from Section 171(b)(1). Accordingly, the Board does not believe it would be appropriate to exclude increases in fees from the right to reject.

Consumer groups argued that the Board should remove the exception in § 226.9(h)(3) for accounts that are more than 60 days' delinquent. However, this exception is based on revised TILA Section 171(b)(4), which provides that the Credit Card Act's limitations on rate increases do not apply when an account is more than 60 days' past due. Accordingly, the Board believes that it is consistent with the intent of the Credit Card Act to provide card issuers with greater flexibility to adjust the account terms in these circumstances.

Consumer groups also argued that the Board should remove the exception in § 226.9(c)(2)(iv) for increases in the required minimum periodic payment. However, the Board believes that, as a general matter, increases in the required minimum payment can be advantageous for consumers insofar as they can increase repayment of the outstanding balance, which can reduce the cost of borrowing. Indeed, although the Credit Card Act limits issuers' ability to accelerate repayment in circumstances where the issuer cannot apply an increased rate to an existing balance (revised TILA Section 171(c)), the Act also encourages consumers to increase the repayment of credit card balances by requiring card issuers to disclose on the periodic statement the costs associated with making only the minimum payment (revised TILA Section 127(b)(11)). Furthermore, although consumer groups argued that card issuers could raise minimum payments to unaffordable levels in order to force accounts to become more than 60 days' past due (which would allow issuers to apply increased rates to existing balances), it seems unlikely that it would be in card issuers' interests to do so, given the high loss rates associated with accounts that become more than 60 days' delinquent.[30] Thus, the Board does not believe application of the right to reject to increases in the minimum payment is warranted at this time.

[30] For example, data submitted to the Board during the comment period for the January 2009 FTC Act Rule indicated that approximately half of all accounts that become two billing cycles' past due (which is roughly equivalent to 60 days' delinquent) charge off during the subsequent twelve months. *See* Federal Reserve Board Docket No. R–1314: Exhibit 5, Table 1a to Comment from Oliver I. Ireland, Morrison Foerster LLP (Aug 7, 2008) (Argus Analysis) (presenting results of analysis by Argus Information & Advisory Services, LLC of historical data for consumer credit card accounts believed to represent approximately 70% of all outstanding consumer credit card balances).

Repayment Restrictions

Because the repayment restrictions in § 226.9(h)(2)(iii) are based on revised TILA Section 171(c), the Board believes that those restrictions should be implemented with the rest of revised Section 171 in § 226.55. Section 226.9(h)(2)(iii) implemented new TILA Section 127(i)(4), which expressly incorporated the repayment methods in revised TILA Section 171(c)(2). Because the rest of revised Section 171 would not be effective until February 22, 2010, the July 2009 Regulation Z Interim Final Rule implemented new TILA Section 127(i)(4) by incorporating the repayment restrictions in Section 171(c)(2) into § 226.9(h)(2)(iii). *See* 74 FR 36089. However, the Board believes that—once revised TILA Section 171 becomes effective on February 22, 2010—these repayment restrictions should be moved to § 226.55(c). In addition to being duplicative, implementing revised TILA Section 171(c)'s repayment methods in both § 226.9(h) and § 226.55(c) would create the risk of inconsistency. Furthermore, because these restrictions will generally be of greater importance in the context of rate increases than other significant changes in terms, the Board believes they should be located in proposed § 226.55.

The Board did not receive significant comment on this aspect of the proposal. Accordingly, the final rule moves the provisions and commentary regarding repayment to § 226.55(c)(2) and amends § 226.9(h)(2)(iii) to include a cross-reference to § 226.55(c)(2).

Furthermore, the Board has amended comment 9(h)(2)(iii)–1 to clarify the application of the repayment methods listed in proposed § 226.55(c)(2) in the context of a rejection of a significant change in terms. As revised, this comment clarifies that, when applying the methods listed in § 226.55(c)(2) pursuant to § 226.9(h)(2)(iii), a creditor may utilize the date on which the creditor was notified of the rejection or a later date (such as the date on which the change would have gone into effect but for the rejection). For example, when a creditor increases an annual percentage rate pursuant to § 226.55(b)(3), § 226.55(c)(2)(ii) permits the creditor to establish an amortization period for a protected balance of not less than five years, beginning no earlier than the effective date of the increase. Accordingly, when a consumer rejects a significant change in terms pursuant to § 226.9(h)(1), § 226.9(h)(2)(iii) permits the creditor to establish an amortization period for the balance on the account of not less than five years, beginning no earlier than the date on which the creditor was notified of the rejection. The comment provides an illustrative example.

In addition, comment 9(h)(2)(iii)–2 has been revised to clarify the meaning of "the balance on the account" that is subject to the repayment restrictions in § 226.55(c)(2). The revised comment would clarify that, when applying the methods listed in § 226.55(c)(2) pursuant to § 226.9(h)(2)(iii), the provisions in § 226.55(c)(2) and the guidance in the commentary to § 226.55(c)(2) regarding protected balances also apply to a balance on the account subject to § 226.9(h)(2)(iii). Furthermore, the revised comment clarifies that, if a creditor terminates or suspends credit availability based on a consumer's rejection of a significant change in terms, the balance on the account for purposes of § 226.9(h)(2)(iii) is the balance at the end of the day on which credit availability was terminated or suspended. However, if a creditor does not terminate or suspend credit availability, the balance on the account for purposes of § 226.9(h)(2)(iii) is the balance on a date that is not earlier than the date on which the creditor was notified of the rejection. An example is provided.

Additional Revisions to Commentary

Consistent with the revisions discussed above, the Board has made non-substantive, technical amendments to the commentary to § 226.9(h). In addition, for organizational reasons, the Board has renumbered comments 9(h)(2)(ii)–1 and –2. Finally, the Board has amended comment 9(h)(2)(ii)–2 to clarify the application of the prohibition in § 226.9(h)(2)(ii) on imposing a fee or charge solely as a result of the consumer's rejection of a significant change in terms. In particular, the revised comment clarifies that, if credit availability is terminated or suspended as a result of the consumer's rejection, a creditor is prohibited from imposing a periodic fee that was not charged before the consumer rejected the change (such as a closed account fee).

Section 226.10 Payments

Section 226.10, which implements TILA Section 164, currently contains rules regarding the prompt crediting of payments and is entitled "Prompt crediting of payments." 15 U.S.C. 1666c. In October 2009, the Board proposed to implement several new provisions of the Credit Card Act regarding payments in § 226.10, such as requirements regarding the permissibility of certain fees to make expedited payments. Several of these rules do not pertain directly to the prompt crediting of payments, but more generally to the conditions that may be imposed upon payments. Accordingly, the Board proposed to amend the title of § 226.10 to "Payments" to more accurately reflect the content of amended § 226.10. The Board received no comments on this change, which is adopted as proposed.

226.10(b) Specific Requirements for Payments

Cut-Off Times for Payments

TILA Section 164 states that payments received by the creditor from a consumer for an open-end consumer credit plan shall be posted promptly to the account as specified in regulations of the Board. The Credit Card Act amended TILA Section 164 to state that the Board's regulations shall prevent a finance charge from being imposed on any consumer if the creditor has received the consumer's payment in readily identifiable form, by 5 p.m. on the date on which such payment is due, in the amount, manner, and location indicated by the creditor to avoid the imposition of such a finance charge. While amended TILA Section 164 generally mirrors current TILA Section 164, the Credit Card Act added the reference to a 5 p.m. cut-off time for payments received on the due date.

TILA Section 164 is implemented in § 226.10. The Board's January 2009 Regulation Z Rule addressed cut-off times by providing that a creditor may specify reasonable requirements for payments that enable most consumers to make conforming payments. Section 226.10(b)(2)(ii) of the January 2009 Regulation Z Rule stated that a creditor may set reasonable cut-off times for payments to be received by mail, by electronic means, by telephone, and in person. Amended § 226.10(b)(2)(ii) provided a safe harbor for the reasonable cut-off time requirement, stating that it would be reasonable for a creditor to set a cut-off time for payments by mail of 5 p.m. on the payment due date at the location specified by the creditor for the receipt of such payments. While this safe harbor referred only to payments received by mail, the Board noted in the supplementary information to the January 2009 Regulation Z Rule that it would continue to monitor other methods of payment in order to determine whether similar guidance was necessary. *See* 74 FR 5357.

As amended by the Credit Card Act, TILA Section 164 differs from § 226.10 of the January 2009 Regulation Z Rule in two respects. First, amended TILA Section 164 applies the requirement that a creditor treat a payment received by 5 p.m. on the due date as timely to all forms of payment, not only payments received by mail. In contrast, the safe harbor regarding cut-off times that the Board provided in § 226.10(b)(2)(ii) of the January 2009 Regulation Z Rule directly addressed only mailed payments. Second, while the Board's January 2009 Regulation Z Rule left open the possibility that in some circumstances, cut-off times earlier than 5 p.m. might be considered reasonable, amended TILA Section 164 prohibits cut-off times earlier than 5 p.m. on the due date in all circumstances.

In the October 2009 Regulation Z Proposal, the Board proposed to implement amended TILA Section 164 in a revised § 226.10(b)(2)(ii). Proposed § 226.10(b)(2)(ii) stated that a creditor may set reasonable cut-off times for payments to be received by mail, by electronic means, by telephone, and in person, provided that such cut-off times must be no earlier than 5 p.m. on the payment due date at the location specified by the creditor for the receipt of such payments. Creditors would be free to set later cut-off times; however, no cut-off time would be permitted to be earlier than 5 p.m. This paragraph, in accordance with amended TILA Section 164, would apply to payments received by mail, electronic means, telephone, or in person, not only payments received by mail. The Board is adopting § 226.10(b)(2)(ii) generally as proposed.

Consistent with the January 2009 Regulation Z Rule, proposed § 226.10(b)(2)(ii) referred to the time zone of the location specified by the creditor for the receipt of payments. The Board believed that this clarification was necessary to provide creditors with certainty regarding how to comply with the proposed rule, given that consumers may reside in different time zones from the creditor. The Board noted that a rule requiring a creditor to process payments differently based on the time zone at each consumer's billing address could impose significant operational burdens on creditors. The Board solicited comment on whether this clarification is appropriate for payments made by methods other than mail.

Consumer group commenters indicated that the cut-off time rule for electronic and telephone payments should refer to the consumer's time zone. These commenters believe that it is unfair for consumers to be penalized for making what they believe to be a timely payment based on their own time zone. In contrast, industry commenters stated that it is appropriate for the 5 p.m. cut-off time to be determined by reference to the time zone of the location specified for making payments, including for payments by means other than mail. These commenters specifically noted the operational burden that would be associated with a rule requiring a creditor to process payments differently based on the time zone of the consumer.

The final rule, consistent with the proposal, refers to the time zone of the location specified by the creditor for making payments. The Board believes that the benefit to consumers of a rule that refers to the time zone of the consumer's billing address would not outweigh the operational burden to creditors. As amended by the Credit Card Act, TILA contains a number of protections, including new periodic statement mailing requirements for credit card accounts implemented in § 226.5(b)(2)(ii), to ensure that consumers receive a sufficient period of time to make payments. The Board also notes that there may be consumers who are United States residents, such that Regulation Z would apply pursuant to comment 1(c)–1, but who have billing addresses that are outside of the United States. Thus, if the rule referred to the time zone of the consumer's billing address, a creditor might need to have many different payment processing procedures, including procedures for time zones outside of the United States.

Section 226.10(b)(2)(ii), consistent with the proposal, generally applies to payments made in person. However, as discussed below, the Credit Card Act amends TILA Section 127(b)(12) to establish a special rule for payments on credit card accounts made in person at branches of financial institutions, which the Board is implementing in a new § 226.10(b)(3). Notwithstanding the general rule in proposed § 226.10(b)(2)(ii), card issuers that are financial institutions that accept payments in person at a branch or office may not impose a cut-off time earlier than the close of business of that office or branch, even if the office or branch closes later than 5 p.m. The Board notes that this rule refers only to payments made in person at the branch or office. Payments made by other means such as by telephone, electronically, or by mail are subject to the general rule prohibiting cut-off times prior to 5 p.m., regardless of when a financial institution's branches or offices close. The Board notes that there may be creditors that are not financial institutions that accept payments in person, such as at a retail location, and thus is adopting a reference in § 226.10(b)(2)(ii) to payments made in person in order to address cut-off times for such creditors that are not also subject to proposed § 226.10(b)(3).

The Board notes that the Credit Card Act applies the 5 p.m. cut-off time requirement to all open-end credit plans, including open-end (home-secured) credit. Accordingly, § 226.10(b)(2)(ii), consistent with the proposal, applies to all open-end credit. This is consistent with current § 226.10, which applies to all open-end credit.

Other Requirements for Conforming Payments

One industry commenter asked the Board to clarify that an issuer can specify a single address for receiving conforming payments. The Board notes that § 226.10(b)(2)(v) provides "[s]pecifying one particular address for receiving payments" such as a post office box" as an example of a reasonable requirement for payments. Accordingly, the Board believes that no additional clarification is necessary. However, a creditor that specifies a single address for the receipt of conforming payments is still subject to the general requirement in § 226.10(b) that the requirement enable most consumers to make conforming payments.

The commenter further urged the Board to adopt a clarification to comment 10(b)–2, which states that if a creditor promotes electronic payment via its Web site, any payments made via the creditor's Web site are generally conforming payments for purposes of § 226.10(b). The commenter asked the Board to clarify that a creditor may set a cut-off time for payments via its Web site, consistent with the general rule in § 226.10(b). The Board agrees that this clarification is appropriate and has included a reference to the creditor's cut-off time in comment 10(b)–2.

Finally, the Board is adopting a technical revision to § 226.10(b)(4), which addresses nonconforming payments. Section 226.10(b)(4) states that if a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the creditor shall credit the payment within five days of receipt. The Board has amended § 226.10(b)(4) to clarify that a creditor may only specify such requirements as are permitted under § 226.10. For example, a creditor may not specify requirements for making payments that would be unreasonable under § 226.10(b)(2), such as a cut-off time for mailed payments of 4:00 p.m., and treat payments received by mail between 4:00 p.m. and 5:00 p.m. as non-conforming payments.

Payments Made at Financial Institution Branches

The Credit Card Act amends TILA Section 127(b)(12) to provide that, for creditors that are financial institutions which maintain branches or offices at which payments on credit card accounts are accepted in person, the date on which a consumer makes a payment on the account at the branch or office is the date on which the payment is considered to have been made for purposes of determining whether a late fee or charge may be imposed. 15 U.S.C. 1637(b)(12). The Board proposed to implement the requirements of amended TILA Section 127(b)(12) that pertain to payments made at branches or offices of a financial institution in new § 226.10(b)(3).

Proposed § 226.10(b)(3)(i) stated that a card issuer that is a financial institution shall not impose a cut-off time earlier than the close of business for payments made in person on a credit card account under an open-end (not home-secured) consumer credit plan at any branch or office of the card issuer at which such payments are accepted. The proposal further provided that payments made in person at a branch or office of the financial institution during the business hours of that branch or office shall be considered received on the date on which the consumer makes the payment. Proposed § 226.10(b)(3) interpreted amended TILA Section 127(b)(12) as requiring card issuers that are financial institutions to treat in-person payments they receive at branches or offices during business hours as conforming payments that must be credited as of the day the consumer makes the in-person payment. The Board believes that this is the appropriate reading of amended TILA Section 127(b)(12) because it is consistent with consumer expectations that in-person payments made at a branch of the financial institution will be credited on the same day that they are made.

Several industry commenters stated that the Board should clarify the relationship between § 226.10(b)(3) and the general rule in § 226.10(b)(2) regarding cut-off times. These commenters indicated that it was unclear whether the Board intended to require that bank branches remain open until 5 p.m. if a card issuer accepts in-person payments at a branch location. The Board did not intend to require branches or offices of financial institutions to remain open until 5 p.m. if in-person credit card payments are accepted at that location. The Board believes that such a rule might discourage financial institutions from accepting in-person payments, to the detriment of consumers. The Board therefore is adopting § 226.10(b)(3)(i) generally as proposed, but has clarified that, notwithstanding § 226.10(b)(2)(ii), a card issuer may impose a cut-off time earlier than 5 p.m. for payments on a credit card account under an open-end (not home-secured) consumer credit plan made in person at a branch or office of a card issuer that is a financial institution, if the close of business of the branch or office is earlier than 5 p.m. For example, if a branch or office of the card issuer closes at 3 p.m., the card issuer must treat in-person payments received at that branch prior to 3 p.m. as received on that date.

Several industry commenters stated that a card issuer should not be required to treat an in-person payment received at a branch or office as conforming, if the issuer does not promote payment at the branch. The Board believes that TILA Section 127(b)(12)(C) requires all card issuers that are financial institutions that accept payments in person at a branch or office to treat those payments as received on the date on which the consumer makes the payment. The Credit Card Act does not distinguish between circumstances where a card issuer promotes in-person payments at branches and circumstances where a card issuer accepts, but does not promote, such payments. The Board believes that the intent of TILA Section 127(b)(12)(C) is to require in-person payments to be treated as received on the same day, which is consistent with consumer expectations. Accordingly, § 226.10(b)(3) does not distinguish between financial institutions that promote in-person payments at a branch and financial institutions that accept, but do not promote, such payments.

Neither the Credit Card Act nor TILA defines "financial institution." In order to give clarity to card issuers, the Board proposed to adopt a definition of "financial institution," for purposes of § 226.10(b)(3), in a new § 226.10(b)(3)(ii). Proposed § 226.10(b)(3)(ii) stated that "financial institution" has the same meaning as "depository institution" as defined in the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

Industry commenters noted that the Board's proposed definition of "financial institution" excluded credit unions. Consumer groups stated that a broader definition of "financial institution" including entities other than depository institutions, such as retail locations that accept payments on store credit cards for that retailer, would be appropriate in light of consumer expectations. The Board has revised § 226.10(b)(3)(ii) in the final rule to cover credit unions, because omission of credit unions in the proposal was an unintentional oversight. Section 226.10(b)(3)(ii) of the final rule states that a "financial institution" means a bank, savings association, or credit union. The Board believes that a broader definition of "financial institution" that includes non-depository institutions, such as retail locations, would not be appropriate, because the primary business of such entities is not the provision of financial services. The Board believes that the statute's reference to "financial institutions" contemplates that not all card issuers will be covered by this rule. The Board believes that the definition it is adopting effectuates the purposes of amended TILA Section 127(b)(12) by including all banks, savings associations, and credit unions, while excluding entities such as retailers that should not be considered "financial institutions" for purposes of proposed § 226.10(b)(3).

In October, 2009, the Board proposed a new comment 10(b)–5 to clarify the application of proposed § 226.10(b)(3) for payments made at point of sale. Proposed comment 10(b)–5 stated that if a creditor that is a financial institution issues a credit card that can be used only for transactions with a particular merchant or merchants, and a consumer is able to make a payment on that credit card account at a retail location maintained by such a merchant, that retail location is not considered to be a branch or office of the creditor for purposes of § 226.10(b)(3).

One industry commenter commented in support of proposed comment 10(b)–5, but asked that it be expanded to cover co-branded cards in addition to private label credit cards. This commenter pointed out that as proposed, comment 10(b)–5 applied only to private label credit cards, but the Board's supplementary information referenced co-branded credit cards. Consumer groups indicated that they believe proposed comment 10(b)–5 is contrary to consumer expectations. These commenters further stated that if a bank branch must credit payments as of the date of in-person payment, consumers will come to expect and assume that retail locations that accept credit card payments should do the same. The Board is adopting comment 10(b)–5 generally as proposed, but has expanded the comment to address co-branded credit cards. The Board believes that the intent of TILA Section 127(b)(12) is to apply only to payments made at a branch or office of the creditor, not to payments made at a location maintained by a third party that is not the creditor. TILA Section 127(b)(12) is limited to branches or offices of a card issuer that is a financial institution, and accordingly the Board believes that the statute was not intended to address other types of locations where an in-person payment on a credit card account may be accepted.

Finally, the Board also proposed a new comment 10(b)–6 to clarify what constitutes a payment made "in person" at a branch or office of a financial institution. Proposed comment 10(b)–6 would state that for purposes of § 226.10(b)(3), payments made in person at a branch or office of a financial institution include payments made with the direct assistance of, or to, a branch or office employee, for example a teller at a bank branch. In contrast, the comment would provide that a payment made at the bank branch without the direct assistance of a branch or office employee, for example a payment placed in a branch or office mail slot, is not a payment made in person for purposes of § 226.10(b)(3). The Board believes that this is consistent with consumer expectations that payments made with the assistance of a financial institution employee will be credited immediately, while payments that are placed in a mail slot or other receptacle at the branch or office may require additional processing time. The Board received no significant comment on proposed comment 10(b)–6, and it is adopted as proposed.

One issuer asked the Board to clarify that in-person payments made at a branch or location of a card issuer's affiliate should not be treated as conforming payments, even if the affiliate shares the same logo or trademark as the card issuer. The Board understands that for many large financial institutions, the card issuing entity may be a separate legal entity from the affiliated depository institution or other affiliated entity. In such cases, the card issuing entity is not likely to have branches or offices at which a consumer can make a payment, while the affiliated depository institution or other affiliated entity may have such branches or offices. Therefore, as a practical matter, in many cases a consumer will only be able to make in-person payments on his or her credit card account at an affiliate of the card issuer, not at a branch of the card issuer itself. The Board believes that in such cases, it may not be apparent to consumers that they are in fact making payment at a legal entity different than their card issuer, especially when the affiliates share a logo or have similar names. Therefore, the Board believes that the clarification requested by the commenter is inappropriate. The Board is adopting a new comment 10(b)–7 which states that if an affiliate of a card issuer that is a financial institution shares a name with the card issuer, such as "ABC," and accepts in-person payments on the card issuer's credit card accounts, those payments are subject to the requirements of § 226.10(b)(3).

10(d) Crediting of Payments When Creditor Does Not Receive or Accept Payments on Due Date

The Credit Card Act adopted a new TILA Section 127(o) that provides, in part, that if the payment due date for a credit card account under an open-end consumer credit plan is a day on which the creditor does not receive or accept payments by mail (including weekends and holidays), the creditor may not treat a payment received on the next business day as late for any purpose. 15 U.S.C. 1637(o). New TILA Section 127(o) is similar to § 226.10(d) of the Board's January 2009 Regulation Z Rule, with two notable differences. Amended § 226.10(d) of the January 2009 Regulation Z Rule stated that if the due date for payments is a day on which the creditor does not receive or accept payments by mail, the creditor may not treat a payment received *by mail* the next business day as late for any purpose. In contrast, new TILA Section 127(o) provides that if the due date is a day on which the creditor does not receive or accept payments by mail, the creditor may not treat a payment received the next business day as late for any purpose. TILA Section 127(o) applies to payments made by any method on a due date which is a day on which the creditor does not receive or accept mailed payments, and is not limited to payments received the next business day by mail. Second, new TILA Section 127(o) applies only to credit card accounts under an open-end consumer plan, while § 226.10(d) of the January 2009 rule applies to all open-end consumer credit.

The Board proposed to implement new TILA Section 127(o) in an amended § 226.10(d). The general rule in proposed § 226.10(d) would track the statutory language of new TILA Section 127(o) to state that if the due date for payments is a day on which the creditor does not receive or accept payments by mail, the creditor may generally not treat a payment received by any method the next business day as late for any purpose. The Board proposed, however, to provide that if the creditor accepts or receives payments made by a method other than mail, such as electronic or telephone payments, a due date on which the creditor does not receive or accept payments by mail, it is not required to treat a payment made by that method on the next business day as timely. The Board proposed this clarification using its authority under TILA Section 105(a) to make adjustments necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a).

Consumer group commenters stated that electronic and telephone payments should not be exempted from the rule for payments made on a due date which is a day on which the creditor does not receive or accept payments by mail. The Board notes that proposed § 226.10(d) did not create a general exemption for electronic or telephone payments, except when the creditor receives or accepts payments by those methods on a day on which it does not accept payments by mail. Under these circumstances, § 226.10(d) requires a creditor to credit a conforming electronic or telephone payment as of the day of receipt, and accordingly the fact that the creditor does not accept mailed payments on that day does not result in any detriment to a consumer who makes his or her payment electronically or by telephone.

The Board believes that it is not the intent of new TILA Section 127(o) to permit consumers who can make timely payments by methods other than mail, such as payments by phone, to have an extra day after the due date to make payments using those methods without those payments being treated as late. Rather, the Board believes that new TILA Section 127(o) was intended to address those limited circumstances in which a consumer cannot make a timely payment on the due date, for example if it falls on a weekend or holiday and the creditor does not accept or receive payments on that date. In those circumstances, without the protections of new TILA Section 127(o), the consumer would have to make a payment one or more days in advance of the due date in order to have that payment treated as timely. The Credit Card Act provides other protections designed to ensure that consumers have adequate time to make payments, such as amended TILA Section 163, which was implemented in § 226.5(b) in the July 2009 Regulation Z Interim Final Rule, which generally requires that creditors mail or deliver periodic statements to consumers at least 21 days in advance of the due date. For these reasons, the Board is adopting § 226.10(d) as proposed, except that the Board has restructured the paragraph for clarity.

An industry trade association asked the Board to clarify that § 226.10(d), which prohibits the treatment of a payment as late for any purpose, does not prohibit charging interest for the period between the due date on which the creditor does not accept payments by mail and the following business day. The Board believes, consistent with the approach it took in § 226.5(b)(2)(ii), that charging interest for the period between the due date and the following business day does not constitute treating a payment as late for any purpose, unless the delay results in the loss of a grace period. Accordingly, the Board is adopting new comment 10(d)–2, which cross-references the guidance on "treating a payment as late for any purpose" in comment 5(b)(2)(ii)–2. The comment also expressly states that when an account is not eligible for a grace period, imposing a finance charge due to a periodic interest rate does not constitute treating a payment as late.

One industry commenter asked the Board to clarify the operation of § 226.10(d) if a holiday on which an issuer does not accept payments is on a Friday, but the bank does accept payments by mail on the following Saturday. The Board believes that in this case, Saturday is the next business day for purposes of § 226.10(d). Accordingly, the Board has included a statement in § 226.10(d)(1) indicating that for the purposes of § 226.10(d), the "next business day" means the next day on which the creditor accepts or receives payments by mail.

Another industry commenter stated that the rule should provide that if a creditor receives multiple mail deliveries on the next business day following a due date on which it does not accept mailed payments, only payments in the first delivery should be required to be treated as timely. The Board believes that such a comment would not be appropriate, because if the creditor received or accepted mailed payments on the due date, payments in every mail delivery on that day would be timely, not just those payments received in the first mail delivery. The Board believes that consumers should accordingly have a full business day after a due date on which the creditor does not accept payments by mail in order to make a timely payment.

Finally, as proposed, amended § 226.10(d) applies to all open-end consumer credit plans, not just credit card accounts, even though new TILA Section 127(o) applies only to credit card accounts. The Board received no comments on the applicability of § 226.10(d) to open-end credit plans that are not credit card accounts. The Board believes that it is appropriate to have one consistent rule regarding the treatment of payments when the due date falls on a date on which the creditor does not receive or accept payments by mail. The Board believes that that Regulation Z should treat payments on an open-end plan that is not a credit card account the same as payments on a credit card account. Regardless of the type of open-end plan, if the payment due date is a day on which the creditor does not accept or receive payments by mail, a consumer should not be required to make payments prior to the due date in order for them to be treated as timely. This is consistent with § 226.10(d) of the January 2009 Regulation Z Rule, which set forth one consistent rule for all open-end credit.

10(e) Limitations on Fees Related to Method of Payment

The Credit Card Act adopted new TILA Section 127(l) which generally prohibits creditors, in connection with a credit card account under an open-end consumer credit plan, from imposing a separate fee to allow a consumer to repay an extension of credit or pay a finance charge, unless the payment involves an expedited service by a customer service representative. 15 U.S.C. 1637(l). In the October 2009 Regulation Z Proposal, the Board proposed to implement TILA Section 127(l) in § 226.10(e), which generally prohibits creditors, in connection with a credit card account under an open-end (not home-secured) consumer credit plan, from imposing a separate fee to allow consumers to make a payment by any method, such as mail, electronic, or telephone payments, unless such payment method involves an expedited service by a customer service representative of the creditor. The final rule adopts new § 226.10(e) as proposed.

Separate fee. Proposed comment 10(e)–1 defined "separate fee" as a fee imposed on a consumer for making a single payment to the account. Consumer group commenters suggested that the definition of the term "separate fee" was too narrow and could create a loophole for periodic fees, such as a monthly fee, to allow consumers to make a payment. Consistent with the statutory provision in TILA Section 127(l), the Board believes a separate fee for any payment made to an account is prohibited, with the exception of a payment involving expedited service by a customer service representative. *See* 15 U.S.C. 1604(a). The Board revises proposed comment 10(e)–1 by removing the word "single" in order to clarify that the prohibition on a "separate fee" applies to any general payment method which does not involve expedited service by a customer service representative and to any payment to an account, regardless of whether the payment involves a single payment transaction or multiple payment transactions. Therefore, the term separate fee includes any fee which may be imposed periodically to allow consumers to make payments. The Board also notes that periodic fees may be prohibited because they do not involve expedited service or a customer service representative. The term separate fee also includes any fee imposed to allow a consumer to make multiple payments to an account, such as automatic monthly payments, if the payments do not involve expedited service by a customer service representative. Accordingly, comment 10(e)–1 is adopted with the clarifying revision.

Expedited. The Board proposed comment 10(e)–2 to clarify that the term "expedited" means crediting a payment to the account the same day or, if the payment is received after the creditor's cut-off time, the next business day. In response to the October 2009 Regulation Z Proposal, industry commenters asked the Board to revise guidance on the term "expedited" to include representative-assisted payments that are scheduled to occur on a specific date, *i.e.,* a future date, and then credited or posted immediately on the requested specified date. The Board has not included this interpretation of expedited in the final rule because the Board believes it would be inconsistent with the intent of TILA Section 127(l). Comment 10(e)–2 is adopted as proposed.

Customer service representative. Proposed comment 10(e)–3 clarified that expedited service by a live customer service representative of the creditor would be required in order for a creditor to charge a separate fee to allow consumers to make a payment. One commenter requested that the Board clarify that a creditor's customer service representative includes the creditor's agents or service bureau. The Board notes that proposed comment 10(e)–3 already stated that payment service may be provided by an agent of the creditor. Consumer group commenters strongly supported the Board's guidance that a customer service representative does not include automated payment systems, such as a voice response unit or interactive voice response system. Another commenter, however, asked the Board to clarify guidance for payment transactions which involve both an automated system and the assistance of a live customer service representative. Specifically, the commenter noted that some payments systems require an initial consumer contact through an automated system but the payment is ultimately handled by a live customer service representative. The Board acknowledges that some payments transactions may require the use of an automated system for a portion of the transaction, even if a live customer service representative provides assistance. For example, a customer's telephone call may be answered by an automated system before the customer is directed to a live customer service representative, or a customer service representative may direct a customer to an automated system to complete the payment transaction, such as entering personal identification numbers (PINs). The Board notes that a payment made with the assistance of a live representative or agent of the credit, which also requires an automated system for a portion of the transaction, is considered service by a live customer service representative. The Board is amending comment 10(e)–3 in the final rule accordingly.

Section 226.10(f) Changes by Card Issuer

The Credit Card Act adopted new TILA Section 164(c), which provides that a card issuer may not impose any late fee or finance charge for a late payment on a credit card account if a card issuer makes "a material change in the mailing address, office, or procedures for handling cardholder payments, and such change causes a material delay in the crediting of a cardholder payment made during the 60-day period following the date on which the change took effect." 15 U.S.C. 1666c(c). The Board is implementing new TILA Section 164(c) in § 226.10(f). Proposed § 226.10(f) prohibited a credit card issuer from imposing any late fee or finance charge for a late payment on a credit card account if a card issuer makes a material change in the address for receiving cardholder payments or procedures for handling cardholder payments, and such change causes a material delay in the crediting of a payment made during the 60-day period following the date on which the change took effect. As discussed in the October 2009 Regulation Z Proposal, the Board modified the language of new TILA Section 164(c) to clarify that the meaning of the term "office" applies only to changes in the address of a branch or office at which payments on a credit card account are accepted. To avoid potential confusion, the Board revises § 226.10(f) to clarify that the prohibition on imposing a late fee or finance charge applies only during the 60-day period following the date on which a material change took effect. The Board adopts § 226.10(f) as proposed with the clarifying revision.

Comment 10(f)–1 clarified that "address for receiving payment" means a mailing address for receiving payment, such as a post office box, or the address of a branch or office at which payments on credit card accounts are accepted. No comments were received on proposed comment 10(f)–1 in particular; however, as discussed below, industry commenters opposed including the closing of a bank branch as an example of a material change in address. *See* comment 10(f)–4.iv. The final rule adopts comment 10(f)–1 as proposed.

The Board also proposed comment 10(f)–2 to provide guidance to creditors in determining whether a change or delay is material. Proposed comment 10(f)–2 clarified that "material change" means any change in address for receiving payment or procedures for handling cardholder payments which causes a material delay in the crediting of a payment. Proposed comment 10(f)–2 further clarified that a "material delay" means any delay in crediting a payment to a consumer's account which would result in a late payment and the imposition of a late fee or finance charge. The final rule adopts comment 10(f)–2 as proposed.

In the October 2009 Regulation Z Proposal, the Board acknowledged that a card issuer may face operational challenges in order to ascertain, for any given change in the address for receiving payment or procedures for handling payments, whether that change did in fact cause a material delay in the crediting of a consumer's payment. Accordingly, proposed comment 10(f)–3 provided card issuers with a safe harbor for complying with the proposed rule. Specifically, a card issuer may elect not to impose a late fee or finance charge on a consumer's account for the 60-day period following a change in address for receiving payment or procedures for handling cardholder payments which could reasonably expected to cause a material delay in crediting of a payment to the consumer's account. The Board solicited comment on other reasonable methods that card issuers may use in complying with proposed § 226.10(f). The Board did not receive any significant comments on the proposed safe harbor or suggestions for alternative reasonable methods which would assist card issuers in compliance.

Despite the lack of comments, the Board believes that a safe harbor based on a "reasonably expected" standard is appropriate. The safe harbor recognizes the operational difficulty in determining in advance the number of customer accounts affected by a particular change in payment address or procedure and whether that change will cause a late payment. However, upon further consideration, the Board notes that in certain circumstances, a late fee or finance charge may have been improperly imposed because the late payment was subsequently determined to have been caused by a material change in the payment address or procedures. Accordingly, the final rule revises comment 10(f)–3, which is renumbered comment 10(f)–3.i, to clarify that for purposes of § 226.10(f), a late fee or finance charge is not imposed if the fee or charge is waived or removed, or an amount equal to the fee or charge is credited to the account. Furthermore, the Board amends proposed comment 10(f)–3 by adopting comment 10(f)–3.ii, which provides a safe harbor specifically for card issuers with a retail location which accepts payment.

The final rule permits a card issuer to impose a late fee or finance charge for a late payment during the 60-day period following a material change in a retail location which accepts payments, such as closing a retail location or no longer accepting payments at the retail location. However, if a card issuer is notified by a consumer, no later than 60 days after the card issuer transmitted the first periodic statement that reflects the late fee or finance charge for a late payment, that a late payment was caused by such change, the card issuer must waive or remove any late fee or finance charge, or credit an amount equal to any late fee or finance charge, imposed on the account during the 60-day period following the date on which the change took effect. In response to concerns raised by commenters, the Board believes a safe harbor for card issuers which accept payment at retail locations addresses the operational difficulty of determining which consumers are affected by a material change in a retail location or procedures for handling payment at a retail location. Accordingly, the final rule adopts comment 10(f)–3(ii) and provides an example as guidance in new comment 10(f)–4.vi, as discussed below.

Proposed comment 10(f)–4 provided illustrative examples consistent with proposed § 226.10(f), in order to provide additional guidance to creditors. Proposed comment 10(f)–4.i illustrated an example of a change in mailing address which is immaterial. No comments were received on this example, and the final rule adopts comment 10(f)–4.i as proposed. Proposed comment 10(f)–4.ii illustrated an example of a material change in mailing address which would not cause a material delay in crediting a payment. No comments were received on this example, and the final rule adopts comment 10(f)–4.ii as proposed. Proposed comment 10(f)–4.iii illustrated an example of a material change in mailing address which could cause a material delay in crediting a payment. No comments were received on this example, and the final rule adopts comment 10(f)–4.iii as proposed.

Proposed comment 10(f)–4.iv illustrated an example of a permanent closure of a local branch office of a card issuer as a material change in address for receiving payment. Several industry commenters raised concerns about proposed comment 10(f)–4.iv. In particular, industry commenters argued that a branch closing of a bank is not a material change in the address for receiving payment. One industry commenter suggested that a bank branch closing should not be considered as a factor in determining the cause of a late payment. Two commenters noted that national banks and insured depository institutions are required to give 90 days' advance notice related to the branch closing as well as post a notice at the branch location at least 30 days prior to closure. *See* 12 U.S.C. 1831r–1; 12 CFR 5.30(j). Commenters argued that these advance notice requirements provide adequate notice for customers to make alternative arrangements for payment.

Furthermore, industry commenters stated that interpreting a branch closing as a material change, as proposed in comment 10(f)–4.iv, would impose significant operational challenges and costs on banks in order to comply with this provision. Specifically, commenters stated that banks would have difficulty determining which customers "regularly make payments" at particular branches and which late payments were caused by the closing of a bank branch. In addition, commenters asserted that they would be unable to identify customers who are outside the "footprint" of a branch and unsuccessfully attempt to make a payment at the closed branch, such as if the customer is traveling in a different city. Furthermore, one commenter noted that banks can respond to a one-time complaint from a customer impacted by a branch closing.

The Board is adopting comment 10(f)–4.iv, but with clarification and additional guidance based on the comments and the Board's further consideration. In order to ease compliance burden, the final comment clarifies that a card issuer is not required to determine whether a customer "regularly makes payments" at a particular branch. As noted by commenters, certain banks and card issuers may have other regulatory obligations which require the identification of and notification to customers of a local bank branch. The final comment is revised to provide an example of a card issuer which chooses to rely on the safe harbor for the late payments on customer accounts which it reasonably believes may be affected by the branch closure.

Proposed comment 10(f)–4.v illustrated an example of a material change in the procedures for handling cardholder payments. The Board did not receive comments on this example, and the final rule adopts comment 10(f)–4.v as proposed.

The final rule includes new comment 10(f)–4.vi to address circumstances when a card issuer which accepts payment at a retail location makes a material change in procedures for handling cardholder payments the retail location, such as no longer accepting payments in person as a conforming payment. The new example also provides guidance for circumstances when a card issuer is notified by a consumer that a late fee or finance charge for a late payment was caused by a material change. Under these circumstances, a card issuer must waive or remove the late fee or finance charge or credit the customer's account in an amount equal to the fee or charge.

Proposed comment 10(f)–5 clarified that when an account is not eligible for a grace period, imposing a finance charge due to a periodic interest rate does not constitute imposition of a finance charge for a late payment for purposes of § 226.10(f). Notwithstanding the proposed rule, a card issuer may impose a finance charge due to a periodic interest rate in those circumstances. The Board received no significant comment addressing comment 10(f)–5, which is adopted as proposed.

Section 226.11 Treatment of Credit Balances; Account Termination

11(c) Timely Settlement of Estate Debts

The Credit Card Act adds new TILA Section 140A and requires that the Board, in consultation with the Federal Trade Commission and each other agency referred to in TILA Section 108(a), to prescribe regulations requiring creditors, with respect to credit card accounts under an open-end consumer credit plan, to establish procedures to ensure that any administrator of an estate can resolve the outstanding credit balance of a deceased accountholder in a timely manner. 15 U.S.C. 1651. The Board proposed to implement TILA Section 140A in new § 226.11(c).

The final rule generally requires that a card issuer adopt reasonable written procedures designed to ensure that an administrator of an estate of a deceased accountholder can determine the amount of and pay any balance on the account. The final rule also has two specific requirements which effectuate the statute's purpose. First, the final rule requires a card issuer to disclose the amount of the balance on the account in a timely manner upon request by an administrator. The final rule provides a safe harbor of 30 days. Second, the final rule places certain limitations on card issuers regarding fees, annual percentage rates, and interest. Specifically, upon request by an administrator for the balance amount, a card issuer must not impose fees on the account or increase any annual percentage rate, except as provided by the rule. In addition, a card issuer must waive or rebate interest, including trailing or residual interest, for any payment in full received within 30 days of disclosing a timely statement of balance.

Proposed § 226.11(c)(1) set forth the general rule requiring card issuers to adopt reasonable procedures designed to ensure that any administrator of an estate of a deceased accountholder can determine the amount of and pay any balance on the decedent's credit card account in a timely manner. For clarity, the Board proposed to interpret the term "resolve" for purposes of § 226.11(c) to mean determine the amount of and pay any balance on a deceased consumer's account. In addition, in order to ensure that the rule applies consistently to any personal representative of an estate who has the duty to settle any estate debt, the Board proposed to include "executor" in proposed § 226.11(c). The Board stated that TILA Section 140A is intended to apply to any deceased accountholder's estate, regardless of whether an administrator or executor is responsible for the estate. In order to provide further guidance, the Board clarifies that for purposes of § 226.11(c), the term "administrator" of an estate means an administrator, executor, or any personal representative of an estate who is authorized to act on behalf of the estate. Accordingly, the final rule removes the reference to "executor" in § 226.11(c), renumbers proposed comment 11(c)–1 as comment 11(c)–2, and adopts the guidance on "administrator" in new comment 11(c)–1.

As the Board discussed in the October 2009 Regulation Z Proposal, the Board recognized that some card issuers may already have established procedures for the resolution of a deceased accountholder's balance. The Board believes a "reasonable procedures" standard would permit card issuers to retain, to the extent appropriate, procedures which may already be in place, in complying with proposed § 226.11(c), as well as applicable state and federal laws governing probate. Consumer group commenters suggested that the language of the general rule be modified to require that card issuers "have and *follow* reasonable *written* procedures" designed to ensure that an administrator of an estate of a deceased accountholder can determine the amount of and pay any balance on the account in a timely manner. The Board is amending proposed § 226.11(c)(1) to require that the reasonable policies and procedures be written. The Board believes that the suggested change to add the word "follow" is unnecessary because there are references throughout Regulation Z and the Board's other regulations that require reasonable policies and procedures without an explicit instruction that they be followed. In each of these instances, the Board has expected and continues to expect that these policies and procedures will be followed. The final rule adopts § 226.11(c)(1), which has been renumbered § 226.11(c)(1)(i), as amended.

The Board is renumbering proposed § 226.11(c)(2)(ii) as § 226.11(c)(1)(ii) in order to clarify that § 226.11(c) does not apply to the account of a deceased consumer if a joint accountholder remains on the account. Proposed § 226.11(c)(2)(ii) (renumbered as § 226.11(c)(1)(ii)) provided that a card issuer may impose fees and charges on a deceased consumer's account if a joint accountholder remains on the account. Proposed comment 11(c)–3 clarified that a card issuer may impose fees and charges on a deceased consumer's account if a joint accountholder remains on the account but may not impose fees and charges on a deceased consumer's account if only an authorized user remains on the account. Consumer groups argued that the Board should require card issuers to provide documentary proof that another party to the account is a joint accountholder, and not just an authorized user, before continuing to impose fees and charges on a deceased consumer's account. Specifically, consumer groups raised the concern that card issuers may attempt to hold authorized users liable for account balances. The Board notes, however, that authorized users are not liable for the debts of a deceased accountholder or the estate. The final rule adopts proposed § 226.11(c)(2)(ii), which has been renumbered § 226.11(c)(1)(ii), and proposed comment 11(c)–3, which has been renumbered as comment 11(c)–6 for organizational purposes.

Proposed comment 11(c)–1 provided examples of reasonable procedures consistent with proposed § 226.11(c). The final rule adopts proposed comments 11(c)–1.i–iv, which have been renumbered as comments 11(c)–2.i–iv, as proposed. Industry commenters asked the Board to permit card issuers to require evidence, such as written documentation, that an administrator, executor, or personal representative has the authority to act on behalf of the estate. Commenters raised privacy concerns of disclosing financial information to third parties. The Board believes a reasonable procedure for verifying an administrator's status or authority is consistent with § 226.11(c), without significantly increasing administrative burden on an administrator. The Board also believes the benefit of greater privacy protection outweighs the additional burden. Two commenters also requested that the Board permit card issuers to require verification of a customer's death. The Board believes, however, that this requirement is unnecessary. Therefore, in response to comments received, the Board adopts new comment 11(c)–2.v to clarify that card issuers are permitted to establish reasonable procedures requiring verification of an administrator's authority to act on behalf of an estate.

Commenters requested that the Board provide additional guidance regarding the use of designated communication channels, such as a specific toll-free number or mailing address. Industry commenters cited the reduced operational costs and burden associated with requiring administrators to use designated communication channels because specialized training and customer service representatives who handle estate matters could be consolidated. Other commenters recommended that the Board consider additional methods for providing an easily accessible point of contact for estate administrators or family members of deceased accountholders. For example, a card issuer could include contact information regarding deceased accountholders on a dedicated link on a creditor's Web site or on the periodic statement. One commenter suggested a standardized form or format which an administrator may use to register an accountholder as deceased at multiple card issuers. Another commenter argued that the examples for reasonable procedures should address practical procedures, and not "debt forgiveness." Consumer groups believed the examples in proposed comment 11(c)–1 did not address the failure of creditors to respond to an administrator's inquiries or correspondence. Consumer groups recommended that the Board consider additional procedures, such as acknowledging receipt of an administrator's inquiry, providing details regarding payoff, and providing a payoff receipt. In response to comments received, the Board adopts new comment 11(c)–2.vi and 11(c)–2.vii to provide additional guidance. New comment 11(c)–2.vi clarifies that a card issuer may designate a department, business unit, or communication channel for administrators in order to expedite handling estate matters. New comment 11(c)–2.vii clarifies that a card issuer should be able to direct administrators who call a toll-free number or send mail to a general correspondence address to the appropriate customer service representative, department, business unit, or communication channel.

For organizational purposes, the Board has renumbered proposed § 226.11(c)(3) as § 226.11(c)(2) in the final rule. Proposed § 226.11(c)(3)(i) required a card issuer to disclose the amount of the balance on the account in a timely manner, upon request by the administrator of the estate. The Board believed a timely statement reflecting the deceased accountholder's balance is necessary to assist administrators with the settlement of estate debts. Consumer groups urged the Board not to require a formal request for a statement balance. Instead, card issuers should be required to act in good faith whenever informed of a consumer's death and the presence of an estate administrator. One commenter asked the Board to clarify that the rule does not supplant state probate laws and timelines for the resolution of estates. Specifically, the commenter argued that state probate law accomplishes the goals of the statutory provision and that compliance with state probate requirements should be explicitly stated as a reasonable procedure for the timely settlement of estates. The Board understands that state probate procedures are well-established, and this final rule does not relieve the card issuer of its obligations, such as filing a claim, nor affect a creditor's rights, such as contesting a claim rejection, under state probate laws. The final rule adopts § 226.11(c)(3)(i), which has been renumbered as § 226.11(c)(2)(i), as proposed with technical revisions.

Proposed § 226.11(c)(3)(ii) provided card issuers with a safe harbor for disclosing the balance amount in a timely manner, stating that it would be reasonable for a card issuer to provide the balance on the account within 30 days of receiving a request by the administrator of an estate. The Board believes that 30 days is reasonable to ensure that transactions and charges have been accounted for and calculated and to provide a written statement or confirmation. The Board solicited comment as to whether 30 days provides creditors with sufficient time to provide a statement of the balance on the deceased consumer's account. Industry commenters and consumer groups generally agreed that 30 days is sufficient time to provide a timely statement of balance on an account. One industry commenter, however, expressed concern that 30 days would be insufficient and requested 45–60 days instead to ensure all charges were processed. Based on the comments received, the Board believes 30 days is sufficient for a card issuer to provide a timely statement of the balance amount. The final rule adopts § 226.11(c)(3)(ii), which has been renumbered as § 226.11(c)(2)(ii), as proposed with technical revisions.

Proposed comment 11(c)–4 (renumbered as comment 11(c)–2) clarified that a card issuer may receive a request for the amount of the balance on the account in writing or by telephone call from the administrator of an estate. If a request is made in writing, such as by mail, the request is received when the card issuer receives the correspondence. No significant comments were received on proposed comment 11(c)–4, and it is adopted as proposed with technical revisions and renumbered as comment 11(c)–2 for organizational purposes.

Proposed comment 11(c)–5 (renumbered as comment 11(c)–3) provided guidance to card issuers in complying with the requirement to provide a timely statement of balance. Card issuers may provide the amount of the balance, if any, by a written statement or by telephone. Proposed comment 11(c)–5 also clarified that proposed § 226.11(c)(3) (renumbered as § 226.11(c)(2)) would not preclude a card issuer from providing the balance amount to appropriate persons, other than the administrator of an estate. For example, the Board noted that the proposed rule would not preclude a card issuer, subject to applicable federal and state laws, from providing a spouse or family members who indicate that they will pay the decedent's debts from obtaining a balance amount for that purpose. Proposed comment 11(c)–5 further clarified that proposed § 226.11(c)(3) (renumbered as § 226.11(c)(2)) does not relieve card issuers of the requirements to provide a periodic statement, under § 226.5(b)(2). A periodic statement, under § 226.5(b)(2), may satisfy the requirements of proposed § 226.11(c)(3) (renumbered as § 226.11(c)(2)), if provided within 30 days of notice of the consumer's death. A commenter stated that proposed comment 11(c)–5 should reference the 30-day period following the date of the balance request, and not the notice of the accountholder's death. The final rule revises proposed comment 11(c)–5 to reference the date of the balance request with regard to using a periodic statement to satisfy the requirements of new § 226.11(c)(2) and renumbers proposed comment 11(c)–5 as comment 11(c)–3 for organizational purposes.

Proposed § 226.11(c)(2)(i) (renumbered as § 226.11(c)(3)(i)) prohibited card issuers from imposing fees and charges on a deceased consumer's account upon receiving a request for the amount of any balance from an administrator of an estate. As stated in the October 2009 Regulation Z Proposal, the Board believed that this prohibition is necessary to provide certainty for all parties as to the balance amount and to ensure the timely settlement of estate debts. The Board solicited comment on whether a card issuer should be permitted to resume the imposition of fees and charges if the administrator of an estate has not paid the account balance within a specified period of time. Consumer group commenters opposed resuming fees and charges because settling estates can be time-consuming and an administrator may not have authority to pay the balance for some time. One industry commenter argued that there should be no prohibition against charging fees or interest because it was unreasonable to provide an interest-free loan for an indefinite period of time until an estate has settled. Most industry commenters, however, requested that card issuer be permitted to resume charging fees and interest if the balance on the account has not been paid within a specified time period after the balance request has been made. Most industry commenters stated 30 days was a reasonable time to pay before fees and interest would resume accruing, and two commenters stated 60 days may be reasonable. Two commenters also suggested that after the time to pay had elapsed, a creditor could be required to provide an updated statement upon subsequent request by an administrator. One government agency suggested that the Board simplify the final rule by determining the amount which can be collected from an estate as the balance on the periodic statement for the billing cycle during which the accountholder died.

The Board is revising proposed § 226.11(c)(2), which has been renumbered as § 226.11(c)(3), based on the comments received and the Board's further consideration. New § 226.11(c)(3)(i) prohibits card issuers from imposing any fee, such as a late fee or annual fee, on a deceased consumer's account upon receiving a request from an administrator of an estate. The Board believes that in order to best effectuate the statute's intent, it is appropriate to limit fees or penalties on a deceased consumer's account which is closed or frozen. For the purposes of § 226.11(c), new § 226.11(c)(3)(i) also prohibits card issuers from increasing the annual percentage rate on an account, and requires card issuers to maintain the applicable interest rate on the date of receiving the request, except as provided by § 226.55(b)(2).

New § 226.11(c)(3)(ii) requires card issuers to waive or rebate trailing or residual interest if the balance disclosed pursuant to § 226.11(c)(2) is paid in full within 30 days after disclosure. A card issuer may continue to accrue interest on the account balance from the date on which a timely statement of balance is provided, however, that interest must be waived or rebated if the card issuer receives payment in full within 30 days. A card issuer is not required to waive or rebate interest if payment in full is not received within 30 days. For example, on March 1, a card issuer receives a request from an administrator for the amount of the balance on a deceased consumer's account. On March 25, the card issuer provides an administrator with a timely statement of balance in response to the administrator's request. If the administrator makes payment in full on April 24, a card issuer must waive or rebate any additional interest that accrued on the balance between March 25 and April 24. However, if a card issuer receives only a partial payment on or before April 24 or receives payment in full after April 24, a card issuer is not required to waive or rebate interest that accrued between March 25 and April 24. The Board believes the requirement to waive or rebate trailing or residual interest, when payment is received within the 30-day period following disclosure of the balance, provides an administrator with certainty as to the amount required to pay the entire account balance and assists administrators in settling the estate. The Board believes a 30-day period is generally sufficient for an administrator to arrange for payment.. The Board notes that if an administrator is unable to pay the card issuer before the 30-day period following the timely statement of balance has elapsed, an administrator is permitted to make subsequent requests for an updated statement of balance. In order to provide additional guidance, the Board is adopting new comment 11(c)–5, which provides an illustrative example.

Proposed comment 11(c)–2 clarified that a card issuer may impose finance charges based on balances for days that precede the date on which the creditor receives a request pursuant to proposed § 226.11(c)(3). No comments were received on proposed comment 11(c)–2, and it is adopted as proposed with technical revision and renumbered as comment 11(c)–4 for organizational purposes.

Section 226.12 Special Credit Card Provisions

Section 226.13 Billing Error Resolution

Comment 12(b)–3 states that a card issuer must investigate claims in a reasonable manner before imposing liability for an unauthorized use, and sets forth guidance on conducting an investigation of a claim. Comment 13(f)–3 contains similar guidance for a creditor investigating a billing effort. The January 2009 Regulation Z Rule amended both comments to specifically provide that a card issuer (or creditor) may not require a consumer to submit an affidavit or to file a police report as a condition of investigating a claim. In the May 2009 Regulation Z Proposed Clarifications, the Board proposed to clarify that the card issuer (or creditor) could, however, require a consumer's signed statement supporting the alleged claim. Such a signed statement may be necessary to enable the card issuer to provide some form of certification indicating that the cardholder's claim is legitimate, for example, to obtain documentation from a merchant relevant to a claim or to pursue chargeback rights. Accordingly, the Proposed Clarifications would have amended comments 12(b)–3 and 13(f)–3 to reflect the ability of the card issuer (or creditor) to require a consumer signed statement for these types of circumstances.

The Board received one comment in support of the proposed clarification. This industry commenter stated that expressly permitting a signature requirement would facilitate expedited resolutions of error claims. The final rule adopts the clarifications in comments 12(b)–3 and 13(f)–3, as proposed.

Section 226.16 Advertising

Although § 226.16 was republished in its entirety, the Board only solicited comment on proposed §§ 226.16(f) and (h), as the other sections of § 226.16 were previously finalized in the January 2009 Regulation Z Rule. Therefore, the Board is only addressing comments received on §§ 226.16(f) and (h).

16(f) Misleading Terms

As discussed in the section-by-section analysis for § 226.5(a)(2)(iii), the Board did not receive any comments regarding § 226.16(f), which is adopted as proposed.

16(h) Deferred Interest or Similar Offers

In the May 2009 Regulation Z Proposed Clarifications, the Board proposed to use its authority under TILA Section 143(3) to add a new § 226.16(h) to address the Board's concern that the disclosures currently required under Regulation Z may not adequately inform consumers of the terms of deferred interest offers. 15 U.S.C. 1663(3). The Board republished this proposal in the October 2009 Regulation Z Proposal. The proposed rules regarding deferred interest would have incorporated many of the same formatting concepts that were previously adopted for promotional rates under § 226.16(g). Specifically, the Board proposed to require that the deferred interest period be disclosed in immediate proximity to each statement regarding interest or payments during the deferred interest period. The Board also proposed that certain information about the terms of the deferred interest offer be disclosed in a prominent location closely proximate to the first statement regarding interest or payments during the deferred interest period. These proposals are discussed in more detail below.

The Board received broad support from both consumer group and industry commenters for its proposal to implement disclosure requirements for advertisements of deferred interest offers. Consumer group commenters, however, believed that the Board should go further and ban "no interest" advertising as deceptive when used in conjunction with an offer that could potentially result in the consumer being charged interest reaching back to the date of purchase. The Board believes that deferred interest plans can provide benefits to consumers who properly understand how the product is structured. Therefore, the Board believes the appropriate approach to addressing deferred interest offers is to ensure that important information about these offers is provided to consumers through the disclosure requirements proposed in § 226.16(h) instead of banning the term "no interest" in advertisements of deferred interest plans.

16(h)(1) Scope

Similar to the rules applicable to promotional rates under § 226.16(g), the Board proposed that the rules related to deferred interest offers under proposed § 226.16(h) be applicable to any advertisement of such offers for open-end (not home-secured) plans. In addition, the proposed rules applied to promotional materials accompanying applications or solicitations made available by direct mail or electronically, as well as applications or solicitations that are publicly available. The Board did not receive any significant comments to § 226.16(h)(1), which is adopted as proposed.

16(h)(2) Definitions

In the May 2009 Regulation Z Proposed Clarifications, the Board proposed to define "deferred interest" in new § 226.16(h)(2) as finance charges on balances or transactions that a consumer is not obligated to pay if those balances or transactions are paid in full by a specified date. The term would not, however, include finance charges the creditor allows a consumer to avoid in connection with a recurring grace period. Therefore, an advertisement including information on a recurring grace period that could potentially apply each billing period, would not be subject to the additional disclosure requirements under § 226.16(h).

The Board also proposed in comment 16(h)–1 to clarify that deferred interest offers would not include offers that allow a consumer to defer payments during a specified time period, but where the consumer is not obligated under any circumstances for any interest or other finance charges that could be attributable to that period. Furthermore, proposed comment 16(h)–1 specified that deferred interest offers would not include zero percent APR offers where a consumer is not obligated under any circumstances for interest attributable to the time period the zero percent APR was in effect, although such offers may be considered promotional rates under § 226.16(g)(2)(i).

Moreover, the Board proposed to define the "deferred interest period" for purposes of proposed § 226.16(h) as the maximum period from the date the consumer becomes obligated for the balance or transaction until the specified date that the consumer must pay the balance or transaction in full in order to avoid finance charges on such balance or transaction. To clarify the meaning of deferred interest period, the Board proposed comment 16(h)–2 to state that the advertisement need not include the end of an informal "courtesy period" in disclosing the deferred interest period. The Board did not receive any significant comments on the proposed definitions under § 226.16(h)(2) and associated commentary. Consequently, § 226.16(h)(2) and comment 16(h)–2 are adopted as proposed. Comment 16(h)–1 is adopted as proposed with one technical amendment.

16(h)(3) Stating the Deferred Interest Period

General rule. The Board proposed § 226.16(h)(3) to require that advertisements of deferred interest or similar plans disclose the deferred interest period clearly and conspicuously in immediate proximity to each statement of a deferred interest triggering term. Proposed § 226.16(h)(3) also required advertisements that use the phrase "no interest" or similar term to describe the possible avoidance of interest obligations under the deferred interest or similar program to state "if paid in full" in a clear and conspicuous manner preceding the disclosure of the deferred interest period. For example, as described in proposed comment 16(h)–7, an advertisement may state "no interest if paid in full within 6 months" or "no interest if paid in full by December 31, 2010." The Board proposed to require these disclosures because of concerns that the statement "no interest," in the absence of additional details about the applicable conditions of the offer may confuse consumers who might not understand that they need to pay their balances in full by a certain date in order to avoid the obligation to pay interest. Commenters supported the Board's proposal, and § 226.16(h)(3) and comment 16(h)–7 are adopted as proposed.

Immediate proximity. Proposed comment 16(h)–3 provided guidance on the meaning of "immediate proximity" by establishing a safe harbor for disclosures made in the same phrase. The guidance was identical to the safe harbor adopted previously for promotional rates. *See* comment 16(g)–2. Therefore, if the deferred interest period is disclosed in the same phrase as each statement of a deferred interest triggering term (for example, "no interest if paid in full within 12 months" or "no interest if paid in full by December 1, 2010" the deferred interest period would be deemed to be in immediate proximity to the statement.

Industry commenters were supportive of the Board's approach. Consumer group commenters suggested that the safe harbor require that the deferred interest period be adjacent to or immediately before or after the triggering term instead of in the same phrase. As the Board discussed in adopting a similar safe harbor for promotional rates, the Board believes that advertisers should be provided with some flexibility to make this disclosure. For example, if the deferred interest offer related to the purchase of a specific item, the advertisement might state, "no interest on this refrigerator if paid in full within 6 months." Therefore, the Board is adopting comment 16(h)–3 as proposed.

Clear and conspicuous standard. The Board proposed to amend comment 16–2.ii to provide that advertisements clearly and conspicuously disclose the deferred interest period only if the information is equally prominent to each statement of a deferred interest triggering term. Under proposed comment 16–2.ii, if the disclosure of the deferred interest period is the same type size as the statement of the deferred interest triggering term, it would be deemed to be equally prominent.

The Board also proposed to clarify in comment 16–2.ii that the equally prominent standard applies only to written and electronic advertisements. This approach is consistent with the treatment of written and electronic advertisements of promotional rates. The Board also noted that disclosure of the deferred interest period under § 226.16(h)(3) for non-written, non-electronic advertisements, while not required to meet the specific clear and conspicuous standard in comment 16–2.ii would nonetheless be subject to the general clear and conspicuous standard set forth in comment 16–1.

Consumer group commenters recommended that the Board apply the equally prominent standard to all advertisements instead of only to written and electronic advertisements. As the Board discussed in its proposal, because equal prominence is a difficult standard to measure outside the context of written and electronic advertisements, the Board believes that the guidance on clear and conspicuous disclosures set forth in proposed comment 16–2.ii, should apply solely to written and electronic advertisements.

16(h)(4) Stating the Terms of the Deferred Interest Offer

In order to ensure that consumers notice and fully understand certain terms related to a deferred interest offer, the Board proposed that certain disclosures be required to be in a prominent location closely proximate to the first listing of a statement of "no interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period. In particular, the Board proposed to require a statement that if the balance or transaction is not paid within the deferred interest period, interest will be charged from the date the consumer became obligated for the balance or transaction. The Board also proposed to require a statement, if applicable, that interest can also be charged from the date the consumer became obligated for the balance or transaction if the consumer's account is in default prior to the end of the deferred interest period. To facilitate compliance with this provision, the Board proposed model language in Sample G–24 in Appendix G.

Prominent location closely prominent. To be consistent with the requirement in § 226.16(g)(4) that terms be in a "prominent location closely proximate to the first listing," the Board proposed guidance in comments 16(h)–4 and 16(h)–5 similar to comments 16(g)–3 and 16(g)–4. As a result, proposed comment 16(h)–4 provided that the information required under proposed § 226.16(h)(4) that is in the same paragraph as the first listing of a statement of "no interest," "no payments, "deferred interest" or similar term regarding interest or payments during the deferred interest period would have been deemed to be in a prominent location closely proximate to the statement. Similar to comment 16(g)–3 for promotional rates, information appearing in a footnote would not be deemed to be in a prominent location closely proximate to the statement.

Some consumer group commenters expressed opposition to the safe harbor for "prominent location closely proximate," and suggested that a disclosure be deemed closely proximate only if it is side-by-side with or immediately under or above the triggering phrase. The Board believes that the safe harbor under proposed comment 16(h)–4 strikes the appropriate balance of ensuring that certain information concerning deferred interest or similar programs is located near the triggering phrase but also providing sufficient flexibility for advertisers. For this reason, and for consistency with a similar safe harbor in comment 16(g)–3 for promotional rates, comment 16(h)–4 is adopted as proposed.

First listing. Proposed comment 16(h)–5 further provided that the first listing of a statement of "no interest," "no payments," or deferred interest or similar term regarding interest or payments during the deferred interest period is the most prominent listing of one of these statements on the front side of the first page of the principal promotional document. The proposed comment borrowed the concept of "principal promotional document" from the Federal Trade Commission's definition of the term under its regulations promulgated under the Fair Credit Reporting Act. 16 CFR 642.2(b). Under the proposal, if one of these statements is not listed on the principal promotional document or there is no principal promotional document, the first listing of one of these statements would be deemed to be the most prominent listing of the statement on the front side of the first page of each document containing one of these statements. The Board also proposed that the listing with the largest type size be a safe harbor for determining which listing is the most prominent. In the proposed comment, the Board also noted that consistent with comment 16(c)–1, a catalog or other multiple-page advertisement would have been considered one document for these purposes.

Consumer group commenters suggested that instead of requiring the disclosures required under § 226.16(h)(4) to be closely proximate to the first listing of the triggering term on the principal promotional document, the disclosures should be closely proximate to the first listing of the triggering term on every document in a mailing. The Board believes that the guidance on what constitutes the "first listing" should be the same as the approach taken for comment 16(g)–4 for promotional rates. Therefore, comment 16(h)–5 is adopted as proposed.

Segregation. The Board also proposed comment 16(h)–6 to clarify that the information the Board proposed to require under § 226.16(h)(4) would not need to be segregated from other information the advertisement discloses about the deferred interest offer. This may include triggered terms that the advertisement is required to disclose under § 226.16(b). The comment is consistent with the Board's approach on many other required disclosures under Regulation Z. *See* comment 5(a)–2. Moreover, the Board believes flexibility is warranted to allow advertisers to provide other information that may be essential for the consumer to evaluate the offer, such as a minimum purchase amount to qualify for the deferred interest offer. The Board received no comments on proposed comment 16(h)–6, and the comment is adopted as proposed.

Clear and conspicuous disclosure. The Board proposed to amend comment 16–2.ii to require equal prominence only for the disclosure of the information required under § 226.16(h)(3). Therefore, disclosures under proposed § 226.16(h)(4) are not required to be equally prominent to the first listing of the deferred interest triggering statement. Consumer group commenters, however, recommended that these disclosures also be required to be equally prominent to the triggering statement. As the Board discussed in the May 2009 Regulation Z Proposed Clarifications, the Board believes that requiring equal prominence to the triggering statement for this information would render an advertisement difficult to read and confusing to consumers due to the amount of information the Board is requiring under § 226.16(h)(4). Therefore, the Board declines to make these suggested amendments to comment 16–2.ii.

Non-written, non-electronic advertisements. As discussed above in the section-by-section analysis to § 226.16(h)(1), the requirements of § 226.16(h) apply to all advertisements, including non-written, non-electronic advertisements. To provide advertisers with flexibility, the Board proposed that only written or electronic advertisements be subject to the requirement to place the terms of the offer in a prominent location closely proximate to the first listing of a statement of "no interest," "no payments," or "deferred interest" or similar term regarding interest or payments during the deferred interest period.

As with their comments regarding clear and conspicuous disclosures under § 226.16(h)(3), consumer group commenters suggested that the specific formatting rules under § 226.16(h)(4) should apply to non-written, non-electronic advertisements. Given the difficulty of applying these standards to non-written, non-electronic advertisements and the time and space constraints of such media, the Board believes this exclusion is appropriate. Consequently, for non-written, non-electronic advertisements, the information required under § 226.16(h)(4) must be included in the advertisement, but is not subject to any proximity or formatting requirements other than the general requirement that information be clear and conspicuous, as contemplated under comment 16–1.

16(h)(5) Envelope Excluded

The Board proposed to exclude envelopes or other enclosures in which an application or solicitation is mailed, or banner advertisements or pop-up advertisements linked to an electronic application or solicitation from the requirements of § 226.16(h)(4). Consumer group commenters objected to the Board's proposal to exempt envelopes, banner advertisements, and pop-up advertisements from these requirements. One industry commenter recommended that the exception in § 226.16(h)(5) should be amended to include the requirements of § 226.16(h)(3).

Given the limited space that envelopes, banner advertisements, and pop-up advertisements have to convey information, the Board believes the burden of providing the information proposed under § 226.16(h)(4) on these types of communications exceeds any benefit. It is the Board's understanding that interested consumers generally look at the contents of an envelope or click on the link in a banner advertisement or pop-up advertisement in order to learn more about the specific terms of an offer instead of relying solely on the information on an envelope, banner advertisement, or pop-up advertisement to become informed about an offer. The Board, however, does not believe the disclosures required by § 226.16(h)(3) are as burdensome as those required by § 226.16(h)(4) and that the exception, should not, therefore, be extended to the disclosures required under § 226.16(h)(3). Thus, § 226.16(h)(5) is adopted as proposed.

Appendix G

As discussed in the supplementary information to §§ 226.7(b)(14) and 226.16(h), the Board proposed to adopt model language for the disclosures required to be given in connection with deferred interest or similar programs in Samples G–18(H) and G–24. Proposed Sample G–24 contained two model clauses, one for use in connection with credit card accounts under an open-end (not home-secured) consumer credit plan, and one for use in connection with other open-end (not home-secured) consumer credit plans. The model clause for credit card issuers reflects the fact that, under those rules, an issuer may only revoke a deferred or waived interest program if the consumer's payment is more than 60 days late. The Board also proposed to add a new comment App. G–12 to clarify which creditors should use each of the model clauses in proposed Sample G–24.

As discussed in the section-by-section analysis to § 226.7(b)(14), the Board is adopting Sample G–18(H) as proposed. Furthermore, the Board did not receive comment on the model language in Sample G–24. Therefore, comment App. G–12 and Sample G–24 are also adopted as proposed.

Section 226.51 Ability To Pay

51(a) General Ability To Pay

In the October 2009 Regulation Z Proposal the Board proposed to implement new TILA Section 150, as added by Section 109 of the Credit Card Act, prohibiting a card issuer from opening a credit card account for a consumer, or increasing the credit limit applicable to a credit card account, unless the card issuer considers the consumer's ability to make the required payments under the terms of such account, in new § 226.51(a). 15 U.S.C. 1665e. Proposed § 226.51(a)(1) contained the substance of the rule in TILA Section 150. Proposed § 226.51(a)(2) required card issuers to use a reasonable method for estimating the required payments under § 226.51(a)(1) and provided a safe harbor for such estimation.

51(a)(1) Consideration of Ability To Pay

Proposed § 226.51(a)(1) generally followed the language provided in TILA Section 150 with two clarifying modifications. As detailed in the October 2009 Regulation Z Proposal, the Board proposed to interpret the term "required payments" to mean the required minimum periodic payment since the minimum periodic payment is the amount that a consumer is required to pay each billing cycle under the terms of the contract with the card issuer. In addition, proposed § 226.51(a)(1) provided that the card issuer's consideration of the ability of the consumer to make the required minimum periodic payments must be based on the consumer's income or assets and the consumer's current obligations. Proposed § 226.51(a)(1) also required card issuers to have reasonable policies and procedures in place to consider this information.

While consumer group commenters and some industry commenters agreed that a consideration of ability to pay should include a review of a consumer's income or assets and current obligations, many industry commenters asserted that the Credit Card Act did not compel this interpretation. These commenters stated that there are other factors that they believe are more predictive of a consumer's ability to pay than information on a consumer's income or assets, such as payment history and credit scores. The Board believes that there indeed may be other factors that are useful for card issuers in evaluating a consumer's ability to pay, and for this reason, the Board had proposed comment 51(a)–1 to clarify that card issuers may also consider other factors that are consistent with the Board's Regulation B (12 CFR Part 202). However, the Board still believes a proper evaluation of a consumer's ability to pay must include a review of a consumer's income or assets and obligations in order to give card issuers a more complete picture of a consumer's current financial state. As a result, the Board is adopting § 226.51(a)(1) as § 226.51(a)(1)(i), largely as proposed.

Industry group commenters also detailed challenges with respect to collecting income or asset information directly from consumers in certain contexts. Several commenters expressed concern regarding the lack of privacy for consumers in supplying income or asset information if a consumer applies for a credit card at point-of-sale. These commenters also suggested that requesting consumers to update income or asset information when increasing credit lines also presented several issues, especially at point-of-sale. Unlike a new account opening, there is generally no formal application for a credit line increase. Therefore, card issuers and retailers may need to develop new procedures to obtain this information. For point-of-sale credit line increases, card issuers and retailers believe this will negatively impact the consumer's experience because a consumer may need to take extra steps to complete a sale, which may lead consumers to abandon the purchase. Other commenters noted that requesting consumers to update income or asset information for credit line increases may foster an environment that encourages phishing scams as consumers may be required to distinguish between legitimate requests for updated information from fraudulent requests. Some industry commenters also suggested that the Board provide a de minimis exception for which a card issuer need not consider income or asset information.

Given these concerns, the Board is clarifying in comment 51(a)–4, which the Board is renumbering as comment 51(a)(1)–4 for organizational purposes, that card issuers may obtain income or asset information from several sources, similar to comment 51(a)–5 (renumbered as 51(a)(1)–5) regarding obligations. In addition to collecting this information from the consumer directly, in connection with either this credit card account or any other financial relationship the card issuer or its affiliates has with the consumer, card issuers may also rely on information from third parties, subject to any applicable restrictions on information sharing. Furthermore, the Board is aware of various models developed to estimate income or assets. The Board believes that empirically derived, demonstrably and statistically sound models that reasonably estimate a consumer's income or assets may provide information as valid as a consumer's statement of income or assets. Therefore, comment 51(a)(1)–4 states that card issuers may use empirically derived, demonstrably and statistically sound models that reasonably estimate a consumer's income or assets.

Moreover, the Board is not providing a de minimis exception for considering a consumer's income or assets. The Board is concerned that any de minimis amount chosen could still have a significant impact on a particular consumer, depending on the consumer's financial state. For example, subprime credit card accounts with relatively "small" credit lines may still be difficult for certain consumers to afford. Suggesting that these card issuers may simply avoid consideration of a consumer's income or assets may be especially harmful for consumers in this market segment.

Consumer group commenters suggested that the Board include more guidance on how card issuers must evaluate a consumer's income or assets and obligations. While consumer group commenters did not recommend a specific debt-to-income ratio or any other particular quantitative measures, they suggested that card issuers be required to consider a debt-to-income ratio and a consumer's disposable income. The Board's proposal required card issuers to have reasonable policies and procedures in place to consider this information. To provide further guidance for card issuers, the Board is adopting a new § 226.51(a)(1)(ii) to state that reasonable policies and procedures to consider a consumer's ability to make the required payments would include a consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations. Furthermore, § 226.51(a)(1)(ii) provides that it would be unreasonable for a card issuer to not review any information about a consumer's income, assets, or current obligations, or to issue a credit card to a consumer who does not have any income or assets.

Consumer group commenters further suggested that the language be modified to require that card issuers "have and *follow* reasonable *written* policies and procedures" to consider a consumer's ability to pay. The Board is moving the requirement that card issuers establish and maintain reasonable policies and procedures to new § 226.51(a)(1)(ii) and amending the provision to require that the reasonable policies and procedures be written. The Board believes that the suggested change to add the word "follow," however, is unnecessary. There are references throughout Regulation Z and the Board's other regulations that require reasonable policies and procedures without an explicit instruction that they be followed. In each of these instances, the Board has expected and continues to expect that these policies and procedures will be followed. Similarly, the Board has the same expectation with § 226.51(a)(1)(ii).

As noted above, proposed comment 51(a)–1 clarified that card issuers may consider credit reports, credit scores, and any other factor consistent with Regulation B (12 CFR Part 202) in considering a consumer's ability to pay. One industry commenter suggested that the Board amend the comment to include a reference to consumer reports, which include credit reports. The Board is adopting proposed comment 51(a)–1 as comment 51(a)(1)–1 with this suggested change.

Proposed comment 51(a)–2 clarified that in considering a consumer's ability to pay, a card issuer must base the consideration on facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account. This guidance is similar to comment 34(a)(4)–5 addressing a creditor's requirement to consider a consumer's repayment ability for certain closed-end mortgage loans based on facts and circumstances known to the creditor at loan consummation. Several industry commenters asked whether this comment required card issuers to update any income or asset information the card issuer may have on a consumer prior to a credit line increase on an existing account. The Board believes that card issuers should be required to update a consumer's income or asset information, similar to how card issuers generally update information on a consumer's obligations, prior to considering whether to increase a consumer's credit line. This will prevent the card issuer from making an evaluation of a consumer's ability to make the required payments based on stale information. Consistent with the Board's changes to comment 51(a)–4 (adopted as 51(a)(1)–4), as discussed below, card issuers have several options to obtain updated income or asset information. Proposed comment 51(a)–2 is adopted as comment 51(a)(1)–2.

Furthermore, since credit line increases can occur at the request of a consumer or through a unilateral decision by the card issuer, proposed comment 51(a)–3 clarified that § 226.51(a) applies in both situations. Consumer group commenters suggested that credit line increases should only be granted upon the request of a consumer. The Board believes that if a card issuer conducts the proper evaluation prior to a credit line increase, such increases should not be prohibited simply because the consumer did not request the increase. The consumer is still in control as to how much of the credit line to ultimately use. Proposed comment 51(a)–3 is adopted as comment 51(a)(1)–3, with a minor non-substantive wording change.

Proposed comment 51(a)–4 provided examples of assets and income the card issuer may consider in evaluating a consumer's ability to pay. As discussed above, in response to comments on issues related to collecting income or asset information directly from consumers, the Board is amending comment 51(a)–4 (renumbered as 51(a)(1)–4) to provide a parallel comment to comment 51(a)–5 (renumbered as 51(a)(1)–5) regarding obligations. Specifically, the Board is clarifying that card issuers are not obligated to obtain income or asset information directly from a consumer. Card issuers may also obtain this information through third parties as well as empirically derived, demonstrably and statistically sound models that reasonably estimates a consumer's income or assets. The Board believes that, to the extent that card issuers are able to obtain information on a consumer's income or assets through means other than directly from the consumer, card issuers should be provided with flexibility.

The Board also proposed comment 51(a)–5 to clarify that in considering a consumer's current obligations, a card issuer may rely on information provided by the consumer or in a consumer's credit report. Commenters were supportive of this comment, and the comment is adopted as proposed, with one addition. Industry commenters requested that the Board clarify that in evaluating a consumer's current open-end obligations, card issuers should not be required to assume such obligations are fully utilized. The Board agrees. In contrast to the Board's safe harbor in estimating the minimum payments for the credit account for which the consumer is applying, the card issuer will have information on the consumer's historic utilization rates for other obligations. With respect to the credit account for which the consumer is applying, the card issuer has no information as to how the consumer plans to use the account, and assumption of full utilization is thus appropriate in that context. Moreover, while credit limit information is widely reported in consumer reports, there are still instances where such information is not reported. Furthermore, the Board is concerned that assuming full utilization of all open-end credit lines could result in an anticompetitive environment wherein card issuers raise credit limits on existing accounts in order to prevent a consumer from obtaining any new credit cards. For these reasons, proposed comment 51(a)–5 is amended to provide that in evaluating a consumer's current obligations to determine the consumer's ability to make the required payments, the card issuer need not assume that any credit line is fully utilized. In addition, the comment has been renumbered as comment 51(a)(1)–5.

Several industry commenters requested that the Board clarify that for joint accounts, a card issuer may consider the ability of both applicants or accountholders to make the required payments, instead of considering the ability of each consumer individually. In response, the Board is adopting new comment 51(a)(1)–6 to permit card issuers to consider joint applicants or joint accountholders collectively.

Moreover, as discussed in the October 2009 Regulation Z Proposal, the Board did not propose to require card issuers to verify information before an account is opened or credit line is increased for several reasons. The Board noted that TILA Section 150 does not require verification of a consumer's ability to make required payments and that verification can be burdensome for both consumers and card issuers, especially when accounts are opened at point of sale or by telephone. Furthermore, as discussed in the October 2009 Regulation Z Proposal, the Board stated its belief that because credit card accounts are generally unsecured, card issuers will be motivated to verify information when either the information supplied by the applicant is inconsistent with the data the card issuers already have or obtain on the consumer or when the risk in the amount of the credit line warrants such verification.

Many industry commenters expressed support for the Board's approach to provide card issuers with flexibility to determine instances when verification might be necessary and to refrain from strictly requiring verification or documentation in all instances. In contrast, consumer group commenters opposed this approach, stating that while there is no widespread evidence of income inflation in the credit card market, such problems do occur. One federal financial regulator commenter suggested that verification could be required in certain instances, such as when a consumer does not have a large credit file or when the credit line is large. The Board believes that given the inconvenience to consumers detailed in the October 2009 Regulation Z Proposal in providing documentation and the lack of evidence currently that consumers' incomes have been inflated in the credit card market on a widespread basis, a strict verification should not be required at this time.

51(a)(2) Minimum Periodic Payments

Under proposed § 226.51(a)(2)(i), card issuers would be required to use a reasonable method for estimating the required minimum periodic payments. Proposed § 226.51(a)(2)(ii) provided a safe harbor that card issuers could use to comply with this requirement. Specifically, the proposed safe harbor required the card issuer to assume utilization of the full credit line that the issuer is considering offering to the consumer from the first day of the billing cycle. The proposed safe harbor also required the issuer to use a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account. If the applicable minimum payment formula includes interest charges, the proposed safe harbor required the card issuer to estimate those charges using an interest rate that the issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases. Finally, if the applicable minimum payment formula included fees, the proposed safe harbor permitted the card issuer to assume that no fees have been charged to the account.

Consumer group commenters and many industry commenters generally agreed with the Board's approach and proposed safe harbor. A federal financial regulator and an industry commenter stated that the Board's emphasis on the minimum periodic payments was misplaced. The federal financial regulator commenter suggested that instead of considering a consumer's ability to make the minimum periodic payments based on full utilization of the credit line, the commenter recommended that card issuers be required to consider a consumer's ability to pay the entire credit line over a reasonable period of time, such as a year. The Credit Card Act requires evaluation of a consumer's ability to make the "required payments." Unless the terms of the contract provide otherwise, repayment of the balance on a credit card account over one year is not required. As discussed in the October 2009 Regulation Z Proposal, the minimum periodic payment is generally the amount that a consumer is required to pay each billing cycle under the terms of the contract. As a result, the Board believes that requiring card issuers to consider the consumer's ability to make the minimum periodic payment is the most appropriate interpretation of the requirements of the Credit Card Act.

With respect to the Board's proposed safe harbor approach, some industry commenters suggested that the Board permit card issuers to estimate minimum periodic payments based on an average utilization rate for the product offered to the consumer. In the October 2009 Regulation Z Proposal, the Board acknowledged that requiring card issuers to estimate minimum periodic payments based on full utilization of the credit line could have the effect of overstating the consumer's likely required payments. The Board believes, however, that since card issuers may not know how a particular consumer may use the account, and the issuer is qualifying the consumer for a certain credit line, of which the consumer will have full use, an assumption that the entire credit line will be used is a proper way to estimate the consumer's payments under the safe harbor. Furthermore, the Board notes that the regulation requires that a card issuer use a reasonable method to estimate payments, and that § 226.51(a)(2)(ii) merely provides a safe harbor for card issuers to comply with this standard, but that it may not be the only permissible way to comply with § 226.51(a)(2)(i). Section 226.51(a)(2)(ii) is therefore adopted as proposed with one minor clarifying change.

As noted above, the proposed safe harbor under § 226.51(a)(2)(ii) required an issuer to use a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account. The Board is adding new comment 51(a)(2)–1 to clarify that if an account has or may have a promotional program, such as a deferred payment or similar program, where there is no applicable minimum payment formula during the promotional period, the issuer must estimate the required minimum periodic payment based on the minimum payment formula that will apply when the promotion ends.

Proposed § 226.51(a)(2)(ii) also provided that if the applicable minimum payment formula includes interest charges, the proposed safe harbor required the card issuer to estimate those charges using an interest rate that the issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases. The Board is adopting a new comment to clarify this provision. New comment 51(a)(2)–2 provides that if the interest rate for purchases is or may be a promotional rate, the safe harbor requires the issuer to use the post-promotional rate to estimate interest charges.

As discussed in the October 2009 Regulation Z Proposal, the Board's proposed safe harbor further provided that if the minimum payment formula includes fees, the card issuer could assume that no fees have been charged because the Board believed that estimating the amount of fees that a typical consumer might incur could be speculative. Consumer group commenters suggested that the Board amend the safe harbor to require the addition of mandatory fees as such fees are not speculative. The Board agrees. As a result, § 226.51(a)(2)(ii) requires that if a minimum payment formula includes the addition of any mandatory fees, the safe harbor requires the card issuer to assume that such fees are charged. In addition, the Board is adopting a new comment 51(a)(2)–3 to provide guidance as to what types of fees are considered mandatory fees. Specifically, the comment provides that mandatory fees for which a card issuer is required to assume are charged include those fees that a consumer will be required to pay if the account is opened, such as an annual fee.

51(b) Rules Affecting Young Consumers

The Board proposed in the October 2009 Regulation Z Proposal to implement new TILA Sections 127(c)(8) and 127(p), as added by Sections 301 and 303 of the Credit Card Act, respectively, in § 226.51(b). Specifically, proposed § 226.51(b)(1) provided that a card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old, unless the consumer submits a written application and provides either a signed agreement of a cosigner, guarantor, or joint applicant pursuant to § 226.51(b)(1)(i) or financial information consistent with § 226.51(b)(1)(ii). The Board proposed § 226.51(b)(2) to state that no increase may be made in the amount of credit authorized to be extended under a credit card account for which an individual has assumed joint liability pursuant to proposed § 226.51(b)(1)(i) for debts incurred by the consumer in connection with the account before the consumer attains the age of 21, unless that individual approves in writing, and assumes joint liability for, such increase.

As discussed in the October 2009 Regulation Z Proposal, proposed § 226.51(b) generally followed the statutory language with modifications to resolve ambiguities in the statute and to improve readability and consistency with § 226.51(a). While many of these proposed changes did not generate much comment, certain of the Board's proposed modifications did prompt suggestions from commenters. First, consumer group commenters maintained that the Board's proposed language to limit the scope of § 226.51(b)(1) to credit card accounts only was not consistent with the language in TILA Section 127(c)(8)(A). For all the reasons set forth in the October 2009 Regulation Z Proposal, however, the Board believes that the intent of TILA Section 127(c)(8), read as a whole, was to apply these requirements only to credit card accounts. Furthermore, as discussed in the October 2009 Regulation Z Proposal, limiting the scope of § 226.51(b)(1) to credit card accounts only is consistent with the treatment of the related provision in TILA Section 127(p) regarding credit line increases, which applies solely to credit card accounts. Therefore, § 226.51(b)(1) will apply only to credit card accounts as proposed.

The Board also received comment regarding its proposal to make § 226.51(b) consistent with § 226.51(a) by requiring card issuers to determine whether a consumer under the age of 21, or any cosigner, guarantor, or joint applicant of a consumer under the age of 21, has the means to repay debts incurred by the consumer by evaluating a consumer's ability to make the required payments under § 226.51(a). Therefore, proposed § 226.51(b)(1)(i) and (ii) both referenced § 226.51(a) in discussing the ability of a cosigner, guarantor, or joint applicant to make the minimum payments on the consumer's debts and the consumer's independent ability to make the minimum payments on any obligations arising under the account.

Industry commenters were supportive of the Board's approach. Consumer group commenters, however, recommended that the Board require a more stringent evaluation of a consumer's ability to make the required payments for consumers under the age of 21 than the one required in § 226.51(a). In particular, consumer group commenters suggested, for example, that card issuers be required to only consider income earned from wages or require a higher residual income or lower debt-to-income ratio for consumers less than 21 years old. A state regulatory agency commenter suggested that the Board require card issuers to verify income or asset information stated on an application submitted by a consumer under the age of 21. The Board declines to make the suggested changes. The Board believes that the heightened procedures already set forth in TILA Sections 127(c)(8) and 127(p), as adopted by the Board in § 226.51(b), will provide sufficient protection for consumers less than 21 years old without unnecessarily impinging on their ability to obtain credit and build a credit history. Furthermore, the Board is concerned that the suggested changes could be inconsistent with the Board's Regulation B (12 CFR Part 202). For example, excluding certain income from consideration, such as alimony or child support, could conflict with 12 CFR § 202.6(b)(5).

The Board, however, is amending § 226.51(b)(1) to clarify that, consistent with comments 51(a)(1)–4 and 51(a)(1)–5, card issuers need not obtain financial information directly from the consumer to evaluate the ability of the consumer, cosigner, guarantor, or joint applicant to make the required payments. The Board is also making organizational and other non-substantive changes to § 226.51(b)(1) to improve readability and consistency. Section 226.51(b)(2) is adopted as proposed. The Board notes that for any credit line increase on an account of a consumer under the age of 21, the requirements of § 226.51(b)(2) are in addition to those in § 226.51(a).

In the October 2009 Regulation Z Proposal, the Board also proposed several comments to provide guidance to card issuers in complying with § 226.51(b). Proposed comment 51(b)–1 clarified that § 226.51(b)(1) and (b)(2) apply only to a consumer who has not attained the age of 21 as of the date of submission of the application under § 226.51(b)(1) or the date the credit line increase is requested by the consumer under § 226.51(b)(2). If no request has been made (for example, for unilateral credit line increases by the card issuer), the provision would apply only to a consumer who has not attained the age of 21 as of the date the credit line increase is considered by the card issuer. Some industry commenters suggested that the Board's final rule provide that the age of the consumer be determined at account opening as opposed to the consumer's age as of the date of submission of the application. The Board notes that TILA Section 127(c)(8)(B) applies to consumers who are under the age of 21 as of the date of submission of the application. Therefore, in compliance with the statutory provision, the Board is adopting comment 51(b)–1 as proposed.

Proposed comment 51(b)–2 addressed the ability of a card issuer to require a cosigner, guarantor, or joint accountholder to assume liability for debts incurred after the consumer has attained the age of 21. Consumer group commenters recommended that the Board require that card issuers obtain separate consent of a cosigner, guarantor, or joint accountholder to assume liability for debts incurred after the consumer has attained the age of 21. The Board believes that requiring separate consent is unnecessary and duplicative as card issuers requiring cosigners, guarantors, or joint accountholders to assume such liability will likely obtain a single consent at the time the account is opened for the cosigner, guarantor, or joint accountholder to assume liability on debt that is incurred before and after the consumer has turned 21. Proposed comment 51(b)–2 is adopted in final.

The Board proposed comment 51(b)–3 to clarify that § 226.51(b)(1) and (b)(2) do not apply to a consumer under the age of 21 who is being added to another person's account as an authorized user and has no liability for debts incurred on the account. The Board did not receive any comment on this provision, and the comment is adopted as proposed.

Proposed comment 51(b)–4 explained how the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) would govern the submission of electronic applications. TILA Section 127(c)(8) requires a consumer who has not attained the age of 21 to submit a written application, and TILA Section 127(p) requires a cosigner, guarantor, or joint accountholder to consent to a credit line increase in writing. As noted in the October 2009 Regulation Z Proposal, the Board believes that, consistent with the purposes of the E-Sign Act, applications submitted under TILA Section 127(c)(8) and consents under TILA Section 127(p), which must be provided in writing, may also be submitted electronically. *See* 15 U.S.C. 7001(a). Furthermore, since the submission of an application by a consumer or consent to a credit line increase by a cosigner, guarantor, or joint accountholder is not a disclosure *to* a consumer, the Board believes the consumer consent and other requirements necessary to provide consumer disclosures electronically pursuant to the E-Sign Act would not apply. The Board notes, however, that under the E-Sign Act, an electronic record of a contract or other record required to be in writing may be denied legal effect, validity or enforceability if such record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record. 15 U.S.C. 7001(e). Consumer group commenters recommended that the Board include this reference in the comment. The Board believes this is unnecessary, and comment 51(b)–4 is adopted as proposed with minor wording changes.

Under proposed comment 51(b)(1)–1, creditors must comply with applicable rules in Regulation B (12 CFR Part 202) in evaluating an application to open a credit card account or credit line increase for a consumer under the age of 21. In the October 2009 Regulation Z Proposal, the Board noted that because age is generally a prohibited basis for any creditor to take into account in any system evaluating the creditworthiness of applicants under Regulation B, the Board believes that Regulation B prohibits card issuers from refusing to consider the application of a consumer solely because the applicant has not attained the age of 21 (assuming the consumer has the legal ability to enter into a contract).

TILA Section 127(c)(8) permits card issuers to open a credit card account for a consumer who has not attained the age of 21 if either of the conditions under TILA Section 127(c)(8)(B) are met. Therefore, the Board believes that a card issuer may choose to evaluate an application of a consumer who is less than 21 years old solely on the basis of the information provided under § 226.51(b)(1)(i). Consequently, the Board believes, a card issuer is not required to accept an application from a consumer less than 21 years old with the signature of a cosigner, guarantor, or joint applicant pursuant to § 226.51(b)(1)(ii), unless refusing such applications would violate Regulation B. For example, if the card issuer permits other applicants of non-business credit card accounts who have attained the age of 21 to provide the signature of a cosigner, guarantor, or joint applicant, the card issuer must provide this option to applicants of non-business credit card accounts who have not attained the age of 21 (assuming the consumer has the legal ability to enter into a contract).

Several industry commenters requested the Board further clarify the interaction between Regulation B and § 226.51(b). Some commenters suggested the Board state that certain provisions of § 226.51(b) override provisions of Regulation B. The Board notes that issuers would not violate Regulation B by virtue of complying with § 226.51(b). Therefore, the Board does not believe it is necessary to state that § 226.51(b) overrides provisions of Regulation B.

Furthermore, many industry commenters asked the Board to permit card issuers, in determining whether consumers under the age of 21 have the "independent" means to repay debts incurred, to consider a consumer's spouse's income. The Board believes that neither Regulation B nor § 226.51(b) compels this interpretation. Pursuant to TILA Section 127(c)(8)(B), card issuers evaluating a consumer under the age of 21 under § 226.51(b)(1)(ii), who is applying as an individual, must consider the consumer's *independent* ability. The Board notes, however, that in evaluating joint accounts, the card issuer may consider the collective ability of the joint applicants or joint accountholders to make the required payments under new comment 51(a)(1)–6, as discussed above. Comment 51(b)(1)–1 is adopted as proposed.

Proposed comment 51(b)(2)–1 provided that the requirement under § 226.51(b)(2) that a cosigner, guarantor, or joint accountholder for a credit card account opened pursuant to § 226.51(b)(1)(ii) must agree in writing to assume liability for a credit line increase does not apply if the cosigner, guarantor or joint accountholder who is at least 21 years old requests the increase. Because the party that must approve the increase is the one that is requesting the increase in this situation, the Board believed that § 226.51(b)(2) would be redundant. An industry commenter requested the Board clarify situations in which this applies. For example, the commenter requested whether comment 51(b)(2)–1 would apply if a consumer under the age of 21 requests the credit line increase over the telephone, but subsequently passes the telephone to the cosigner, guarantor, or joint accountholder who is at least 21 years old to make the request after being told that they are not sufficiently old enough to do so. The Board believes this approach will be tantamount to an oral approval and would circumvent the protections of § 226.51(b)(2). Consequently, the Board is modifying the proposed comment to clarify that it must be the cosigner, guarantor, or joint accountholder who is at least 21 years old who initiates the request to increase the credit line.

Section 226.52 Limitations on Fees

52(a) Limitations During First Year After Account Opening

New TILA Section 127(n)(1) applies "[i]f the terms of a credit card account under an open end consumer credit plan require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened." 15 U.S.C. 1637(n)(1). If the 25 percent threshold is met, then "no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account." However, new TILA Section 127(n)(2) provides that Section 127(n) may not be construed as authorizing any imposition or payment of advance fees prohibited by any other provision of law. The Board proposed to implement new TILA Section 127(n) in § 226.52(a).[31]

Subprime credit cards often charge substantial fees at account opening and during the first year after the account is opened. For example, these cards may impose multiple one-time fees when the consumer opens the account (such as an application fee, a program fee, and an annual fee) as well as a monthly maintenance fee, fees for using the account for certain types of transactions, and fees for increasing the credit limit. The account-opening fees are often billed to the consumer on the first periodic statement, substantially reducing from the outset the amount of credit that the consumer has available to make purchases or other transactions on the account. For example, some subprime credit card issuers assess $250 in fees at account opening on accounts with credit limits of $300, leaving the consumer with only $50 of available credit with which to make purchases or other transactions. In addition, the consumer may pay interest on the fees until they are paid in full.

Because of concerns that some consumers were not aware of how fees would affect their ability to use the card for its intended purpose of engaging in transactions, the Board's January 2009 Regulation Z Rule enhanced the disclosure requirements for these types of fees and clarified the circumstances under which a consumer who has been notified of the fees in the account-opening disclosures (but has not yet used the account or paid a fee) may reject the plan and not be obligated to pay the fees. *See* § 226.5(b)(1)(iv), 74 FR 5402; § 226.5a(b)(14), 74 FR 5404; § 226.6(b)(1)(xiii), 74 FR 5408. In addition, because the Board and the other Agencies were concerned that disclosure alone was insufficient to protect consumers from unfair practices regarding high-fee subprime credit cards, the January 2009 FTC Act Rule prohibited institutions from charging certain types of fees during the first year after account opening that, in the aggregate, constituted the majority of the credit limit. In addition, these fees were limited to 25 percent of the initial credit limit in the first billing cycle with any additional amount (up to 50 percent) spread equally over the next five billing cycles. Finally, institutions were prohibited from circumventing these restrictions by providing the consumer with a separate credit account for the payment of additional fees. *See* 12 CFR 227.26, 74 FR 5561, 5566; *see also* 74 FR 5538–5543.

In the October 2009 Regulation Z Proposal, the Board discussed two issues of statutory interpretation related to the implementation of new TILA Section 127(n). First, as noted above, new TILA Section 127(n)(1) applies when "the terms of a credit card account * * * *require* the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened." (Emphasis added.) In the proposal, the Board acknowledged that Congress's use of "require" could be construed to mean that Section 127(n)(1) applies only to fees that are unconditional requirements of the account—in other words, fees that all consumers are required to pay regardless of how the account is used (such as account-opening fees, annual fees, and monthly maintenance fees). However, the Board stated that such a narrow reading would be inconsistent with the words "*any* fees," which indicate that Congress intended the provision to apply to a broader range of fees. Furthermore, the Board expressed concern that categorically excluding fees that are conditional (in other words, fees that consumers are only required to pay in certain circumstances) would enable card issuers to circumvent the 25 percent limit by, for example, requiring consumers to pay fees in order to receive a particular credit limit or to use the account for purchases or other transactions. Finally, the Board noted that new TILA Section 127(n)(1) specifically excludes three fees that are conditional (late payment fees, over-the-limit fees, and fees for a payment returned for insufficient funds), which suggests that Congress otherwise intended Section 127(n)(1) to apply to fees that a consumer is required to pay only in certain circumstances (such as fees for other violations of the account terms or fees for using the account for transactions). In other words, if Congress had intended Section 127(n)(1) to apply only to fees that are unconditional requirements of the account, there would have been no need to specifically exclude conditional fees such as late payment fees. For these reasons, the Board concluded that the best interpretation of new TILA Section 127(n)(1) was to apply the 25 percent limitation to any fee that a consumer is required to pay with respect to the account (unless expressly excluded), even if the requirement only applies in certain circumstances.

Consumer group commenters strongly supported this interpretation of new TILA Section 127(n)(1), while industry commenters strongly disagreed. In particular, institutions that do not issue subprime cards argued that Congress intended Section 127(n) to apply only to fees imposed on subprime cards with low credit limits and that it would be unduly burdensome to require issuers of credit card products with higher limits to comply. However, while new TILA Section 127(n) is titled "Standards Applicable to Initial Issuance of Subprime or 'Fee Harvester' Cards," nothing in the statutory text limits its application to a particular type of credit card. Instead, for the reasons discussed above, it appears that Congress intended

[31] In a separate rulemaking, the Board will implement new TILA Section 149 in § 226.52(b). New TILA Section 149, which is effective August 22, 2010, requires that credit card penalty fees and charges be reasonable and proportional to the consumer's violation of the cardholder agreement.

Section 127(n) to apply to a broad range of fees regardless of the type of credit card account. Although the practice of charging fees that represent a high percentage of the credit limit is generally limited to subprime cards at present, it appears that Congress intended Section 127(n) to prevent this practice from spreading to other types of credit card products. Accordingly, although the Board understands that complying with Section 127(n) may impose a significant burden on card issuers, the Board does not believe that this burden warrants a different interpretation of Section 127(n).

Second, in the proposal, the Board interpreted new TILA Section 127(n)(1), which provides that, if the 25 percent threshold is met, "no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account." The Board stated that, although this language could be read to require card issuers to determine at account opening the total amount of fees that will be charged during the first year, this did not appear to be Congress's intent because the total amount of fees charged during the first year will depend on how the account is used. For example, most card issuers currently require consumers who use a credit card account for cash advances, balance transfers, or foreign transactions to pay a fee that is equal to a percentage of the transaction. Thus, the total amount of fees charged during the first year will depend on, among other things, the number and amount of cash advances, balance transfers, or foreign transactions. Accordingly, the Board interpreted Section 127(n)(1) to limit the fees charged to a credit card account during the first year to 25 percent of the initial credit limit and to prevent card issuers from collecting additional fees by other means (such as directly from the consumer or by providing a separate credit account). The Board did not receive significant comment on this interpretation, which is adopted in the final rule.

Accordingly, in order to effectuate this purpose and to facilitate compliance, the Board uses its authority under TILA Section 105(a) to implement new TILA Section 127(n) as set forth below.

52(a)(1) General Rule

Proposed § 226.52(a)(1)(i) provided that, if a card issuer charges any fees to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after account opening, those fees must not in total constitute more than 25 percent of the credit limit in effect when the account is opened. Furthermore, in order to prevent card issuers from circumventing proposed § 226.52(a)(1)(i), proposed § 226.52(a)(1)(ii) provided that a card issuer that charges fees to the account during the first year after account opening must not require the consumer to pay any fees in excess of the 25 percent limit with respect to the account during the first year.

Commenters generally supported the proposed rule. However, a federal banking agency requested that the Board clarify the proposed rule, expressing concern that, as proposed, § 226.52(a)(1) could be construed to authorize card issuers to require consumers to pay an unlimited amount of fees so long as the total amount of fees charged to the account did not equal the 25 percent limit. This was not the Board's intent, nor does the Board believe that the proposed rule supports such an interpretation. Nevertheless, in order to avoid any potential uncertainty, the Board has revised § 226.52(a)(1) to provide that, if a card issuer charges any fees to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after the account is opened, the total amount of fees the consumer is required to pay with respect to the account during that year must not exceed 25 percent of the credit limit in effect when the account is opened.

The Board has also reorganized and revised the proposed commentary for consistency with the revisions to § 226.52(a)(1). Comment 52(a)(1)–1 clarifies that § 226.52(a)(1) applies if a card issuer charges any fees to a credit card account during the first year after the account is opened (unless the fees are specifically exempted by § 226.52(a)(2)). Thus, if a card issuer charges a non-exempt fee to the account during the first year after account opening, § 226.52(a)(1) provides that the total amount of non-exempt fees the consumer is required to pay with respect to the account during the first year cannot exceed 25 percent of the credit limit in effect when the account is opened. The comment further clarifies that this 25 percent limit applies to fees that the card issuer charges to the account as well as to fees that the card issuer requires the consumer to pay with respect to the account through other means (such as through a payment from the consumer to the card issuer or from another credit account provided by the card issuer). The comment also provides illustrative examples of the application of § 226.52(a), including the examples previously provided in proposed comments 52(a)(1)(i)–1 and 52(a)(1)(ii)–1.

Proposed comment 52(a)(1)(i)–2 clarified that a card issuer that charges a fee to a credit card account that exceeds the 25 percent limit could comply with § 226.52(a)(1) by waiving or removing the fee and any associated interest charges or crediting the account for an amount equal to the fee and any associated interest charges at the end of the billing cycle during which the fee was charged. Thus, if a card issuer's systems automatically assess a fee based on certain account activity (such as automatically assessing a cash advance fee when the account is used for a cash advance) and, as a result, the total amount of fees subject to § 226.52(a) that have been charged to the account during the first year exceeds the 25 percent limit, the card issuer could comply with § 226.52(a)(1) by removing the fee and any interest charged on that fee at the end of the billing cycle.

Some industry commenters expressed concern that, because fees are totaled at the end of the billing cycle, there would be circumstances in which their systems would not be able to identify a fee that exceeds the 25 percent limit in time to correct the account before the billing cycle ends (such as when the fee was charged late in the cycle). The Board is concerned that providing additional time will result in fees that exceed the 25 percent limit appearing on consumer's periodic statements. However, in order to facilitate compliance, the Board has revised the proposed comment to require card issuers to waive or remove the excess fee and any associated interest charges within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the fee was charged. For organizational purposes, the Board has also redesignated this comment as 52(a)(1)–2.

Proposed comment 52(a)(1)(i)–3 clarified that, because the limitation in § 226.52(a)(1) is based on the credit limit in effect when the account is opened, a subsequent increase in the credit limit during the first year does not permit the card issuer to charge to the account additional fees that would otherwise be prohibited (such as a fee for increasing the credit limit). An illustrative example was provided. For organizational purposes, this comment has been redesignated as 52(a)(1)–3.

In addition, in response to comments from consumer groups, the Board has also provided guidance regarding decreases in credit limits during the first year after account opening. Consumer groups expressed concern that card issuers could evade the 25 percent limitation by, for example, providing a $500 credit limit and charging $125 in fees for the issuance or availability of credit at account opening and then quickly reducing the limit to $200, leaving the consumer with only $75 of available credit. Although there are legitimate reasons for reducing a credit limit during the first year after account opening (such as concerns about fraud), the Board believes that, in these circumstances, it would be inconsistent with the intent of new TILA Section 127(n) to require the consumer to pay (or to allow the issuer to retain) any fees that exceed 25 percent of the reduced limit. Accordingly, proposed comment 52(a)(1)–3 clarifies that, if a card issuer decreases the credit limit during the first year after the account is opened, § 226.52(a)(1) requires the card issuer to waive or remove any fees charged to the account that exceed 25 percent of the reduced credit limit or to credit the account for an amount equal to any fees the consumer was required to pay with respect to the account that exceed 25 percent of the reduced credit limit within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the fee was charged. An example is provided.

52(a)(2) Fees Not Subject to Limitations

Section 226.52(a)(2)(i) implements the exception in new TILA Section 127(n)(1) for late payment fees, over-the-limit fees, and fees for payments returned for insufficient funds. However, pursuant to the Board's authority under TILA Section 105(a), § 226.52(a)(2)(i) applies to all fees for returned payments because a payment may be returned for reasons other than insufficient funds (such as because the account on which the payment is drawn has been closed or because the consumer has instructed the institution holding that account not to honor the payment). The Board did not receive significant comment on § 226.52(a)(2)(i), which is adopted as proposed.

As discussed above, new TILA Section 127(n)(1) applies to fees that a consumer is required to pay with respect to a credit card account. Accordingly, proposed § 226.52(a)(2)(ii) would have created an exception to § 226.52(a) for fees that a consumer is not required to pay with respect to the account. The proposed commentary to § 226.52(a) illustrated the distinction between fees the consumer is required to pay and those the consumer is not required to pay. Proposed comment 52(a)(2)–1 clarified that, except as provided in § 226.52(a)(2), the limitations in § 226.52(a)(1) apply to any fees that a card issuer will or may require the consumer to pay with respect to a credit card account during the first year after account opening. The proposed comment listed several types of fees as examples of fees covered by § 226.52(a). First, fees that the consumer is required to pay for the issuance or availability of credit described in § 226.5a(b)(2), including any fee based on account activity or inactivity and any fee that a consumer is required to pay in order to receive a particular credit limit. Second, fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, if the insurance or debt cancellation or debt suspension coverage is required by the terms of the account. Third, fees that the consumer is required to pay in order to engage in transactions using the account (such as cash advance fees, balance transfer fees, foreign transaction fees, and other fees for using the account for purchases). And fourth, fees that the consumer is required to pay for violating the terms of the account (except to the extent specifically excluded by § 226.52(a)(2)(i)).

Proposed comment 52(a)(2)–2 provided as examples of fees that generally fall within the exception in § 226.52(a)(2)(ii) fees for making an expedited payment (to the extent permitted by § 226.10(e)), fees for optional services (such as travel insurance), fees for reissuing a lost or stolen card, and statement reproduction fees.

Commenters generally supported proposed § 226.52(a)(2)(ii) and proposed comments 52(a)(2)–1 and –2. Although one industry commenter suggested that the Board take a broader approach to identifying the fees that fall within the exception in § 226.52(a)(2)(ii), the Board believes that such an approach would be inconsistent with the purposes of TILA Section 127(n). Accordingly, the Board adopts these aspects of the proposal.

Finally, proposed comment 52(a)(2)–3 clarified that a security deposit that is charged to a credit card account is a fee for purposes of § 226.52(a). However, the comment also clarified that § 226.52(a) would not prohibit a card issuer from providing a secured credit card that requires a consumer to provide a cash collateral deposit that is equal to the credit line for the account. Consumer group commenters strongly supported this commentary. However, a federal banking agency requested that the Board clarify that a security deposit is an amount of funds transferred by a consumer to a card issuer at account opening that is pledged as security on the account. The Board has revised the proposed comment to include similar language. Otherwise, comment 52(a)(2)–3 is adopted as proposed.

52(a)(3) Rule of Construction

New TILA Section 127(n)(2) states that "[n]o provision of this subsection may be construed as authorizing any imposition or payment of advance fees otherwise prohibited by any provision of law." 15 U.S.C. 1637(n)(2). The Board proposed to implement this provision in § 226.52(a)(3). As an example of a provision of law limiting the payment of advance fees, proposed comment 52(a)(3)–1 cited 16 CFR 310.4(a)(4), which prohibits any telemarketer or seller from "[r]equesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person." The Board did not receive significant comment on either the proposed regulation or the proposed commentary, both of which have been adopted as proposed.

Section 226.53 Allocation of Payments

As amended by the Credit Card Act, TILA Section 164(b)(1) provides that, "[u]pon receipt of a payment from a cardholder, the card issuer shall apply amounts in excess of the minimum payment amount first to the card balance bearing the highest rate of interest, and then to each successive balance bearing the next highest rate of interest, until the payment is exhausted." 15 U.S.C. 1666c(b)(1). However, amended Section 164(b)(2) provides the following exception to this general rule: "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 expiration of the period during which interest is deferred." As discussed in detail below, the Board has implemented amended TILA Section 164(b) in new § 226.53.

As an initial matter, however, the Board interprets amended TILA Section 164(b) to apply to credit card accounts under an open-end (not home-secured) consumer credit plan rather than to all open-end consumer credit plans. Although the requirements in amended TILA Section 164(a) regarding the prompt crediting of payments apply to "[p]ayments received from [a consumer] under an open end consumer credit plan," the general payment allocation rule in amended TILA Section 164(b)(1) applies "[u]pon receipt of a payment from a *cardholder*." Furthermore, the exception for deferred interest plans in amended Section 164(b)(1) requires "the *card issuer* [to] apply amounts in excess of the minimum payment amount first to the *card balance* bearing the highest rate of interest. * * *" Based on this language, it appears that Congress intended to apply the payment allocation requirements in amended Section 164(b) only to credit card accounts. This is consistent with the approach taken by the Board and the other Agencies in the January 2009 FTC Act Rule. *See* 74 FR 5560. Furthermore, the Board is not aware of concerns regarding payment allocation with respect to other open-end credit products, likely because such products generally do not apply different annual percentage rates to different balances. Commenters generally supported this aspect of the proposal.

53(a) General Rule

The Board proposed to implement amended TILA Section 164(b)(1) in § 226.53(a), which stated that, except as provided in § 226.53(b), when a consumer makes a payment in excess of the required minimum periodic payment for a credit card account under an open-end (not home-secured) consumer credit plan, the card issuer must allocate the excess amount first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate. The Board and the other Agencies adopted a similar provision in the January 2009 FTC Act Rule in response to concerns that card issuers were applying consumers' payments in a manner that inappropriately maximized interest charges on credit card accounts with balances at different annual percentage rates. *See* 12 CFR 227.23, 74 FR 5512–5520, 5560. Specifically, most card issuers currently allocate consumers' payments first to the balance with the lowest annual percentage rate, resulting in the accrual of interest at higher rates on other balances (unless all balances are paid in full). Because many card issuers offer different rates for purchases, cash advances, and balance transfers, this practice can result in consumers who do not pay the balance in full each month incurring higher finance charges than they would under any other allocation method.[32] Commenters generally supported § 226.53(a), which is adopted as proposed.

The Board also proposed comment 53–1, which clarified that § 226.53 does not limit or otherwise address the card issuer's ability to determine, consistent with applicable law and regulatory guidance, the amount of the required minimum periodic payment or how that payment is allocated. It further clarified that a card issuer may, but is not required to, allocate the required minimum periodic payment consistent with the requirements in proposed § 226.53 to the extent consistent with other applicable law or regulatory guidance. The Board did not receive any significant comment on this guidance, which is adopted as proposed.

Comment 53–2 clarified that § 226.53 permits a card issuer to allocate an excess payment based on the annual percentage rates and balances on the date the preceding billing cycle ends, on the date the payment is credited to the account, or on any day in between those two dates. Because the rates and balances on an account affect how excess payments will be applied, this comment was intended to provide flexibility regarding the point in time at which payment allocation determinations required by proposed § 226.53 can be made. For example, it is possible that, in certain circumstances, the annual percentage rates may have changed between the close of a billing cycle and the date on which payment for that billing cycle is received.

Industry commenters generally supported this guidance. However, consumer groups opposed it on the grounds that card issuers could misuse the flexibility to systematically vary the dates on which payments are allocated at the account level in order to generate higher interest charges. The Board agrees that such a practice would be inconsistent with the intent of comment 53–2. Accordingly, the Board has revised this comment to clarify that the day used by the card issuer to determine the applicable annual percentage rates and balances for purposes of § 226.53 generally must be consistent from billing cycle to billing cycle, although the card issuer may adjust this day from time to time.

Proposed comment 53–3 addressed the relationship between the dispute rights in § 226.12(c) and the payment allocation requirements in proposed § 226.53. This comment clarified that, when a consumer has asserted a claim or defense against the card issuer pursuant to § 226.12(c), the card issuer must apply the consumer's payment in a manner that avoids or minimizes any reduction in the amount of that claim or defense. *See* comment 12(c)–4. Based on comments from industry, the Board has revised the proposed comment to clarify that the same requirements apply with respect to amounts subject to billing error disputes under § 226.13. The Board has also added illustrative examples.

Proposed comment 53–4 addressed circumstances in which the same annual percentage rate applies to more than one balance on a credit card account but a different rate applies to at least one other balance on that account. For example, an account could have a $500 cash advance balance at 20%, a $1,000 purchase balance at 15%, and a $2,000 balance also at 15% that was previously at a 5% promotional rate. The comment clarified that, in these circumstances, § 226.53 generally does not require that any particular method be used when allocating among the balances with the same rate and that the card issuer may treat the balances with the same rate as a single balance or separate balances.[33] The Board did not receive any significant comment on this aspect of the guidance, which is adopted as proposed.

However, proposed comment 53–4 also clarified that, when a balance on a credit card account is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of § 226.53 during that period of time rather than a balance with the rate at which interest accrues (the accrual rate).[34] In the proposal, the Board noted

[32] For example, assume that a credit card account charges annual percentage rates of 12% on purchases and 20% on cash advances. Assume also that, in the same billing cycle, the consumer uses the account for purchases totaling $3,000 and cash advances totaling $300. If the consumer pays $800 in excess of the required minimum periodic payment, most card issuers would apply the entire excess payment to the purchase balance and the consumer would incur interest charges on the more costly cash advance balance. Under these circumstances, the consumer is effectively prevented from paying off the balance with the higher interest rate (cash advances) unless the consumer pays the total balance (purchases and cash advances) in full.

[33] An example of how excess payments could be applied in these circumstances is provided in comment 53–5.iv.

[34] For example, if an account has a $1,000 purchase balance and a $2,000 balance that is subject to a deferred interest program that expires on July 1 and a 15% annual percentage rate applies

Continued

that treating the rate as zero is consistent with the nature of deferred interest and similar programs insofar as the consumer will not be obligated to pay any accrued interest if the balance is paid in full prior to expiration. The Board further noted that this approach ensures that excess payments will generally be applied first to balances on which interest is being charged, which will generally result in lower interest charges if the consumer pays the balance in full prior to expiration.

However, the Board also acknowledged that treating the rate on this type of balance as zero could be disadvantageous for consumers in certain circumstances. Specifically, the Board noted that, if the rate for a deferred interest balance is treated as zero during the deferred interest period, consumers who wish to pay off that balance in installments over the course of the program would be prevented from doing so.

In response to the proposal, the Board received a number of comments from industry and consumer groups raising concerns about prohibiting consumers from paying off a deferred interest or similar balance in monthly installments. Accordingly, as discussed below, the Board has revised § 226.53(b) to address those concerns.

Finally, proposed comment 53(a)–1 provided examples of allocating excess payments consistent with proposed § 226.53. The Board has redesignated this comment as 53–5 for organizational purposes and revised the examples for consistency with the revisions to § 226.53(b).[35]

53(b) Special Rule for Accounts With Balances Subject to Deferred Interest or Similar Programs

The Board proposed to implement amended TILA Section 164(b)(2) in § 226.53(b), which provided that, when a balance on a credit card account under an open-end (not home-secured) consumer credit plan is subject to a deferred interest or similar program, the card issuer must allocate any amount paid by the consumer in excess of the required minimum periodic payment first to that balance during the two billing cycles immediately preceding expiration of the deferred interest period and any remaining portion to any other balances consistent with proposed § 226.53(a). *See* 15 U.S.C. 1666c(b)(2).

The Board and the other Agencies proposed a similar exception to the January 2009 FTC Act Rule's payment allocation provision in the May 2009 proposed clarifications and amendments. *See* proposed 12 CFR 227.23(b), 74 FR 20814. This exception was based on the Agencies' concern that, if the deferred interest balance was not the only balance on the account, the general payment allocation rule could prevent consumers from paying off the deferred interest balance prior to expiration of the deferred interest period unless they also paid off all other balances on the account.[36] If the consumer is unaware of the need to pay off the entire balance, the consumer would be charged interest on the deferred interest balance and thus would not obtain the benefits of the deferred interest program. *See* 74 FR 20807–20808.

As noted above, comments from industry and consumer groups raised concerns that the proposed rule would prohibit consumers who may lack the resources to pay off a deferred interest balance in one of the last two billing cycles of the deferred interest period from paying that balance off in monthly installments over the course of the period. These commenters generally urged the Board to permit card issuers to allocate payments consistent with a consumer's request when an account has a deferred interest or similar balance.

Because the consumer testing conducted by the Board for the January 2009 Regulation Z Rule indicated that disclosures do not enable consumers to understand sufficiently the effects of payment allocation on interest charges, the Board is concerned that permitting card issuers to allocate payments based on a consumer's request could create a loophole that would undermine the purposes of revised TILA Section 164(b). For example, consumers who do not understand the effects of payment allocation could be misled into selecting an allocation method that will generally result in higher interest charges than applying payments first to the balance with the highest rate (such as a method under which payments are applied first to the oldest unpaid transactions on the account). For this reason, the Board does not believe that a general exception to § 226.53(a) based on a consumer's request is warranted.

However, in the narrow context of accounts with balances subject to deferred interest or similar programs, the Board is persuaded that the benefits of providing flexibility for consumers who are able to avoid deferred interest charges by paying off a deferred interest balance in installments over the course of the deferred interest period outweigh the risk that some consumers could make choices that result in higher interest charges than would occur under the proposed rule.

Accordingly, pursuant to its authority under TILA § 105(a) to make adjustments and exceptions in order to effectuate the purposes of TILA, the Board has revised proposed § 226.53(b) to permit card issuers to allocate payments in excess of the minimum consistent with a consumer's request when the account has a balance subject to a deferred interest or similar program.[37] Specifically, § 226.52(b)(1) provides that, when a balance on a credit card account under an open-end (not home-secured) consumer credit plan is subject to a deferred interest or similar program, the card issuer must allocate any amount paid by the consumer in excess of the required minimum periodic payment consistent with § 226.53(a) except that, during the two billing cycles immediately preceding expiration of the specified period, the excess amount must be allocated first to the balance subject to the deferred interest or similar program and any remaining portion allocated to any other balances consistent with § 226.53(a). In the alternative, § 226.53(b)(2) provides that the card issuer may at its option allocate any

to both, the balances must be treated as balances with different rates for purposes of § 226.53 until July 1. In addition, for purposes of allocating pursuant to § 226.53, any amount paid by the consumer in excess of the required minimum periodic payment must be applied first to the $1,000 purchase balance except during the last two billing cycles of the deferred interest period (when it must be applied first to any remaining portion of the $2,000 balance). *See* comment 53–5.v.

[35] The commentary discussed above is similar to commentary adopted by the Board and the other Agencies in the January 2009 FTC Act Rule as well as to amendments to that commentary proposed in May 2009. *See* 74 FR 5561–5562; 74 FR 20815–20816.

[36] For example, assume that a credit card account has a $2,000 purchase balance with a 20% annual percentage rate and a $1,000 balance on which interest accrues at a 15% annual percentage rate, but the consumer will not be obligated to pay that interest if that balance is paid in full by a specified date. If the general rule in § 226.53(a) applied, the consumer would be required to pay $3,000 in order to avoid interest charges on the $1,000 balance.

[37] Although consumer group commenters urged the Board to *require* (rather than permit) card issuers to allocate consistent with a consumer's request, the Board understands that—while some card issuers currently have the systems in place to accommodate such requests—many do not. The Board further understands that card issuers without the ability to allocate payments based on a consumer request could not develop the systems to do so prior to February 22, 2010. Although these issuers could presumably develop the necessary systems by some later date, the Board believes that the difficulties associated with making informed decisions regarding payment allocation are such that a requirement that all issuers develop the systems to accommodate consumer requests is not warranted. Instead, the Board has revised § 226.53(b) to ensure that card issuers that currently accommodate consumer requests can continue to do so.

amount paid by the consumer in excess of the required minimum periodic payment among the balances on the account in the manner requested by the consumer.

The Board has revised the proposed commentary to § 226.53(b) for consistency with the amendments to § 226.53(b) and for organizational purposes. As an initial matter, the Board has redesignated proposed comment 53(b)–2 as comment 53(b)–1. Proposed comment 53(b)–2 clarified that § 226.53(b) applies to deferred interest or similar programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. The proposed comment further clarified that a grace period during which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate is not a deferred interest or similar program for purposes of § 226.53(b).[38] In response to requests for guidance from commenters, the Board has revised this comment to clarify that § 226.53(b) applies regardless of whether the consumer is required to make payments with respect to the balance subject to the deferred interest or similar program during the specified period. In addition, the Board has revised the comment to clarify that a temporary annual percentage rate of zero percent that applies for a specified period of time consistent with § 226.55(b)(1) is not a deferred interest or similar program for purposes of § 226.53(b) unless the consumer may be obligated to pay interest that accrues during the period if a balance is not paid in full prior to expiration of the period. Finally, in order to ensure consistent treatment of deferred interest programs in Regulation Z, the Board has clarified that, for purposes of § 226.53, "deferred interest" has the same meaning as in § 226.16(h)(2) and associated commentary.

For organizational purposes, the Board has redesignated proposed comment 53(b)–1 as comment 53(b)–2. Proposed comment 53(b)–1 clarified the application of § 226.53(b) in circumstances where the deferred interest or similar program expires during a billing cycle (rather than at the end of a billing cycle). The comment clarified that, for purposes of § 226.53(b), a billing cycle does not constitute one of the two billing cycles immediately preceding expiration of a deferred interest or similar program if the expiration date for the program precedes the payment due date in that billing cycle. An example is provided. The Board believes that this interpretation is consistent with the purpose of amended TILA Section 164(b)(2) insofar as it ensures that, at a minimum, the consumer will receive two complete billing cycles to avoid accrued interest charges by paying off a balance subject to a deferred interest or similar program. The Board did not receive any significant comment on this guidance, which has been revised for consistency with the revisions to § 226.53(b).

The Board has also adopted a new comment 53(b)–3 in order to clarify that § 226.53(b) does not require a card issuer to allocate amounts paid by the consumer in excess of the required minimum periodic payment in the manner requested by the consumer, provided that the card issuer instead allocates such amounts consistent with § 226.53(b)(1). For example, a card issuer may decline consumer requests regarding payment allocation as a general matter or may decline such requests when a consumer does not comply with requirements set by the card issuer (such as submitting the request in writing or submitting the request prior to or contemporaneously with submission of the payment), provided that amounts paid by the consumer in excess of the required minimum periodic payment are allocated consistent with § 226.53(b)(1). Similarly, a card issuer that accepts requests pursuant to § 226.53(b)(2) generally must allocate amounts paid by a consumer in excess of the required minimum periodic payment consistent with § 226.53(b)(1) if the consumer does not submit a request or submits a request with which the card issuer cannot comply (such as a request that contains a mathematical error).

Comment 53(b)–3 also provides illustrative examples of what does and does not constitute a consumer request for purposes of § 226.53(b)(2). In particular, the comment clarifies that a consumer has made a request for purposes of § 226.53(b)(2) if the consumer contacts the card issuer and specifically requests that a payment or payments be allocated in a particular manner during the period of time that the deferred interest or similar program applies to a balance on the account. Similarly, a consumer has made a request for purposes of § 226.53(b)(2) if the consumer completes a form or payment coupon provided by the card issuer for the purpose of requesting that a payment or payments be allocated in a particular manner and submits that form to the card issuer. Finally, a consumer has made a request for purposes of § 226.53(b)(2) if the consumer contacts a card issuer and specifically requests that a payment that the card issuer has previously allocated consistent with § 226.53(b)(1) instead be allocated in a different manner.

In contrast, the comment clarifies that a consumer has not made a request for purposes of § 226.53(b)(2) if the terms and conditions of the account agreement contain preprinted language stating that by applying to open an account or by using that account for transactions subject to a deferred interest or similar program the consumer requests that payments be allocated in a particular manner. Similarly, a consumer has not made a request for purposes of § 226.53(b)(2) if the card issuer's on-line application contains a preselected check box indicating that the consumer requests that payments be allocated in a particular manner and the consumer does not deselect the box.[39]

In addition, a consumer has not made a request for purposes of § 226.53(b)(2) if the payment coupon provided by the card issuer contains preprinted language or a preselected check box stating that by submitting a payment the consumer requests that the payment be allocated in a particular manner. Furthermore, a consumer has not made a request for purposes of § 226.53(b)(2) if the card issuer requires a consumer to accept a particular payment allocation method as a condition of using a deferred interest or similar program, making a payment, or receiving account services or features.

Section 226.54 Limitations on the Imposition of Finance Charges

The Credit Card Act creates a new TILA Section 127(j), which applies when a consumer loses any time period provided by the creditor with respect to a credit card account within which the consumer may repay any portion of the credit extended without incurring a finance charge (*i.e.,* a grace period). 15 U.S.C. 1637(j). In these circumstances, new TILA Section 127(j)(1)(A) prohibits the creditor from imposing a finance charge with respect to any balances for days in billing cycles that precede the most recent billing cycle (a practice that is sometimes referred to as "two-cycle" or "double-cycle" billing). Furthermore, in these circumstances, Section 127(j)(1)(B) prohibits the creditor from imposing a finance charge with respect to any balances or portions thereof in

[38] The Board and the other Agencies proposed a similar comment in May 2009. *See* 12 CFR 227.23 proposed comment 23(b)–1, 74 FR 20816.

[39] These examples are similar to examples adopted by the Board with respect to the affiliate marketing provisions of the Fair Credit Reporting Act. *See* 12 CFR 222.21(d)(4)(iii) and (iv).

the current billing cycle that were repaid within the grace period. However, Section 127(j)(2) provides that these prohibitions do not apply to any adjustment to a finance charge as a result of the resolution of a dispute or the return of a payment for insufficient funds. As discussed below, the Board is implementing new TILA Section 127(j) in § 226.54.

54(a) Limitations on Imposing Finance Charges as a Result of the Loss of a Grace Period

54(a)(1) General Rule

Prohibition on Two-Cycle Billing

As noted above, new TILA Section 127(j)(1)(A) prohibits the balance computation method sometimes referred to as "two-cycle billing" or "double-cycle billing." The January 2009 FTC Act Rule contained a similar prohibition. *See* 12 CFR 227.25, 74 FR 5560–5561; *see also* 74 FR 5535–5538. The two-cycle balance computation method has several permutations but, generally speaking, a card issuer using the two-cycle method assesses interest not only on the balance for the current billing cycle but also on balances on days in the preceding billing cycle. This method generally does not result in additional finance charges for a consumer who consistently carries a balance from month to month (and therefore does not receive a grace period) because interest is always accruing on the balance. Nor does the two-cycle method affect consumers who pay their balance in full within the grace period every month because interest is not imposed on their balances. The two-cycle method does, however, result in greater interest charges for consumers who pay their balance in full one month (and therefore generally qualify for a grace period) but not the next month (and therefore generally lose the grace period).

The following example illustrates how the two-cycle method results in higher costs for these consumers than other balance computation methods: Assume that the billing cycle on a credit card account starts on the first day of the month and ends on the last day of the month. The payment due date for the account is the twenty-fifth day of the month. Under the terms of the account, the consumer will not be charged interest on purchases if the balance at the end of a billing cycle is paid in full by the following payment due date (in other words, the consumer receives a grace period). The consumer uses the credit card to make a $500 purchase on March 15. The consumer pays the balance for the February billing cycle in full on March 25. At the end of the March billing cycle (March 31), the consumer's balance consists only of the $500 purchase and the consumer will not be charged interest on that balance if it is paid in full by the following due date (April 25). The consumer pays $400 on April 25, leaving a $100 balance. Because the consumer did not pay the balance for the March billing cycle in full on April 25, the consumer would lose the grace period and most card issuers would charge interest on the $500 purchase from the start of the April billing cycle (April 1) through April 24 and interest on the remaining $100 from April 25 through the end of the April billing cycle (April 30). Card issuers using the two-cycle method, however, would also charge interest on the $500 purchase from the date of purchase (March 15) to the end of the March billing cycle (March 31).

In the October 2009 Regulation Z Proposal, the Board proposed to implement new TILA Section 127(j)(1)(A)'s prohibition on two-cycle billing in § 226.54(a)(1)(i), which states that, except as provided in proposed § 226.54(b), a card issuer must not impose finance charges as a result of the loss of a grace period on a credit card account if those finance charges are based on balances for days in billing cycles that precede the most recent billing cycle. The Board also proposed to adopt § 226.54(a)(2), which would define "grace period" for purposes of § 226.54(a)(1) as having the same meaning as in § 226.5(b)(2)(ii).[40] Finally, proposed comment 54(a)(1)–4 explained that § 226.54(a)(1)(i) prohibits use of the two-cycle average daily balance computation method.

The Board did not receive significant comment on this proposed regulation and commentary. Accordingly, they are adopted as proposed.

Partial Grace Period Requirement

As discussed above, many credit card issuers that provide a grace period currently require the consumer to pay off the entire balance on the account or the entire balance subject to the grace period before the period expires. However, new TILA Section 127(j)(1)(B) limits this practice. Specifically, Section 127(j)(1)(B) provides that a creditor may not impose any finance charge on a credit card account as a result of the loss of any time period provided by the creditor within which the consumer may repay any portion of the credit extended without incurring a finance charge with respect to any balances or portions thereof in the current billing cycle that were repaid within such time period. The Board proposed to implement this prohibition in § 226.54(a)(1)(ii), which states that, except as provided in § 226.54(b), a card issuer must not impose finance charges as a result of the loss of a grace period on a credit card account if those finance charges are based on any portion of a balance subject to a grace period that was repaid prior to the expiration of the grace period. The Board did not receive significant comment on § 226.54(a)(1)(ii), which is adopted as proposed.

The Board also proposed comment 54(a)(1)–5, which clarified that card issuers are not required to use a particular method to comply with § 226.54(a)(1)(ii) but provided an example of a method that is consistent with the requirements of § 226.54(a)(1)(ii). Specifically, it stated that a card issuer can comply with the requirements of § 226.54(a)(1)(ii) by applying the consumer's payment to the balance subject to the grace period at the end of the prior billing cycle (in a manner consistent with the payment allocation requirements in § 226.53) and then calculating interest charges based on the amount of that balance that remains unpaid. An example of the application of this method is provided in comment 54(a)(1)–6 along with other examples of the application of § 226.54(a)(1)(i) and (ii). For the reasons discussed below, the Board has revised comments 54(a)(1)–5 and –6 to clarify the circumstances in which § 226.54 applies. Otherwise, these comments are adopted as proposed.

In addition to the commentary clarifying the specific prohibitions in § 226.54(a)(1)(i) and (ii), the Board also proposed to adopt three comments clarifying the general scope and applicability of § 226.54. First, proposed comment 54(a)(1)–1 clarified that § 226.54 does not require the card issuer to provide a grace period or prohibit a card issuer from placing limitations and conditions on a grace period to the extent consistent with § 226.54. Currently, neither TILA nor Regulation Z requires a card issuer to provide a grace period. Nevertheless, for competitive and other reasons, many credit card issuers choose to do so, subject to certain limitations and conditions. For example, credit card grace periods generally apply to

[40] Section 226.5(b)(2)(ii) was amended by the July 2009 Regulation Z Interim Final Rule to define "grace period" as a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. 74 FR 36094. As discussed above, the Board has revised § 226.5(b)(2)(ii) by, among other things, moving the definition of grace period to § 226.5(b)(2)(ii)(B). Accordingly, the Board has also made a corresponding revision to § 226.54(a)(2).

purchases but not to other types of transactions (such as cash advances). In addition, as noted above, card issuers that provide a grace period generally require the consumer to pay off all balances on the account or the entire balance subject to the grace period before the period expires.

Although new TILA Section 127(j) prohibits the imposition of finance charges as a result of the loss of a grace period in certain circumstances, the Board does not interpret this provision to mandate that card issuers provide such a period or to limit card issuers' ability to place limitations and conditions on a grace period to the extent consistent with the statute. Instead, Section 127(j)(1) refers to "*any time provided by the creditor* within which the [consumer] may repay any portion of the credit extended without incurring a finance charge." This language indicates that card issuers retain the ability to determine when and under what conditions to provide a grace period on a credit card account so long as card issuers that choose to provide a grace period do so consistent with the requirements of new TILA Section 127(j). Commenters generally supported this interpretation, which the Board has adopted in this final rule.

The Board also proposed to adopt comment 54(a)(1)–2, which clarified that § 226.54 does not prohibit the card issuer from charging accrued interest at the expiration of a deferred interest or similar promotional program. Specifically, the comment stated that, when a card issuer offers a deferred interest or similar promotional program, § 226.54 does not prohibit the card issuer from charging accrued interest to the account if the balance is not paid in full prior to expiration of the period (consistent with § 226.55 and other applicable law and regulatory guidance). A contrary interpretation of proposed § 226.54 (and new TILA Section 127(j)) would effectively eliminate deferred interest and similar programs as they are currently constituted by prohibiting the card issuer from charging any interest based on any portion of the deferred interest balance that is paid during the deferred interest period. However, as discussed above with respect to proposed § 226.53, the Credit Card Act's revisions to TILA Section 164 specifically create an exception to the general rule governing payment allocation for deferred interest programs, which indicates that Congress did not intend to ban such programs. *See* Credit Card Act § 104(1) (revised TILA Section 164(b)(2)).

Comments from credit card issuers, retailers, and industry groups strongly supported this interpretation. However, consumer group commenters argued that new TILA Section 127(j) should be interpreted to prohibit the interest charges on amounts paid within a deferred interest and similar period. For the reasons discussed above, the Board believes that such a prohibition would be inconsistent with Congress' intent. Accordingly, the Board adopts the interpretation in proposed comment 54(a)(1)–2.

In response to requests for clarification from industry commenters, the Board has also made a number of revisions to comments 54(a)(1)–1 and –2 in order to clarify the circumstances in which § 226.54 applies. As discussed below, these clarifications are intended to preserve current industry practices with respect to grace periods and the waiver of trailing or residual interest that are generally beneficial to consumers. First, the Board has generally revised the commentary to clarify that a card issuer is permitted to condition eligibility for the grace period on the payment of certain transactions or balances within the specified period, rather than requiring consumers to pay in full all transactions or balances on the account within that period. The Board understands that, for example, some card issuers permit a consumer to retain a grace period on purchases by paying the purchase balance in full, even if other balances (such as balances subject to promotional rates or deferred interest programs) are not paid in full. Insofar as this practice enables consumers to avoid interest charges on purchases without paying the entire account balance in full, it appears to be advantageous for consumers.

Second, the Board has revised comment 54(a)(1)–1 to clarify that § 226.54 does not limit the imposition of finance charges with respect to a transaction when the consumer is not eligible for a grace period on that transaction at the end of the billing cycle in which the transaction occurred. This clarification is intended to preserve a grace period eligibility requirement used by some card issuers that is more favorable to consumers than the requirement used by other issuers. Specifically, the Board understands that, while most credit card issuers only require consumers to pay the relevant balance in full in one billing cycle in order to be eligible for the grace period, some issuers require consumers to pay in full for two consecutive cycles. While either requirement is permissible under § 226.54,[41] the less restrictive requirement appears to be more beneficial to consumers.

However, many industry commenters expressed concern that, under the less restrictive requirement, a consumer could be considered eligible for a grace period in every billing cycle—and therefore § 226.54 would apply—regardless of whether the consumer had ever paid the relevant balance in full in a previous cycle. Because new TILA Section 127(j) does not mandate provision of a grace period, the Board believes that interpreting § 226.54 as applying in every billing cycle regardless of whether the consumer paid the previous cycle's balance in full would be inconsistent with Congress' intent. Furthermore, although this interpretation could be advantageous for consumers if card issuers retained the less restrictive eligibility requirement, the Board is concerned that card issuers would instead convert to the more restrictive approach, which would ultimately harm consumers. Accordingly, the Board has revised the commentary to clarify that a card issuer that employs the less restrictive eligibility requirement is not subject to § 226.54 unless the relevant balance for the prior billing cycle has been paid in full before the beginning of the current cycle. The Board has also added illustrative examples to comment 54(a)(1)–1.

Third, the Board has revised comment 54(a)(1)–2 to clarify that the practice of waiving or rebating finance charges on an individualized basis (such as in response to a consumer's request) and the practice of waiving or rebating trailing or residual interest do not constitute provision of a grace period for purposes of § 226.54. The Board believes that these practices are generally beneficial to consumers. In particular, the Board understands that, when a consumer is not eligible for a grace period at the start of a billing cycle, many card issuers waive interest that accrues during that billing cycle if the consumer pays the relevant balance in full by the payment due date. For reasons similar to those discussed above, industry commenters expressed concern that waiving interest in these circumstances could be construed as providing a grace period regardless of whether the relevant balance for the prior cycle was paid in full. Accordingly, the revisions to comment 54(a)(1)–2 are intended to encourage issuers to continue waiving or rebating

[41] Consumer group commenters argued that the Board should prohibit the more restrictive eligibility requirement. However, as discussed above, it does not appear that Congress intended to limit card issuers' ability to place conditions on grace period eligibility.

interest charges in these circumstances. Illustrative examples are provided.

However, consumer group commenters also raised concerns about an emerging practice of establishing interest waiver or rebate programs that are similar in many respects to grace periods. Under these programs, all interest accrued on purchases will be waived or rebated if the purchase balance at the end of the billing cycle during which the purchases occurred is paid in full by the following payment due date. The Board is concerned that these programs may be structured to avoid the requirements of new TILA Section 127(j) and § 226.54 (particularly the prohibition on imposing finance charges on amounts paid during a grace period). Accordingly, pursuant to its authority under TILA Section 105(a) to prevent evasion, the Board clarifies in comment 54(a)(1)–2 that this type of program is subject to the requirements of § 226.54. An illustrative example is provided.

Finally, proposed comment 54(a)(1)–3 clarified that card issuers must comply with the payment allocation requirements in § 226.53 even if doing so will result in the loss of a grace period. For example, as illustrated in comment 54(a)(1)–6.ii, a card issuer must generally allocate a payment in excess of the required minimum periodic payment to a cash advance balance with a 25% rate before a purchase balance with a 15% rate even if this will result in the loss of a grace period on the purchase balance. Although there could be a narrow set of circumstances in which—depending on the size of the balances and the amount of the difference between the rates—this allocation would result in higher interest charges than if the excess payment were applied in a way that preserved the grace period, Congress did not create an exception for these circumstances in the provisions of the Credit Card Act specifically addressing payment allocation.

Consumer group commenters argued that credit card issuers should be required to allocate payments in a manner that preserves the grace period. However, the Board is not persuaded that, as a general matter, this approach would necessarily be more advantageous for consumers than paying down the balance with the highest annual percentage rate. Furthermore, the payment allocation requirements in revised TILA Section 164(b) are mandatory in all circumstances, whereas the limitations on the imposition of finance charges in new TILA Section 127(j) apply only when the card issuer chooses to provide a grace period. Therefore, in circumstances where, for example, a card issuer must choose between allocating a payment to the balance with the highest rate (which the Credit Card Act requires) or preserving a grace period (which the Credit Card Act does not require), the Board believes it is appropriate that the payment allocation requirements control. Accordingly, comment 54(a)(1)–3 is adopted as proposed.

54(b) Exceptions

New TILA Section 127(j)(2) provides that the prohibitions in Section 127(j)(1) do not apply to any adjustment to a finance charge as a result of resolution of a dispute or as a result of the return of a payment for insufficient funds. The Board proposed to implement these exceptions in § 226.54(b).

The Board interpreted the exception for the "resolution of a dispute" in new TILA Section 127(j)(2)(A) to apply when the dispute is resolved pursuant to TILA's dispute resolution procedures. Accordingly, proposed § 226.54(b)(1) permitted adjustments to finance charges when a dispute is resolved under § 226.12 (which governs the right of a cardholder to assert claims or defenses against the card issuer) or § 226.13 (which governs resolution of billing errors).

In addition, because a payment may be returned for reasons other than insufficient funds (such as because the account on which the payment is drawn has been closed or because the consumer has instructed the institution holding that account not to honor the payment), the Board proposed to use its authority under TILA Section 105(a) to apply the exception in new TILA Section 127(j)(2)(B) to all circumstances in which adjustments to finance charges are made as a result of the return of a payment.

The Board did not receive significant comment on this aspect of the proposal. Accordingly, § 226.54(b) is adopted as proposed.

Section 226.55 Limitations on Increasing Annual Percentage Rates, Fees, and Charges

As revised by the Credit Card Act, TILA Section 171(a) generally prohibits creditors from increasing any annual percentage rate, fee, or finance charge applicable to any outstanding balance on a credit card account under an open-end consumer credit plan. *See* 15 U.S.C. 1666i–1. Revised TILA Section 171(b), however, provides exceptions to this rule for temporary rates that expire after a specified period of time and rates that vary with an index. Revised TILA Section 171(b) also provides exceptions in circumstances where the creditor has not received the required minimum periodic payment within 60 days after the due date and where the consumer completes or fails to comply with the terms of a workout or temporary hardship arrangement. Revised TILA Section 171(c) limits a creditor's ability to change the terms governing repayment of an outstanding balance. The Credit Card Act also creates a new TILA Section 172, which provides that a creditor generally cannot increase a rate, fee, or finance charge during the first year after account opening and that a promotional rate (as defined by the Board) generally cannot expire earlier than six months after it takes effect. As discussed in detail below, the Board is implementing both revised TILA Section 171 and new TILA Section 172 in § 226.55.

55(a) General Rule

As noted above, revised TILA Section 171(a) generally prohibits increases in annual percentage rates, fees, and finance charges on outstanding balances. Revised TILA Section 171(d) defines "outstanding balance" as the amount owed as of the end of the fourteenth day after the date on which the creditor provides notice of an increase in the annual percentage rate, fee, or finance charge in accordance with TILA Section 127(i).[42] TILA Section 127(i)(1) and (2), which went into effect on August 20, 2009, generally require creditors to notify consumers 45 days before an increase in an annual percentage rate or any other significant change in the terms of a credit card account (as determined by rule of the Board).

In the July 2009 Regulation Z Interim Final Rule, the Board implemented new TILA Section 127(i)(1) and (2) in § 226.9(c) and (g). In addition to increases in annual percentage rates, § 226.9(c)(2)(ii) lists the fees and other charges for which an increase constitutes a significant change to the account terms necessitating 45 days' advance notice, including annual or other periodic fees, fixed finance

[42] As discussed in the July 2009 Regulation Z Interim Final Rule (at 74 FR 36090), the Board believes that this fourteen-day period is intended to balance the interests of consumers and creditors. On the one hand, the fourteen-day period ensures that the increased rate, fee, or charge will not apply to transactions that occur before the consumer has received the notice and had a reasonable amount of time to review it and decide whether to use the account for additional transactions. On the other hand, the fourteen-day period reduces the potential that a consumer—having been notified of an increase for new transactions—will use the 45-day notice period to engage in transactions to which the increased rate, fee, or charge cannot be applied.

charges, minimum interest charges, transaction charges, cash advance fees, late payment fees, over-the-limit fees, balance transfer fees, returned-payment fees, and fees for required insurance, debt cancellation, or debt suspension coverage. As discussed above, however, the Board has amended § 226.9(c)(2)(ii) to identify these significant account terms by a cross-reference to the account-opening disclosure requirements in § 226.6(b). Because the definition of outstanding balance in revised TILA Section 171(d) is expressly conditioned on the provision of the 45-day advance notice, the Board believes that it is consistent with the purposes of the Credit Card Act to limit the general prohibition in revised TILA Section 171(a) on increasing fees and finance charges to increases in fees and charges for which a 45-day notice is required under § 226.9.

Furthermore, because revised TILA Section 171(a) prohibits the application of increased fees and charges to outstanding balances rather than to new transactions or to the account as a whole, the Board believes that it is appropriate to apply that prohibition only to fees and charges that could be applied to an outstanding balance. For example, increased cash advance or balance transfer fees would apply only to new cash advances or balance transfers, not to existing balances. Similarly, increased penalty fees such as late payment fees, over-the-limit fees, and returned payment fees would apply to the account as a whole rather than any specific balance.[43]

Accordingly, the Board proposed to use its authority under TILA Section 105(a) to limit the general prohibition in revised TILA Section 171(a) to increases in annual percentage rates and in fees and charges required to be disclosed under § 226.6(b)(2)(ii) (fees for the issuance or availability of credit), § 226.6(b)(2)(iii) (fixed finance charges and minimum interest charges), or § 226.6(b)(2)(xii) (fees for required insurance, debt cancellation, or debt suspension coverage).[44] Although consumer groups expressed concern that card issuers might develop new fees in order to evade the prohibition on applying increased fees to existing balances, the Board believes that these categories of fees are sufficiently broad to address any attempts at circumvention.

In addition, for clarity and organizational purposes, proposed § 226.55(a) generally prohibited increases in annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) with respect to all transactions, rather than just increases on existing balances. As explained in the proposal, the Board does not intend to alter the substantive requirements in revised TILA Section 171. Instead, the Board believes that revised TILA Section 171 can be more clearly and effectively implemented if increases in rates, fees, and charges that apply to transactions that occur more than fourteen days after provision of a § 226.9(c) or (g) notice are addressed in an exception to the general prohibition rather than placed outside that prohibition. The Board and the other Agencies adopted a similar approach in the January 2009 FTC Act Rule. *See* 12 CFR 227.24, 74 FR 5560. The Board did not receive significant comment on this aspect of the proposal. Accordingly, § 226.55(a) states that, except as provided in § 226.55(b), a card issuer must not increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii).

Proposed comment 55(a)–1 provided examples of the general application of § 226.55(a) and the exceptions in § 226.55(b). The Board has clarified these examples but no substantive change is intended. Additional examples illustrating specific aspects of the exceptions in § 226.55(b) are provided in the commentary to those exceptions.

Proposed comment 55(a)–2 clarified that nothing in § 226.55 prohibits a card issuer from assessing interest due to the loss of a grace period to the extent consistent with § 226.54. In addition, the comment states that a card issuer has not reduced an annual percentage rate on a credit account for purposes of § 226.55 if the card issuer does not charge interest on a balance or a portion thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 226.55. The Board has revised this comment to clarify that any loss of a grace period must also be consistent with the requirements for mailing or delivering periodic statements in § 226.5(b)(2)(ii)(B). Otherwise, it is adopted as proposed.

55(b) Exceptions

Revised TILA Section 171(b) lists the exceptions to the general prohibition in revised Section 171(a). Similarly, § 226.55(b) lists the exceptions to the general prohibition in § 226.55(a). In addition, § 226.55(b) clarifies that the listed exceptions are not mutually exclusive. In other words, a card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in § 226.55(b) even if that increase would not be permitted under a different exception. Comment 55(b)–1 clarifies that, for example, although a card issuer cannot increase an annual percentage rate pursuant to § 226.55(b)(1) unless that rate is provided for a specified period of at least six months, the card issuer may increase an annual percentage rate during a specified period due to an increase in an index consistent with § 226.55(b)(2). Similarly, although § 226.55(b)(3) does not permit a card issuer to increase an annual percentage rate during the first year after account opening, the card issuer may increase the rate during the first year after account opening pursuant to § 226.55(b)(4) if the required minimum periodic payment is not received within 60 days after the due date. The Board did not receive significant comment on the prefatory language in § 226.55(b) or on comment 55(b)–1, which are adopted as proposed. Similarly, except as noted below, comments 55(b)–2 through –6 are adopted as proposed.

Proposed comment 55(b)–2 addressed circumstances where the date on which a rate, fee, or charge may be increased pursuant to an exception in § 226.55(b) does not fall on the first day of a billing cycle. Because it may be operationally difficult for some card issuers to apply an increased rate, fee, or charge in the middle of a billing cycle, the comment clarifies that, in these circumstances, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge.

Commenters generally supported this guidance, but requested additional clarification regarding mid-cycle increases. Because these increases can occur as a result of the interaction between the exceptions in § 226.55(b) and the 45-day notice requirements in § 226.9(c) and (g), the Board has incorporated into comment 55(b)–2 the

[43] However, the Board notes that a consumer that does not want to accept an increase in these types of fees may reject the increase pursuant to § 226.9(h).

[44] As discussed below with respect to § 226.55(b)(3), a card issuer may still increase these types of fees and charges so long as the increased fee or charge is not applied to the outstanding balance.

guidance provided in proposed comment 55(b)–6 regarding that interaction.[45] Specifically, proposed comment 55(b)–6 stated that nothing in § 226.55 alters the requirements in § 226.9(c) and (g) that creditors provide written notice at least 45 days prior to the effective date of certain increases in annual percentage rates, fees, and charges. For example, although § 226.55(b)(3)(ii) permits a card issuer that discloses an increased rate pursuant to § 226.9(c) or (g) to apply that rate to transactions that occurred more than fourteen days after provision of the notice, the card issuer cannot begin to accrue interest at the increased rate until that increase goes into effect, consistent with § 226.9(c) or (g). The final rule adopts this guidance—with illustrative examples—in comment 55(b)–2.

In addition, proposed comment 55(b)–6 clarified that, on or after the effective date, the card issuer cannot calculate interest charges for days before the effective date based on the increased rate. In response to requests from commenters for further clarification, the Board has added this guidance to comment 55(b)–2 and adopted additional guidance addressing the application of different balance computation methods when an increased rate goes into effect in the middle of a billing cycle.

Comment 55(b)–3 clarifies that, although nothing in § 226.55 prohibits a card issuer from lowering an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii), a card issuer that does so cannot subsequently increase the rate, fee, or charge unless permitted by one of the exceptions in § 226.55(b). The Board believes that this interpretation is consistent with the intent of revised TILA Section 171 insofar as it ensures that consumers are informed of the key terms and conditions associated with a lowered rate, fee, or charge before relying on that rate, fee, or charge. For example, revised Section 171(b)(1)(A) requires creditors to disclose how long a temporary rate will apply and the rate that will apply after the temporary rate expires *before* the consumer engages in transactions in reliance on the temporary rate. Similarly, revised Section 171(b)(3)(B) requires the creditor to disclose the terms of a workout or temporary hardship arrangement before the consumer agrees to the arrangement. The comment provides examples illustrating the application of § 226.55 when an annual percentage rate is lowered. Comment 55(b)–3 is adopted as proposed, although the Board has made non-substantive clarifications and added additional examples in response to comments regarding the application of § 226.55 when an existing temporary rate is extended and when a default occurs before a temporary rate expires.

As discussed below, several of the exceptions in proposed § 226.55 require the creditor to determine when a transaction occurred. For example, consistent with revised TILA Section 171(d)'s definition of "outstanding balance," § 226.55(b)(3)(ii) provides that a card issuer that discloses an increased rate pursuant to § 226.9(c) or (g) may not apply that increased rate to transactions that occurred prior to or within fourteen days after provision of the notice. Accordingly, comment 55(b)–4 clarifies that when a transaction occurred for purposes of § 226.55 is generally determined by the date of the transaction.[46] The Board understands that, in certain circumstances, a short delay can occur between the date of the transaction and the date on which the merchant charges that transaction to the account. As a general matter, the Board believes that these delays should not affect the application of § 226.55. However, to address the operational difficulty for card issuers in the rare circumstance where a transaction that occurred within fourteen days after provision of a § 226.9(c) or (g) notice is not charged to the account prior to the effective date of the increase or change, this comment clarifies that the card issuer may treat the transaction as occurring more than fourteen days after provision of the notice for purposes of § 226.55. In addition, the comment clarifies that, when a merchant places a "hold" on the available credit on an account for an estimated transaction amount because the actual transaction amount will not be known until a later date, the date of the transaction for purposes of § 226.55 is the date on which the card issuer receives the actual transaction amount from the merchant. Illustrative examples are provided in comment 55(b)(3)–4.iii.

Comment 55(b)–5 clarifies the meaning of the term "category of transactions," which is used in some of the exceptions in § 226.55(b). This comment states that, for purposes of § 226.55, a "category of transactions" is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions.[47] For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § 226.55 if a card issuer applies different annual percentage rates to each. Furthermore, if, for example, the card issuer applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline or purchases over $100 and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § 226.55.

55(b)(1) Temporary Rate Exception

Revised TILA Section 171(b)(1) provides that a creditor may increase an annual percentage rate upon the expiration of a specified period of time, subject to three conditions. First, prior to commencement of the period, the creditor must have disclosed to the consumer, in a clear and conspicuous manner, the length of the period and the increased annual percentage rate that will apply after expiration of the period. Second, at the end of the period, the creditor must not apply a rate that exceeds the increased rate that was disclosed prior to commencement of the period. Third, at the end of the period, the creditor must not apply the previously-disclosed increased rate to transactions that occurred prior to commencement of the period. Thus, under this exception, a creditor that, for example, discloses at account opening that a 5% rate will apply to purchases for six months and that a 15% rate will apply thereafter is permitted to increase the rate on the purchase balance to 15% after six months.

The Board proposed to implement the exception in revised TILA Section 171(b)(1) regarding temporary rates as well as the requirements in new TILA Section 172(b) regarding promotional rates in § 226.55(b)(1). As a general matter, commenters supported or did not address proposed § 226.55(b)(1) and its commentary. Accordingly, except as discussed below, they are adopted as proposed.[48]

[45] As a result, proposed comment 55(b)–6 is not adopted in this final rule.

[46] This comment is based on comment 9(h)(3)(ii)–2, which was adopted in the July 2009 Regulation Z Interim Final Rule. *See* 74 FR 36101.

[47] Similarly, a type or group of transactions is a "category of transactions" for purposes of § 226.55 if a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) applies to those transactions that is different than the fee or charge that applies to other transactions.

[48] Some industry commenters requested that the Board expand § 226.55(b)(1) to apply to increases in fees to a pre-disclosed amount after a specified period of time. However, as discussed above with respect to § 226.9(c) and (h), the Board believes that such an exception would be inconsistent with the Credit Card Act. In addition, some industry

New TILA Section 172(b) provides that "[n]o increase in any * * * promotional rate (as that term is defined by the Board) shall be effective before the end of the 6-month period beginning on the date on which the promotional rate takes effect, subject to such reasonable exceptions as the Board may establish by rule." Pursuant to this authority, the Board believes that promotional rates should be subject to the same requirements and exceptions as other temporary rates that expire after a specified period of time. In particular, the Board believes that consumers who rely on promotional rates should receive the disclosures and protections set forth in revised TILA Section 171(b)(1) and § 226.55(b)(1). This will ensure that a consumer will receive disclosure of the terms of the promotional rate before engaging in transactions in reliance on that rate and that, at the expiration of the promotion, the rate will only be increased consistent with those terms. Accordingly, the Board has incorporated the requirement that promotional rates last at least six months into § 226.55(b)(1), which would permit a card issuer to increase a temporary annual percentage rate upon the expiration of a specified period that is six months or longer.

Furthermore, pursuant to its authority under new TILA Section 172(b) to establish reasonable exceptions to the six-month requirement for promotional rates, the Board believes that it is appropriate to apply the other exceptions in revised TILA Section 171(b) and § 226.55(b) to promotional rate offers. For example, the Board believes that a card issuer should be permitted to offer a consumer a promotional rate that varies with an index consistent with revised TILA Section 171(b)(2) and § 226.55(b)(2) (such as a rate that is one percentage point over a prime rate that is not under the card issuer's control). Similarly, the Board believes that a card issuer should be permitted to increase a promotional rate if the account becomes more than 60 days delinquent during the promotional period consistent with revised TILA Section 171(b)(4) and § 226.55(b)(4). Thus, the Board has applied to promotional rates the general proposition in proposed § 226.55(b) that a rate may be increased pursuant to an exception in § 226.55(b) even if that increase would not be permitted under a different exception.

Section 226.55(b)(1)(i) implements the requirement in revised TILA Section 171(b)(1)(A) that creditors disclose the length of the period and the annual percentage rate that will apply after the expiration of that period. This language tracks § 226.9(c)(2)(v)(B)(*1*), which the Board adopted in the July 2009 Regulation Z Interim Final Rule as part of an exception to the general requirement that creditors provide 45 days' notice before an increase in annual percentage rate. Because the disclosure requirements in § 226.9(c)(2)(v)(B)(*1*) and § 226.55(b)(1)(i) implement the same statutory provision (revised TILA Section 171(b)(1)(A)), the Board believes a single set of disclosures should satisfy both requirements. Accordingly, comment 55(b)(1)–1 clarifies that a card issuer that has complied with the disclosure requirements in § 226.9(c)(2)(v)(B) has also complied with the disclosure requirements in § 226.55(b)(2)(i).

Section 226.55(b)(1)(ii) implements the limitations in revised TILA Section 171(b)(1)(B) and (C) on the application of increased rates following expiration of the specified period. First, § 226.55(b)(1)(ii)(A) states that, upon expiration of the specified period, a card issuer must not apply an annual percentage rate to transactions that occurred prior to the period that exceeds the rate that applied to those transactions prior to the period. In other words, the expiration of a temporary rate cannot be used as a reason to apply an increased rate to a balance that preceded application of the temporary rate. For example, assume that a credit card account has a $5,000 purchase balance at a 15% rate and that the card issuer reduces the rate that applies to all purchases (including the $5,000 balance) to 10% for six months with a 22% rate applying thereafter. Under § 226.55(b)(1)(ii)(A), the card issuer cannot apply the 22% rate to the $5,000 balance upon expiration of the six-month period (although the card issuer could apply the original 15% rate to that balance).

Second, § 226.55(b)(1)(ii)(B) states that, if the disclosures required by § 226.55(b)(1)(i) are provided pursuant to § 226.9(c), the card issuer must not—upon expiration of the specified period—apply an annual percentage rate to transactions that occurred within fourteen days after provision of the notice that exceeds the rate that applied to that category of transactions prior to provision of the notice. The Board believes that this clarification is necessary to ensure that card issuers do not apply an increased rate to an outstanding balance (as defined in revised TILA Section 171(d)) upon expiration of the specified period. Accordingly, consistent with the purpose of revised TILA Section 171(d), § 226.55(b)(1)(ii)(B) ensures that a consumer will have fourteen days to receive the § 226.9(c) notice and review the terms of the temporary rate (including the increased rate that will apply upon expiration of the specified period) before engaging in transactions to which that increased rate may eventually apply.

Third, § 226.55(b)(1)(ii)(C) states that, upon expiration of the specified period, the card issuer must not apply an annual percentage rate to transactions that occurred during the specified period that exceeds the increased rate disclosed pursuant to § 226.55(b)(1)(i). In other words, the card issuer can only increase the rate consistent with the previously-disclosed terms. Examples illustrating the application of § 226.55(b)(1)(ii)(A), (B), and (C) are provided in comments 55(a)–1 and 55(b)–3.

Comment 55(b)(1)–2 clarifies when the specified period begins for purposes of the six-month requirement in § 226.55(b)(1). As a general matter, comment 55(b)(1)–2 states that the specified period must expire no less than six months after the date on which the creditor discloses to the consumer the length of the period and rate that will apply thereafter (as required by § 226.55(b)(1)(i)). However, if the card issuer provides these disclosures before the consumer can use the account for transactions to which the temporary rate will apply, the temporary rate must expire no less than six months from the date on which it becomes available.

For example, assume that on January 1 a card issuer offers a 5% annual percentage rate for six months on purchases (with a 15% rate applying thereafter). If a consumer may begin making purchases at the 5% rate on January 1, § 226.55(b)(1) permits the issuer to begin accruing interest at the 15% rate on July 1. However, if a consumer may not begin making purchases at the 5% rate until February 1, § 226.55(b)(1) does not permit the issuer to begin accruing interest at the 15% rate until August 1.

The Board understands that card issuers often limit the application of a promotional rate to particular categories of transactions (such as balance transfers or purchases over $100). The Board does not believe that the six-month requirement in new TILA Section 172(b) was intended to prohibit

commenters requested that the Board exclude promotional programs under which no interest is charged for a specified period of time. However, the Board believes that, for purposes of § 226.55, these programs do not differ in any material way from programs that offer annual percentage rate of 0% for a specified period of time.

this practice so long as the consumer receives the benefit of the promotional rate for at least six months. Accordingly, proposed comment 55(b)(1)–2 clarifies that § 226.55(b)(1) does not prohibit these types of limitations. However, the comment also clarifies that, in circumstances where the card issuer limits application of the temporary rate to a particular transaction, the temporary rate must expire no less than six months after the date on which that transaction occurred. For example, if on January 1 a card issuer offers a 0% temporary rate on the purchase of an appliance and the consumer uses the account to purchase a $1,000 appliance on March 1, the card issuer cannot increase the rate on that $1,000 purchase until September 1.

The Board believes that this application of the six-month requirement is consistent with the intent of new TILA Section 172(b). Although the six-month requirement could be interpreted as requiring a separate six-month period for every transaction to which the temporary rate applies, the Board believes this interpretation would create a level of complexity that would be not only confusing for consumers but also operationally burdensome for card issuers, potentially leading to a reduction in promotional rate offers that provide significant consumer benefit.

As a general matter, commenters supported the guidance in comment 55(b)(1)–2. Some industry commenters argued that the six-month requirement should not apply when the temporary rate is limited to a particular transaction, but the Board finds no support for such an exclusion in new TILA Section 172(b). Other industry commenters argued that, even if a temporary rate is limited to a particular transaction, the six-month period required by § 226.55(b)(1) should always begin once the terms have been disclosed and the rate is available to consumers. However, because temporary rates that are limited to particular transactions are frequently offered in retail settings, the Board is concerned that many consumers would not receive the benefit of the six-month period mandated by Section 172(b) if that period began when the rate was available.

For example, assume that a temporary rate of 0% is available on the purchase of a television from a particular retailer beginning on January 1. If the six-month period begins on January 1, a consumer who purchases a television on January 1 will receive the benefit of 0% rate for six months. However, a consumer who purchases a television on June 1 will only receive the benefit of the 0% rate for one month. As discussed above, the Board believes that, as a general matter, the benefits of temporary rates that can be used for multiple transactions sufficiently outweigh the fact that a consumer will not receive the temporary rate for the full six months on every transaction and therefore justify interpreting the six-month period in new TILA Section 172(b) as beginning when the rate becomes available. However, when the temporary rate applies only to a single transaction, the Board believes that Section 172(b) requires the card issuer to apply the temporary rate to that transaction for at least six months.

Although some industry commenters cited the operational difficulty of tracking transaction-specific expiration dates for temporary rates, the Board notes that several card issuers do so today. Furthermore, as discussed in comment 55(b)–2, a card issuer is not required to increase the rate precisely six months after the date of the transaction. Instead, assuming monthly billing cycles, a card issuer could, for example, use a single expiration date of July 31 for all temporary rate transactions that occur during the month of January (although this would require the card issuer to extend the temporary rate for up to a month). Accordingly, in this respect, comment 55(b)(1)–2 is adopted as proposed.[49]

Comment 55(b)(1)–3 clarifies that the general prohibition in § 226.55(a) applies to the imposition of accrued interest upon the expiration of a deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. As discussed in the January 2009 FTC Act Rule, the assessment of deferred interest is effectively an increase in rate on an existing balance. *See* 74 FR 5527–5528. However, if properly disclosed, deferred interest programs can provide substantial benefits to consumers. *See* 74 FR 20812–20813. Furthermore, as discussed above with respect to § 226.54, the Board does not believe that the Credit Card Act was intended to ban properly-disclosed deferred interest programs. Accordingly, comment 55(b)(1)–3 further clarifies that card issuers may continue to offer such programs consistent with the requirements of § 226.55(b)(1). In particular, § 226.55(b)(1) requires that the deferred interest or similar period be at least six months. Furthermore, prior to the commencement of the period, § 226.55(b)(1)(i) requires the card issuer to disclose the length of the period and the rate that will apply to the balance subject to the deferred interest program if that balance is not paid in full prior to expiration of the period. The comment provides examples illustrating the application of § 226.55 to deferred interest and similar programs.

Some industry commenters requested that the Board exclude deferred interest and similar programs from the six-month requirement in § 226.55(b)(1). However, because the Board has concluded that these programs should be treated as promotional programs for purposes of revised TILA Section 171, the Board does believe there is a basis for excluding these programs from the six-month requirement in new TILA Section 172(b). However, in order to ensure consistent treatment of deferred interest programs across Regulation Z, the Board has revised comment 55(b)(1)–3 to clarify that "deferred interest" has the same meaning as in § 226.16(h)(2) and associated commentary. In addition, the Board has added an example clarifying the application of the exception in § 226.55(b)(4) for accounts that are more than 60 days delinquent to deferred interest and similar programs.

Comment 55(b)(1)–4 clarifies that § 226.55(b)(1) does not permit a card issuer to apply an increased rate that is contingent on a particular event or occurrence or that may be applied at the card issuer's discretion. The comment provides examples of rate increases that are not permitted by § 226.55. Some industry commenters requested that, when a reduced rate is provided to employees of a business, the Board permit application of an increased rate to existing balances when employment ends. However, the Board believes that such an exception would be inconsistent with revised TILA Section 171(b)(1) because it is based on a contingent event rather than a specified period of time.

55(b)(2) Variable Rate Exception

Revised TILA Section 171(b)(2) provides that a card issuer may increase "a variable annual percentage rate in accordance with a credit card agreement that provides for changes in the rate according to operation of an index that is not under the card issuer's control

[49] However, in order to address confusion regarding the application of comment 55(b)(1)–2 to balance transfer offers, the Board has added an example clarifying that the six-month period for temporary rates that apply to multiple balance transfers begins once the terms have been disclosed and the rate is available to consumers. The Board has also made non-substantive clarifications to the examples in comment 55(b)(1)–2.

and is available to the general public." The Board proposed to implement this exception in § 226.55(b)(2), which states that a creditor may increase an annual percentage rate that varies according to an index that is not under the creditor's control and is available to the general public when the increase in rate is due to an increase in the index. Section 226.55(b)(2) is adopted as proposed.

The proposed commentary to § 226.55(b)(2) was modeled on commentary adopted by the Board and the other Agencies in the January 2009 FTC Act Rule as well as § 226.5b(f) and its commentary. *See* 12 CFR 227.24 comments 24(b)(2)–1 through 6, 74 FR 5531, 5564; § 226.5b(f)(1), (3)(ii); comment 5b(f)(1)–1 and –2; comment 5b(f)(3)(ii)–1. Proposed comment 55(b)(2)–1 clarified that § 226.55(b)(2) does not permit a card issuer to increase a variable annual percentage rate by changing the method used to determine that rate (such as by increasing the margin), even if that change will not result in an immediate increase. However, consistent with existing comment 5b(f)(3)(v)–2, the comment also clarifies that a card issuer may change the day of the month on which index values are measured to determine changes to the rate. This comment is generally adopted as proposed, although the Board has clarified that that changes to the day on which index values are measured are permitted from time to time. As discussed below, systematic changes in the date to capture the highest possible index value would be inconsistent with § 226.55(b)(2).

Proposed comment 55(b)(1)–2 further clarified that a card issuer may not increase a variable rate based on its own prime rate or cost of funds. A card issuer is permitted, however, to use a published prime rate, such as that in the *Wall Street Journal,* even if the card issuer's own prime rate is one of several rates used to establish the published rate. In addition, proposed comment 55(b)(2)–3 clarified that a publicly-available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the annual percentage rate applied to the credit card account. These comments are adopted as proposed, except that, as discussed below, the Board has provided additional clarification in comment 55(b)(2)–2 regarding what constitutes exercising control over the operation of an index for purposes of § 226.55(b)(2).

Consumer groups and a member of Congress raised concerns about two industry practices that, in their view, exercise control over the variable rate in a manner that is inconsistent with revised TILA Section 171(b)(2). First, they noted that many card issuers set minimum rates or "floors" below which a variable rate cannot fall even if a decrease would be consistent with a change in the applicable index. For example, assume that a card issuer offers a variable rate of 17%, which is calculated by adding a margin of 12 percentage points to an index with a current value of 5%. However, the terms of the account provide that the variable rate will not decrease below 17%. As a result, the variable rate can only increase, and the consumer will not benefit if the value of the index falls below 5%. The Board agrees that this practice is inconsistent with § 226.55(b)(2). Accordingly, the Board has revised comment 55(b)(2)–2 to clarify that a card issuer exercises control over the operation of the index if the variable rate based on that index is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index.[50]

The second practice raised by consumer groups and a member of Congress relates to adjusting or resetting variable rates to account for changes in the index. Typically, card issuers do not reset variable rates on a daily basis. Instead, card issuers may reset variable rates monthly, every two months, or quarterly. When the rate is reset, some card issuers calculate the new rate by adding the margin to the value of the index on a particular day (such as the last day of a month or billing cycle). However, some issuers calculate the variable rate based on the highest index value during a period of time (such as the 90 days preceding the last day of a month or billing cycle). Consumer groups and a member of Congress argued that the latter practice is inconsistent with § 226.55(b)(2) insofar as the consumer can be prevented from receiving the benefit of decreases in the index.

The Board agrees that a card issuer exercises control over the operation of the index if the variable rate can be calculated based on any index value during a period of time. Accordingly, the Board has revised comment 55(b)(2)–2 to clarify that, if the terms of the account contain such a provision, the card issuer cannot apply increases in the variable rate to existing balances pursuant to § 226.55(b)(2). However, the comment also clarifies that a card issuer can adjust the variable rate based on the value of the index on a particular day or, in the alternative, the average index value during a specified period.

Because the conversion of a non-variable rate to a variable rate could lead to future increases in the rate that applies to an existing balance, comment 55(b)(2)–4 clarifies that a non-variable rate may be converted to a variable rate only when specifically permitted by one of the exceptions in § 226.55(b). For example, under § 226.55(b)(1), a card issuer may convert a non-variable rate to a variable rate at the expiration of a specified period if this change was disclosed prior to commencement of the period. This comment is adopted as proposed.

Because § 226.55 applies only to *increases* in annual percentage rates, proposed comment 55(b)(2)–5 clarifies that nothing in § 226.55 prohibits a card issuer from changing a variable rate to an equal or lower non-variable rate. Whether the non-variable rate is equal to or lower than the variable rate is determined at the time the card issuer provides the notice required by § 226.9(c). An illustrative example is provided. Consumer group commenters argued that the Board should prohibit issuers from converting a variable rate to a non-variable rate when the index used to calculate the variable rate has reached its peak value. However, it would be difficult or impossible to develop workable standards for determining when a variable rate has reached its peak value or for distinguishing between conversions that are done for legitimate reasons and those that are not. Furthermore, as the consumer group commenters acknowledged, non-variable rates can be beneficial to consumers insofar as they provide increased predictability regarding the cost of credit. Accordingly, this comment is adopted as proposed.

Proposed comment 55(b)(2)–6 clarified that a card issuer may change the index and margin used to determine a variable rate if the original index becomes unavailable, so long as historical fluctuations in the original and replacement indices were substantially similar and the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. This comment further clarified that, if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

[50] However, because there is no disadvantage to consumers, comment 55(b)(2)–2 clarifies that card issuers are permitted to set fixed maximum rates or "ceilings" that do not permit the variable rate to increase consistent with increases in an index.

Consumer group commenters raised concerns that card issuers could substitute indices in a manner that circumvents the requirements of § 226.55(b)(2). Because comment 55(b)(2)–6 addresses the narrow circumstance in which an index becomes unavailable, the Board does not believe there is a significant risk of abuse. Indeed, this comment is substantively similar to long-standing guidance provided by the Board with respect to HELOCs (comment 5b(f)(3)(ii)–1), and the Board is not aware of any abuse in that context. Accordingly, the Board does not believe that revisions to comment 55(b)(2)–6 are warranted at this time.

55(b)(3) Advance Notice Exception

Section 226.55(a) prohibits increases in annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) with respect to both existing balances and new transactions. However, as discussed above, the prohibition on increases in rates, fees, and finance charges in revised TILA Section 171 applies only to "outstanding balances" as defined in Section 171(d). Accordingly, § 226.55(b)(3) provides that a card issuer may generally increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) with respect to new transactions after complying with the notice requirements in § 226.9(b), (c), or (g).

Because § 226.9 applies different notice requirements in different circumstances, § 226.55(b)(3) clarifies that the transactions to which an increased rate, fee, or charge may be applied depend on the type of notice required. As a general matter, when an annual percentage rate, fee, or charge is increased pursuant to § 226.9(c) or (g), § 226.55(b)(3)(ii) provides that the card issuer must not apply the increased rate, fee, or charge to transactions that occurred within fourteen days after provision of the notice. This is consistent with revised TILA Section 171(d), which defines the outstanding balance to which an increased rate, fee, or finance charge may not be applied as the amount due at the end of the fourteenth day after notice of the increase is provided.

However, pursuant to its authority under TILA Section 105(a), the Board has adopted a different approach for increased rates, fees, and charges disclosed pursuant to § 226.9(b). As discussed in the July 2009 Regulation Z Interim Final Rule, the Board believes that the fourteen-day period is intended, in part, to ensure that an increased rate, fee, or charge will not apply to transactions that occur before the consumer has received the notice of the increase and had a reasonable amount of time to review it and decide whether to engage in transactions to which the increased rate, fee, or charge will apply. *See* 74 FR 36090. The Board does not believe that a fourteen-day period is necessary for increases disclosed pursuant to § 226.9(b), which requires card issuers to disclose any new finance charge terms applicable to supplemental access devices (such as convenience checks) and additional features added to the account after account opening before the consumer uses the device or feature for the first time. For example, § 226.9(b)(3)(i)(A) requires that card issuers providing checks that access a credit card account to which a temporary promotional rate applies disclose key terms on the front of the page containing the checks, including the promotional rate, the period during which the promotional rate will be in effect, and the rate that will apply after the promotional rate expires. Thus, unlike increased rates, fees, and charges disclosed pursuant to a § 226.9(c) and (g) notice, the fourteen-day period is not necessary for increases disclosed pursuant to § 226.9(b) because the device or feature will not be used before the consumer has received notice of the applicable terms. Accordingly, § 226.55(b)(3)(i) provides that, if a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 226.9(b), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to provision of the notice.

Finally, § 226.55(b)(3)(iii) provides that the exception in § 226.55(b)(3) does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after the credit card account is opened. This provision implements new TILA Section 172(a), which generally prohibits increases in annual percentage rates, fees, and finance charges during the one-year period beginning on the date the account is opened.

The Board did not receive significant comment regarding § 226.55(b)(3). Thus, the final rules adopt § 226.55(b)(3) as proposed. Similarly, except as discussed below, the Board has generally adopted the commentary to § 226.55(b)(3) as proposed, although the Board has made some non-substantive clarifications.

Comment 55(b)(3)–1 clarifies that a card issuer may not increase a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to § 226.55(b)(3) if the consumer has rejected the increased fee or charge pursuant to § 226.9(h). In addition, comment 55(b)(3)–2 clarifies that, if an increased annual percentage rate, fee, or charge is disclosed pursuant to both § 226.9(b) and (c), the requirements in § 226.55(b)(3)(ii) control and the rate, fee, or charge may only be applied to transactions that occur more than fourteen days after provision of the § 226.9(c) notice.

Comment 55(b)(3)–3 clarifies whether certain changes to a credit card account constitute an "account opening" for purposes of the prohibition in § 226.55(b)(3)(iii) on increasing annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening. In particular, the comment distinguishes between circumstances in which a card issuer opens multiple accounts for the same consumer and circumstances in which a card issuer substitutes, replaces, or consolidates one account with another. As an initial matter, this comment clarifies that, when a consumer has a credit card account with a card issuer and the consumer opens a new credit card account with the same card issuer (or its affiliate or subsidiary), the opening of the new account constitutes the opening of a credit card account for purposes of § 226.55(b)(3)(iii) if, more than 30 days after the new account is opened, the consumer has the option to obtain additional extensions of credit on each account. Thus, for example, if a consumer opens a credit card account with a card issuer on January 1 of year one and opens a second credit card account with that card issuer on July 1 of year one, the opening of the second account constitutes an account opening for purposes of § 226.55(b)(3)(iii) so long as, on August 1, the consumer has the option to engage in transactions using either account. This is the case even if the consumer transfers a balance from the first account to the second. Thus, because the card issuer has two separate account relationships with the consumer, the prohibition in § 226.55(b)(3)(iii) on increasing annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening applies to the opening of the second account.[51]

[51] This comment is based on commentary to the January 2009 FTC Act Rule proposed by the Board and the other Agencies in May 2009. *See* 12 CFR 227.24, proposed comment 24–4, 74 FR 20816; *see also* 74 FR 20809. In that proposal, the Board recognized that the process of replacing one

In contrast, the comment clarifies that an account has not been opened for purposes of § 226.55(b)(3)(iii) when a card issuer substitutes or replaces one credit card account with another credit card account (such as when a retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants) or when a card issuer consolidates or combines a credit card account with one or more other credit card accounts into a single credit card account. As discussed below with respect to proposed § 226.55(d)(2), the Board believes that these transfers should be treated as a continuation of the existing account relationship rather than the creation of a new account relationship. Similarly, the comment also clarifies that the substitution or replacement of an acquired credit card account does not constitute an "account opening" for purposes of § 226.55(b)(3)(iii). Thus, in these circumstances, the prohibition in § 226.55(b)(3)(iii) does not apply. However, when a substitution, replacement or consolidation occurs during the first year after account opening, comment 55(b)(3)–3.ii.B clarifies that the card issuer may not increase an annual percentage rate, fee, or charge in a manner otherwise prohibited by § 226.55.[52]

Comment 55(b)(3)–4 provides illustrative examples of the application of the exception in proposed § 226.55(b)(3). Comment 55(b)(3)–5 contains a cross-reference to comment 55(c)(1)–3, which clarifies the circumstances in which increased fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) may be imposed consistent with § 226.55.

account with another generally is not instantaneous. If, for example, a consumer requests that a credit card account with a $1,000 balance be upgraded to a credit card account that offers rewards on purchases, the second account may be opened immediately or within a few days but, for operational reasons, there may be a delay before the $1,000 balance can be transferred and the first account can be closed. For this reason, the Board sought comment on whether 15 or 30 days was the appropriate amount of time to complete this process. In response, industry commenters generally stated that at least 30 days was required. Accordingly, the Board proposed a 30-day period in comment 55(b)(3)–3. The Board did not receive additional comment on this issue. Accordingly, the 30-day period is adopted in the final rule.

[52] For example, assume that, on January 1 of year one, a consumer opens a credit card account with a purchase rate of 15%. On July 1 of year one, the account is replaced with a credit card account issued by the same card issuer, which offers different features (such as rewards on purchases). Under these circumstances, the card issuer could not increase the annual percentage rate for purchases to a rate that is higher than 15% pursuant to § 226.55(b)(3) until January 1 of year two (which is one year after the first account was opened).

55(b)(4) Delinquency Exception

Revised TILA Section 171(b)(4) permits a creditor to increase an annual percentage rate, fee, or finance charge "due solely to the fact that a minimum payment by the [consumer] has not been received by the creditor within 60 days after the due date for such payment." However, this exception is subject to two conditions. First, revised Section 171(b)(4)(A) provides that the notice of the increase must include "a clear and conspicuous written statement of the reason for the increase and that the increase will terminate not later than 6 months after the date on which it is imposed, if the creditor receives the required minimum payments on time from the [consumer] during that period." Second, revised Section 171(b)(4)(B) provides that the creditor must "terminate [the] increase not later than 6 months after the date on which it is imposed, if the creditor receives the required minimum payments on time during that period."

The Board has implemented this exception in § 226.55(b)(4). The additional notice requirements in revised TILA Section 171(b)(4)(A) are set forth in § 226.55(b)(4)(i). The requirement in revised Section 171(b)(4)(B) that the increase be terminated if the card issuer receives timely payments during the six months following the increase is implemented in § 226.55(b)(4)(ii), although the Board proposed to make four adjustments to the statutory requirement pursuant to its authority under TILA Section 105(a) to make adjustments to effectuate the purposes of TILA and to facilitate compliance therewith.

First, proposed § 226.55(b)(4)(ii) interpreted the requirement that the creditor "terminate" the increase as a requirement that the card issuer reduce the annual percentage rate, fee, or charge to the rate, fee, or charge that applied prior to the increase. The Board believes that this interpretation is consistent with the intent of revised TILA Section 171(b)(4)(B) insofar as the increased rate, fee, or charge will cease to apply once the consumer has met the statutory requirements. The Board does not interpret revised TILA Section 171(b)(4)(B) to require the card issuer to refund or credit the account for amounts charged as a result of the increase prior to the termination or cessation. The Board did not receive significant comment on this aspect of the proposal, which is adopted in the final rule.

Second, proposed § 226.55(b)(4)(ii) provided that the card issuer must reduce the annual percentage rate, fee, or charge after receiving six consecutive required minimum periodic payments on or before the payment due date. The Board believes that shifting the focus from the number of months to the number of on-time payments provides more specificity and clarity for both consumers and card issuers as to what is required to obtain the reduction. Because credit card accounts typically require payment on a monthly basis,[53] a consumer who makes six consecutive on-time payments will also generally have paid on time for six months. However, card issuers are permitted to adjust their due dates and billing cycles from time to time,[54] which could create uncertainty regarding whether a consumer has complied with the statutory requirement to make on-time payments during the six-month period. The Board did not receive significant comment on this proposed adjustment. Accordingly, because the Board believes that this adjustment to TILA Section 171(b)(4) will facilitate compliance with that provision, it is adopted in the final rule.

Third, proposed § 226.55(b)(4)(ii) applied to the six consecutive required minimum periodic payments received on or before the payment due date beginning with the first payment due following the effective date of the increase. The Board believes that limiting this requirement to the period immediately following the increase is consistent with revised TILA Section 171(b)(4)(B), which requires a creditor to terminate an increase "6 months *after* the date on which it is imposed, if the creditor receives the required minimum payments on time during that period." Thus, as clarified in comment 55(b)(4)–3 (which is discussed below), § 226.55(b)(4)(ii) does not require a card issuer to terminate an increase if, at some later point in time, the card issuer receives six consecutive required minimum periodic payments on or before the payment due date. The Board did not receive significant comment on this interpretation, which is adopted in the final rule.

Fourth, proposed § 226.55(b)(4)(ii) provided that the card issuer must also reduce the annual percentage rate, fee, or charge with respect to transactions that occurred within fourteen days after provision of the § 226.9(c) or (g) notice. This requirement is consistent with the definition of "outstanding balance" in revised TILA Section 171(d), as applied in § 226.55(b)(1)(ii)(B) and

[53] Although some creditors use quarterly billing cycles for other open-end products, the Board is not aware of any creditor that does so with respect to credit card accounts under open-end (not home-secured) consumer credit plans.

[54] *See, e.g.,* comments 2(a)(4)–3 and 7(b)(11)–7.

§ 226.55(b)(3)(ii). As above, the Board did not receive significant comment on this aspect of the proposal, which is adopted in the final rule.

Accordingly, for the reasons discussed above, § 226.55(b)(4) is adopted as proposed. Similarly, except as discussed below, the Board has adopted the commentary to § 226.55(b)(4) as proposed (with certain non-substantive clarifications).

Comment 55(b)(4)–1 clarifies that, in order to satisfy the condition in § 226.55(b)(4) that the card issuer has not received the consumer's required minimum periodic payment within 60 days after the payment due date, a card issuer that requires monthly minimum payments generally must not have received two consecutive minimum payments. The comment further clarifies that whether a required minimum periodic payment has been received for purposes of § 226.55(b)(4) depends on whether the amount received is equal to or more than the first outstanding required minimum periodic payment. The comment provides the following example: Assume that the required minimum periodic payments for a credit card account are due on the fifteenth day of the month. On May 13, the card issuer has not received the $50 required minimum periodic payment due on March 15 or the $150 required minimum periodic payment due on April 15. If the card issuer receives a $50 payment on May 14, § 226.55(b)(4) does not apply because the payment is equal to the required minimum periodic payment due on March 15 and therefore the account is not more than 60 days delinquent. However, if the card issuer instead received a $40 payment on May 14, § 226.55(b)(4) does apply because the payment is less than the required minimum periodic payment due on March 15. Furthermore, if the card issuer received the $50 payment on May 15, § 226.55(b)(4) applies because the card issuer did not receive the required minimum periodic payment due on March 15 within 60 days after the due date for that payment.

As discussed above, § 226.9(g)(3)(i)(B) requires that the written notice provided to consumers 45 days before an increase in rate due to delinquency or default or as a penalty include the information required by revised Section 171(b)(4)(A). Accordingly, comment 55(b)(4)–2 clarifies that a card issuer that has complied with the disclosure requirements in § 226.9(g)(3)(i)(B) has also complied with the disclosure requirements in § 226.55(b)(4)(i).

Comment 55(b)(4)–3 clarifies the requirements in § 226.55(b)(4)(ii) regarding the reduction of annual percentage rates, fees, or charges that have been increased pursuant to § 226.55(b)(4). First, as discussed above, the comment clarifies that § 226.55(b)(4)(ii) does not apply if the card issuer does not receive six consecutive required minimum periodic payments on or before the payment due date beginning with the payment due immediately following the effective date of the increase, even if, at some later point in time, the card issuer receives six consecutive required minimum periodic payments on or before the payment due date.

Second, the comment states that, although § 226.55(b)(4)(ii) requires the card issuer to reduce an annual percentage rate, fee, or charge increased pursuant to § 226.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge consistent with any of the other exceptions in § 226.55(b). For example, if a temporary rate applied prior to the § 226.55(b)(4) increase and the temporary rate expired before a reduction in rate pursuant to § 226.55(b)(4), the card issuer may apply an increased rate to the extent consistent with § 226.55(b)(1). Similarly, if a variable rate applied prior to the § 226.55(b)(4) increase, the card issuer may apply any increase in that variable rate to the extent consistent with § 226.55(b)(2). This is consistent with § 226.55(b), which provides that a card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to one of the exceptions in § 226.55(b) even if that increase would not be permitted under a different exception.

Third, the comment states that, if § 226.55(b)(4)(ii) requires a card issuer to reduce an annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the reduced rate, fee, or charge until the first day of the following billing cycle. As discussed above with respect to comment 55(b)–2, the Board understands that it may be operationally difficult for some card issuers to reduce a rate, fee, or charge in the middle of a billing cycle. Accordingly, this comment is consistent with comment 55(b)–2, which clarifies that a card issuer may delay application of an increase in a rate, fee, or charge until the start of the next billing cycle without relinquishing its ability to apply that rate, fee, or charge. Finally, the comment provides examples illustrating the application of § 226.55(b)(4)(ii).[55]

55(b)(5) Workout and Temporary Hardship Arrangement Exception

Revised TILA Section 171(b)(3) permits a creditor to increase an annual percentage rate, fee, or finance charge "due to the completion of a workout or temporary hardship arrangement by the [consumer] or the failure of a [consumer] to comply with the terms of a workout or temporary hardship arrangement." However, like the exception for delinquencies of more than 60 days in revised TILA Section 171(b)(4), this exception is subject to two conditions. First, revised Section 171(b)(3)(A) provides that "the annual percentage rate, fee, or finance charge applicable to a category of transactions following any such increase does not exceed the rate, fee, or finance charge that applied to that category of transactions prior to commencement of the arrangement." Second, revised Section 171(b)(3)(B) provides that the creditor must have "provided the [consumer], prior to the commencement of such arrangement, with clear and conspicuous disclosure of the terms of the arrangement (including any increases due to such completion or failure)."

The Board proposed to implement this exception in § 226.55(b)(5). The notice requirements in revised Section 171(b)(3)(B) were set forth in proposed § 226.55(b)(5)(i). The limitation on increases following completion or failure of a workout or temporary hardship arrangement was set forth in proposed § 226.55(b)(5)(ii). Section 226.55(b)(5) is generally adopted as proposed, although—as discussed below—the Board has revised § 226.55(b)(5)(i) and comment 55(b)(5)–2 for consistency with the revisions to the notice requirements for workout and temporary hardship arrangements in § 226.9(c)(2)(v)(D). Otherwise, the commentary to § 226.55(b)(5) is adopted as proposed.

Comment 55(b)(5)–1 clarifies that nothing in § 226.55(b)(5) permits a card issuer to alter the requirements of § 226.55 pursuant to a workout or temporary hardship arrangement. For example, a card issuer cannot increase

[55] In response to requests for clarification, the Board has added an example to comment 55(b)(4)–3 illustrating the application of § 226.55(b)(4)(ii) when a consumer qualifies for a reduction in rate while a temporary rate is still in effect. In addition, the Board has added a cross-reference to comment 55(b)(1)–3, which provides an illustrative example of the application of § 226.55(b)(4) to deferred interest or similar programs.

an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to a workout or temporary hardship arrangement unless otherwise permitted by § 226.55. In addition, a card issuer cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under § 226.55(c).[56]

Comment 55(b)(5)–2 clarifies that a card issuer that has complied with the disclosure requirements in § 226.9(c)(2)(v)(D) has also complied with the disclosure requirements in § 226.55(b)(5)(i). The comment also contains a cross-reference to proposed comment 9(c)(2)(v)–10 (formerly comment 9(c)(2)(v)–8), which the Board adopted in the July 2009 Regulation Z Interim Final Rule to clarify the terms a creditor is required to disclose prior to commencement of a workout or temporary hardship arrangement for purposes of § 226.9(c)(2)(v)(D), which is an exception to the general requirement that a creditor provide 45 days advance notice of an increase in annual percentage rate. *See* 74 FR 36099. Because the disclosure requirements in § 226.9(c)(2)(v)(D) and § 226.55(b)(5)(i) implement the same statutory provision (revised TILA Section 171(b)(3)(B)), the Board believes a single set of disclosures should satisfy the requirements of all three provisions. The Board has revised the disclosure requirement in § 226.55(b)(5)(i) and the guidance in comment 55(b)(5)–2 for consistency with the revisions to § 226.9(c)(2)(v)(D), which permit creditors to disclose the terms of the workout or temporary hardship arrangement orally by telephone, provided that the creditor mails or delivers a written disclosure of the terms as soon as reasonably practicable after the oral disclosure is provided.

Similar to the commentary to § 226.55(b)(4), comment 55(b)(5)–3 states that, although the card issuer may not apply an annual percentage rate, fee, or charge to transactions that occurred prior to commencement of the arrangement that exceeds the rate, fee, or charge that applied to those transactions prior to commencement of the arrangement, § 226.55(b)(5)(ii) does not prohibit the card issuer from applying an increased rate, fee, or charge upon completion or failure of the arrangement to the extent consistent with any of the other exceptions in § 226.55(b) (such as an increase in a variable rate consistent with § 226.55(b)(2)). Finally, comment 55(b)(5)–4 provides illustrative examples of the application of this exception.[57]

[56] The definition of "protected balance" and the permissible repayment methods for such a balance are discussed in detail below with respect to § 226.55(c).

55(b)(6) Servicemembers Civil Relief Act Exception

In the October 2009 Regulation Z Proposal, the Board proposed to use its authority under TILA Section 105(a) to clarify the relationship between the general prohibition on increasing annual percentage rates in revised TILA Section 171 and certain provisions of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. 501 *et seq.* Specifically, 50 U.S.C. app. 527(a)(1) provides that "[a]n obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent. * * *" With respect to credit card accounts, this restriction applies during the period of military service. *See* 50 U.S.C. app. 527(a)(1)(B).[58]

Under revised TILA Section 171, a creditor that complies with the SCRA by lowering the annual percentage rate that applies to an existing balance on a credit card account when the consumer enters military service arguably would not be permitted to increase the rate for that balance once the period of military service ends and the protections of the SCRA no longer apply. In May 2009, the Board and the other Agencies proposed to create an exception to the general prohibition in the January 2009 FTC Act Rule on applying increased rates to existing balances for these circumstances, provided that the increased rate does not exceed the rate that applied prior to the period of military service. *See* 12 CFR 227.24(b)(6), 74 FR 20814; *see also* 74 FR 20812. Revised TILA Section 171 does not contain a similar exception.

Nevertheless, the Board does not believe that Congress intended to prohibit creditors from returning an annual percentage rate that has been reduced by operation of the SCRA to its pre-military service level once the SCRA no longer applies. Accordingly, the Board proposed to create § 226.55(b)(6), which states that, if an annual percentage rate has been decreased pursuant to the SCRA, a card issuer may increase that annual percentage rate once the SCRA no longer applies. However, the proposed rule would not have permitted the card issuer to apply an annual percentage rate to any transactions that occurred prior to the decrease that exceeds the rate that applied to those transactions prior to the decrease. Furthermore, because the Board believes that a consumer leaving military service should receive 45 days advance notice of this increase in rate, the Board did not propose a corresponding exception to § 226.9.

[57] In response to requests for clarifications, the Board has revised comment 55(b)(5)–4 to provide an example of the application of § 226.55(b)(5) to fees.

[58] 50 U.S.C. app. 527(a)(1)(B) applies to obligations or liabilities that do not consist of a mortgage, trust deed, or other security in the nature of a mortgage.

Commenters were generally supportive of proposed § 226.55(b)(6). Accordingly, it is adopted as proposed. However, although industry commenters argued that a similar exception should be adopted in § 226.9(c), the Board continues to believe—as discussed above with respect to § 226.9(c)—that consumers who leave military service should receive 45 days advance notice of an increase in rate.

The Board has also adopted the commentary to § 226.55(b)(6) as proposed. Comment 55(b)(6)–1 clarifies that, although § 226.55(b)(6) requires the card issuer to apply to any transactions that occurred prior to a decrease in annual percentage rate pursuant to 50 U.S.C. app. 527 a rate that does not exceed the rate that applied to those transactions prior to the decrease, the card issuer may apply an increased rate once 50 U.S.C. app 527 no longer applies, to the extent consistent with any of the other exceptions in § 226.55(b). For example, if the rate that applied prior to the decrease was a variable rate, the card issuer may apply any increase in that variable rate to the extent consistent with § 226.55(b)(2). This comment mirrors similar commentary to § 226.55(b)(4) and (b)(5). An illustrative example is provided in comment 26(b)(6)–2.

55(c) Treatment of Protected Balances

Revised TILA Section 171(c)(1) states that "[t]he creditor shall not change the terms governing the repayment of any outstanding balance, except that the creditor may provide the [consumer] with one of the methods described in [revised Section 171(c)(2)] * * * or a method that is no less beneficial to the [consumer] than one of those methods." Revised TILA Section 171(c)(2) lists two methods of repaying an outstanding balance: first, an amortization period of not less than five years, beginning on the effective date of the increase set forth in the Section 127(i) notice; and, second, a required minimum periodic payment that includes a percentage of the outstanding balance that is equal to not more than twice the percentage required before the effective date of the increase set forth in the Section 127(i) notice.

For clarity, § 226.55(c)(1) defines the balances subject to the protections in revised TILA Section 171(c) as "protected balances." Under this definition, a "protected balance" is the amount owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) cannot be applied after the annual percentage rate, fee, or charge for that category of transactions has been increased pursuant to § 226.55(b)(3). For example, when a card issuer notifies a consumer of an increase in the annual percentage rate that applies to new purchases pursuant to § 226.9(c), the protected balance is the purchase balance at the end of the fourteenth day after provision of the notice. *See* § 226.55(b)(3)(ii). The Board and the other Agencies adopted a similar definition in the January 2009 FTC Act Rule. *See* 12 CFR 227.24(c), 74 FR 5560; *see also* 74 FR 5532. The Board did not receive significant comment on § 226.55(c)(1), which is adopted as proposed.

Comment 55(c)(1)–1 provides an illustrative example of a protected balance. Comment 55(c)(1)–2 clarifies that, because § 226.55(b)(3)(iii) does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening, § 226.55(c) does not apply to balances during the first year after account opening. These comments are adopted as proposed.

Comment 55(c)(1)–3 clarifies that, although § 226.55(b)(3) does not permit a card issuer to apply an increased fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) to a protected balance, a card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. For example, a card issuer may add a new annual or a monthly maintenance fee to an account or increase such a fee so long as the fee is not based solely on the protected balance. However, if the consumer rejects an increase in a fee or charge pursuant to § 226.9(h), the card issuer is prohibited from applying the increased fee or charge to the account and from imposing any other fee or charge solely as a result of the rejection. *See* § 226.9(h)(2)(i) and (ii); comment 9(h)(2)(ii)–2.

Proposed § 226.55(c)(2) would have implemented the restrictions on accelerating the repayment of protected balances in revised TILA Section 171(c). As discussed above with respect to § 226.9(h), the Board previously implemented these restrictions in the July 2009 Regulation Z Interim Final Rule as § 226.9(h)(2)(iii). However, for clarity and consistency, the Board proposed to move these restrictions to § 226.55(c)(2). The Board did not propose to substantively alter the repayment methods in § 226.9(h)(2)(iii), except that the repayment methods in § 226.55(c)(2) focused on the effective date of the increase (rather than the date on which the card issuer is notified of the rejection pursuant to § 226.9(h)). The Board did not receive significant comment on § 226.55(c)(2), which is adopted as proposed.

Similarly, for the reasons discussed above with respect to § 226.9(h), the Board proposed to move the commentary clarifying the application of the repayment methods from § 226.9(h)(2)(iii) to § 226.55(c) and to adjust that commentary for consistency with § 226.55(c). In addition, proposed comment 55(c)(2)(iii)–1 clarified that, although § 226.55(c)(2)(iii) limits the extent to which the portion of the required minimum periodic payment based on the protected balance may be increased, it does not limit or otherwise address the creditor's ability to determine the amount of the required minimum periodic payment based on other balances on the account or to apply that portion of the minimum payment to the balances on the account. Proposed comment 55(c)(2)(iii)–2 provided an illustrative example. These comments are adopted as proposed.

55(d) Continuing Application of § 226.55

Pursuant to its authority under TILA Section 105(a), the Board proposed to adopt § 226.55(d), which provided that the limitations in § 226.55 continue to apply to a balance on a credit card account after the account is closed or acquired by another card issuer or the balance is transferred from a credit card account issued by a card issuer to another credit account issued by the same card issuer or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 226.5b). This provision is based on commentary to the January 2009 FTC Act Rule proposed by the Board and the other Agencies in May 2009, primarily in response to concerns that permitting card issuers to apply an increased rate to an existing balance in these circumstances could lead to circumvention of the general prohibition on such increases. *See* 12 CFR 227.21 comments 21(c)–1 through –3, 74 FR 20814–20815; *see also* 74 FR 20805–20807. As discussed below, § 226.55(d) and its commentary are adopted as proposed.

Because the protections in revised TILA Section 171 and new TILA Section 172 cannot be waived or forfeited, § 226.55(d) does not distinguish between closures or transfers initiated by the card issuer and closures or transfers initiated by the consumer. Although there may be circumstances in which individual consumers could make informed choices about the benefits and costs of waiving the protections in revised Section 171 and new Section 172, an exception for those circumstances would create a significant loophole that could be used to deny the protections to other consumers. For example, if a card issuer offered to transfer its cardholder's existing balance to a credit product that would reduce the rate on the balance for a period of time in exchange for the cardholder accepting a higher rate after that period, the cardholder would have to determine whether the savings created by the temporary reduction would offset the cost of the subsequent increase, which would depend on the amount of the balance, the amount and length of the reduction, the amount of the increase, and the length of time it would take the consumer to pay off the balance at the increased rate. Based on extensive consumer testing conducted during the preparation of the January 2009 Regulation Z Rule and the January 2009 FTC Act Rule, the Board believes that it would be very difficult to ensure that card issuers disclosed this information in a manner that will enable most consumers to make informed decisions about whether to accept the increase in rate. Although some approaches to disclosure may be effective, others may not and it would be impossible to distinguish among such approaches in a way that would provide clear guidance for card issuers. Furthermore, consumers might be presented with choices that are not meaningful (such as a choice between accepting a higher rate on an existing balance or losing credit privileges on the account).

Section 226.55(d)(1) provides that § 226.55 continues to apply to a balance on a credit card account after the account is closed or acquired by another card issuer. In some cases, the acquiring institution may elect to close the acquired account and replace it with its own credit card account. *See* comment

12(a)(2)–3. The acquisition of an account does not involve any choice on the part of the consumer, and the Board believes that consumers whose accounts are acquired should receive the same level of protection against increases in annual percentage rates after acquisition as they did beforehand.[59] Comment 55(d)–1 clarifies that § 226.55 continues to apply regardless of whether the account is closed by the consumer or the card issuer and provides illustrative examples of the application of § 226.55(d)(1). Comment 55(d)–2 clarifies the application of § 226.55(d)(1) to circumstances in which a card issuer acquires a credit card account with a balance by, for example, merging with or acquiring another institution or by purchasing another institution's credit card portfolio.

Section 226.55(d)(2) provides that § 226.55 continues to apply to a balance on a credit card account after the balance is transferred from a credit card account issued by a card issuer to another credit account issued by the same card issuer or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 226.5b). Comment 55(d)–3.i provides examples of circumstances in which balances may be transferred from one credit card account issued by a card issuer to another credit card account issued by the same card issuer (or its affiliate or subsidiary), such as when the consumer's account is converted from a retail credit card that may only be used at a single retailer or an affiliated group of retailers to a co-branded general purpose credit card which may be used at a wider number of merchants. Because of the concerns discussed above regarding circumvention and informed consumer choice and for consistency with the issuance rules regarding card renewals or substitutions for accepted credit cards under § 226.12(a)(2), the Board believes—and § 226.55(d)(2) provides—that these transfers should be treated as a continuation of the existing account relationship rather than the creation of a new account relationship. *See* comment 12(a)(2)–2.

[59] Thus, as discussed in the commentary to § 226.55(b)(2), a card issuer that acquires a credit card account with a balance to which a variable rate applies generally would not be permitted to substitute a new index for the index used to determine the variable rate if the change could result in an increase in the annual percentage rate. However, the commentary to § 226.55(b)(2) does clarify that a card issuer that does not utilize the index used to determine the variable rate for an acquired balance may convert that rate to an equal or lower non-variable rate, subject to the notice requirements of § 226.9(c).

Section 226.55(d)(2) does not apply to balances transferred from a credit card account issued by a card issuer to a credit account issued by the same card issuer (or its affiliate or subsidiary) that is subject to § 226.5b (which applies to open-end credit plans secured by the consumer's dwelling). The Board believes that excluding transfers to such accounts is appropriate because § 226.5b provides protections that are similar to—and, in some cases, more stringent than—the protections in § 226.55. For example, a card issuer may not change the annual percentage rate on a home-equity plan unless the change is based on an index that is not under the card issuer's control and is available to the general public. *See* 12 CFR 226.5b(f)(1).

Comment 55(d)–3.ii clarifies that, when a consumer chooses to transfer a balance to a credit card account issued by a *different* card issuer, § 226.55 does not prohibit the card issuer to which the balance is transferred from applying its account terms to that balance, provided those terms comply with 12 CFR part 226. For example, if a credit card account issued by card issuer A has a $1,000 purchase balance at an annual percentage rate of 15% and the consumer transfers that balance to a credit card account with a purchase rate of 17% issued by card issuer B, card issuer B may apply the 17% rate to the $1,000 balance. However, card issuer B may not subsequently increase the rate that applies to that balance unless permitted by one of the exceptions in § 226.55(b).

Although balance transfers from one card issuer to another raise some of the same concerns as balance transfers involving the same card issuer, the Board believes that transfers between card issuers are not contrary to the intent of revised TILA Section 171 and § 226.55 because the card issuer to which the balance is transferred is not increasing the cost of credit it previously extended to the consumer. For example, assume that card issuer A has extended a consumer $1,000 of credit at a rate of 15%. Because § 226.55 generally prohibits card issuer A from increasing the rate that applies to that balance, it would be inconsistent with § 226.55 to allow card issuer A to reprice that balance simply by transferring it to another of its accounts. In contrast, in order for the $1,000 balance to be transferred to card issuer B, card issuer B must provide the consumer with a new $1,000 extension of credit in an arms-length transaction and should be permitted to price that new extension consistent with its evaluation of prevailing market rates, the risk presented by the consumer, and other factors. Thus, the transfer from card issuer A to card issuer B does not appear to raise concerns about circumvention of proposed § 226.55 because card issuer B is not increasing the cost of credit it previously extended.

Consumer groups and some industry commenters supported proposed § 226.55(d). However, the Board understands from industry comments received regarding both the May 2009 and October 2009 proposals that drawing a distinction between balance transfers involving the same card issuer and balance transfers involving different card issuers may limit a card issuer's ability to offer its existing cardholders the same terms that it would offer another issuer's cardholders. As noted in those proposals, however, the Board understands that currently card issuers generally do not make promotional balance transfer offers available to their existing cardholders for balances held by the issuer because it is not cost-effective to do so. Furthermore, although many card issuers do offer existing cardholders the opportunity to upgrade to accounts offering different terms or features (such as upgrading to an account that offers a particular type of rewards), the Board understands that these offers generally are not conditioned on a balance transfer, which indicates that it may be cost-effective for card issuers to make these offers without repricing an existing balance. The comments opposing § 226.55(d) do not lead the Board to a different understanding. Accordingly, the Board continues to believe that § 226.55(d) will benefit consumers overall.

Section 226.56 Requirements for Over-the-Limit Transactions

When a consumer seeks to engage in a credit card transaction that may cause his or her credit limit to be exceeded, the creditor may, at its discretion, authorize the over-the-limit transaction. If the creditor pays an over-the-limit transaction, the consumer is typically assessed a fee or charge for the service.[60] In addition, the over-the-limit transaction may also be considered a default under the terms of the credit card agreement and trigger a rate

[60] According to the GAO, the average over-the-limit fee assessed by issuers in 2005 was $30.81, an increase of 138 percent since 1995. *See Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers,* GAO Report 06–929, at 20 (September 2006) (citing data reported by CardWeb.com). The GAO also reported that among cards issued by the six largest issuers in 2005, most charged an over-the-limit fee amount between $35 and $39. *Id.* at 21.

increase, in some cases up to the default, or penalty, rate on the account.

The Credit Card Act adds new TILA Section 127(k) and requires a creditor to obtain a consumer's express election, or opt-in, before the creditor may impose any fees on a consumer's credit card account for making an extension of credit that exceeds the consumer's credit limit. 15 U.S.C. 1637(k). TILA Section 127(k)(2) further provides that no election shall take effect unless the consumer, before making such election, has received a notice from the creditor of any fees that may be assessed for an over-the-limit transaction. If the consumer opts in to the service, the creditor is also required to provide notice of the consumer's right to revoke that election on any periodic statement that reflects the imposition of an over-the-limit fee during the relevant billing cycle. The Board is implementing the over-the-limit consumer consent requirements in § 226.56.

The Credit Card Act directs the Board to issue rules governing the disclosures required by TILA Section 127(k), including rules regarding (i) the form, manner and timing of the initial opt-in notice and (ii) the form of the subsequent notice describing how an opt-in may be revoked. *See* TILA Section 127(k)(2). In addition, the Board must prescribe rules to prevent unfair or deceptive acts or practices in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees. *See* TILA Section 127(k)(5)(B).

56(a) Definition

Proposed § 226.56(a) defined "over-the-limit transaction" to mean any extension of credit by a creditor to complete a transaction that causes a consumer's credit card account balance to exceed the consumer's credit limit. No comments were received on the proposed definition and it is adopted as proposed. The term is limited to extensions of credit required to complete a transaction that has been requested by a consumer (for example, to make a purchase at a point-of-sale or on-line, or to transfer a balance from another account). The term is not intended to cover the assessment of fees or interest charges by the card issuer that may cause the consumer to exceed the credit limit.[61] *See, however,* § 226.56(j)(4), discussed below.

[61] As discussed below, § 226.56 and the accompanying commentary have been revised to refer to a "card issuer" in place of "creditor" to reflect the scope of accounts to which the rule applies.

56(b) Opt-In Requirement

General rule. Proposed § 226.56(b)(1) set forth the general rule prohibiting a creditor from assessing a fee or charge on a consumer's account for paying an over-the-limit transaction unless the consumer is given notice and a reasonable opportunity to affirmatively consent, or opt in, to the creditor's payment of over-the-limit transactions and the consumer has opted in. If the consumer affirmatively consents, or "opts in," to the service, the creditor must provide the consumer notice of the right to revoke that consent after assessing an over-the-limit fee or charge on the consumer's account.

The Board adopts the opt-in requirement as proposed. Under the final rule, § 226.56, including the requirement to provide notice and an opt-in right, applies only to a credit card account under an open-end (not home-secured) consumer credit plan, and therefore does not apply to credit cards that access a home equity line of credit or to debit cards linked to an overdraft line of credit. *See* § 226.2(a)(15)(ii). Section 226.56 and the accompanying commentary are also revised throughout to refer to a "card issuer," rather than "creditor," to reflect that the rule applies only to credit card accounts.

The opt-in notice may be provided by the card issuer orally, electronically, or in writing. *See* § 226.56(b)(1)(i). Compliance with the consumer consent provisions or other requirements necessary to provide consumer disclosures electronically pursuant to the E-Sign Act is not required if the card issuer elects to provide the opt-in notice electronically. *See also* § 226.5(a)(1)(ii)(A). However, as discussed below under § 226.56(d)(1)(ii), before the consumer may consent orally or electronically, the card issuer must also have provided the opt-in notice immediately prior to obtaining that consent. In addition, while the opt-in notice may be provided orally, electronically, or in writing, the revocation notice must be provided to the consumer in writing, consistent with the statutory requirement that such notice appear on the periodic statement reflecting the assessment of an over-the-limit fee or charge on the consumer's account. *See* TILA Section 127(k)(2), and § 226.56(d)(3), discussed below.

Proposed comment 56(b)–1 clarified that a creditor that has a policy and practice of declining to authorize or pay any transactions that the creditor reasonably believes would cause the consumer to exceed the credit limit is not subject to the requirements of this section and would therefore not be required to provide the consumer notice or an opt-in right. This "reasonable belief" standard recognizes that creditors generally do not have real-time information regarding a consumer's prior transactions or credits that may have posted to the consumer's credit card account.

Industry commenters asked the Board to clarify the aspects of the proposed rule that would *not* be applicable to a creditor that declined transactions if it reasonably believed that a transaction would cause the consumer to exceed the credit limit. In particular, industry commenters stated it was unclear whether a creditor would be permitted to charge an over-the-limit fee where a transaction was authorized on the creditor's reasonable belief that the consumer had sufficient available credit for a transaction, but the transaction nonetheless exceeded the consumer's credit limit when it later posts to the account (for example, because of an intervening charge). Industry commenters also requested additional guidance regarding the "reasonable belief" standard.

Comment 56(b)–1 as revised in the final rule clarifies that § 226.56(b)(1)(i)–(v), including the requirements to provide notice and obtain a consumer's affirmative consent to a card issuer's payment of over-the-limit transactions, do not apply to any card issuer that has a policy and practice of declining to pay any over-the-limit transaction when the card issuer has a reasonable belief that completing the transaction will cause the consumer to exceed his or her credit limit. While the notice and opt-in requirements of the rule do not apply to such card issuers, the prohibition against assessing an over-the-limit fee or charge without the consumer's affirmative consent continues to apply. *See also* § 226.56(b)(2). This clarification regarding application of the fee prohibition has been moved into the comment in response to consumer group suggestions. Thus, if an over-the-limit transaction is paid, for example, because of a must-pay transaction that was authorized by the card issuer on the belief that the consumer had sufficient available credit and which later causes the consumer's credit limit to be exceeded when it posts, the card issuer may not charge a fee for paying the transaction, absent the consumer's consent to the service. The revised comment also clarifies that a card issuer has a policy and practice of declining transactions on a "reasonable belief" that a consumer does not have sufficient available credit if it only authorizes those transactions that the card issuer reasonably believes, at the time of authorization, would not cause the consumer to exceed a credit limit.

Although a card issuer must obtain consumer consent before any over-the-limit fees or charges are assessed on a consumer's account, the final rule does not require that the card issuer obtain the consumer's separate consent for each extension of credit that causes the consumer to exceed his or her credit limit. Such an approach is not compelled by the Credit Card Act. Comment 56(b)–2, which is substantively unchanged from the proposal, also explains, however, that even if a consumer has affirmatively consented or opted in to a card issuer's over-the-limit service, the card issuer is not required to authorize or pay any over-the-limit transactions.

Proposed comment 56(b)–3 would have provided that the opt-in requirement applies whether a creditor assesses over-the-limit fees or charges on a per transaction basis or as a periodic account or maintenance fee that is imposed each cycle for the creditor's payment of over-the-limit transactions regardless of whether the consumer has exceeded the credit limit during a particular cycle (for example, a monthly "over-the-limit protection" fee). As further discussed below under § 226.56(j)(1), however, TILA Section 127(k)(7) prohibits the imposition of periodic or maintenance fees related to the payment of over-the-limit transactions, even with consumer consent, if the consumer has not engaged in an over-the-limit transaction during the particular cycle. Accordingly, the final rule does not adopt proposed comment 56(b)–3.

Some industry commenters asserted that the new provisions, including the requirements to provide notice and obtain consumer consent to the payment of over-the-limit transactions, should not apply to existing accounts out of concern that transactions would otherwise be disrupted for consumers who may rely on the creditor's over-the-limit service, but fail to provide affirmative consent by February 22, 2010. By contrast, consumer groups strongly supported applying the new requirements to all credit card accounts, including existing accounts. Consumer groups urged the Board to explicitly state this fact in the rule or staff commentary. As the Board stated previously, nothing in the statute or the legislative history suggests that Congress intended that existing account-holders should not have the same rights regarding consumer choice for over-the-limit transactions as those afforded to new customers. Thus, § 226.56 applies to all credit card accounts, including those opened prior to February 22, 2010.

Reasonable opportunity to opt in. Proposed § 226.56(b)(1)(ii) required a creditor to provide a reasonable opportunity for the consumer to affirmatively consent to the creditor's payment of over-the-limit transactions. TILA Section 127(k)(3) provides that the consumer's affirmative consent (and revocation) may be made orally, electronically, or in writing, pursuant to regulations prescribed by the Board. *See also* § 226.56(e), discussed below. Proposed comment 56(b)–4 contained examples to illustrate methods of providing a consumer a reasonable opportunity to affirmatively consent using the specified methods. The rule and comment (which has been renumbered as comment 56(b)–3) are adopted, substantially as proposed with certain revisions for clarity.

Final comment 56(b)–3 explains that a card issuer provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. The comment provides four examples of such reasonable methods.

The first example provides that a card issuer may include the notice on an application form that a consumer may fill out to request the service as part of the application process. *See* comment 56(b)–3.i. Alternatively, after the consumer has been approved for the card, the card issuer could provide a form with the account-opening disclosures or the periodic statement that can be filled out separately and mailed to affirmatively request the service. *See* comment 56(b)–3.ii and Model Form G–25(A) in Appendix G, discussed below.

Comment 56(b)–3.iii illustrates that a card issuer may obtain consumer consent through a readily available telephone line. The final rule does not require that the telephone number be toll-free, however, as card issuers have sufficient incentives to facilitate a consumer's opt-in choice. Of course, if a card issuer elects to establish a toll-free number to obtain a consumer's opt-in, it must similarly make that number available for consumers to later revoke their opt-ins if the consumer so decides. *See* § 226.56(c).

Comment 56(b)–3.iv illustrates that a card issuer may provide an electronic means for the consumer to affirmatively consent. For example, a card issuer could provide a form on its Web site that enables the consumer to check a box to indicate his or her agreement to the over-the-limit service and confirm that choice by clicking on a button that affirms the consumer's consent. *See also* § 226.56(d)(1)(ii) (requiring the opt-in notice to be provided immediately prior to the consumer's consent). The final comment does not require that a card issuer direct consumers to a specific Web site address because issuers have an incentive to facilitate consumer opt-ins.

Segregation of notice and consent. The Board solicited comment in the proposal regarding whether creditors should be required to segregate the opt-in notice from other account disclosures. Some industry commenters argued that it was unnecessary to require that the opt-in notice be segregated from other disclosures because the proposed rule would also require that the consumer's consent be provided separately from other consents or acknowledgments obtained by the creditor. In addition, one industry commenter stated that the over-the-limit opt-in notice was not more significant than other disclosures given to consumers and therefore the notice did not warrant a separate segregation requirement. Consumer groups and one state government agency, as well as one industry commenter, however, supported a segregation requirement to ensure that the information is highlighted and to help consumers understand the choice that is presented to them. One industry commenter asked whether it would be permissible to include a simplified notice on the credit application that provided certain key information about the opt-in right, but that referred the applicant to separate terms and conditions that included the remaining disclosures.

The final rule requires that the opt-in notice be segregated from all other information given to the consumer. *See* § 226.56(b)(1)(i). The Board believes such a requirement is necessary to ensure that the information is not obscured within other account documents and overlooked by the consumer, for example, in preprinted language in the account-opening disclosures, leading the consumer to inadvertently consent to having over-the-limit transactions paid or authorized by the card issuer. The rule would not prohibit card issuers from providing a simplified notice on an application regarding the opt-in right that referred the consumer to the full notice elsewhere in the application disclosures, provided that the full notice contains all of the required content segregated from all other information.

As discussed above, § 226.56(b)(1)(iii) of the final rule requires the card issuer to obtain the consumer's affirmative consent, or opt-in, to the card issuer's payment of over-the-limit transactions. Proposed comment 56(b)–5 provided examples of ways in which a consumer's affirmative consent is or is not obtained. Specifically, the proposed comment clarified that the consumer's consent must be obtained separately from other consents or acknowledgments provided by the consumer. The proposal further provided that the consumer must initial, sign or otherwise make a separate request for the over-the-limit service. Thus, for example, a consumer's signature alone on an application for a credit card would not sufficiently evidence the consumer's consent to the creditor's payment of over-the-limit transactions. The final rule adopts the proposed comment, renumbered as comment 56(b)–4, substantially as proposed.

One industry commenter agreed that it was appropriate to segregate consumer consent for over-the-limit transactions from other consents provided by the consumer. A state government agency believed, however, that the check box approach described in the proposal would not sufficiently ensure that consumers will understand that the over-the-limit decision is not a required part of the credit card application. Accordingly, the agency urged the Board to explicitly require that both disclosures and written consents are presented separately from other account disclosures, with stand-alone plain language documents that clearly present the over-the-limit service as discretionary.

Final comment 56(b)–4 clarifies that regardless of the means in which the notice of the opt-in right is provided, the consumer's consent must be obtained separately from other consents or acknowledgments provided by the consumer. Consent to the payment of over-the-limit transactions may not, for example, be obtained solely because the consumer signed a credit application to request a credit card. The final comment further provides that a card issuer could obtain a consumer's affirmative consent by providing a blank signature line or a check box on the application that the consumer can sign or select to request the over-the-limit coverage, provided that the signature line or check box is used solely for the purpose of evidencing the consumer's choice and not for any other purpose, such as to obtain consumer consents for other account services or features or to receive disclosures electronically. The Board believes that the need to obtain a consumer's consent separate from any other consents or acknowledgments, including from the request for the credit card account itself, sufficiently ensures that a consumer would understand that consenting to the payment of over-the-limit transactions is not a required part of the credit card application.[62] See, however, § 226.56(j)(3) (prohibiting card issuers from conditioning the amount of credit provided on the consumer also opting in to over-the-limit coverage).

Written confirmation. The September 2009 Regulation Z Proposal also solicited comment on whether creditors should be required to provide the consumer with written confirmation once the consumer has opted in under proposed § 226.56(b)(1)(iii) to verify that the consumer intended to make the election. Industry commenters opposed such a requirement, stating that it would impose considerable burden and costs on creditors, while resulting in little added protection for the consumer. In particular, industry commenters observed that the statute and proposed rule already require consumers to receive notices of their right to revoke a prior consent on each periodic statement reflecting an over-the-limit fee or charge. Thus, industry commenters argued that the revocation notice would provide sufficient confirmation of the consumer's opt-in choice. Industry commenters further noted that written confirmation is not required by the statute. In the event that written confirmation was required, industry commenters asked the Board to permit creditors to provide such notice on or with the next periodic statement provided to the consumer after the opt-in election.

Consumer groups and one state government agency strongly supported a written confirmation requirement as a safeguard to ensure consumers that have opted in understand that they have consented to the payment of over-the-limit transactions. These commenters believed that written confirmation of the consumer's choice was critical where a consumer has opted in by a non-written method, such as by telephone or in person. In this regard, one consumer group asserted that oral opt-ins should be permitted only if written confirmation was also required to allow consumers time to examine the terms of the opt-in and make a considered determination whether the option is right for them.

The final rule in § 226.56(b)(1)(iv) requires that the card issuer provide the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically. The Board believes that written confirmation will help ensure that a consumer intended to opt into the over-the-limit service by providing the consumer with a written record of his or her choice. The Board also anticipates that card issuers are most likely to attempt to obtain a consumer's opt-in by telephone, and thus in those circumstances in particular, written confirmation is appropriate to evidence the consumer's intent to opt in to the service.

Under new comment 56(d)–5, a card issuer could comply with the written confirmation requirement, for example, by sending a letter to the consumer acknowledging that the consumer has elected to opt in to the card issuer's service, or, in the case of a mailed request, the card issuer could provide a copy of the consumer's completed opt-in form. The new comment also provides that a card issuer could satisfy the written confirmation requirement by providing notice on the first periodic statement sent after the consumer has opted in. *See* § 225.56(d)(2), discussed below. Comment 56(d)–5 further provides that a notice consistent with the revocation notice described in § 226.56(e)(2) would satisfy the requirement. Notwithstanding a consumer's consent, however, a card issuer would be prohibited from assessing over-the-limit fees or charges to the consumer's credit card account until the card issuer has sent the written confirmation. Thus, if a card issuer elects to provide written confirmation on the first periodic statement after the consumer has opted in, it would not be permitted to assess any over-the-limit fees or charges until the next statement cycle.

Payment of over-the-limit transactions where consumer has not opted in. Proposed § 226.56(b)(2) provided that a creditor may pay an over-the-limit transaction even if the consumer has not provided affirmative consent, so long as the creditor does not impose a fee or charge for paying the transaction. Proposed comment 56(b)(2)–1 contained further guidance stating that the prohibition on imposing fees for paying an over-the-limit transaction where the consumer has not opted in applies even in circumstances where the creditor is unable to avoid paying a transaction that exceeds the consumer's credit limit. The proposed comment also set forth two illustrative examples of this provision.

The first proposed example addressed circumstances where a merchant does not submit a credit card transaction to

[62] Evidence of consumer consents (as well as revocations) must be retained for a period of at least two years under Regulation Z's record retention rules, regardless of the means by which consent is obtained. *See* § 226.25.

the creditor for authorization. Such an event may occur, for instance, because the transaction is below the floor limits established by the card network rules requiring authorization or because the small dollar amount of the transaction does not pose significant payment risk to the merchant. Under the proposed example, if the transaction exceeds the consumer's credit limit, the creditor would not be permitted to assess an over-the-limit fee if the consumer has not consented to the creditor's payment of over-the-limit transactions.

Under the second proposed example, a creditor could not assess a fee for an over-the-limit transaction that occurs because the final transaction amount exceeds the amount submitted for authorization. For example, a consumer may use his or her credit card at a pay-at-the-pump fuel dispenser to purchase $50 of fuel. At the time of authorization, the gas station may request an authorization hold of $1 to verify the validity of the card. Even if the subsequent $50 transaction amount exceeds the consumer's credit limit, proposed § 226.56(b)(2) would prohibit the creditor from assessing an over-the-limit fee if the consumer has not opted in to the creditor's over-the-limit service.

Industry commenters urged the Board to create exceptions for the circumstances described in the examples to allow creditors to impose over-the-limit fees or charges even if the consumer has not consented to the payment of over-the-limit transactions. These commenters argued that exceptions were warranted in these circumstances because creditors may not be able to block such transactions at the time of purchase. One industry commenter recommended that the Board create a broad exception to the fee prohibition for any transactions that are approved based on a reasonable belief that the transaction would not exceed the consumer's credit limit. Consumer group commenters strongly supported the proposed comment and the included examples.

Comment 56(b)(2)–1 is adopted substantially as proposed and clarifies that the prohibition against assessing over-the-limit fees or charges without consumer consent to the payment of such transactions applies even in circumstances where the card issuer is unable to avoid paying a transaction that exceeds the consumer's credit limit. As the Board stated in the supplementary information to the proposal, nothing in the statute suggests that Congress intended to permit an exception to allow any over-the-limit fees to be charged in these circumstances absent consumer consent. *See* 74 FR at 54179.

The final comment includes a third example of circumstances where a card issuer would not be permitted to assess any fees or charges on a consumer's account in connection with an over-the-limit transaction if the consumer has not opted in to the over-the-limit service. Specifically, the new example addresses circumstances where an intervening transaction (for example, a recurring charge) that is charged to the account before a previously authorized transaction is submitted for payment causes the consumer to exceed his or her credit limit with respect to the authorized transaction. Under these circumstances, the card issuer would not be permitted to assess an over-the-limit fee or charge for the previously authorized transaction absent consumer consent to the payment of over-the-limit transactions. *See* comment 56(b)(2)–1.iii.

Proposed comment 56(b)(2)–2 clarified that a creditor is not precluded from assessing other fees and charges unrelated to the payment of the over-the-limit transaction itself even where the consumer has not provided consent to the creditor's over-the-limit service, to the extent permitted under applicable law. For example, if a consumer has not opted in, a creditor could permissibly assess a balance transfer fee for a balance transfer, provided that such a fee is assessed whether or not the transfer exceeds the credit limit. The proposed comment also clarified that a creditor could continue to assess interest charges for the over-the-limit transaction.

Consumer groups opposed the proposed comment, expressing concern that the comment could enable creditors to potentially circumvent the statutory protections by charging consumers that have not opted in a fee substantively similar to an over-the-limit fee or charge, and using a different term to describe the fee. Consumer groups urged the Board to instead broadly prohibit any fee directly or indirectly caused by or resulting from the payment of an over-the-limit transaction unless the consumer has opted in. Specifically, consumer groups argued that creditors should be prohibited from paying an over-the-limit transaction if it might result in any type of fee, including any late fees that might arise if the consumer cannot make the increased minimum payment caused by the over-the-limit transaction.

By its terms, TILA Section 127(k)(1) applies only to the assessment of any over-the-limit fees by the creditor as a result of an extension of credit that exceeds a consumer's credit limit where the consumer has not consented to the completion of such transactions. The protections in TILA Section 127(k)(1) apply to any such fees for paying an over-the-limit transaction regardless of the term used to describe the fee. This provision does not, however, apply to other fees or charges that may be imposed as a result of the over-the-limit transaction, such as balance transfer fees or late payment fees. Nor does the statute require that a card issuer cease paying over-the-limit transactions altogether if the consumer has not opted in. Accordingly, the final rule adopts comment 56(b)(2)–2 substantively as proposed.[63] The final comment has also been revised to clarify that a card issuer may debit the consumer's account for the amount of the transaction, provided that the card issuer is permitted to do so under applicable law. *See* comment 56(b)(2)–2.

56(c) Method of Election

TILA Section 127(k)(2) provides that a consumer may consent or revoke consent to over-the-limit transactions orally, electronically, or in writing, and directs the Board to prescribe rules to ensure that the same options are available for both making and revoking such election. The Board proposed to implement this requirement in § 226.56(c). In addition, proposed comment 56(c)–1 clarified that the creditor may determine the means by which consumers may provide affirmative consent. The creditor could decide, for example, whether to obtain consumer consent in writing, electronically, by telephone, or to offer some or all of these options.

In addition, proposed § 226.56(c) would have required that whatever method a creditor provides for obtaining consent, such method must be equally available to the consumer to revoke the prior consent. *See* TILA Section 127(k)(3). In that regard, the Board requested comment on whether the rule should require creditors to allow consumers to opt in and to revoke that consent using any of the three methods (that is, orally, electronically, and in writing).

Industry commenters stated that the final rule should not require creditors to provide all three methods of consent and revocation, citing the compliance

[63] The final rule does not prohibit a creditor from increasing the consumer's interest rate as a result of an over-the-limit transaction, subject to the creditor's compliance with the 45-day advance notice requirement in § 226.9(g), the limitations on applying an increased rate to an existing balance in § 226.55, and other provisions of the Credit Card Act.

burden and costs of setting up separate systems for obtaining consumer consents and processing consumer revocations, particularly for small community banks and credit unions. Consumer groups agreed with the clarification in comment 56(c)–1 that a creditor should be required to accept revocations of consent made by the same methods made available to the consumer for providing consent. However, consumer groups believed that the proposed rule fell short of that goal because it did not similarly provide a form that consumers could fill out and mail in to revoke consent similar to the form for providing consent. Instead, consumer groups noted that the proposed model revocation notice directed the consumer to write a separate letter and mail it in to the creditor.

Section 226.56(c) is adopted substantively as proposed and allows a card issuer to obtain a consumer's consent to the card issuer's payment of over-the-limit transactions in writing, orally, or electronically, at the card issuer's option. The rule recognizes that card issuers have a strong interest in facilitating a consumer's ability to opt in, and thus permits them to determine the most effective means in obtaining such consent. Regardless of which methods are provided to the consumer for obtaining consent, the final rule requires that the same methods must be made available to the consumer for revoking consent. As discussed below, Model Form G–25(B) has been revised to include a check box form that a card issuer may use to provide consumers for revoking a prior consent.

Comment 56(c)–2 is adopted as proposed and provides that consumer consent or revocation requests are not consumer disclosures for purposes of the E-Sign Act. Accordingly, card issuers would not be required to comply with the consumer consent or other requirements for providing disclosures electronically pursuant to the E-Sign Act for consumer requests submitted electronically.

56(d) Timing

Proposed § 226.56(d)(1)(i) established a general requirement that a creditor provide an opt-in notice before the creditor assesses any fee or charge on the consumer's account for paying an over-the-limit transaction. No comments were received regarding proposed § 226.56(d)(1)(i), and it is adopted as proposed. A card issuer may comply with the rule, for example, by including the notice as part of the credit card application. *See* comment 56(b)–3.i. Alternatively, the creditor could include the notice with other account-opening documents, either within the account-opening disclosures under § 226.6 or in a stand-alone document. *See* comment 56(b)–3.ii.

Proposed § 226.56(d)(1)(ii) would have required a creditor to provide the opt-in notice immediately before and contemporaneously with a consumer's election where the consumer consents by oral or electronic means. For example, if a consumer calls the creditor to consent to the creditor's payment of over-the-limit transactions, the proposed rule would have required the creditor to provide the opt-in notice immediately prior to obtaining the consumer's consent. This proposed requirement recognized that creditors may wish to contact consumers by telephone or electronically as a more expeditious means of obtaining consumer consent to the payment of over-the-limit transactions. Thus, proposed § 226.56(d)(1)(ii) was intended to ensure that a consumer would have full information regarding the opt-in right at the most meaningful time, that is, when the opt-in decision is made. Consumer groups strongly supported the proposed requirement for oral and electronic consents to ensure that consumers are able to make an informed decision regarding over-the-limit transactions. Industry commenters did not oppose this requirement. The final rule adopts § 226.56(d)(1)(ii), generally as proposed.

New comment 56(d)–1 clarifies that the requirement to provide an opt-in notice immediately prior to obtaining consumer consent orally or electronically means that the card issuer must provide an opt-in notice prior to and as part of the process of obtaining the consumer's consent. That is, the issuer must provide an opt-in notice containing the content in § 226.56(e)(1) as part of the same transaction in which the issuer obtains the consumer's oral or electronic consent.

As discussed above, a card issuer must provide a consumer with written confirmation of the consumer's decision to opt in to the card issuer's payment of over-the-limit transactions. *See* § 226.56(b)(1)(iv). New § 226.56(d)(2) requires that this written confirmation must be provided no later than the first periodic statement sent after the consumer has opted in. As discussed above, a card issuer could provide a notice consistent with the revocation notice described in § 226.56(e)(2). *See* comment 56(b)–5. Consistent with § 226.56(b)(1), however, a card issuer may not assess any over-the-limit fees or charges unless and until it has sent written confirmation of the consumer's opt-in decision.

Proposed § 226.56(d)(2) would have provided that notice of the consumer's right to revoke a prior election for the creditor's over-the-limit service must appear on each periodic statement that reflects the assessment of an over-the-limit fee or charge on a consumer's account. *See* TILA Section 127(k)(2). A revocation notice would be required regardless of whether the fee was imposed due to an over-the-limit transaction initiated by the consumer in the prior cycle or because the consumer failed to reduce the account balance below the credit limit in the next cycle. To ensure that the revocation notice is clear and conspicuous, the proposed rule required that the notice appear on the front of any page of the periodic statement. Proposed comment 56(d)–1 would have provided creditors flexibility in how often a revocation notice should be provided. Specifically, creditors, at their option, could, but were not required to, include the revocation notice on every periodic statement sent to the consumer, even if the consumer has not incurred an over-the-limit fee or charge during a particular billing cycle.

One industry commenter stated that the periodic statement requirement would be overly burdensome and costly for financial institutions. This commenter believed that providing a consumer notice of his or her right to revoke consent at the time of the opt-in would sufficiently inform the consumer of that possibility without requiring creditors to bear the cost of providing a revocation notice on each statement reflecting an over-the-limit fee or charge. Consumer groups believed that the final rule should require that a standalone revocation notice be sent to a consumer after the incurrence of an over-the-limit fee to make it more likely that a consumer would see the notice, rather than placing the notice on the periodic statement with other disclosures. In the alternative, consumer groups stated that the revocation notice should be placed on the first page of the periodic statement or on the page reflecting the fee to enhance likelihood that the consumer would notice it. Consumer groups also argued that revocation notices should only be provided by a creditor when an over-the-limit fee is assessed to a consumer's credit card account to avoid the possibility that consumers would ignore the notice as boilerplate language on the statement.

In the final rule, the timing and placement requirements for the notice of the right of revocation has been adopted in § 226.56(d)(3), as proposed. The requirement to provide notice informing a consumer of the right to revoke a prior election regarding the payment of over-the-limit transactions following the imposition of an over-the-limit fee is statutory. TILA Section 127(k)(2) also provides that such notice must be on the periodic statement reflecting the fee. The final rule does not, however, mandate that the notice be placed on the front of the first page of the periodic statement or on the front of the page that indicates the over-the-limit fee or charge. The Board is concerned about the potential for information overload in light of other requirements elsewhere in the regulation regarding notices that must be on the front of the first page of the periodic statement or in proximity to disclosures regarding fees that have been assessed by the creditor during that cycle. *See, e.g.,* § 226.7(b)(6)(i); § 226.7(b)(13).

Proposed comment 56(d)–1, which would have permitted creditors to include a revocation notice on each periodic statement whether or not a consumer has incurred an over-the-limit fee or charge, is not adopted in the final rule. The final rule does not expressly prohibit card issuers from providing a revocation notice on every statement regardless of whether a consumer has been assessed an over-the-limit fee or charge. Nonetheless, the Board believes that for some consumers, a notice appearing on each statement informing the consumer of the right to revoke a prior consent would not be as effective as a more targeted notice that is provided at a point in time when the consumer may be motivated to act, that is, after he or she has incurred an over-the-limit fee or charge.

56(e) Content and Format

TILA Section 127(k)(2) provides that a consumer's election to permit a creditor to extend credit that would exceed the credit limit may not take effect unless the consumer receives notice from the creditor of any over-the-limit fee "in the form and manner, and at the time, determined by the Board." TILA Section 127(k)(2) also requires that the creditor provide notice to the consumer of the right to revoke the election, "in the form prescribed by the Board," in any periodic statement reflecting the imposition of an over-the-limit fee. Proposed § 226.56(e) set forth the content requirements for both notices. The proposal also included model forms that creditors could use to facilitate compliance with the new requirements. *See* proposed Model Forms G–25(A) and G–25(B) in Appendix G.

Initial notice content. Proposed § 226.56(e)(1) set forth content requirements for the opt-in notice provided to consumers before a creditor may assess any fees or charges for paying an over-the-limit transaction. In addition to the amount of the over-the-limit fee, the proposed rule prescribed certain other information regarding the opt-in right to be included in the opt-in notice pursuant to the Board's authority under TILA Section 105(a) to make adjustments that are necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a). The Board requested comment regarding whether the rule should permit or require any other information to be included in the opt-in notice.

Consumer groups and one state government agency generally supported the proposed content and model opt-in form, but suggested the Board revise the form to include additional information about the opt-in right, including that a consumer is not required to sign up for over-the-limit coverage and the minimum over-the-limit amount that could trigger a fee. Consumer groups and this agency also asserted that no other information should be permitted in the notice unless expressly specified or permitted under the rule. For example, these commenters believed that creditors should be precluded from including any marketing of the benefits that may be associated with over-the-limit coverage out of concern that the additional information could dilute consumer understanding of the opt-in disclosure. Industry commenters suggested various additions to the model form to enable creditors to provide more information that they deemed appropriate to enhance a consumer's understanding or the risks and benefits associated with the opt-in right. Industry commenters also stated that creditors should be able to include contractual terms or safeguards regarding the right.

The Board is adopting § 226.56(e)(1) largely as proposed, but with modified content based on the comments received and upon further consideration. The final rule does not permit card issuers to include any information in the opt-in notice that is not specified or otherwise permitted by § 226.56(e)(1). The Board believes that the addition of other information would potentially overwhelm the required content in the notice and impede consumer understanding of the opt-in right. For the same reason, the final rule does not require card issuers to include any additional information regarding the opt-in right as suggested by consumer groups and others.

Under § 226.56(e)(1)(i), the opt-in notice must include information about the dollar amount of any fees or charges assessed on a consumer's credit card account for an over-the-limit transaction. The requirement to state the fee amount on the opt-in notice itself is separate from other required disclosures regarding the amount of the over-the-limit fee or charge. *See, e.g.,* § 226.5a(b)(10). Because a card issuer could comply with the opt-in notice requirement in several forms, such as providing the notice in the application or solicitation, in the account-opening disclosures, or as a stand-alone document, the Board believes that including the fee disclosure in the opt-in notice itself is necessary to ensure that consumers can easily determine the amounts they could be charged for an over-the-limit transaction.

Some card issuers may vary the fee amount that may be imposed based upon the number of times the consumer has gone over the limit, the amount the consumer has exceeded the credit limit, or due to other factors. Under these circumstances, proposed comment 56(e)–1 would have permitted a creditor to disclose the maximum fee that may be imposed or a range of fees. The final comment does not include the reference to the range of fees. Card issuers that tier the amount of the fee could otherwise include a range from $0 to their maximum fee, which could lead consumers to underestimate the costs of exceeding their credit limit. To address tiered over-the-limit fees, comment 56(e)–1 provides that the card issuer may indicate that the consumer may be assessed a fee "up to" the maximum fee.

In addition to disclosing the amount of the fee or charge that may be imposed for an over-the-limit transaction, § 226.56(e)(1)(ii) requires card issuers to disclose any increased rate that may apply if consumers exceed their credit limit. The Board believes the additional requirement is necessary to ensure consumers fully understand the potential consequences of exceeding their credit limit, particularly as a rate increase can be more costly than the imposition of a fee. This requirement is consistent with the content required to be disclosed regarding the consequences of a late payment. *See* TILA Section 127(b)(12); § 226.7(b)(11) of the January 2009 Regulation Z Rule. Accordingly, if, under the terms of the account agreement, an over-the-limit transaction could result in the loss of a promotional rate, the imposition of a penalty rate, or both, this fact must be included in the opt-in notice.

Section 226.56(e)(1)(iii) requires card issuers to explain the consumer's right to affirmatively consent to the card issuer's payment of over-the-limit transactions, including the method(s) that the card issuer may use to exercise the right to opt in. Comment 56(e)–2 provides guidance regarding how a card issuer may describe this right. For example, the card issuer could explain that any transactions that exceed the consumer's credit limit will be declined if the consumer does not consent to the service. In addition, a card issuer should explain that even if a consumer consents, the payment of over-the-limit transactions is at the card issuer's discretion. In this regard, the card issuer may indicate that it may decline a transaction for any reason, such as if the consumer is past due or significantly over the limit. The card issuer may also disclose the consumer's right to revoke consent.

Under the comment as proposed, a creditor would have been permitted to also describe the benefits of the payment of over-the-limit transactions. Upon further analysis, the Board believes that including discussion of any such benefits could dilute the core purpose of the form, which is to explain the opt-in right in a clear and readily understandable manner. Of course, a card issuer may provide additional discussion about the over-the-limit service, including the potential benefits of the service, in a separate document.

Notice of right of revocation. Section 226.56(e)(2) implements the requirement in TILA Section 127(k)(2) that a creditor must provide notice of the right to revoke consent that was previously granted for paying over-the-limit transactions. Under the final rule, the notice must describe the consumer's right to revoke any consent previously granted, including the method(s) by which the consumer may revoke the service. The Board did not receive any comment on proposed § 226.56(e)(2), and it is adopted without any substantive changes.

Model forms. Model Forms G–25(A) and (B) include sample language that card issuers may use to comply with the notice content requirement. Use of the model forms, or substantially similar notices, provides card issuers a safe harbor for compliance under § 226.56(e)(3). The Model Forms have been revised from the proposal for clarity, and in response to comments received. To facilitate consumer understanding, a card issuer may, but is not required, to provide a signature line or check box on the opt-in form where the consumer can indicate that they decline to opt in. *See* Model Form G–25(A). Nonetheless, if the consumer does not check any box or provide a signature, the card issuer must assume that the consumer does not opt in.

Model Form G–25(B) contains language that card issuers may use to satisfy both the revocation notice and written confirmation requirements in § 226.56(b)(1)(iv) and (v). The model form has been revised to include a form that consumers may fill out and send back to the card issuer to cancel or revoke a prior consent.

56(f)–(i) Additional Provisions Addressing Consumer Opt-In Right

Joint accounts. Proposed § 226.56(f) would have required a creditor to treat affirmative consent provided by any joint consumer of a credit card account as affirmative consent for the account from all of the joint consumers. The proposed provision also provided that a creditor must treat a revocation of affirmative consent by any of the joint consumers as revocation of consent for that account. Consumer groups urged the Board to require creditors to obtain consent from all account-holders on a joint account before any over-the-limit fees or charges could be assessed on the account so that each account-holder would have an equal opportunity to avoid the imposition of such fees or charges.

The Board is adopting § 226.56(f) substantively as proposed. This provision recognizes that it may not be operationally feasible for a card issuer to determine which account-holder was responsible for a particular transaction and then decide whether to authorize or pay an over-the-limit transaction based on that account-holder's opt-in choice. Moreover, because the same credit limit presumably applies to a joint account, one joint account-holder's decision to opt in to the payment of over-the-limit transactions would also necessarily impact the other account-holder. Accordingly, if one joint consumer opts in to the creditor's payment of over-the-limit transactions, the card issuer must treat the consent as applying to all over-the-limit transactions for that account. The final rule would similarly provide that if one joint consumer elects to cancel the over-the-limit coverage for the account, the card issuer must treat the revocation as applying to all over-the-limit transactions for that account.

Section 226.56(f) applies only to consumer consent and revocation requests from consumers that are jointly liable on a credit card account. Accordingly, card issuers are not required or permitted to honor a request by an authorized user on an account to opt in or revoke a prior consent with respect to the card issuer's over-the-limit transaction. Comment 56(f)–1 provides this guidance.

Continuing right to opt in or revoke opt-in. Proposed § 226.56(g) provided that a consumer may affirmatively consent to a creditor's payment of over-the-limit transactions at any time in the manner described in the opt-in notice. This provision would allow consumers to decide later in the account relationship whether they want to opt in to the creditor's payment of over-the-limit transactions. Similarly, a consumer may revoke a prior consent at any time in the manner described in the revocation notice. *See* TILA Section 127(k)(4). No comments were received on § 226.56(g), and it is adopted substantively as proposed.

Comment 56(g)–1 has been revised to clarify that a consumer's decision to revoke a prior consent would not require the card issuer to waive or reverse any over-the-limit fee or charges assessed to the consumer's account for transactions that occurred prior to the card issuer's implementation of the consumer's revocation request. Thus, the comment permits a card issuer to impose over-the-limit fees or charges for transactions that the card issuer authorized prior to implementing the revocation request, even if the transaction is not charged to the account until after implementation. In addition, the final rule does not prevent the card issuer from assessing over-the-limit fees in a subsequent cycle if the consumer's account balance continues to exceed the credit limit after the payment due date as a result of an over-the-limit transaction that occurred prior to the consumer's revocation of consent. *See* § 226.56(j)(1).

Duration of opt-in. Section 226.56(h) provides that a consumer's affirmative consent is generally effective until revoked by the consumer. Comment 56(h)–1 clarifies, however, that a card issuer may cease paying over-the-limit transactions at any time and for any reason even if the consumer has consented to the service. For example, a card issuer may wish to stop providing the service in response to changes in the credit risk presented by the consumer. Section 226.56(h) and comment 56(h)–1 are adopted substantively as proposed.

Time to implement consumer revocation. Proposed § 226.56(i) would have required a creditor to implement a consumer's revocation request as soon as reasonably practicable after the creditor receives the request. The proposed requirement recognized that while creditors will presumably want to implement a consumer's consent request as soon as possible, the same incentives may not apply if the consumer subsequently decides to revoke that request.

The proposal also solicited comment whether a safe harbor for implementing revocation requests would be useful to facilitate compliance with the proposed rule, such as five business days from the date of the request. In addition, comment was requested on an alternative approach which would require creditors to implement revocation requests within the same time period that a creditor generally takes to implement opt-in requests. For example, under the alternative approach, if the creditor typically takes three business days to implement a consumer's written opt-in request, it should take no more than three business days to implement the consumer's later written request to revoke that consent.

Consumer groups supported the alternative approach of requiring creditors to implement a consumer's revocation request within the same period taken to implement the consumer's opt-in request, but believed that a firm number of days would provide greater certainty for consumers regarding when their revocation requests will be implemented. Specifically, consumer groups urged the Board to establish a safe harbor of three days from when the creditor receives the revocation request.

Industry commenters varied in their recommendations of an appropriate safe harbor for implementing a revocation request, ranging from five to 20 days or the creditor's normal billing cycle. In general, industry commenters generally believed that the Board should provide flexibility for creditors in processing revocation requests because the appropriate amount of time will vary due to a number of factors, including the volume of requests and the channel in which the creditor receives the request. One industry commenter supported the alternative approach stating that there was little reason opt-in and revocation requests could not be processed in the same period of time. Another industry commenter stated, however, that the rule should provide creditors a reasonable period of time to implement a revocation request to prevent a consumer from engaging in transactions that may exceed the consumer's credit limit before a creditor can update its systems to decline the transactions.

The final rule requires a card issuer to implement a consumer's revocation request as soon as reasonably practicable after the creditor receives it, as proposed. Accordingly, § 226.56(i) does not prescribe a specific period of time within which a card issuer must honor a consumer's revocation request because the appropriate time period may depend on a number of variables, including the method used by the consumer to communicate the revocation request (for example, in writing or orally) and the channel in which the request is received (for example, if a consumer sends a written request to the card issuer's general address for receiving correspondence or to an address specifically designated to receive consumer opt-in and revocation requests). The Board also notes that the approach taken in the final rule mirrors the same rule adopted in the Board's recently issued final rule on overdraft services for processing revocation requests relating to consumer opt-ins to ATM and one-time debit card overdraft services. *See* 74 FR 59033 (Nov. 17, 2009). The Board believes that in light of the similar opt-in and revocation regimes adopted in both rules, consistency across the regulations would facilitate compliance for institutions that offer both debit and credit card products.

56(j) Prohibited Practices

Section 226.56(j) prohibits certain card issuer practices in connection with the assessment of over-the-limit fees or charges. These prohibitions implement separate requirements set forth in TILA Sections 127(k)(5) and 127(k)(7), and apply even if the consumer has affirmatively consented to the card issuer's payment of over-the-limit transactions.

56(j)(1) Fees Imposed Per Billing Cycle

New TILA Section 127(k)(7) provides that a creditor may not impose more than one over-the-limit fee during a billing cycle. In addition, Section 127(k)(7) generally provides that an over-the-limit fee may be imposed "only once in each of the 2 subsequent billing cycles" for the same over-the-limit transaction. The Board proposed to implement these restrictions in § 226.56(j)(1).

Proposed § 226.56(j)(1)(i) would have prohibited a creditor from imposing more than one over-the-limit fee or charge on a consumer's credit card account in any billing cycle. The proposed rule also prohibited a creditor from imposing an over-the-limit fee or charge on the account for the same over-the-limit transaction or transactions in more than three billing cycles. Proposed § 226.56(j)(1)(ii) would have provided, however, that the limitation on imposing over-the-limit fees for more than three billing cycles does not apply if a consumer engages in an additional over-the-limit transaction in either of the two billing cycles following the cycle in which the consumer is first assessed a fee for exceeding the credit limit. No comments were received on the proposed restrictions in § 226.56(j)(1) and the final rule adopts § 226.56(j)(1) substantively as proposed.

Section 226.56(j)(1)(i) in the final rule further prohibits a card issuer from imposing any over-the-limit fees or charges for the same transaction in the second or third cycle unless the consumer has failed to reduce the account balance below the credit limit by the payment due date of either cycle. The Board believes that this interpretation of TILA Section 127(k)(7) is consistent with Congress's general intent to limit a creditor's ability to impose multiple over-the-limit fees for the same transaction as well as the requirement in TILA Section 106(b) that consumers be given a sufficient amount of time to make payments.[64]

One possible interpretation of new TILA Section 127(k)(7) would provide consumers until the end of the billing cycle, rather than the payment due date, to make a payment that reduces the account balance below the credit limit. The Board understands, however, that under current billing practices, the end of the billing cycle serves as the statement cut-off date and occurs a certain number of days after the due date for payment on the prior cycle's activity. The time period between the payment due date and the end of the billing cycle allows the card issuer sufficient time to reflect timely payments on the subsequent periodic statement and to determine the fees and interest charges for the statement period. Thus, if the rule were to give consumers until the end of the billing cycle to reduce the account balance below the credit limit, card issuers would have difficulty determining whether or not they could impose another over-the-limit fee for the statement cycle, which could delay the generation and mailing of the periodic statement and impede their ability to comply with the 21-day requirement for mailing statements in advance of the payment due date. *See* TILA Section 163(a); § 226.5(b)(2)(ii).

[64] In the supplementary information accompanying the proposed rule, the Board noted that a creditor's failure to provide a consumer sufficient time to reduce his or her balance below the credit limit would appear to be an unfair or deceptive act or practice. Because the Board has used its authority under TILA Section 105(a) to adjust the requirements in TILA Section 127(k)(7) in order to ensure that the consumer has at least until the payment due date to reduce his or her balance below the credit limit, the Board believes it is unnecessary to address this concern using its separate authority under TILA Section 127(k)(5).

Moreover, because a consumer is likely to make payment by the due date to avoid other adverse financial consequences (such as a late payment fee or increased APRs for new transactions), the additional time to make payment to avoid successive over-the-limit fees would appear to be unnecessary from a consumer protection perspective. Such a date also could confuse consumers by providing two distinct dates, each with different consequences (that is, penalties for late payment or the assessment of over-the-limit fees). For these reasons, the Board is exercising its TILA Section 105(a) authority to provide that a card issuer may not impose an over-the-limit fee or charge on the account for a consumer's failure to reduce the account balance below the credit limit during the second or third billing cycle unless the consumer has not done so by the payment due date.

New comment 56(j)–1 clarifies that an over-the-limit fee or charge may be assessed on a consumer's account only if the consumer has exceeded the credit limit during the billing cycle. Thus, a card issuer may not impose any recurring or periodic fees for paying over-the-limit transactions (for example, a monthly "over-the-limit protection" service fee), even if the consumer has affirmatively consented to or opted in to the service, unless the consumer has in fact exceeded the credit limit during that cycle. The new comment is adopted in response to a consumer group comment that TILA Section 127(k)(7) only permits an over-the-limit fee to be charged during a billing cycle "if the credit limit on the account is exceeded."

Section 226.56(j)(1)(ii) of the final rule provides that the limitation on imposing over-the-limit fees for more than three billing cycles in § 226.56(j)(1)(i) does not apply if a consumer engages in an additional over-the-limit transaction in either of the two billing cycles following the cycle in which the consumer is first assessed a fee for exceeding the credit limit. The assessment of fees or interest charges by the card issuer would not constitute an additional over-the-limit transaction for purposes of this exception, consistent with the definition of "over-the-limit transaction" under § 226.56(a). In addition, the exception would not permit a card issuer to impose fees for both the initial over-the-limit transaction as well as the additional over-the-limit transaction(s), as the general restriction on assessing more than one over-the-limit fee in the same billing cycle would continue to apply. Comment 56(j)–2 contains examples illustrating the general rule and the exception.

Proposed Prohibitions on Unfair or Deceptive Over-the-Limit Acts or Practices

Section 226.56(j) includes additional substantive limitations and restrictions on certain creditor acts or practices regarding the imposition of over-the-limit fees. These limitations and restrictions are based on the Board's authority under TILA Section 127(k)(5)(B) which directs the Board to prescribe regulations that prevent unfair or deceptive acts or practices in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees.

Legal Authority

The Credit Card Act does not set forth a standard for what is an "unfair or deceptive act or practice" and the legislative history for the Credit Card Act is similarly silent. Congress has elsewhere codified standards developed by the Federal Trade Commission for determining whether acts or practices are unfair under Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).[65] Specifically, the FTC Act provides that an act or practice is unfair when it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In addition, in determining whether an act or practice is unfair, the FTC may consider established public policy, but public policy considerations may not serve as the primary basis for its determination that an act or practice is unfair. 15 U.S.C. 45(a).

According to the FTC, an unfair act or practice will almost always represent a market failure or market imperfection that prevents the forces of supply and demand from maximizing benefits and minimizing costs.[66] Not all market failures or imperfections constitute unfair acts or practices, however. Instead, the central focus of the FTC's unfairness analysis is whether the act or practice causes substantial consumer injury.[67]

The FTC has also adopted standards for determining whether an act or practice is deceptive, although these standards, unlike unfairness standards, have not been incorporated into the FTC Act.[68] Under the FTC's standards, an act or practice is deceptive where: (1) There is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that information is material to consumers.[69]

Many states also have adopted statutes prohibiting unfair or deceptive acts or practices, and these statutes may employ standards that are different from the standards currently applied to the FTC Act.[70] In adopting rules under TILA Section 127(k)(5), the Board has considered the standards currently applied to the FTC Act's prohibition against unfair or deceptive acts or practices, as well as the standards applied to similar state statutes.

56(j)(2) Failure To Promptly Replenish

Section 226.10 of Regulation Z generally requires creditors to credit consumer payments as of the date of receipt, except when a delay in crediting does not result in a finance or other charge. This provision does not address, however, when a creditor must *replenish* the consumer's credit limit after receiving payment. Thus, a consumer may submit payment sufficient to reduce his or her account balance below the credit limit and make additional purchases during the next cycle on the assumption that the credit line will be replenished once the payment is credited. If the creditor does not promptly replenish the credit line, the additional transactions may cause the consumer to exceed the credit limit and incur fees.

In the September 2009 Regulation Z Proposal, the Board proposed to prohibit creditors from assessing an over-the-limit fee or charge that is caused by the creditor's failure to

[65] *See* 15 U.S.C. 45(n); Letter from FTC to the Hon. Wendell H. Ford and the Hon. John C. Danforth, S. Comm. On Commerce, Science & Transp. (Dec. 17, 1980) (FTC Policy Statement on Unfairness) (available at *http://www.ftc.gov/bcp/policystmt/ad-unfair.htm*).

[66] Statement of Basis and Purpose and Regulatory Analysis for Federal Trade Commission Credit Practices Rule (Statement for FTC Credit Practices Rule), 49 FR 7740, 7744 (Mar. 1, 1984).

[67] *Id.* at 7743.

[68] Letter from the FTC to the Hon. John H. Dingell, H. Comm. on Energy & Commerce (Oct. 14, 1983) (FTC Policy Statement on Deception) (available at *http://www.ftc.gov/bcp/policystmt/ad-decept.html*).

[69] *Id.* at 1–2. The FTC views deception as a subset of unfairness but does not apply the full unfairness analysis because deception is very unlikely to benefit consumers or competition and consumers cannot reasonably avoid being harmed by deception.

[70] For example, a number of states follow an unfairness standard formerly used by the FTC. Under this standard, an act or practice is unfair where it offends public policy; or is immoral, unethical, oppressive, or unscrupulous; and causes substantial injury to consumers. *See, e.g., Kenai Chrysler Ctr., Inc.* v. *Denison,* 167 P.3d 1240, 1255 (Alaska 2007) (quoting *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244–45 n.5 (1972)); *State* v. *Moran,* 151 N.H. 450, 452, 861 A.2d 763, 755–56 (N.H. 2004); *Robinson* v. *Toyota Motor Credit Corp.,* 201 Ill. 2d 403, 417–418, 775, N.E.2d 951, 961–62 (2002).

promptly replenish the consumer's available credit. Section 226.56(j)(2) of the final rule adopts the prohibition substantively as proposed.

Public Comments

Consumer groups supported the proposed prohibition against assessing over-the-limit fees or charges caused by a creditor's failure to promptly replenish the consumer's available credit. Industry commenters generally did not oppose the proposed prohibition, but asked the Board to provide additional guidance regarding what it considered to be "prompt" replenishment of the consumer's available credit. One industry commenter asked the Board to specifically permit a creditor to wait a reasonable amount of time after receiving payment before replenishing the consumer's available credit. This commenter noted that while creditors will typically credit payments as of the date of receipt, the rule should not expose creditors to possible fraud or nonpayment by requiring them to make credit available in connection with a payment that has not cleared.

In response to the Board's request for comment regarding whether the rule should provide a safe harbor specifying the number of days following the crediting of a consumer's payment by which a creditor must replenish a consumer's available credit, industry commenters offered suggestions ranging from three to ten days in order to provide creditors sufficient time to mitigate any losses due to fraud or returned payments. One industry commenter cautioned that establishing any parameters regarding replenishment could contribute to a higher cost of credit if the established time period did not permit sufficient time for payments to clear.

Legal Analysis

The Board finds that the imposition of fees or charges for an over-the-limit transaction caused solely by a card issuer's failure to promptly replenish the consumer's available credit after the card issuer has credited the consumer's payment is an unfair practice.

Potential injury that is not reasonably avoidable. A 2006 Government Accountability Office (GAO) report on credit cards indicates that the average cost to consumers resulting from over-the-limit transactions exceeded $30 in 2005.[71] The GAO also reported that in the majority of credit card agreements that it surveyed, default rates could apply if a consumer exceeded the credit limit on the card.[72]

In most cases, card issuers replenish the available credit on a credit card account shortly after the payment has been credited to the account to enable the cardholder to make new transactions on the account. As a result, a consumer that has used all or most of the available credit during one billing cycle would again be able to make transactions using the credit card account once the consumer has made payments on the account balance and the available credit is restored to the account. If, however, the card issuer delays replenishment on the account after crediting the payment to the consumer's account, the consumer could inadvertently exceed the credit limit if the consumer uses the credit card account for new transactions and such transactions are authorized by the card issuer. In such event, the consumer could incur substantial monetary injury due to the fees assessed and potential interest rate increases in connection with the card issuer's payment of over-the-limit transactions.

Because the consumer will generally be unaware when the card issuer has delayed replenishing the available credit on the account after crediting the payment to the account, the Board concludes that consumers cannot reasonably avoid the injury caused by over-the-limit fees and rate increases triggered by transactions that exceed the limit as a result of the delay in replenishment.

Potential costs and benefits. The Board also finds that the prohibited practice does not create benefits for consumers and competition that outweigh the injury. While a card issuer may reasonably decide to delay replenishing a consumer's available credit, for example, to ensure the payment clears or in cases of suspected fraud on the account, there is minimal if any benefit to the consumer from permitting the card issuer to assess over-the-limit fees that may be incurred as a result of the delay in replenishment.

Final Rule

Section 226.56(j)(2) is adopted substantively as proposed and prohibits a card issuer from imposing any over-the-limit fee or charge solely because of the card issuer's failure to promptly replenish the consumer's available credit after the card issuer has credited the consumer's payment under § 226.10.

Comment 56(j)–3 clarifies that the final rule does not require card issuer to immediately replenish the consumer's available credit upon crediting the consumer's payment under § 226.10. Rather, the creditor is only prohibited from assessing any over-the-limit fees or charges caused by the creditor's decision not to replenish the available credit after posting the consumer's payment to the account. Thus, a card issuer may continue to delay replenishment as necessary to allow the consumer's payment to clear or to prevent potential fraud, provided that it does not assess any over-the-limit fees or charges because of its delay in restoring the consumer's available credit. Comment 56(j)–3 also clarifies that the rule does not require a card issuer to decline all transactions for consumers who have opted in to the card issuer's payment of over-the-limit transactions until the available credit has been restored.

As discussed above, § 226.56(j)(2) solely prohibits the assessment of an over-the-limit fee or charge due to a card issuer's failure to promptly replenish a consumer's available credit following the crediting of the consumer's payment under § 226.10. Thus, the final rule does not establish a number of days within which a consumer's available credit must be replenished by a card issuer after a payment has been credited. Because the time in which a payment may take to clear may vary greatly depending on the type of payment, the Board believes that the determination of when the available credit should be replenished should rest with the individual card issuer, so long as the consumer does not incur over-the-limit fees or charges as a result of the card issuer's delay in replenishment.

56(j)(3) Conditioning

The Board proposed to prohibit a creditor from conditioning the amount of available credit provided on the consumer's affirmative consent to the creditor's payment of over-the-limit transactions. Proposed § 226.56(j)(3) was intended to address concerns that a creditor may seek to tie the amount of credit provided to the consumer affirmatively consenting to the creditor's payment of over-the-limit transactions. The final rule adopts the prohibition as proposed.

Public Comments

Consumer groups and one federal banking agency supported the proposed prohibition to help ensure that consumers can freely choose whether or not to opt in. However, these commenters believed that greater

[71] *See* U.S. Gov't Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers* at 20–21 (Sept. 2006) (GAO Credit Card Report) (available at *http://www.gao.gov/new.items/d06929.pdf*).

[72] *See id.* at 25.

protections were needed to prevent other creditor actions that could compel a consumer to opt in or that otherwise discriminated against a consumer that elected not to opt in. Specifically, these commenters urged the Board to prohibit *any* differences in credit card accounts based upon whether the consumer elects to opt in to the payment of over-the-limit transactions. These commenters were concerned that issuers might otherwise offer other less favorable terms to consumers who do not opt in, such as a higher interest rate or a higher annual fee. Or, creditors might induce consumers to opt in by waiving a fee or lowering applicable APRs. Consumer groups further observed that the Board has recently taken a similar approach in the Board's recent final rules under Regulation E addressing overdraft services to prohibit financial institutions from varying the account terms, conditions, or features for consumers that do not opt in to overdraft services for ATM and one-time debit card transactions. *See* 74 FR 59033 (Nov. 17, 2009). Consumer groups also urged the Board to prohibit issuers from imposing fees, such as denied transaction fees, that could be designed to coerce consumers to opt in to over-the-limit coverage.

Both consumer groups and the federal banking agency agreed with the Board's observation in the supplementary information to the proposal that conditioning the amount of credit provided based on whether the consumer opts in to the creditor's payment of over-the-limit transactions raised significant concerns under the Equal Credit Opportunity Act (ECOA). *See* 15 U.S.C. 1691(a)(3). The federal banking agency expressed concern, however, that the Board's failure to similarly state that providing other adverse credit terms, such as higher fees or rates, based on the consumer's decision not to opt in could suggest that such variances were in fact permissible under ECOA and Regulation B (12 CFR 205).

Legal Analysis

The Board finds that conditioning or linking the amount of credit available to the consumer based on the consumer consenting to the card issuer's payment of over-the-limit transactions is an unfair practice.

Potential injury that is not reasonably avoidable. As the Board has previously stated elsewhere, consumers receive considerable benefits from receiving credit cards that provide a meaningful amount of available credit. For example, credit cards enable consumers to engage in certain types of transactions, such as making purchases by telephone or on-line, or renting a car or hotel room. Given these benefits, some consumers might be compelled to opt in to a card issuer's payment of over-the-limit transactions if not doing so may result in the consumer otherwise obtaining a minimal amount of credit or failing to qualify for credit altogether. Thus, it appears that such consumers would be prevented from exercising a meaningful choice regarding the card issuer's payment of over-the-limit transactions.

Potential costs and benefits. The Board concludes that there are few if any benefits to consumers or competition from conditioning or linking the amount of credit available to the consumer based on the consumer consenting to the card issuer's payment of over-the-limit transactions. While some card issuers may seek to replace the revenue from over-the-limit fees by charging consumers higher annual percentage rates or fees, the Board believes that consumers will benefit overall from having a meaningful choice regarding whether to have over-the-limit transactions approved by the card issuer.

Final Rule

Section 226.56(j)(3) prohibits a card issuer from conditioning or otherwise linking the amount of credit granted on the consumer opting in to the card issuer's payment of over-the-limit transactions. Thus, the final rule is intended to prevent card issuers from effectively circumventing the consumer choice requirement by tying the amount of a consumer's credit limit to the consumer's opt-in decision.

Under the final rule, a card issuer may not, for example, require a consumer to opt in to the card issuer's fee-based over-the-limit service in order to receive a higher credit limit for the account. Similarly, a card issuer would be prohibited from denying a consumer's credit card application solely because the consumer did not opt in to the card issuer's over-the-limit service. The final rule is illustrated by way of example in comment 56(j)–4.

The final rule does not address other card issuer actions that may also lead a consumer to opt in to the card issuer's payment of over-the-limit transactions contrary to the consumer's preferences. As discussed above, TILA Section 127(k)(5)(B) directs the Board to prescribe regulations preventing unfair or deceptive acts or practices "in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees." Nonetheless, the Board notes this rule is not intended to identify all unfair or deceptive acts or practices that may arise in connection with the opt-in requirement. To the extent that specific practices raise concerns regarding unfairness or deception under the FTC Act with respect to this requirement, this rule would not limit the ability of the Board or any other agency to make any such determination on a case-by-case basis. This rule also does not preclude any action by the Board or any other agency to address creditor practices with respect to a consumer's exercise of the opt-in right that may raise significant concerns under ECOA and Regulation B.

56(j)(4) Over-the-Limit Fees Attributed to Fees or Interest

The Board proposed to prohibit the imposition of any over-the-limit fees or charges if the credit limit is exceeded solely because of the creditor's assessment of accrued interest charges or fees on the consumer's credit card account. Section 226.56(j)(4) adopts this prohibition substantively as proposed.

Public Comments

Consumer groups supported the proposed prohibition. In contrast, one industry trade association representing community banks believed that the proposed prohibition would require extensive programming of data systems and urged the Board not to adopt the prohibition in light of the significant operational burden and costs that would be incurred. Another industry commenter questioned whether the proposed prohibition was sufficiently tied to a creditor's manipulation of credit limits as contemplated by TILA Section 127(k)(5).

Legal Analysis

The Board finds the imposition of any over-the-limit fees or charges if a consumer's credit limit is exceeded solely because of the card issuer's assessment of accrued interest charges or fees on the consumer's credit card account is an unfair practice.

Potential injury that is not reasonably avoidable. As discussed above, consumers may incur substantial monetary injury due to the fees assessed in connection with the payment of over-the-limit transactions. In addition to per transaction fees, consumers may also trigger rate increases if the over-the-limit transaction is deemed to be a violation of the credit card contract.

The Board concludes that the injury from over-the-limit fees and potential rate increases is not reasonably avoidable in these circumstances because consumers are, as a general matter, unlikely to be aware of the amount of interest charges or fees that may be added to their account balance when deciding whether or not to engage in a credit card transaction. With respect to accrued interest charges, these additional amounts are typically added to a consumer's account balance at the end of the billing cycle after the consumer has completed his or her transactions for the cycle and thus are unlikely to have been taken into account when the consumer engages in the transactions.

Potential costs and benefits. Although prohibition of the assessment of over-the-limit fees caused by accrued finance charges and fees may reduce card issuer revenues and lead card issuers to replace lost revenue by charging consumers higher rates or fees, the Board believes the final rule will result in a net benefit to consumers because some consumers are likely to benefit substantially while the adverse effects on others are likely to be small. Because permitting fees and interest charges to trigger over-the-limit fees may have the effect of retroactively reducing a consumer's available credit for prior transactions, prohibiting such a practice would protect consumers against unexpected over-the-limit fees and rate increases which could substantially add to their cost of credit. Moreover, consumers will be able to more accurately manage their credit lines without having to factor additional costs that cannot be easily determined. While some consumers may pay higher fees and initial rates, consumers are likely to benefit overall through more transparent pricing.

Final Rule

Section 226.56(j)(4) in the final rule prohibits card issuers from imposing an over-the-limit fee or charge if a consumer exceeds a credit limit solely because of fees or interest charged by the card issuer to the consumer's account during the billing cycle, as proposed. For purposes of this prohibition, the fees or interest charges that may not trigger the imposition of an over-the-limit fee or charge are considered charges imposed as part of the plan under § 226.6(b)(3)(i). Thus, the final rule also prohibits the assessment of an over-the-limit fee or charge even if the credit limit was exceeded due to fees for services requested by the consumer if such fees constitute charges imposed as part of the plan (for example, fees for voluntary debt cancellation or suspension coverage). The prohibition in the final rule does not, however, restrict card issuers from assessing over-the-limit fees due to accrued finance charges or fees from prior cycles that have subsequently been added to the account balance. New comment 56(j)–5 includes this additional guidance and illustrative examples.

Section 226.57 Reporting and Marketing Rules for College Student Open-End Credit

New TILA Section 140(f), as added by Section 304 of the Credit Card Act, requires the public disclosure of contracts or other agreements between card issuers and institutions of higher education for the purpose of marketing a credit card and imposes new restrictions related to marketing open-end credit to college students. 15 U.S.C. 1650(f). The Board proposed to implement these provisions in new § 226.57.

The Board also proposed to implement provisions related to new TILA Section 127(r) in § 226.57. TILA Section 127(r), which was added by Section 305 of the Credit Card Act, requires card issuers to submit an annual report to the Board containing the terms and conditions of business, marketing, promotional agreements, and college affinity card agreements with an institution of higher education, or other related entities, with respect to any college student credit card issued to a college student at such institution. 15 U.S.C. 1637(r).

57(a) Definitions

New TILA Section 127(r) provides definitions for terms that are also used in new TILA Section 140(f). *See* 15 U.S.C. 1650(f). To ensure the use of these terms is consistent throughout these sections, the Board proposed to incorporate the definitions set forth in TILA Section 127(r) in § 226.57(a) and apply them to regulations implementing both TILA Sections 127(r) and 140(f).

Proposed § 226.57(a)(1) defined "college student credit card" as a credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan to any college student. This definition is similar to TILA Section 127(r)(1)(B), which defines "college student credit card account" as a credit card account under an open-end consumer credit plan established or maintained for or on behalf of any college student. The Board received no comments on this definition, and the definition is adopted as proposed with one non-substantive wording change. As proposed, § 226.57(a)(1) defines "college student credit card" rather than "college student credit card account" because the statute and regulation use the former term but not the latter. Consistent with the approach the Board is implementing for other sections of the Credit Card Act, the definition uses the proposed term "credit card account under an open-end (not home-secured) consumer credit plan," as defined in § 226.2(a)(15). The term "college student credit card" therefore excludes home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by debit cards, which the Board believes are not typical types of college student credit cards.

TILA Section 127(r)(1)(A) defines "college affinity card" as a credit card issued under an open end consumer credit plan in conjunction with an agreement between the issuer and an institution of higher education or an alumni organization or a foundation affiliated with or related to an institution of higher education under which cards are issued to college students having an affinity with the institution, organization or foundation where at least one of three criteria also is met. These three criteria are: (1) The creditor has agreed to donate a portion of the proceeds of the credit card to the institution, organization, or foundation (including a lump-sum or one-time payment of money for access); (2) the creditor has agreed to offer discounted terms to the consumer; or (3) the credit card bears the name, emblem, mascot, or logo of such institution, organization, or foundation, or other words, pictures or symbols readily identified with such institution or affiliated organization. In connection with the proposed rule, the Board solicited comment on whether § 226.57 should include a regulatory definition of "college affinity card." One card issuer commenter requested that the Board include such a definition in the final rule. The Board continues to believe, however, that the definition of "college student credit card," discussed above, is broad enough to encompass any "college affinity card" as defined in TILA Section 127(r)(1)(A), and that a definition of "college affinity card" therefore is unnecessary. As proposed, the Board is not adopting a regulatory definition comparable to this definition in the statute.

Comment 57(a)(1)–1 is adopted as proposed. Comment 57(a)(1)–1 clarifies that a college student credit card includes a college affinity card, as discussed above, and that, in addition, a card may fall within the scope of the definition regardless of the fact that it is not intentionally targeted at or marketed to college students.

Proposed § 226.57(a)(2) defined "college student" as an individual who is a full-time or a part-time student attending an institution of higher education. This definition is consistent with the definition of "college student" in TILA Section 127(r)(1)(C). An industry commenter suggested that the Board limit the definition to students who are under the age of 21. As the Board discussed in the October 2009 Regulation Z Proposal, the definition is intended to be broad and would apply to students of any age attending an institution of higher education and applies to all students, including those enrolled in graduate programs or joint degree programs. The Board believes that it was Congress's intent to apply this term broadly, and is adopting § 226.57(a)(2) as proposed with one non-substantive wording change.

As discussed in the October 2009 Regulation Z Proposal, the Board proposed to adopt a definition of "institution of higher education" in § 226.57(a)(3) that would be consistent with the definition of the term in TILA Section 127(r)(1)(D) and in § 226.46(b)(2) for private education loans. The proposed definition provided that the term has the same meaning as in sections 101 and 102 of the Higher Education Act of 1965. 20 U.S.C. 1001 and 1002. In proposing the definition, the Board proposed to use its authority under TILA Section 105(a) to apply the definition in TILA Section 127(r)(1)(D) to TILA Section 140(f) in order to have a consistent definition of the term for all sections added by the Credit Card Act and to facilitate compliance. 15 U.S.C. 1604(a). The Board received no comment on the proposed definition, and § 226.57(a)(3) is adopted as proposed.

Proposed § 226.57(a)(4) defined "affiliated organization" as an alumni organization or foundation affiliated with or related to an institution of higher education, to provide a conveniently shorter term to be used to refer to such organizations and foundations in various provisions of the proposed regulations. The Board received no comment regarding this definition, and § 226.57(a)(4) is adopted as proposed with one non-substantive wording change.

Proposed § 226.57(a)(5) delineated the types of agreements for which creditors must provide annual reports to the Board, under the defined term "college credit card agreement." The term was defined to include any business, marketing or promotional agreement between a card issuer and an institution of higher education or an affiliated organization in connection with which college student credit cards are issued to college students currently enrolled at that institution. In connection with the proposed rule, the Board noted that the proposed definition did not incorporate the concept of a college affinity card agreement used in TILA Section 127(r)(1)(A) and solicited comment on whether language referring to college affinity card agreements also should be included in the regulations. The Board received no comments on this issue. The Board continues to believe that the definition of "college credit card agreement" is broad enough to include agreements concerning college affinity cards. Section 226.57(a)(5) therefore is adopted as proposed with one non-substantive wording change.

Comment 57(a)(5)–1 is adopted as proposed. Comment 57(a)(5)–1 clarifies that business, marketing and promotional agreements may include a broad range of arrangements between a creditor and an institution of higher education or affiliated organization, including arrangements that do not fall within the concept of a college affinity card agreement as discussed in TILA Section 127(r)(1)(A). For example, TILA Section 127(r)(1)(A) specifies that under a college affinity card agreement, the card issuer has agreed to make a donation to the institution or affiliated organization, the card issuer has agreed to offer discounted terms to the consumer, or the credit card will display pictures, symbols, or words identified with the institution or affiliated organization; even if these conditions are not met, an agreement may qualify as a college credit card agreement, if the agreement is a business, marketing or promotional agreement that contemplates the issuance of college student credit cards to college students currently enrolled at the institution. An agreement may qualify as a college credit card agreement even if marketing of cards under the agreement is targeted at alumni, faculty, staff, and other non-student consumers, as long as cards may also be issued to students in connection with the agreement.

57(b) Public Disclosure of Agreements

In the October 2009 Regulation Z Proposal the Board proposed to implement new TILA Section 140(f)(1) in § 226.57(b). Consistent with the statute, proposed § 226.57(b) requires an institution of higher education to publicly disclose any credit card marketing contract or other agreement made with a card issuer or creditor. The Board also proposed comment 57(b)–1 to specify that an institution of higher education may fulfill its duty to publicly disclose any contract or other agreement made with a card issuer or creditor for the purposes of marketing a credit card by posting such contract or agreement on its Web site. Comment 57(b)–1 also provided that the institution of higher education may alternatively make such contract or agreement available upon request, provided the procedures for requesting the documents are reasonable and free of cost to the requestor, and the contract or agreement is provided within a reasonable time frame. As discussed in the October 2009 Regulation Z Proposal the list in proposed comment 57(b)–1 was not meant to be exhaustive, and the Board noted that an institution of higher education may publicly disclose these contracts or agreements in other ways.

Consumer group commenters suggested that the Board clarify that the term "any contracts or agreements" includes a memorandum of understanding or other amendment, interpretation or understanding between the parties that directly or indirectly relates to a college credit agreement. The Board does not believe such amendments are necessary. If, as a matter of contract law, any amendment or memorandum of understanding constitutes a part of a contract, the Board believes that the language in the regulation would require its disclosure. As a result, the Board is adopting comment 57(b)–1 as proposed.

The Board also proposed comment 57(b)–2 in the October 2009 Regulation Z Proposal to bar institutions of higher education from redacting any contracts or agreements they are required to publicly disclose under proposed § 226.57(b). As a result, any clauses in existing contract or agreements addressing the confidentiality of such contracts or agreements would be invalid to the extent they prevent institutions of higher education from publicly disclosing such contracts or agreements in accordance with proposed § 226.57(b). The Board did not receive any significant comments on comment 57(b)–2. Furthermore, the Board continues to believe that it is important that all provisions of these contracts or agreements be available to college students and other interested parties, and comment 57(b)–2 is adopted as proposed.

57(c) Prohibited Inducements

TILA Section 140(f)(2) prohibits card issuers and creditors from offering to a student at an institution of higher education any tangible item to induce such student to apply for or participate in an open-end consumer credit plan offered by such card issuer or creditor, if such offer is made on the campus of an institution of higher education, near the campus of an institution of higher education, or at an event sponsored by