Sample G-21 – Change-in-Terms Sample (Increase in Fees) (§ 226.9(c)(2))

The Board is amending the model language in Sample G-21 disclosing a change in a late payment fee for consistency with the amendments to Samples G-10(B), G-10(C), G-17(B), and G-17(C).

Model Form G-25(A) – Consent Form for Over-the-Limit Transactions (§ 226.56)

Model Form G-25(B) – Revocation Notice for Periodic Statement Regarding Over-the-Limit Transactions (§ 226.56)

As noted above, § 226.56(e)(1)(i) provides that, in the notice informing consumers that they must affirmatively consent (or opt in) to the card issuer's payment of over-the-limit transactions, the card issuer must disclose the dollar amount of any fees or charges assessed by the issuer on a consumer's account for an over-the-limit transaction. Model language is provided in Model Forms G-25(A) and G-25(B). For consistency with § 226.52(b) and the amendments to Samples G-10(B), G-10(C), G-17(B), and G-17(C) discussed above, the Board is revising Model Forms G-25(A) and G-25(B) to disclose the amount of the over-the-limit fee as "up to $35."

V. Mandatory Compliance Dates

A. General mandatory compliance date. The consumer protections in new TILA Sections 148 and 149 go into effect on August 22, 2010. See new TILA Section 148(d); new TILA Section 149(b). Accordingly, the final rule is effective August 22, 2010. In addition, the mandatory compliance date for the amendments to §§ 226.9, 226.52, and 226.59 and the amendments to Model Forms G-20 and G-22 is August 22, 2010. The amendments to the change-in-terms disclosures in Model Forms G-18(F) and G-18(G) also have a mandatory compliance date of August 22, 2010. These amendments

implement the statutory requirements in new TILA Sections 148 and 149.

B. Prospective application of new rules. The final rule is prospective in application. The following paragraphs set forth additional guidance and examples as to how a creditor must comply with the final rule by the relevant mandatory compliance date.

C. Special mandatory compliance date for amendments to penalty fee disclosures. The mandatory compliance date for the amendments to the penalty fee disclosures in §§ 226.5a, 226.6, 226.7, and 226.56 and in Model Forms G-10(B), G-10(C), G-10(E), G-17(B), G-17(C), G-18(B), G-18(D), G-18(F), G-18(G), G-21, G-25(A), and G-25(B) is December 1, 2010. Although card issuers may not charge late payment fees, returned payment fees, or over-the-limit fees that are inconsistent with § 226.52(b) after August 22, 2010, the Board understands that it may not be possible for some card issuers to revise the disclosures for such fees prior to August 22. Accordingly, the Board has established a mandatory compliance date of December 1, 2010 for the amendments to the penalty fee disclosure requirements.

Until December 1, 2010, a card issuer complies with §§ 226.5a, 226.6, 226.7, and 226.56 if it discloses an amount for a late payment fee, returned payment fee, over-the-limit fee, or other penalty fee that exceeds the amount permitted by § 226.52(b). For example, a card issuer that imposed a late payment fee of $39 prior to August 22, 2010 may continue to disclose the amount of its late payment fee as $39 until December 1, 2010, even if – consistent with the safe harbors in § 226.52(b)(1)(ii) – the card issuer does not actually impose a fee that exceeds $35. However, the card issuer may begin to disclose the amount of the late payment fee as "up to $35" or otherwise comply with the

amendments to §§ 226.5a, 226.6, 226.7, and 226.56 prior to December 1, 2010. Additional guidance and examples as to how a creditor must comply with the final rule are provided below.

The Board recognizes that, for a period of time, some consumers may receive disclosures containing fee amounts that are inconsistent with § 226.52(b). However, a consumer who is told, for example, that a $39 penalty fee will be imposed for late payments will not be harmed if – when he or she pays late – a lower penalty fee is imposed.

D. Tabular summaries that accompany applications or solicitations (§ 226.5a). Credit and charge card applications provided or made available to consumers on or after December 1, 2010 must comply with the final rule. For example, if a direct-mail application or solicitation is mailed to a consumer on November 30, 2010, it is not required to comply with the new requirements, even if the consumer does not receive it until December 7, 2010. If a direct-mail application or solicitation is mailed to consumers on or after December 1, 2010, however, it must comply with the final rule. If a card issuer makes an application or solicitation available to the general public, such as "take-one" applications, any new applications or solicitations issued by the card issuer on or after December 1, 2010 must comply with the new rule. However, if a card issuer issues an application or solicitation by making it available to the public prior to December 1, 2010, for example by restocking an in-store display of "take-one" applications on November 15, 2010, those applications need not comply with the new rule, even if a consumer may pick up one of the applications from the display on or after

December 1, 2010. Any "take-one" applications that the card issuer uses to restock the display on or after December 1, 2010, however, must comply with the final rule.

E. Account-opening disclosures (§ 226.6). Account-opening disclosures furnished on or after December 1, 2010 must comply with the final rule. The relevant date for purposes of this requirement is the date on which the disclosures are furnished, not when the consumer applies for the account. For example, if a consumer applies for an account on November 30, 2010, but the account-opening disclosures are not mailed until December 2, 2010, those disclosures must comply with the final rule. In addition, if the disclosures are furnished by mail, the relevant date is the day on which the disclosures were sent, not the date on which the consumer receives the disclosures. Thus, if a creditor mails the account-opening disclosures on November 30, 2010, even if the consumer receives those disclosures on December 7, 2010, the disclosures are not required to comply with the final rule.

F. Periodic statements (§ 226.7). Periodic statements mailed or delivered on or after December 1, 2010 must comply with the final rule's revised penalty fee disclosures. For example, if a card issuer mails a periodic statement to the consumer on November 30, 2010, that statement is not required to comply with the final rule's revised penalty fee disclosures, even if the consumer does not receive the statement until December 7, 2010. However, as discussed below, if the periodic statement contains a notice of a rate increase, the requirements of § 226.9(c)(2)(iv)(A)(8) and (g)(3)(i)(A)(6) of the final rule apply to that notice if the periodic statement is mailed on or after August 22, 2010.

G. Subsequent disclosure requirements (§ 226.9).

Notice of rate increases (§ 226.9(c) and (g)). Sections § 226.9(c)(2)(iv)(A)(8) and (g)(3)(i)(A)(6) of the final rule require that notices disclosing rate increases for credit card accounts under an open-end (not home-secured) consumer credit plan state no more than four principal reasons for the increase. The requirements of § 226.9(c)(2)(iv)(A)(8) and (g)(3)(i)(A)(6) apply to notices of rate increases mailed or delivered on or after August 22, 2010.

Changes necessary to comply with final rule (§ 226.9(c)). The Board understands that, in order to comply with §§ 226.52(b) and 226.59 by August 22, 2010, card issuers may have to make changes to the account terms set forth in a consumer's credit card agreement or similar legal documents. Card issuers should notify consumers of such changes as soon as reasonably practicable. However, the Board understands that, given the amount of time between issuance of this final rule and the statutory effective date, it may not be possible for some card issuers to comply with the provision in § 226.9(c)(2) stating that any required notice must be provided 45 days in advance of a change that is effective August 22. In these circumstances, the card issuer must comply with the applicable substantive provisions set forth in §§ 226.52(b) and 226.59 on August 22, even if the terms of the account have not been amended consistent with § 226.9(c)(2). Otherwise, the notice requirements in § 226.9(c)(2) could permit card issuers to continue to engage in practices that are inconsistent with §§ 226.52(b) and 226.59 after August 22, which would not be consistent with Congress' intent.

For example, in order to comply with § 226.52(b), card issuers may have to change the terms governing the imposition of fees for violating those terms or other

requirements of the account. If the change involves a reduction in the amount of the fee, § 226.9(c)(2)(v)(A) provides that no notice is required under § 226.9(c) (although, as discussed below, notice may be required under § 226.9(e)). However, if a change does not involve a reduction in a fee and a card issuer provides a notice of the change on July 10, 2010, § 226.9(c)(2) technically prohibits the issuer from applying those changes to the account until August 24, 2010. In these circumstances, notwithstanding the 45-day notice requirement in § 226.9(c)(2), the card issuer cannot impose a penalty fee that is inconsistent with § 226.52(b) on or after August 22, 2010.

For these reasons, if § 226.9(c)(2) requires a card issuer to provide notice of a change that is necessary to comply with this final rule, the card issuer is not required to provide that notice 45 days before the effective date of the change. Furthermore, because it would not be appropriate to permit consumers to reject a change that is necessary to comply with this final rule, card issuers are not required to provide consumers with the right to reject pursuant to § 226.9(h) in these circumstances. Additional guidance regarding changes necessary to comply with § 226.52(b) is provided below.

Renewal notices (§ 226.9(e)). As amended by the February 2010 Regulation Z Rule, § 226.9(e), in part, requires card issuers to provide a notice at least 30 days prior to renewal of a credit or charge card if the card issuer has changed or amended any term of a cardholder's account required to be disclosed under § 226.6(b)(1) and (b)(2) that has not previously been disclosed to the cardholder. The Board is aware that as creditors implement changes to their systems and pricing structures to comply with §§ 226.52(b) and 226.59, they may make changes to terms required to be disclosed under § 226.6(b)(1) and (b)(2) for which advance notice is not required under § 226.9(c)(2) or (g). For

example, a creditor may decrease its penalty fees to comply with § 226.52(b) or may change its contractual provisions regarding penalty pricing in order to facilitate compliance with § 226.59. To the extent that these changes result in the reduction of finance or other charges, § 226.9(c)(2)(v)(A) provides that advance notice is not required. However, such changes may give rise to the requirement to provide disclosures under § 226.9(e) prior to the scheduled renewal of the card.

The Board understands that an issuer's credit or charge card accounts may renew on a rolling basis, and that, given the short compliance period for this final rule, providing the notice under § 226.9(e) 30 days in advance of renewal may pose significant operational issues for issuers that are making changes to comply or facilitate compliance with new §§ 226.52(b) or 226.59. Accordingly, for a brief transition period after the effective date of this final rule, a card issuer that makes changes to terms required to be disclosed under § 226.6(b)(1) and (b)(2) that are not otherwise required to be disclosed in advance under § 226.9(c) or (g) in order to comply or facilitate compliance with 226.52(b) or 226.59 may provide the notice under § 226.9(e) as soon as reasonably practicable after such changes become effective. The Board understands that in some cases this will mean that a consumer will receive the notice required under § 226.9(e) less than 30 days before, or even shortly after, the renewal of the account.

This transition guidance is intended to apply only in those circumstances where the renewal notice is required because of changes to terms required to be disclosed under § 226.6(b)(1) or (b)(2) that have not previously been disclosed to the consumer. If the card issuer imposes an annual or other periodic fee for renewal, § 226.9(e) requires that the renewal notice be mailed or delivered at least 30 days or one billing cycle, whichever

is less, before the mailing or delivery of the periodic statement on which any renewal fee is initially charged to the account.

The Board understands that some card issuers may both (1) impose an annual or other periodic fee for renewal and (2) make changes to terms required to be disclosed under § 226.6(b)(1) or (b)(2), in order to comply or facilitate compliance with §§ 226.52(b) or 226.59, that have not previously been disclosed to the consumer. In these circumstances, the notice required by § 226.9(e) must be mailed or delivered at least 30 days or one billing cycle, whichever is less, before the mailing or delivery of the periodic statement on which any renewal fee is initially charged to the account. The Board understands that, for a brief transition period, it may be operationally difficult or impossible for issuers to disclose changes to terms that were made to comply or facilitate compliance with §§ 226.52(b) or 226.59 in such a § 226.9(e) notice. In these circumstances, a card issuer may disclose the changes made to comply with or facilitate compliance with §§ 226.52(b) or 226.59 in the next § 226.9(e) notice that it provides for a subsequent renewal of the account.

H. Limitations on credit card penalty fees (§ 226.52(b)).

Generally. The effective date for new TILA Section 149 is August 22, 2010. Accordingly, card issuers must comply with § 226.52(b) beginning on August 22, 2010. However, unlike new TILA Section 148 (which expressly applies to rate increases that occurred prior to its statutory effective date), nothing in new TILA Section 149 indicates that Congress intended the "reasonable and proportional" standard to apply retroactively. Accordingly, § 226.52(b) does not apply to fees imposed prior to August 22, 2010.

Furthermore, the Board notes that this final rule should not be construed as suggesting that penalty fees imposed prior to August 22, 2010 were unreasonable.

Fees based on costs (§ 226.52(b)(1)(i)). A card issuer that begins imposing penalty fees pursuant to § 226.52(b)(1)(i) on August 22, 2010 must have previously determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation.

Safe harbors (§ 226.52(b)(1)(ii)). The Board understands that some card issuers will not be able to perform the cost analysis required by § 226.52(b)(1)(i) prior to August 22, 2010 and will therefore be required to comply with the safe harbors in § 226.52(b)(1)(ii) for a period of time. In these circumstances, the card issuer may impose penalty fees that are consistent with the safe harbors in § 226.52(b)(1)(ii) beginning on August 22, 2010, even if corresponding amendments to the terms of the account have not yet been made consistent with the advance notice requirements in § 226.9(c)(2) (as applicable). Furthermore, because it would not be appropriate to permit consumers to reject changes to account terms that are consistent with the safe harbors in § 226.52(b)(1)(ii), card issuers are not required to provide consumers with the right to reject pursuant to § 226.9(h) in these circumstances.

If a card issuer utilizes the safe harbors in § 226.52(b)(1)(ii), the first penalty fee imposed on or after August 22, 2010 generally must comply with the $25 safe harbor in § 226.52(b)(1)(ii)(A). For example, if the required minimum periodic payment due on August 25 is late, the amount of the late payment fee cannot exceed $25, even if the payment due on July 25 was also late. As discussed above, the safe harbors in § 226.52(b)(1)(ii)(A)-(B) are designed to balance the statutory factors of cost, deterrence,

and consumer conduct by limiting the fee for an initial violation to $25 while permitting an increased fee of $35 for additional violations of the same type during the next six billing cycles. Thus, it would be inconsistent with this purpose to permit a card issuer to impose a $35 penalty fee after August 22 based on a violation that occurred prior to August 22.

However, the safe harbor in § 226.52(b)(1)(ii)(C) is intended to permit charge card issuers to effectively manage seriously delinquent accounts. Thus, § 226.52(b)(1)(ii)(C) applies once the required payment for a charge card account has not been received for two or more consecutive billing cycles, even if the delinquency began prior to August 22, 2010. For example, assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. If the required payment due at the end of the July 2010 billing cycle has not been received by the end of the August 2010 billing cycle, § 226.52(b)(1)(ii)(C) permits the charge card issuer to impose a late payment fee that does not exceed 3% of the delinquent balance.

Closed account fees (§ 226.52(b)(2)(i)(B)(3)). Section 226.52(b)(2)(i)(B)(3) prohibits a card issuer from imposing a fee based on the closure or termination of an account. Comment 226.52(b)(2)(i)-6 clarifies that § 226.52(b)(2)(i)(B)(3) does not prohibit a card issuer from continuing to impose a periodic fee that was imposed before the account was closed or terminated. Similarly, to the extent that a permissible periodic fee was charged on a closed account prior to August 22, 2010, § 226.52(b)(2)(i)(B)(3) does not prohibit a card issuer from continuing to impose that fee with respect to that

account after August 22 (although the card issuer is not permitted to increase the amount of the fee).

The Board notes that, effective February 22, 2010, § 226.55(d)(1) prohibited card issuers from imposing a periodic fee based solely on the balance on a closed account (such as a closed account fee) if that fee was not charged before the account was closed. See comment 55(d)-1. In other words, beginning on February 22, card issuers were no longer permitted to begin charging a periodic fee when an account with a balance was closed.

Accordingly, § 226.52(b)(2)(i)(B)(3) does not, for example, prohibit a card issuer that imposed a $10 monthly closed account fee on a specific account prior to August 22 from continuing to charge that $10 monthly fee after August 22. However, consistent with § 226.55(d)(1), the card issuer must have begin charging the $10 monthly fee to the account prior to February 22.

Multiple fees based on a single event or transaction (§ 226.52(b)(2)(ii)). Beginning on August 22, 2010, § 226.52(b)(2)(ii) prohibits card issuers from imposing more than one penalty fee based on a single event or transaction. However, § 226.52(b)(2)(ii) permits card issuers to comply with this prohibition by imposing no more than one penalty fee during a billing cycle. A card issuer that uses this method to comply with § 226.52(b)(2)(ii) is not required to determine whether multiple penalty fees were imposed during a billing cycle that begins prior to August 22, 2010.

I. Requirements for over-the-limit transactions (§ 226.56). Notices provided pursuant to § 226.56 on or after December 1, 2010 must comply with the final rule. For example, if a creditor mails an opt-in notice to a consumer on November 30, 2010,

that notice is not required to comply with the final rule, even if the consumer does not receive the notice until December 7, 2010. However, if a card issuer mails an opt-in notice to a consumer on December 1, that notice must comply with the final rule.

J. Reevaluation of rate increases (§ 226.59). Section 226.59 generally requires that rate increases be reviewed in accordance with that section no less frequently than once every six months. As discussed in comment 59(c)-3, the review of annual percentage rates increased on or after January 1, 2009 and prior to August 22, 2010 must be completed prior to February 22, 2011. For annual percentage rates increased on or after August 22, 2010, any review required by § 226.59 must be completed within six months of the effective date of the increase.

VI. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) requires an agency to perform an initial and final regulatory flexibility analysis on the impact a rule is expected to have on small entities.

The Board received no significant comments addressing the initial regulatory flexibility analysis. Therefore, based on its analysis and for the reasons stated below, the Board has concluded that this final rule will have a significant economic impact on a substantial number of small entities. Accordingly, the Board has prepared the following final regulatory flexibility analysis pursuant to section 604 of the RFA.

1. Statement of the need for, and objectives of, the final rule. The final rule implements new substantive requirements and updates to disclosure provisions in the Credit Card Act, which establishes fair and transparent practices relating to the extension