49885 previously mailed to you.