~~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 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

[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.

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.

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

[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.

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

[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.

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 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

[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.

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 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]

[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).

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).

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

[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).

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 in to 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.

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[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).

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 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]

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[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.

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.

<u>Potential costs and benefits</u>. 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 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).~~