June 8, 2017

Via regulations.gov
Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

> Re: Comments in Response to Request for Information Regarding the Credit Card Market, Docket No. CFPB-2017-0006

The National Consumer Law Center is pleased to submit the following comments on behalf of our low-income clients to the CFPB's 2017 Request for Information (RFI) 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, which requires the CFPB to conduct this study on a regular basis.

1. <u>Deferred Interest Products (Question (e))</u>

The CFPB asks about deferred interest products, the risks they present to consumers, and what should be done to address those risks. We urge the CFPB, as we have many times before, to ban deferred interest.

Deferred interest products entice consumers with promises of "no interest for 12 months," but there is a significant condition that can trap unwary consumers. Unlike true "0% APR" promotions, interest is actually accruing during the promotional period for deferred interest products, and will only be waived if the consumer completely repays the entire balance by the end of the promotional period. Consumers who fail to do so will be charged with a large lump sum interest charge going 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 stereo system on June 1, 2017 using a one-year 24% deferred interest plan, then pays off all but $100 by June 1, 2018, the lender will add to the next bill nearly $400 in interest on the entire $2,500 dating back one year. These plans make money by taking advantage of consumers who are unaware of how the plans work or who meet with an unexpected difficulty in repaying the balance in full.

In the prior 2015 Credit CARD Act study, the CFPB conducted an extensive analysis of deferred interest and documented the host of problems presented by these products. We commend the Bureau for that research, which we believe demonstrated that deferred interest should be eliminated because of its inherent harm to consumers. The CFPB found that deferred interest plans were especially harmful to vulnerable subprime consumers, 40% of whom were unable to pay off their balances in time to avoid deferred interest, and thus were socked with a lump sum retroactive charge.[1] Director Cordray stated in the 2015 report that these products are "the main

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[1] Consumer Financial Protection Bureau, Consumer Credit Card Market Report, at 167 (Dec. 3, 2015), *available at* http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf [hereinafter "CFPB, 2015 Credit CARD Act Study"].

surviving exception to the general shift towards upfront and transparent credit card pricing" and they "impose significant costs on many consumers."[2]

Right after the 2015 Credit CARD Act study, NCLC issued its own report on deferred interest, entitled *Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards*. A copy of our December 2015 report is attached as Attachment A to these comments.

The CFPB has inquired how market trends and issuer practices have evolved since its 2015 Credit CARD Act study. As far as we can observe, deferred interest products are still being aggressively marketed. The latest survey by WalletHub, dated November 2016, found that about one-third (23 out of 75) of the largest retailers offered deferred interest plans,[3] which is about the same as in 2015.[4]

Furthermore, deferred interest products appear to be still causing harm to consumers. For example, the CFPB complaints database shows 69 complaints between January 1, 2016 and April 17, 2017 involving credit cards and using the words "deferred interest." This likely severely underestimates the number of complaints about deferred interest, since many consumers would not be sophisticated enough to use that term in their complaint narratives. Furthermore, the CFPB itself has noted the presence of complaints about the assessment of deferred interest in its complaint database.[5]

Even members of industry have recognized the problems with deferred interest products. Walmart recently announced it is getting rid of deferred interest plans, and is offering truly 0% promotional APRs. Walmart stated it was doing so in order to "save our customers money and help remove unnecessary hassle or burden."[6] We are pleased that Walmart dropped deferred interest products, and commend the company for doing so. Walmart has shown leadership on this issue, which puts it ahead of other retailers that still offer deferred interest such as Amazon, Apple, Best Buy, Home Depot, and Lowes.

Many credit card issuers have appropriately stayed out of the deferred interest business. For example, Capital One sold off the Best Buy card portfolio that it acquired from HSBC and does

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[2] CFPB, 2015 Credit CARD Act Study at 3.
[3] Alina Comoreanu, 2016 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Nov. 1, 2016, *available at* https://wallethub.com/edu/deferred-interest-study/25707/.
4 Alina Comoreanu, 2015 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Cardhub.com, on file with author.
[5] CFPB, Monthly Complaint Report Vol. 21, March 2017, at 14.
[6] Daniel Eckert, Walmart, Blog Post - We're Taking a New Approach to Our Credit Card – Here's Why, May 4, 2017, *available at* http://blog.walmart.com/business/20170504/were-taking-a-new-approach-to-our-credit-card-heres-why.

not offered deferred interest cards.[7] Citibank, which bought the Best Buy portfolio, continues to do so.[8]

It is well past time that the CFPB take action on deferred interest. There is plenty of evidence that deferred interest is unfair, deceptive, and abusive. As we have repeatedly noted in our comments to the 2013 CARD Act Study,[9] the 2015 CARD Act study, our Deceptive Bargain report and various other comments, the Bureau has clear authority under the Truth in Lending Act to eliminate the Regulation Z loophole that permits deferred interest. Without that loophole, deferred interest would violate the Credit CARD Act itself, specifically the prohibition against double cycle billing.

At a minimum, the Bureau should use its bully pulpit to urge other retailers and card issuers to follow Walmart's example in dropping deferred interest. We applaud the CFPB's announcement today that the Bureau has sent letters to the top retail card issuers encouraging them to move away from deferred interest and toward true 0% APR financing.[10] We also appreciate Director Cordray's statement in a NerdWallet article that "We hope to see others in the industry reconsider their reliance on deferred-interest products."[11] We urge the Bureau to continue and increase such efforts. If the world's largest retailer can eliminate deferred interest, so can other companies, some of whom have much higher margins on their goods.

We recognize that some retailers, especially brick-and-mortar chains, are struggling financially and are heavily dependent on credit card income.[12] But deferred interest is not the solution for their woes. First, in some cases, retailers actually pay the issuer for deferred interest plans, so it is unclear the level of profit they derive from these plans.[13] And ultimately, deferred interest programs may end up hurting retailers, as customers feel cheated by the programs and fail to patronize the same stores due to dissatisfaction over deferred interest.

Finally, we note that deferred interest products might not be all that profitable even for card issuers. One of the two largest issuers of deferred interest products is Synchrony Bank, which has reportedly been forced to add $1 billion to its loan loss reserves for the first three quarters of 2017.[14] A quick glance at the CFPB complaints database seems to indicate that Synchrony is

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[7] *See* Danielle Douglas, Washington Post, "Capital One sells Best Buy credit card portfolio to Citigroup" (Feb. 19, 2013) (quoting analyst as saying, "From what we've heard from Capital One, strategically it seems the two parties had a difference of opinion and felt it was best to terminate the contractual obligation."), *available at* https://www.washingtonpost.com/business/economy/capital-one-sells-best-buy-credit-card-portfolio-to-citigroup/2013/02/19/9b4ba18a-7ab6-11e2-a044-676856536b40_story.html?utm_term=.cd9c67aa746f.
[8] *See* http://www.bestbuy.com/site/financing-rewards/learn-about-best-buy-financing/pcmcat1476112234971.c?id=pcmcat1476112234971**.**
[9] NCLC Comments to the 2013 CFPB Request for Information Regarding the Credit Card Market, at 7, Feb. 19, 2013, *available at* https://www.nclc.org/images/pdf/rulemaking/comments-credit-card-act-evaluation-2013.pdf.
[10] CFPB, CFPB Encourages Retail Credit Card Companies to Consider More Transparent Promotions, June 8, 2017.
[11] Melissa Lambarena, With a True 0% Offer, Wal-Mart Changes Game in Store Credit Cards, NerdWallet.com, at https://www.nerdwallet.com/blog/credit-cards/walmart-no-more-deferred-interest/.
[12] *See* Michael Corkery and Jessica Silver-Greenberg, Profits from Store-Branded Credit Cards Hide Depth of Retailers' Troubles, N.Y. Times, May 11, 2017.
[13] For example, Synchrony receives fees from retailers for providing deferred interest promotions. Synchrony Financial, Form S-1: Registration Statement under the Securities Act of 1933, March 13, 2014, at 72, 126.
[14] Kevin Wack, Synchrony faces its biggest test since going public, American Banker, May 3, 2017.

engaged in heavy-handed collection tactics. For example, these are a few complaints just from one month, April 2017:

> "I missed a few payments due to being out of work from XXXX. Synchrony Bank was calling me and leaving messages saying they needed to contact my attorney and would be arresting me if me or my attorney did not contact them by the end of that day. This went on for weeks until I was able to pay them.[15]
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> "I am 11 days late making a payment and they call me up to 10 times a day, some times more."[16]
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> "I opened an account at XXXX with Synchrony Bank. During the holiday season, someone depleted money from my checking account. I called Synchrony to explain what was going on and informed them that until I had money to put back in my account I was not able to make the payment on the card. They said they understood and not to worry - DAILY I received calls 2-5 times a day as to when I was going to pay the amount due. Once I got the money, I paid {$150.00} at XXXX and the next week I got a collection letter.[17]
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> "They are calling me at work, which is not allowed, literally every 15 minutes. They are also calling my cell phone every 15 minutes as well (right before they call my office)."[18]

Synchrony's need to increase its loan loss reserves, and the debt collection complaints against it, might indicate that the issuer is in trouble. Given that Synchrony is a CFPB-supervised entity, the Bureau should examine whether their accounts with deferred interest balances have excessive defaults, likely due to the abusive nature of the product causing consumers financial difficulties. The CFPB should also take action against abusive debt collection tactics.

2. Online Statements (Online and Mobile Account Servicing –Question (j))

Credit card issuers and other banks have aggressively pushed consumers to receive their monthly statements for credit cards, bank accounts, and other financial accounts via electronic delivery. As documented in our 2016 report entitled *Paper Statements: An Important Consumer Protection*, these efforts can be harmful to consumers. A copy of this report is attached and submitted as part of these comments as Attachment B.

Paper statements may seem old-fashioned, but consumers have good reasons to continue receiving them. Millions of Americans -- particularly those who are lower-income, less educated, older, and households of color -- are on the other side of the "digital divide," lacking

[15] CFPB Complaint No. 2431043, filed April 12, 2017.
[16] CFPB Complaint No. 2436973, filed April 15, 2017.
[17] CFPB Complaint No. 2436347, filed April 14, 2017.
[18] CFPB Complaint No. 2423506, filed April 6, 2017.

home broadband Internet access.[19] Mobile devices are not an adequate substitute to home computers because of their smaller size and formatting and unsuitability for recordkeeping.

Furthermore, even consumers with ready Internet access on a computer may prefer paper statements, because electronic statements are easy to overlook due to email overload. Consumers may value a physical mail piece as a record-keeping tool and reminder to pay. Studies show that consumers prefer paper when a payment is due upon receipt.[20]
Indeed, our report includes examples of when electronic credit card statements caused consumers to forget to make a payment, and thus triggered late fees and adverse credit reporting consequences.[21] Electronic statements create barriers for consumers to access vital information because it takes effort to remember the task, find the free time, go to the correct webpage, remember their password, and download the document – as opposed to simply opening an envelope. As the Bureau's 2015 Credit CARD Act study documented, over half of consumers who opted for electronic credit card statements are not opening or reviewing these statements.[22]

Paper also provides a more permanent (and in some cases the only) record. If statements are saved on a hard drive, computers can crash or become outdated. Consumers whose only online access is through a mobile device cannot save electronic records. The records that are available online (or even by phone) may not go as far back as they need.

The CFPB needs to protect consumers who want to keep paper statements. The Bureau should prohibit credit card lenders, as well as depositories and other lenders under its supervision, from:

- making electronic statements the default choice;
- compelling consumers to consent to electronic statements by making it a condition of a product or condition of web access; or
- charging a fee for paper statements that are required by federal law.

The CFPB should also examine or investigate financial institutions that use deceptive measures to coerce consumers into "choosing" electronic statements.

3. Subprime Specialist Products (Question (f))

The CFPB has asked for information about subprime specialist products, also known as fee-harvester cards. As we did in our comments to the 2015 Credit CARD Act RFI, we urge the

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[19] Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, at 3, attached as Attachment B.
[20] 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), *available at* https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-15-006_0.pdf; Emmett Higdon, eBusiness & Channel Strategy Professionals, "Paperless Plight: Growing Resistance Outpaces Adoption Among US Bank Account Holders" at 2 (Nov. 1, 2010).
[21] Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, at 6, attached as Attachment B. *See also* Chi Chi Wu, National Consumer Law Center, Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards, at 13, December 2015, attached as Attachment A.
[22] CFPB, 2015 Credit CARD Act study at 134.

Bureau to re-issue the rule requiring pre-account opening fees to be included in the calculation of fees for purposes of the 25% cap. While the original rule was struck down by a district court in *First Premier Bank v. United States Consumer Fin. Prot. Bureau*, 819 F.Supp.2d 906 (D.S.D. 2011), that decision involved promulgation using the Federal Reserve's somewhat more restricted rulemaking authority under the Truth in Lending Act (TILA). As we explained in our comments to the 2015 Credit CARD Act study RFI, the Dodd-Frank Act expanded the CFPB's rulemaking authority under TILA by allowing the Bureau to adopt "additional requirements." 15 U.S.C. § 1604(a), *as amended b*y Section 1100A(4) of Dodd-Frank. Also, if necessary, the CFPB could use its UDAAP authority to adopt the pre-account opening rule.

In 2015, we had pointed out that at least one issuer in addition to First Premier was charging pre-account opening fees – the Total Visa offered by Mid America Bank & Trust Co., was charging an $89 pre-account opening "processing" fee on top of a $75 annual fee for a $300 credit line.[23] Two years later, it appears that a few more fee-harvester cards are charging these fees. In addition to First Premier and Total Visa, we see that Merrick Bank is offering fee-harvester cards with pre-account opening "set up" fees of up to $75.[24] Furthermore, Mid-America is charging pre-account opening fees for several of its other credit cards, such as the "First Access" card ($89)[25] and the "Milestone" card ($5 to $50).[26]

Thus, the plague of pre-accounting opening fees appears to be spreading, albeit slowly. The CFPB should put a stop to this spread, by requiring that pre-account opening fees be included in the calculation of fees for the 25% cap.

4. <u>Affordability of Credit Card Minimum Payments (Question (*l*))</u>

In Question (*l*), the CFPB has expressed concerns about the impact of rising interest rates on credit card borrowers, the vast majority of whom have variable rates on their cards. While the question is framed as one of consumer awareness, the more important issue seems to be whether consumers will be able to afford such rate increases. The concerns about money borrowed at 15% needing to be repaid at 20% seem to boil down to whether the consumer has the ability to repay the debt at the higher rate.

Ultimately, the solution to this issue involves reforming the rules around the ability-to-pay (ATP) analysis. Currently, Regulation Z only requires card issuers to analyze the consumer's ability to repay based on the minimum payment for the card account. Regulation Z, 12 C.F.R. § 1026.51(a)(2)(i). As the CFPB knows, the minimum payment formulas currently used by issuers are quite low – either 2% of the balance or 1% plus fees & finance charges.[27]

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[23] NCLC First Set of Comments to the 2015 CFPB Request for Information Regarding the Credit Card Market, at 4, May 18, 2015, attached as Attachment C.
[24] http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/4_2017_Merrick%20Bank%20-%20Visa%20or%20MasterCard%20%28Unsecured%29%20Account%20Opening%20Disclosures.pdf
[25] http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/4_2017_First%20Access%20Visa%20Cardholder%20Agreement.pdf
[26] https://www.milestonegoldcard.com/get-my-card/terms?#
[27] CFPB, 2015 Credit CARD Act study at 131.

These small minimum payments result in hundreds or thousands of dollars of payments that make little progress in repaying the balance, leading to long repayment periods of 20 plus years and large amounts of interest accruing during that time.[28] Underwriting based on low minimum payments also makes consumers vulnerable to financial distress when the minimum payments spike due to increasing interest rates.

Thus, we urge the CFPB to revise the ATP requirements to require that the analysis be based 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.

Beyond underwriting for a higher payment, we also recommend that the Bureau require or nudge issuers to increase their minimum payment formulas, so the minimum itself pays off the balance in 5 years, not in 20 plus years. Instituting higher minimum payments would have several benefits. First, it would result in payments that actually make progress in repaying the balance and that are not nearly interest-only in the initial years. Second, it would help borrowers save a considerable amount of interest. Third, it would free up available credit for future needs. Fourth, it would give issuers more leeway to work with struggling borrowers to reduce the minimum payment if an interest rate shock or financial problems cause difficulty.

Requiring higher minimum payments might result in lower credit lines for some borrowers. But the high credit lines extended today can lead to serious difficulties if consumers use them in full. We recognize that increasing the minimum payment formula would cause stress for current borrowers, so the Bureau should require or urge issuers to consider such increased minimum payments only for new transactions and accounts on a going forward basis, not on existing balances.

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,[29] 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, insurance, and utilities (none of which are typically reflected on a consumer report) can consume almost all of the consumer's income.

The CFPB recently proposed that payday lenders verify a consumer's major debt obligations and include a cushion for other basic living expenses in order to ensure the ability to repay the loan. This evaluation is also appropriate for credit cards that can have credit lines in the thousands or even tens of thousands of dollars.

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[28] *See* National Consumer Law Center, Consumer Credit Regulation § 8.6.8.1 (2d ed. 2015), *updated at* www.nclc.org/library.

[29] *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).

5. Secured Credit Cards (Question (i))

The CFPB asks for information about secured credit cards, the state of that market, and obstacles to secured cards reaching their potential, including regulatory obstacles. While we believe that secured cards do present some benefits to consumers, these benefits do not justify removing or watering down regulatory protections in relationship to these cards. Furthermore, we do not believe regulatory protections are the obstacles preventing secured cards from reaching their potential.

Secured credit cards do offer some utility in helping consumers with limited or impaired credit histories. For instance, a recent study from the Payments Card Center of the Federal Reserve Bank of Philadelphia found that 82% of secured cards remained open after 2 years, and that an open secured card had a median increase in credit score of 24 points.[30]

Secured credit cards may be especially helpful for younger or other credit invisible consumers to build credit. These consumers do not have a history of trouble repaying credit, they simply have not had enough credit to build a thick credit file.

However, secured cards are not a panacea to addressing impaired credit. First, the Payment Card Center study indicates that the median credit score at the time of origination was 589 for those cardholders who kept their secured card account open.[31] Thus, the increase of 24 points resulted in a median score of 613 – a respectable increase from perhaps deep subprime to core subprime, but hardly putting the cardholder in prime territory.

The Payments Card Center study also found that nearly 18% of secured cards were closed after 2 years, and those cardholders experienced a score decrease of 42 to 60 points. In addition, 9% of the secured card accounts remained open after two years, but were delinquent.[32] Thus, it was more likely that about 27% of secured card holders suffered a decrease to their credit score from the secured card. While this is a far lower percentage than the 73% who benefitted, it does mean that a not-insubstantial minority of cardholders were actually harmed by a secured card.

As for barriers to secured cards reaching their potential, a study by the Center for Financial Services Innovation (CFSI) and Visa identifies them as: (1) lack of consumer awareness and insufficient customer acquisition efforts, (2) problems in consumers being able to obtain the funds to make the deposit, (3) optimal customer usage (i.e. keeping utilization levels low), and (4) graduation and building a long-term relationship.[33] *Note that none of the barriers cited by the CFSI/Visa study are regulatory.*

We are concerned that the Bureau is asking about potential "solutions" to supposed regulatory "barriers," when there is no indication that they are the main problems for secured cards to reach

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[30] Larry Santucci, The Secured Credit Card Market, Payments Card Center – Federal Reserve Bank of Philadelphia, at 24-25, Nov. 2016, *available at* https://www.philadelphiafed.org/-/media/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2016/dp16-03_the-secured-credit-card.pdf?la=en.
[31] *Id.*
[32] *Id.*
[33] Kaitlin Asrow, et al., Center for Financial Services Innovation (CFSI) and Visa, Secured Credit Cards: Innovating at the Intersection of Savings and Credit, May 12, 2016.

their potential. These alleged “barriers” are actually important regulatory requirements necessary to protect consumers.

For example, a primary regulatory requirement for secured cards is the ban on offset unless the consumer gives active and knowing consent to the security interest in deposited funds. As the Bureau knows, TILA generally prohibits offsets from a deposit account held by the issuer in order to repay a credit card debt. 15 U.S.C. § 1666h. Congress adopted this provision in 1993 in order to prevent credit card companies from accessing deposited funds “without any recourse to the courts and in spite of any valid legal defense the cardholder may have against the bank,” and also out of concern about the “unique leverage over the consumer” that the bank could obtain through offset.[34]

In the recent prepaid card rulemaking, the CFPB reiterated the importance of applying the offset protection to prepaid cards with credit features. The CFPB retained the offset protection “to ensure that card issuers are not able to obtain unfair leverage over the consumer or over other creditors” and also out of concern about the “overall creditworthiness” of prepaid accountholders and the importance of letting these consumers “retain control over the funds in their prepaid accounts.”[35]

Regulation Z does allow for voluntary security deposits if specific protections are met. In particular, there must be an affirmative indication that the consumer is aware that a security interest is a condition for an account and specifically intends to grant the security interest. Regulation Z, 13 C.F.R. § 1026.12(d)(2). Examples of such an indication are a separate signature or initials on the agreement indicating that a security interest is being given, placement of the security agreement on a separate page, or reference to a specific amount of deposited funds or to a specific deposit account number. Official Interpretations to Regulation Z, 12 C.F.R. § 1026.12(d)(2)-1.

We have seen violations of TILA’s anti-offset provision by card issuers who included security interests in a deposit account in the fine print of account agreements, where consumers were not aware of the interest and thus did not knowingly give consent.[36] We urge the CFPB to not loosen any of the protections regarding the offset protection, particularly the need for an indication of knowing and truly voluntary consent for the security interest. If a consumer does not knowingly realize they are giving a security deposit for a credit card, it is unlikely that they will experience the benefits of the card in terms of credit building.

As CFSI noted, a major barrier to secured cards is that the credit blemished consumers who could potentially benefit from these cards are precisely those who may have difficulty sparing

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[34] Public Law 93–495, 88 Stat. 1500.
[35] 79 Fed. Reg. 77102, 77239 (Dec. 23, 2014).
[36] One category of violations were financial institutions that used a boilerplate deposit agreement product called Loanliner, which automatically took a security interest in the consumer’s deposit account and used it to secure any lending product from that institution, including credit cards. *See* In re Okigbo, 2009 WL 5227844 (Bankr. D. Md. Dec. 30, 2009) (Loanliner application did not create consensual security interest where indicia not met). *See also* Martino v. Am. Airlines Fed. Credit Union, 121 F. Supp. 3d 277, 287 (D. Mass. 2015)(financial institution originally alleged Loanliner applied to credit card at issue and allowed offset, but subsequently discovered different agreement applied).

the funds to make a secured deposit. This is simply a reflection of their situation, not a barrier caused by regulation. While one provision of the fee-harvester rule prevents faux security interests that in fact are simply increased fees,[37] that provision does not impact genuine secured cards.[38]

6. <u>Credit Reporting Issues (related to Secured Cards Question (i))</u>

As discussed above, one of the primary reasons that consumers obtain secured credit cards is to help build or repair a credit history. Credit reporting issues are often critical to cardholders, and a great deal of a consumer's credit score is dependent on the history of their credit card accounts.[39] Furthermore, the importance of credit cards on consumer credit scores will only grow with the development of "trended data", *i.e.* data showing trends in loan payments. One of the drivers of trended data is Fannie Mae, which now uses it in the Desktop Underwriting program.[40] VantageScore's latest scoring model, VantageScore 4.0, also uses trended data.[41]

A significant issue around trended data will be the accuracy of payment information. In order for trended data to work accurately, information furnishers, most particular credit card issuers, must provide complete and correct information to the credit reporting agencies about the amount of each monthly payment – not just whether a payment was made that met or exceeded the minimum required. We have seen that several credit card issuers do not provide such information. The CFPB should ensure that the credit card issuers under its supervision properly report actual payment amounts to the credit reporting agencies.

An issue that plagues both credit reporting and some supposedly "innovative" new products are false promises to consumers that a product will improve a consumer's credit history. As the CFPB well knows from its enforcement action against LendUp, there are some high-cost lenders that will specifically market their loans by promising to report payments to credit reporting agencies, but fail to do so or to do so consistently and accurately.[42]

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[37] The Official Interpretations treat security interests charged to the account as a fee for purposes of the 25% cap on fees. Official Interpretations to Regulation Z, 12 C.F.R. § 1026.52(a)(2)-3. This particular provision would limit the amount that an issuer can claim is a security deposit where the consumer did not provide any funds for that amount.

[38] These faux security deposits that were extremely problematic because they, along with high fees, would be charged to accounts with very low credit limits, leaving consumers with little to no available credit on their newly-issued credit cards, but with significant debt. Rick Jurgens & Chi Chi Wu, National Consumer Law Center, Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers 15 (Nov. 2007), available at www.nclc.org.

[39] *See generally* Consumer Financial Protection Bureau, Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureaus Manage Consumer Data 14 (2012), *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf (noting that about 40% of tradelines on credit reports are from credit card issuers and another 18% from retail cards, versus only 13% from debt collectors, 7% from student lenders, and 7% from mortgage servicers).

[40] Fannie Mae, Trended Credit Data and Desktop Underwriter (DU), 2016, *available a*t https://www.fanniemae.com/content/fact_sheet/desktop-underwriter-trended-data.pdf.

[41] VantageScore, Introducing VantageScore 4.0, May 15, 2017.

[42] In re Flurish, Inc., d/b/a LendUp, File No. 2016-CFPB-0023 (C.F.P.B. Sep. 27, 2016) (consent order).

7. Innovation (Question (h))

The CFPB asks about issues raised by financial innovations that could substantially impact the credit card market, including new consumer lending products that could compete with credit cards. The Bureau also asks about the benefits and risks of these new innovations.

One risk always presented by new or innovative products is that they often fail to realize that they are just as much regulated by existing laws as "old" products. The purveyors of such products sometimes fail to comply with existing laws, thinking that their newness and innovativeness somehow allows them to escape regulation. However, Congress was quite wise when it passed the Truth in Lending Act, as well as various other Acts that compose the federal Consumer Credit Protection Act. The definitions in these Acts are very broad in scope, and capable of regulating hot, new products just as well as boring, old ones.

For example, the definition of "credit card" is extremely broad. It is not limited to the traditional plastic cards with 16 digits, a Visa/MasterCard/Amex/Discover logo, a magnetic stripe/chip, and a signature block. Instead a "credit card" includes "any card, plate, coupon book *or other credit device* existing for the purpose of obtaining money, property, labor or services on credit." 15 U.S.C. § 1602(*l*). This definition literally encompasses any device that can be used from time to time to access a line of credit.[43] Furthermore, the Official Interpretations provide that even just an account number can be a credit card if it accesses a credit line that can be used directly to purchase goods or services. Official Interpretations to Regulation Z, 12 C.F.R. § 1026.2(a)(15)-2.ii.C.

Thus, some of the newfangled consumer lending products are credit cards. One example is PayPal Credit (as distinguished from the PayPal MasterCard offered by Synchrony Bank), which appears to be a credit card and should follow credit card rules (which in the past it has not always followed[44]) even though it does not have a physical plastic card.

Treatment as credit cards does not mean these innovative products cannot thrive and provide benefits for consumers; it simply levels the playing field and ensures that consumers have the same protections whether they choose a traditional product or a newfangled one. It means that consumer lending innovations must play by the same rules as other credit cards, such as providing TILA disclosures, conducting billing error investigations, and determining an applicant's ability to repay the credit. It subjects them to Credit CARD Act rules that are important for fundamental fairness, such as the prohibition against retroactive rate increases – the principle that "a deal is a deal."

Even if they are not credit cards, many of these innovative products would be covered by the open-end credit or closed-end credit rules of TILA. Thus, purveyors of open-end credit need to conduct billing error investigations pursuant to the Fair Credit Billing Act, and all creditors need to provide TILA disclosures.

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[43] The "time to time" requirement was added by Regulation Z. 12 C.F.R. § 1026.2(a)(15).

[44] The Bureau's complaint against PayPal describes some of these violations. Complaint, Consumer Financial Protection Bureau v. PayPal Inc., Civ. Ac. No. 1:15-cv-1426, (D. Md. May 18, 2015). However, the CFPB did not take action against PayPal's violations under TILA, but instead used its UDAAP authority.

8. Third Party Comparison Websites (Question (g))

The CFPB has asked about issues raised by third party comparison websites, which provide information about different credit card products to consumers who are shopping for cards. These websites often provide other features, such as free credit scores, free credit reports, free credit monitoring, advice articles, and even "hard news" articles. Examples include CreditKarma, NerdWallet, Bankrate.com, WalletHub, Creditcards.com, and Credit.com

One of the most critical issues regarding these websites is the independence of their advice. We have no information about the quality of their advice specifically regarding which cards to choose, or if some of these websites are more impartial than others. However, being a frequent source of interviews with these websites, we do know that they vary in the quality of their journalism and objectivity. Some sites have made a strong commitment to independent journalism, like NerdWallet and creditcards.com, and often produce very informative articles. Other websites have engaged in questionable tactics and even crossed the line.

For example, the author of these comments gave an interview to a reporter for a news story on the website Credit.com in August 2016. It was then disturbing to discover that the reporter's article contained a deceptively placed advertisement for Lexington Law, which is a credit repair organization. The advertisement appeared to be part of the article, as it was placed within the text of the article, not off to the side. It did not include the word "Advertisement." Subsequently, we learned that credit.com is owned by Progrexion, which also operates Lexington Law.[45] At no time, did the reporter disclose that such an advertisement would appear within the news story.

It is unclear what authority the CFPB would have to regulate these third-party comparison websites, and whether they could be treated as "covered persons" under the Dodd-Frank Act. If the CFPB does uncover UDAP violations by entities that are not within its jurisdiction, it should refer them to the FTC. These websites of course would also be subject to state laws prohibiting unfair or deceptive acts or practices if they deceptively present themselves as impartial when they are steering consumers to certain cards or other financial products at the behest of issuers.

Even if the CFPB cannot regulate third-party comparison websites, the Bureau can regulate the conduct of card issuers vis a vis these websites, so that the issuers could not offer incentives or engage in threats to unduly or deceptively influence the advice or articles issued by these websites. Thus, the CFPB could state that it is a deceptive practice for an issuer to compensate a website to steer consumers to its cards without such an arrangement being clearly and conspicuously disclosed. The Bureau could also prohibit issuers from threatening websites that give critical opinions about their products. Such threats are unfortunately very real. For example, when Evolution Finance, which operates WalletHub and CardHub, criticized First Premier for its excessive fees, First Premier sued the company.[46] While First Premier ultimately

[45] https://www.progrexion.com/who-we-are/our-consumer-brands.
[46] Nikhil Hutheesing, How to protect yourself from credit-card bullies -First Premier sues CardHub: Is there no end to how far this bank will go when it deals with the financially vulnerable?, Consumer Reports, Aug. 4, 2014, at http://www.consumerreports.org/cro/news/2014/08/how-to-protect-yourself-from-credit-card-bullies/index.htm.

dropped the lawsuit,[47] the threat of such litigation and the expense involved could deter comparison websites from given their honest opinions about credit cards with unfavorable terms. The CFPB should discourage such issuer behavior.

9. <u>The Effectiveness of Disclosure for Credit Card Plans (Question (b))</u>

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. This is similar to the inquiry that the Bureau made in its 2015 Credit CARD Act RFI. As we discussed in our comments to that RFI, there were two recommendations that we make to improve cost disclosures for credit card plans.

- Revise the Annual Percentage Rate (APR) disclosure so that it includes the impact of fees.
- Eliminate the ability for issuers to disclose multiple APRs or a range of APRs, for pre-approved credit card solicitations.

Both of the above rules were actually in effect prior to the Federal Reserve Board's revamping of the TILA disclosures for credit cards in 2010. While most of the FRB's 2010 changes improved credit card disclosures, these two changes (narrowing the APR disclosures to exclude fees and allowing disclosure of multiple APRs) seriously undermined the effectiveness of the APR disclosure for credit card accounts, and the CFPB should reverse them.

We wrote extensively about these two changes in our comments to the 2015 Credit CARD Act study RFI, which is incorporated by reference and attached as Attachment C.

10. <u>Grace Periods</u>

In its 2015 Credit CARD Act study RFI, the CFPB noted that disclosing the complex interactions between grace periods and promotional balances (balance transfer, convenience checks, deferred interest) is quite challenging, and asked what improvements in disclosures would benefit consumers. In response, we had urged that credit cards should have simple, consistent grace periods and rules for when interest accrues that do not lead to unexpected interest charges, such as:

- *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.

[47] AnnaMaria Andriotis, Lender Drops Challenge to Credit-Card Comparison Website, Wall St. J., Jan. 12, 2015, at https://blogs.wsj.com/totalreturn/2015/01/12/lender-drops-challenge-to-credit-card-comparison-website/.

We are encouraged that some issuers have voluntarily adopted reforms with respect to grace periods and promotional rate balances. For example, Capital One has provided cardholders using a convenience check with a method to avoid paying interest on new purchases. Capital One provides an "Interest Saver Payment" that includes the minimum payment on the promotional balance plus all non-promotional balances. A copy of this promotion is attached as Attachment D. We commend Capital One for providing this option and making a 180 turnaround from problematic practices with respect to this issue. We urge other issuers to follow suit. Furthermore, the CFPB should also encourage other issuers to follow Capital One's example.

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Thank you for the opportunity to submit these comments and for your excellent prior and forthcoming research on credit card issues. If you have questions about these comments, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

Respectfully submitted,

National Consumers Law Center
(on behalf of its low-income clients)