

~~request exception to the 45-day notice requirement in § 226.9(c)(2) because of the difficulty of defining by regulation the circumstances under which a consumer is deemed to have requested a change versus the circumstances in which the change is “suggested” by the card issuer. See revised § 226.9(c)(2)(i). Thus, the Board does not believe that the determination of whether §§ 226.6(b) or 226.9(c)(2) applies should turn solely on whether a consumer has requested the replacement or substitution.~~

~~For the foregoing reasons, the Board believes that the proposed standard provides the appropriate degree of flexibility insofar as it states that whether §§ 226.6(b) or 226.9(c)(2) applies is determined in light of the relevant facts and circumstances. However, in response to requests from commenters, the Board has clarified some of the listed facts and circumstances. Specifically, the Board has added the substitution or replacement of a retail card with a cobranded general purpose credit card as an example of a circumstance in which an account can be used to conduct transactions at a greater or lesser number of merchants after the substitution or replacement. Similarly, the Board has added a substitution or replacement in response to a consumer’s request as an example of a substitution or replacement on an individualized basis. Finally, the Board has clarified that, notwithstanding the listed facts and circumstances, a card issuer that replaces a credit card or provides a new account number because the consumer has reported the card stolen or because the account appears to have been used for unauthorized transactions is not required to provide a notice under § 226.6(b) or 226.9(c)(2) unless the card issuer has changed a term of the account that is subject to §§ 226.6(b) or 226.9(c)(2).~~

### **5(b)(2) Periodic Statements**

As amended by the Credit Card Act in May 2009, TILA Section 163 generally prohibited a creditor from treating a payment as late or imposing additional finance charges unless the creditor mailed or delivered the periodic statement at least 21 days before the payment due date and the expiration of any period within which any credit extended may be repaid without incurring a finance charge (i.e., a “grace period”). See Credit Card Act § 106(b)(1). Unlike most of the Credit Card Act’s provisions, the amendments to Section 163 applied to all open-end consumer credit plans rather than just credit card accounts.<sup>13</sup> The Board’s July 2009 Regulation Z Interim Final Rule implemented the amendments to TILA Section 163 by revising § 226.5(b)(2)(ii) and the accompanying official staff commentary. Both the statutory amendments and the interim final rule became effective on August 22, 2009. See Credit Card Act § 106(b)(2).

However, in November 2009, the Credit CARD Technical Corrections Act of 2009 (Technical Corrections Act) further amended TILA Section 163, narrowing application the requirement that statements be mailed or delivered at least 21 days before the payment due date to credit card accounts. Public Law 111-93, 123 Stat. 2998 (Nov. 6, 2009).<sup>14</sup> Accordingly, the Board adopts § 226.5(b)(2)(ii) and its commentary in this final rule with revisions implementing the Technical Corrections Act and clarifying aspects of the July 2009 interim final rule in response to comments.

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<sup>13</sup> Specifically, while most provisions in the Credit Card Act apply to “credit card account[s] under an open end consumer credit plan” (e.g., § 101(a)), the May 2009 amendments to TILA Section 163 applied to all “open end consumer credit plan[s].”

<sup>14</sup> As discussed below, the Technical Corrections Act did not alter the requirement in amended TILA Section 163 that all open-end consumer credit plans generally mail or deliver periodic statements at least 21 days before the date on which any grace period expires.

### **5(b)(2)(ii) Mailing or Delivery**

Prior to the Credit Card Act, TILA Section 163 required creditors to send periodic statements at least 14 days before the expiration of the grace period (if any), unless prevented from doing so by an act of God, war, natural disaster, strike, or other excusable or justifiable cause (as determined under regulations of the Board). 15 U.S.C. 1666b. The Board's Regulation Z, however, applied the 14-day requirement even when the consumer did not receive a grace period. Specifically, § 226.5(b)(2)(ii) required that creditors mail or deliver periodic statements 14 days before the date by which payment was due for purposes of avoiding not only finance charges as a result of the loss of a grace period but also any charges other than finance charges (such as late fees). See also comment 5(b)(2)(ii)-1.

In the January 2009 FTC Act Rule, the Board and the other Agencies prohibited institutions from treating payments on consumer credit card accounts as late for any purpose unless the institution provided a reasonable amount of time for consumers to make payment. See 12 CFR 227.22(a), 74 FR 5560; see also 74 FR 5508-5512.<sup>15</sup> This rule included a safe harbor for institutions that adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date were mailed or delivered to consumers at least 21 days before the payment due date. See 12 CFR 227.22(b)(2), 74 FR 5560. The 21-day safe harbor was intended to allow seven days for the periodic statement to reach the consumer by mail, seven days for the consumer to review their statement and make payment, and seven days for that payment to reach the institution by

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<sup>15</sup> Although the Board, OTS, and NCUA adopted substantively identical rules under the FTC Act, each agency placed its rules in its respective part of Title 12 of the Code of Federal Regulations. Specifically, the Board placed its rules in part 227, the OTS in part 535, and the NCUA in part 706. For simplicity, this supplementary information cites to the Board's rules and official staff commentary.

mail. However, to avoid any potential conflict with the 14-day requirement in TILA Section 163(a), the rule expressly stated that it would not apply to any grace period provided by an institution. See 12 CFR 227.22(c), 74 FR 5560.

The Credit Card Act's amendments to TILA Section 163 codified aspects of the Board's § 226.5(b)(2)(ii) as well as the provision in the January 2009 FTC Act Rule regarding the mailing or delivery of periodic statements. Specifically, like the Board's § 226.5(b)(2)(ii), amended TILA Section 163 applies the mailing or delivery requirement to both the expiration of the grace period and the payment due date. In addition, similar to the January 2009 FTC Act Rule, amended TILA Section 163 adopts 21 days as the appropriate time period between the date on which the statement is mailed or delivered to the consumer and the date on which the consumer's payment must be received by the creditor to avoid adverse consequences.

Rather than establishing an absolute requirement that periodic statements be mailed or delivered 21 days in advance of the payment due date, amended TILA Section 163(a) codifies the same standard adopted by the Board and the other Agencies in the January 2009 FTC Act Rule, which requires creditors to adopt "reasonable procedures designed to ensure" that statements are mailed or delivered at least 21 days before the payment due date. Notably, however, the 21-day requirement for grace periods in amended TILA Section 163(b) does not include similar language regarding "reasonable procedures." Because the payment due date generally coincides with the expiration of the grace period, the Board believes that it will facilitate compliance to apply a single standard to both circumstances. The "reasonable procedures" standard recognizes that, for issuers mailing hundreds of thousands of periodic statements each month, it would be

difficult if not impossible to know whether a specific statement is mailed or delivered on a specific date. Furthermore, applying different standards could encourage creditors to establish a payment due date that is different from the date on which the grace period expires, which could lead to consumer confusion.

Accordingly, the Board's interim final rule amended § 226.5(b)(2)(ii) to require that creditors adopt reasonable procedures designed to ensure that periodic statements are mailed or delivered at least 21 days before the payment due date and the expiration of the grace period. In doing so, the Board relied on its authority under TILA Section 105(a) to make adjustments that are necessary or proper to effectuate the purposes of TILA and to facilitate compliance therewith. See 15 U.S.C. 1604(a).

For clarity, the interim final rule also amended § 226.5(b)(2)(ii) 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." This definition is consistent with the definition of grace period adopted by the Board in its January 2009 Regulation Z Rule. See §§ 226.5a(b)(5), 226.6(b)(2)(v), 74 FR 5404, 5407; see also 74 FR 5291-5294, 5310.

Finally, the Credit Card Act removed prior TILA Section 163(b), which stated that the 14-day mailing requirement does not apply "in any case where a creditor has been prevented, delayed, or hindered in making timely mailing or delivery of [the] periodic statement within the time period specified . . . because of an act of God, war, natural disaster, strike, or other excusable or justifiable cause, as determined under regulations of the Board." 15 U.S.C. 1666b(b). The Board believes that the Credit Card Act's removal of this language is consistent with the adoption of a "reasonable procedures" standard insofar as a creditor's procedures for responding to any of the

situations listed in prior TILA Section 163(b) will now be evaluated for reasonableness. Accordingly, the interim final rule removed the language implementing prior TILA Section 163(b) from footnote 10 to § 226.5(b)(2)(ii).<sup>16</sup>

Commenters generally supported the interim final rule, with one notable exception. Credit unions and community bank commenters strongly opposed the interim final rule on the grounds that requiring creditors to mail or deliver periodic statements at least 21 days before the payment due date with respect to open-end consumer credit plans other than credit card accounts was unnecessary and unduly burdensome. In particular, these commenters noted that the requirement disproportionately impacted credit unions, which frequently provide open-end products with multiple due dates during a month (such as bi-weekly due dates that correspond to the dates on which the consumer is paid) as well as consolidated periodic statements for multiple open-end products with different due dates. These commenters argued that applying the 21-day requirement to these products would significantly increase costs by requiring multiple periodic statements or cause creditors to cease offering such products altogether. However, these commenters noted that the requirement that statements be provided at least 21 days before the expiration of a grace period was not problematic because these products do not provide a grace period.

The Technical Corrections Act addressed these concerns by narrowing the application of the 21-day requirement in TILA Section 163(a) to credit cards. However, open-end consumer credit plans that provide a grace period remain subject to the 21-day requirement in Section 163(b). The final rule revises § 226.5(b)(2)(ii) consistent with the

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<sup>16</sup> The Board notes that the October 2009 Regulation Z Proposal erroneously included this language in § 226.5(b)(2)(iii). The final rule corrects this error.

Technical Corrections Act. Specifically, because the Technical Corrections Act amended TILA Section 163 to apply different requirements to different types of open-end credit accounts, the Board has reorganized § 226.5(b)(2)(ii) into § 226.5(b)(2)(ii)(A) and § 226.5(b)(2)(ii)(B). This reorganization does not reflect any substantive revision of the interim final rule beyond those changes necessary to implement the Technical Corrections Act.

**5(b)(2)(ii)(A) Payment Due Date**

Section 226.5(b)(2)(ii)(A)(1) provides that, for consumer credit card accounts under an open-end (not home-secured) consumer credit plan, a card issuer must adopt reasonable procedures designed to ensure that periodic statements are mailed or delivered at least 21 days prior to the payment due date. Furthermore, § 226.5(b)(2)(ii)(A)(2) provides that the card issuer must also adopt reasonable procedures designed to ensure that a required minimum periodic payment received by the card issuer within 21 days after mailing or delivery of the periodic statement disclosing the due date for that payment is not treated as late for any purpose.

For clarity and consistency, § 226.5(b)(2)(ii)(A)(1) provides that a periodic statement generally must be mailed or delivered at least 21 days before the payment due date disclosed pursuant to § 226.7(b)(11)(i)(A). As discussed in greater detail below, § 226.7(b)(11)(i)(A) implements the Credit Card Act's requirement that periodic statements for credit card accounts disclose a payment due date. See amended TILA Section 127(b)(12)(A).<sup>17</sup> The Board believes that – like the mailing or delivery

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<sup>17</sup> Although the 21-day requirement in amended TILA Section 163(a) is specifically tied to provision of a periodic statement that “includ[es] the information required by [TILA] section 127(b),” the July 2009 interim final rule did not cross-reference the due date disclosure because that disclosure was not scheduled to go into effect until February 22, 2010.

requirements for periodic statements in the January 2009 FTC Act Rule – the Credit Card Act’s amendments to TILA Section 163 are intended to ensure that consumers have a reasonable amount of time to make payment after receiving their periodic statements. For that reason, the Board believes that it is important to ensure that the payment due date disclosed pursuant to § 226.7(b)(11)(i)(A) is consistent with requirements of § 226.5(b)(2)(ii)(A). If creditors were permitted to disclose a payment due date on the periodic statement that was less than 21 days after mailing or delivery of the periodic statement, consumers could be misled into believing that they have less time to pay than provided under TILA Section 163 and § 226.5(b)(2)(ii)(A).

The interim final rule adopted a new comment 5(b)(2)(ii)-1, which clarifies that, under the “reasonable procedures” standard, a creditor is not required to determine the specific date on which periodic statements are mailed or delivered to each individual consumer. Instead, a creditor complies with § 226.5(b)(2)(ii) if it has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than a certain number of days after the closing date of the billing cycle and adds that number of days to the 21-day period required by § 226.5(b)(2)(ii) when determining the payment due date and the date on which any grace period expires. For example, if a creditor has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than three days after the closing date of the billing cycle, the payment due date and the date on which any grace period expires must be no less than 24 days after the closing date of the billing cycle.

The final rule retains this comment with revisions to reflect the reorganization of § 226.5(b)(2)(ii).<sup>18</sup>

The interim final rule also adopted a new comment 5(b)(2)(ii)-2, which clarifies that treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, or assessing a late fee or any other fee based on the consumer's failure to make a payment within a specified amount of time or by a specified date.<sup>19</sup> Several commenters requested that the Board narrow or expand this language to clarify that certain activities are included or excluded. The current language is consistent with the Board's intent that the prohibition on treating a payment as late for purpose be broadly construed and that the list of examples be illustrative rather than exhaustive. Nevertheless, in order to provide additional clarity, the final rule amends comment 5(b)(2)(ii)-2 to provide two additional examples of activities that constitute treating a payment as late for purposes of § 226.5(b)(2)(ii)(A)(2): terminating benefits (such as rewards on purchases) and initiating collection activities. However, the provision of additional examples should not be construed as a determination by the Board that other activities would not constitute treating a payment as late for any purpose.

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<sup>18</sup> The Board and the other Agencies adopted a similar comment in the January 2009 FTC Act Rule. See 12 CFR 227.22 comment 22(b)-1, 74 FR 5511, 5561. The interim final rule deleted prior comment 5(b)(2)(ii)-1 because it referred to the 14-day rule for grace periods and was therefore no longer consistent with § 226.5(b)(2)(ii). In doing so, the Board concluded that, to the extent that the comment clarified that § 226.5(b)(2)(ii) applied in circumstances where the consumer is not eligible or ceases to be eligible for a grace period, it was no longer necessary because that requirement was reflected in amended § 226.5(b)(2)(ii) and elsewhere in the amended commentary.

<sup>19</sup> The Board and the other Agencies adopted a similar comment in the January 2009 FTC Act Rule. See 12 CFR 227.22 comment 22(a)-1, 74 FR 5510, 5561. The interim final rule deleted prior comment 5(b)(2)(ii)-2, which clarified that the emergency circumstances exception in prior footnote 10 does not extend to the failure to provide a periodic statement because of computer malfunction. As discussed above, prior footnote 10 was based on prior TILA Section 163(b), which has been repealed.

In the October 2009 Regulation Z Proposal, the Board proposed to amend other aspects of comment 5(b)(2)(ii)-2. In particular, the Board proposed to clarify that the prohibition in § 226.5(b)(2)(ii) on treating a payment as late for any purpose or collecting finance or other charges applies only during the 21-day period following mailing or delivery of the periodic statement stating the due date for that payment. Thus, if a creditor does not receive a payment within 21 days of mailing or delivery of the periodic statement, the prohibition does not apply and the creditor may, for example, impose a late payment fee. Commenters generally supported this clarification. Accordingly, the Board has adopted this guidance – with additional clarifications – in the final rule. In addition, for consistency with the reorganization of § 226.5(b)(2)(ii), the Board has moved the guidance regarding grace periods to comment 5(b)(2)(ii)-3.

**5(b)(2)(ii)(B) Grace Period Expiration Date**

Section 226.5(b)(2)(ii)(B)(1) provides that, for open-end consumer credit plans, a creditor must adopt reasonable procedures designed to ensure that periodic statements are mailed or delivered at least 21 days prior to the date on which any grace period expires. Furthermore, § 226.5(b)(2)(ii)(B)(2) provides that the creditor must also adopt reasonable procedures designed to ensure that the creditor does not impose finance charges as a result of the loss of a grace period if a payment that satisfies the terms of the grace period is received by the creditor within 21 days after mailing or delivery of the periodic statement. Finally, the interim final rule’s definition of “grace period” has been moved to § 226.5(b)(2)(ii)(B)(3) without any substantive change.

The interim final rule adopted comment 5(b)(2)(ii)-3, which clarified that, for purposes of § 226.5(b)(2)(ii), “payment due date” generally excluded courtesy periods

following the contractual due date during which a consumer could make payment without incurring a late payment fee. This comment was intended to address open-end consumer credit plans other than credit cards and therefore is not necessary in light of the Technical Corrections Act.<sup>20</sup> Accordingly, the guidance in current comment 5(b)(2)(ii)-3 has been replaced with guidance regarding application of the grace period requirements in § 226.5(b)(2)(ii)(B). Specifically, this comment incorporates current comment 5(b)(2)(ii)-4, which clarifies that the definition of “grace period” in § 226.5(b)(2)(ii) does not include 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. The comment also clarifies that courtesy periods following the payment due date during which a late payment fee will not be assessed are not grace periods for purposes of § 226.5(b)(2)(ii)(B) and provides a cross-reference to comments 7(b)(11)-1 and -2 for additional guidance regarding such periods.

Comment 5(b)(2)(ii)-3 also clarifies the applicability of § 226.5(b)(2)(ii)(B). Specifically, it states that § 226.5(b)(2)(ii)(B) applies if an account is eligible for a grace period when the periodic statement is mailed or delivered. It further states that § 226.5(b)(2)(ii)(B) does not require the creditor to provide a grace period or prohibit the creditor from placing limitations and conditions on a grace period to the extent consistent with § 226.5(b)(2)(ii)(B) and § 226.54. Finally, it states that the prohibition in § 226.5(b)(2)(ii)(B)(2) applies only during the 21-day period following mailing or delivery of the periodic statement and applies only when the creditor receives a payment

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<sup>20</sup> Furthermore, similar guidance is provided in comments 7(b)(11)-1 and -2, which the Board is adopting in this final rule (as discussed below). The Board initially adopted comments 7(b)(11)-1 and -2 in the January 2009 Regulation Z Rule. *See* 74 FR 5478. However, because this commentary was not yet effective, the July 2009 Regulation Z Interim Final Rule provided similar guidance in current comment 5(b)(2)(ii)-3.

that satisfies the terms of the grace period within that 21-day period. An illustrative example is provided.

As noted above, current comment 5(b)(2)(ii)-4 has been incorporated into comment 5(b)(2)(ii)-3. In its place, the Board has adopted guidance to address confusion regarding the interaction between the payment due date disclosure in proposed § 226.7(b)(11)(i)(A) and the 21-day requirements in § 226.5(b)(2)(ii) with respect to charge card accounts and charged-off accounts. Charge cards are typically products where outstanding balances cannot be carried over from one billing cycle to the next and are payable when the periodic statement is received. See § 226.5a(b)(7). Therefore, the contractual payment due date for a charge card account is the date on which the consumer receives the periodic statement (although charge card issuers generally request that the consumer make payment by some later date). See comment 5a(b)(7)-1. Similarly, when an account is over 180 days past due and has been placed in charged off status, full payment is due immediately.

However, as discussed below, the Board has concluded that it would not be appropriate to apply the payment due date disclosure in § 226.7(b)(11)(i)(A) to periodic statements provided solely for charge card accounts or periodic statements provided for charged-off accounts where full payment of the entire account balance is due immediately. In addition, a card issuer could not comply with the requirement to mail or deliver the periodic statement 21 days before the payment due date if the payment due date is the date that the consumer receives the statement. Accordingly, comment 5(b)(2)(ii)-4 clarifies that, because the payment due date disclosure in § 226.7(b)(11)(i)(A) does not apply to periodic statements provided solely for charge

card accounts or periodic statements provided for charged-off accounts where full payment of the entire account balance is due immediately, § 226.5(b)(2)(ii)(A)(1) does not apply to the mailing or delivery of periodic statements provided solely for such accounts.

Comment 5(b)(2)(ii)-4 further clarifies that, with respect to charge card accounts, § 226.5(b)(2)(ii)(A)(2) nevertheless requires the card issuer to have reasonable procedures designed to ensure that a payment is not treated as late for any purpose during the 21-day period following mailing or delivery of that statement. Thus, notwithstanding the contractual due date, consumers with charge card accounts must receive at least 21 days to make payment without penalty.

With respect to charged-off accounts, comment 5(b)(2)(ii)-4 clarifies that, as discussed above with respect to comment 5(b)(2)(ii)-2, a card issuer is only prohibited from treating a payment as late during the 21-day period following mailing or delivery of the periodic statement stating the due date for that payment. Thus, because a charged-off account will generally have several past due payments, the card issuer may continue to treat those payments as late during the 21-day period for new payments.

Comment 5(b)(2)(ii)-4 also clarifies the application of the grace period requirements in § 226.5(b)(2)(ii)(B) to charge card and charged-off accounts. Specifically, the comment states that § 226.5(b)(2)(ii)(B) does not apply to charge card accounts because, for purposes of § 226.5(b)(2)(ii)(B), a grace period is a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate and, consistent with § 226.2(a)(15)(iii), charge card accounts do not impose a finance charge based on a periodic rate. Similarly, the comment states that

§ 226.5(b)(2)(ii)(B) does not apply to charged-off accounts where full payment of the entire account balance is due immediately because such accounts do not provide a grace period.

The final rule does not alter current comment 5(b)(2)(ii)-5, which provides that, when a consumer initiates a request, the creditor may permit, but may not require, the consumer to pick up periodic statements. Finally, the Board has adopted the proposed revisions to comment 5(b)(2)(ii)-6, which amend the cross-reference to reflect the restructuring of the commentary to § 226.7.

## ~~**Section 226.5a Credit and Charge Card Applications and Solicitations**~~

### ~~**5a(b) Required Disclosures**~~

#### ~~**5a(b)(1) Annual Percentage Rate**~~

~~The Board republished proposed comment 5a(b)(1)-9 in the October 2009 Regulation Z Proposal, which was originally published in the May 2009 Regulation Z Proposed Clarifications. The comment clarified that an issuer offering a deferred interest or similar plan may not disclose a rate as 0% due to the possibility that the consumer may not be obligated for interest pursuant to a deferred interest or similar transaction. The Board did not receive any comments opposing this provision, and the comment is adopted as proposed. The Board notes that comment 5a(b)(1)-9 would apply to account opening disclosures pursuant to comment 6(b)(1)-1.~~

#### ~~**5a(b)(5) Grace Period**~~

~~Sections 226.5a(b)(5) and 6(b)(2)(v) require that creditors disclose, among other things, any conditions on the availability of a grace period. As discussed below with respect to § 226.54, the Credit Card Act provides that, when a consumer pays some but~~