COMMENTS
of the
National Consumer Law Center
on Behalf of Its Low Income Clients
to the
Consumer Financial Protection Bureau
regarding
the Credit CARD Act of 2009
Docket No. CFPB-2012-0048
77 Fed. Reg. 75410 (Dec. 20, 2012)

February 19, 2013

The National Consumer Law Center[1] is pleased to submit the following comments, on behalf of our low income clients, on the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (CARD Act). We join with the many other commenters who explain how the Credit CARD Act has been an enormous benefit to consumers and to responsible credit card issuers. We write briefly in these comments to address two issues: the implications of any impact on the cost and availability of credit, and unfair and deceptive practices that remain on the market.

The CARD Act requires the CFPB to report on whether, in addition to other issues, the Act has affected the "cost and availability of credit, particularly with respect to non-prime borrowers."[2] While others will debate whether the Act has had such an impact, we write to emphasize that some increase in up-front prices, and some restriction on the availability of credit, should be viewed as measures of success, not as negative unintended consequences.

Honest lending requires full and honest up front prices, not deceptively low ones that mask the back-end fees and bait-and-switch repricing that were widespread before 2009. Similarly, predatory credit card lending that was not based on ability to pay was part of what drove the 2009 reforms. Responsible lending requires turning down applicants who are unable to repay the credit. Regulation *should* restrict access to irresponsible and destructive forms of credit.

We also reiterate our earlier comments that additional reforms are still needed to address unfair and deceptive credit card practices, particularly regarding:

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[1] 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, including Truth in Lending and Unfair and Deceptive Acts and Practices; 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. These comments were written by Lauren Saunders with assistance from Chi Chi Wu and Carolyn Carter.
[2] 15 U.S.C. sec. 1616(a)(4)(A).

- Deferred interest credit cards used by big box retailers, healthcare providers, and bill-me-later plans;
- "Bad credit" and fee harvester cards;
- Debt collector credit cards that revive old stale debts;
- Lending without regard to ability to pay;
- Tricks and traps with rewards.

These practices are discussed in more detail below.

Higher, Honest Up-Front Prices and Underwriting, Instead of Back-End Tricks and Traps and Inappropriate Cross Subsidies, is a Measure of Success

A number of the Bureau's questions in its request for comments relate to changes in the pricing of credit cards since the implementation of the CARD Act. The Bureau properly asks not only whether the "upfront interest rate" has changed, but more importantly, whether "the overall, all-in cost of credit" has changed as a result of the CARD Act.

As other commenters will explain in greater detail, there has been little if any change in the up-front interest rates that consumers pay due to the CARD Act. But to the extent that there has been, a purpose of the CARD Act was precisely to drive credit card issuers toward more honest up-front prices.

A number of the practices disallowed by the CARD Act enabled issuers to entice consumers with deceptive low initial prices but load the cards with tricks that drove up prices on the back end. Those tricks included retroactive interest rate changes on existing balances, rate changes due to unrelated conduct without any explanation of why a rate was going up, fees imposed on over-the-limit transactions that the issuer approved, late fees that were completely disproportional to the amount of the late payment or the cost to the issuer, tricks to treat a timely payment as late or inhibit timely telephone or internet payments, payment allocation practices that transformed zero or low rate offers into high rate balances, and cards laden with fees that took away much of the available credit and distorted the APR.

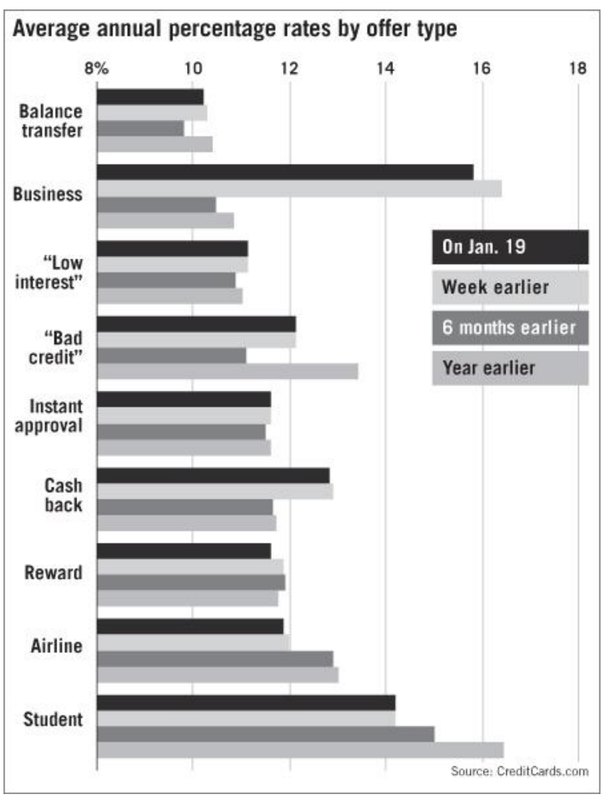
The dishonesty of the advertised prices of credit card issuers before the CARD Act was particularly apparent in the subprime fee harvester card market. Consumers with bad credit were solicited with dishonestly low rates – often below the rates offered to prime consumers – but tricked into enormous fees that swallowed much of the available credit and made the APR a farce. For example, the writer of these comments once opened her email to a large ad for "The best card for bad credit!! 9.9% APR!" But the $300 limit card came with upwards of $200 in fees. In addition, these fee harvester credit cards pushed consumers into unknowingly triggering over limit fees and planned for them to trigger default rates and late fees.

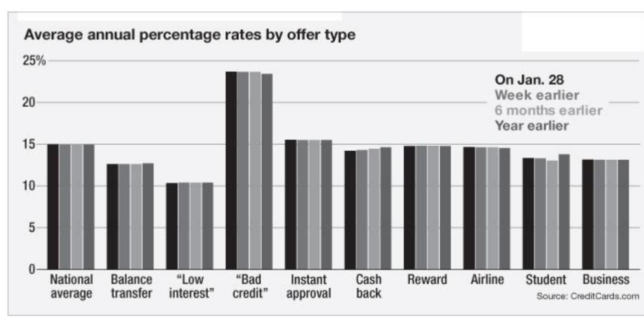
The CARD Act restricted these practices. In addition to the new rules governing rate increases and penalty fees, the Act limited other fees to 25% of the credit line. Previously, various junk fees like application, participation, program, acceptance and account set up fees could have consumed as much as 75% of the credit line.[3]

The success of the CARD Act in reducing – but not eliminating – these practices can be clearly seen in the change in the rates advertised to consumers with bad credit. Prior to the CARD Act, those rates were incongruously at or below the rates offered to consumers with better credit. Since the CARD Act, the advertised rates for "bad credit" cards have been consistently higher than the rates for other consumers.

For example, the first graph below, from the January 21, 2009 *American Banker*, shows that the rates for "bad credit" cards were below the rates offered to businesses and students and about the same as those offered to other customers, including airline cards likely targeted at high income consumers. Yet those rates masked a host of bait-and-switch repricing and back end fees that resulted in prices far higher than the APRs offered.

The second graph, from the January 29, 2013 *American Banker*, shows that the up-front rates for "bad credit" cards are now well above every other category. The rates for "bad credit" cards in 2009 were in the 11-13% APR range, whereas in 2013 they are in the 23- 25% APR range.





[3] See Rick Jurgens & Chi Chi Wu, National Consumer Law Center, Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers 6 (Nov. 2007), available at www.nclc.org/images/pdf/credit_cards/fee-harvesters-report.pdf.

Even the 2013 rates are dishonest, as the cards continue to carry heavy fees and default rates that will end up costing the users far more than the advertised APR. But at least the difference between the advertised price and the actual price is closer. The higher APR offer rates today for those with "bad credit" show that the CARD Act is working to reduce deception in the marketplace.

Similarly, after the Credit CARD Act took effect, one issuer of fee harvester cards, First Premier Bank, was initially forced to raise its rates to a more honest level – from the 9.9% offered in 2007[4] to 79.9% APR in 2010.[5] The bank undoubtedly found that an honest rate did not attract many customers. So the bank lowered its APR to 36% and started charging "pre-application fees" beyond the 25% cap permitted by the CARD Act, successfully challenging the CFPB regulation that outlawed such evasions.

While the work against dishonest advertising tactics will continue on many fronts, the essential point for purposes of these comments is that the Credit CARD Act should be considered a success if it leads issuers to *increase* up-front prices as a necessary consequence of stopping deceptive advertising, predatory bait-and-switch tactics and hidden back end fees. An honest, competitive marketplace requires full and complete prices that consumers can understand and compare.

We have seen no evidence that the "overall, all-in cost of credit" – including all fees and subsequent rate increases – has increased since the CARD Act. *But even if it has*, caution is also warranted before viewing such increases in a negative light.

First of all, to determine the true net cost of a credit card, the sum of the interest and the fees must be discounted to the extent of the rewards that are being paid. Banks' renewed desire for credit card interchange fees has ramped up the competition for various forms of rewards. To the extent that credit card prices are going up, it may be in order to cover the cost of those rewards.

In addition, prior to the CARD Act, exorbitant profits on consumers in the "sweat box" helped to subsidize free credit for convenience users and consumers who were able to take advantage of 0% teaser rates and balance transfer offers without triggering penalty rates and late or over limit fees. To the extent that those inappropriate cross-subsidies from struggling consumers to those who are better off have decreased, and everyone is paying more appropriately for the credit they are using, it is not necessarily a bad thing

For example, the writer of these comments knows a consumer who financed a $100,000 home remodeling project entirely on 0% credit cards. Other consumers, by contrast, were lured in by 0%

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[4] See Rick Jurgens & Chi Chi Wu, National Consumer Law Center, Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers at 24 (Nov. 2007), available at www.nclc.org/images/pdf/credit_cards/fee-harvesters-report.pdf.

[5] See Connie Prater, CreditCards.com, "Issuer of 79.9% Interest Rate Credit Card Defends Its Product" (Feb. 12, 2010), available at http://finance.yahoo.com/banking-budgeting/article/108839/issuer-of-79.9-interest-rate-credit-card-defends-its-product?mod=bb-creditcards.

offers but ending up paying far more. Those offers have stopped, and between higher transfer fees and higher teaser rates, that homeowner can no longer borrow $100,000 without paying a dime. Clearly, he was being subsidized by consumers who got caught in the tricks of teaser offers. His rates may have gone up, and he now has to pay for the credit he uses, but that is a measure of the Act's success, not a regulatory failure.

One of the CFPB's core missions is to promote honesty in pricing and to enable consumers to compare the prices of products apples to apples. To the extent that the CARD Act has led to higher, most honest prices, it has been a success.

<u>An Appropriate Purpose of the CARD Act was to Restrict Access to Irresponsible, Destructive Forms of Credit</u>

Beyond pricing, the CFPB is also looking at access to credit. Though some claim that the CARD Act has restricted access to credit, other commenters will show how tighter credit is due to economic conditions and not to the CARD Act.

But here again, it is important not to assume that tighter access to credit is necessarily a bad thing. The CFPB is charged with looking out for access to helpful forms of credit, not destructive ones. By pushing credit card issuers to lend based on ability to pay, and by reducing deceptive and destructive forms of credit, the CARD Act *intended* to eliminate bad forms of credit in the market.

For many consumers, bad credit is worse than no credit. 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.

Congress mandated that credit card issuers generally, and especially those loaning to young consumers, extend credit only if they determined that the consumer was likely to be able to financially handle the payments as they came due. Lending based on ability to pay necessarily means denying credit to those who cannot pay.

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 the answer to every problem. It is neither a substitute for living within one's means nor 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. These methods include saving, budgeting, doing without, selling or pawning items, and borrowing from friends or family (free sources that can only be used on occasion). [6] Those methods are often more

[6] 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.

difficult than the lure of fast and easy credit, but they are usually safer in the long run. And in the long run, it is not beneficial for our society when easy credit is used to mask the hole in family budgets created by stagnant wages and rising housing and healthcare costs.

Here again, the fee harvester credit cards provide a useful case in point. About 40% to 50% of First Premier Bank's cardholders default.[7] A card that drives such a high proportion of its users to default *should not be on the market.* Even many of those who do not default have undoubtedly suffered severe impacts as a result of the card. Those consumers are better off with no credit than with credit that ruins them.

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. Too much dangerous credit was being offered, and it was appropriate to rein it in.

The mantra of "access to credit" and "democratization of credit" is frequently thrown around as if it were a constitutional right. We would be well to remember the old fashioned values of responsible lending and responsible borrowing. Not everyone can handle unlimited access to credit, and the CARD Act should be judged a success if it cut back on the destructive credit available in the marketplace.

Unfair, Deceptive and Abusive Credit Card Practices Remain

Beyond the impact of the Credit CARD Act, the CFPB has also asked about unfair, deceptive and abusive practices that are still in the market. We have described many of these in previous comments and will only summarize them briefly here.

[7] 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), Attachment C to Comments of NCLC et. al to CFPB on Fee Harvester Credit Cards (June 11, 2012), available at http://www.nclc.org/images/pdf/credit_cards/consumer_groups_comments_to_fee_harvester.pdf. 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 http://www.americanbanker.com/bankthink/CFPB-Card-Act-First-Premier-Fed-1048401-1.html.

Deferred Interest Credit Cards Offered by Big Box Retailers, Healthcare Providers, and Bill-me-later Plans.

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. Thus, these cards differ from cards that offer low introductory teaser rates but only charge interest going forward once the teaser rate ends.

Deferred interest credit cards are typically offered by:

- Big box retailers, who use the cards to promote expensive purchases like computers, big screen TVs and large appliances.
- Some doctors and dentists, who offer cards to as a means to pay for services that are either not covered by insurance, such as vision correction, or for which they do not accept certain types of insurance (Medicaid), notably dental services.
- Billmelater, owned by Pay Pal, which is becoming an increasingly common option for internet shopping.[8]

As we described in comments earlier this year, deferred interest credit cards should be banned.[9] They are inherently unfair, deceptive and abusive, and violate the rule in the Credit CARD Act against retroactive interest charges.

"Bad Credit" and Fee Harvester Credit Cards

Fee harvester credit cards still trap consumers into signing up for cards that are far more expensive than they seem and that have a high likelihood of entrapping the consumer in unaffordable debt. Any card promoted to consumers who have "bad credit" needs to be scrutinized especially closely and must be appropriate for the consumers at whom it is targeted. Any card that is knowingly offered to consumers with impaired credit histories and results in predictably high defaults is clearly violating the ability-to-pay requirements of the Credit CARD Act. As we discussed at greater length in earlier comments, the CFPB should retain the current rule that includes pre-application fees in the 25% cap, re-issue the rule using its expanded authority under TILA or its authority under Dodd-Frank to prohibit unfair, deceptive or abusive practices, and take other measures to restrict unfair fee harvester credit card practices.[10]

[8] Billmelater's account number is an access device that is a "credit card" under the Credit CARD Act.
[9] See Comments of NCLC, et al to CFPB on ability-to-pay requirements and household income at 5-6 (Jan. 7, 2012), available at http://www.nclc.org/images/pdf/rulemaking/comments-household-income-credit-card7jan2013.pdf.
[10] See Comments of NCLC et. al to CFPB on Fee Harvester Credit Cards (June 11, 2012), available at http://www.nclc.org/images/pdf/credit_cards/consumer_groups_comments_to_fee_harvester.pdf.

Debt Collector Credit Cards

Some debt collectors, especially debt buyers, trick consumers into reviving debt that is too old to be legally collectible in court by offering them new credit cards that can be used to pay the debt. The consumers are unlikely to realize that they cannot legally be sued on a debt that is beyond the statute of limitations, but that new activity on the credit card starts the clock running again and revives the zombie debt.

Several debt collectors, in partnership with banks, have been increasing offers for debt-collection credit cards. The debt collection arm of CompuCredit Holdings in Atlanta, for example, has collected about $15 million in newly resurrected debts and fees by issuing credit cards to people with damaged credit through the first nine months of 2011. We suspect that the vast majority of the consumers issued those cards did not realize that the cards had revived debt that was otherwise uncollectible.

Offering a credit card to pay a debt that is beyond the statute of limitations should be ruled an unfair, deceptive and abusive practice prohibited by the Fair Debt Collection Practices Act. When debt collection credit cards are offered to consumers who are otherwise unable to qualify for a credit card, there are also serious questions about whether the cards comply with ability-to-pay rules.

Credit that Consumers are Unable to Pay

Despite the reforms of the CARD Act, credit cards remain a very dangerous product and make it far too easy for consumers to get in over their heads. The CFPB should insist that credit card issuers do more to improve the underwriting for credit cards and other measures to enable consumers to pay the debt that they incur.

Problems that we continue to see include:

- Intense marketing of credit cards to consumers whose credit reports show that they are clearly struggling or have recently emerged from bankruptcy;
- Failure to consider the consumer's full expenses and obligations, not just their monetary debt obligations;[11]
- The ability of issuers to consider a student's financial aid to be income considered in the ability-to-pay analysis;
- The low minimum payments that are the norm in the industry and can require 20 years to pay off a debt;
- Unwillingness to offer reasonable payment plan arrangements, waivers of back fees and interest, or other measures to consumers who are struggling.[12]

[11] See Comments of NCLC, et al to CFPB on ability-to-pay requirements and household income at 4-5 (Jan. 7, 2012), available at http://www.nclc.org/images/pdf/rulemaking/comments-household-income-credit-card7jan2013.pdf.

We also point out that banks that are seeking higher interchange revenue have been pushing consumers towards credit cards and away from debit cards, which are a safer option for many consumers. Thus, vigorous enforcement of the ability-to-pay rules is all the more important for consumers who are lured into a more risky method of managing their payments.

Tricks and Traps with Rewards

Reward cards have moved beyond airline miles into a form of currency for a wide variety of goods and services and even cash. There are a number of reasons for the increasing competition to add more rewards, but one of them is that rewards are not regulated by the CARD Act reforms that stopped manipulations of fees and interest rates. Consumers can lose valuable cash and value through minor, hair trigger mistakes that would not be sufficient to justify a penalty rate under the CARD Act rules. Indeed, the loss of cash rewards is the equivalent of a rate increase but is subject to none of the appropriate protections. The CFPB should closely scrutinize rewards programs and adopt appropriate protections.

Conclusion

Credit cards offer an enormous source of convenience and liquidity to consumers. The Credit CARD Act made major strides in making credit cards a safer, more transparent and more competitive product, but there remains much more to be done.

Thank you for the opportunity to submit these comments. Please feel free to contact us if you have any questions.

[12] We note that higher initial minimum payments would give credit card issuers more flexibility in lowering those payments for a consumer who runs into trouble.