B. Evaluation of Consumer's Ability to Pay

General requirements. The Credit Card Act prohibits creditors from opening a new credit card account or increasing the credit limit for an existing credit card account unless the creditor considers the consumer's ability to make the required payments under the terms of the account. Because credit card accounts typically require consumers to make a minimum monthly payment that is a percentage of the total balance (plus, in some cases, accrued interest and fees), the proposed rule would require creditors to consider the consumer's ability to make the required minimum payments.

However, because a creditor will not know the exact amount of a consumer's minimum payments at the time it is evaluating the consumer's ability to make those payments, the proposal would require creditors to use a reasonable method for estimating a consumer's minimum payments and would provide a safe harbor that creditors could use to satisfy this requirement. For example, with respect to the opening of a new credit card account, the safe harbor would provide that it would be reasonable for a creditor to estimate minimum payments based on a consumer's utilization of the full credit line using the minimum payment formula employed by the creditor with respect to the credit card product for which the consumer is being considered.

The proposed rule would also clarify the types of factors creditors should review in considering a consumer's ability to make the required minimum payments. Specifically, an evaluation of a consumer's ability to pay must include a review of the consumer's income or assets as well as the consumer's current obligations, and a creditor must establish reasonable policies and procedures for considering that information. When considering a consumer's income or assets and current obligations, a creditor would be permitted to rely on information provided by the consumer or information in a consumer's credit report.

~~Specific requirements for underage consumers. Consistent with the Credit Card Act, the proposed rule prohibits a creditor from issuing a credit card to a consumer who has not attained the age of 21 unless the consumer has submitted a written application that meets certain requirements. Specifically, the application must include either: (1) the signature of a cosigner who has attained the age of 21, who has the means to repay debts incurred by the underage consumer in connection with the account, and who assumes joint liability for such debts; or (2) information indicating that the underage consumer has the ability to make the required payments for the account.~~

~~C. Marketing to Students~~

~~Prohibited inducements. The Credit Card Act limits a creditor's ability to offer a student at an institution of higher education any tangible item to induce the student to apply for or open an open-end consumer credit plan offered by the creditor. Specifically, the Credit Card Act prohibits such offers: (1) on the campus of an institution of higher education; (2) near the campus of an institution of higher education; or (3) at an event sponsored by or related to an institution of higher education.~~

~~The proposed commentary would provide guidance to assist creditors in complying with the rule. For example, the proposed commentary would clarify that "tangible item" means a physical item (such as a gift card, t-shirt, or magazine subscription) and does not include non-physical items (such as discounts, rewards points, or promotional credit terms). The proposed commentary would also clarify that a location that is within 1,000 feet of the border of the campus of an institution of higher~~

~~further clarified the meaning of "deferred or waived interest period."[18] 74 FR 20800. Similar to guidance adopted in the January 2009 Regulation Z Rule for advertisements of promotional rates under § 226.16(g), the Board proposed comment 16(h)-3 to further clarify the meaning of "immediate proximity," comment 16(h)-4 to further clarify the meaning of "prominent location closely proximate," and comment 16(h)-5 to further clarify the meaning of "first listing." 74 FR 20800. The Board also proposed comment 16(h)-6 to clarify that the information required under proposed § 226.16(h)(4) need not be segregated from other information the advertisement discloses about the deferred interest or similar offer. 74 FR 20800. Finally, proposed comment 16(h)-7 provided examples of phrases that could be used to comply with proposed 226.16(h)(3). 74 FR 20801.~~

Section 226.51 Ability to Pay

51(a) General Ability to Pay

Section 109 of the Credit Card Act adds new TILA Section 150 prohibiting a card issuer from opening a credit card account for a consumer, or increasing the credit limit applicable to a credit card account, unless the card issuer considers the consumer's ability to make the required payments under the terms of such account. 15 U.S.C. 1665e. The Board proposes to implement TILA Section 150 in § 226.51(a).

Proposed § 226.51(a)(1) generally follows the language provided in TILA Section 150 with two modifications. First, because the minimum payment is the amount that a consumer is required to pay each billing cycle under the terms of the contract with the

[18] While the May 2009 Regulation Z Proposed Clarifications referred to a "deferred or waived interest" offer, this proposal refers to such promotional programs more generally as deferred interest or similar offers.

card issuer, the Board proposes to interpret the term "required payments" to mean the required minimum periodic payment.

Second, the Board believes an evaluation of a consumer's current ability to pay must include a review of the consumer's income or assets as well as the consumer's current obligations. Therefore, proposed § 226.51(a)(1) would provide that the card issuer's consideration of the ability of the consumer to make the required minimum periodic payments must be based on the consumer's income or assets and the consumer's current obligations. Proposed § 226.51(a)(1) would also require that card issuers have reasonable policies and procedures in place to consider this information. A card issuer has not complied with this provision if, for example, a card issuer does not review any information about a consumer's income, assets, or current obligations, or issues a credit card to a consumer who does not have any income or assets. In addition, the Board believes that other factors may be useful for card issuers to evaluate a consumer's ability to pay. Accordingly, proposed comment 51(a)-1 would clarify that card issuers may also consider credit reports or credit scores, and any other factors that are consistent with the Board's Regulation B (12 CFR Part 202).

Because the minimum payments a consumer is required to pay each billing cycle may vary depending on the amount of the balance as well as the finance and other charges a consumer incurs during the billing cycle, card issuers would be required to estimate the minimum payments a consumer might be obligated to pay before the account is opened or the credit line is increased. Proposed § 226.51(a)(2)(i) would require card issuers to use a reasonable method for estimating the required minimum periodic payments, and proposed § 226.51(a)(2)(ii) would provide a safe harbor that card issuers could use to comply with this requirement. Specifically, the safe harbor requires the card issuer to assume utilization of the full credit line that the issuer is considering offering to the consumer from the first day of the billing cycle. The safe harbor also requires the issuer to use a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account. For example, in evaluating an application to open a new account, if the minimum payment formula used by the card issuer for the product is 2% of the outstanding balance, the estimated required minimum periodic payment for a $10,000 credit line would be $200 under the safe harbor.

However, if the applicable minimum payment formula includes interest charges, the safe harbor requires the card issuer to estimate those charges using an interest rate that the issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases. For example, if the minimum payment formula that applies to an existing consumer's account is 3% plus interest and fees, the current purchase rate for the account is 10%, and the card issuer is considering increasing the consumer's credit line to $10,000, the estimated required minimum periodic payment would be approximately $380 under the safe harbor. Finally, if the applicable minimum payment formula includes fees, the card issuer may assume that no fees have been charged to the account.

In developing the proposed safe harbor, the Board considered a number of different approaches. The Board recognizes that consumers generally do not use the full credit line, and consequently, the Board's proposed safe harbor approach could have the effect of overstating the consumer's likely required payments. The Board, however, believes that since card issuers are qualifying consumers for a certain credit line, of which consumers presumably have full use, card issuers should be expected to underwrite based on required payments on the full amount under the safe harbor. Furthermore, although estimating a consumer's required minimum periodic payments may be more accurate with the addition of some estimated fees when using a minimum payment formula that includes the interest and fees, the Board believes that estimating the amount of fees that a typical consumer might incur could be speculative. As a result the Board's proposed safe harbor does not require issuers to estimate fees. The Board seeks comment on other reasonable methods that card issuers may use in estimating minimum payments.

Proposed comment 51(a)-2 would clarify that in considering a consumer's ability to pay, a card issuer must base the consideration on facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account. This guidance is similar to comment 34(a)(4)-5 addressing a creditor's requirement to consider a consumer's repayment ability for certain closed-end mortgage loans based on facts and circumstances known to the creditor at loan consummation. Furthermore, since credit line increases can occur at the request of a consumer or through a unilateral decision by the card issuer, proposed comment 51(a)-3 would clarify that § 226.51(a) applies in both situations.

Proposed comment 51(a)-4 would provide examples of assets and income the card issuer may consider in evaluating a consumer's ability to pay. The comment would provide similar guidance to comment 34(a)(4)-6 regarding the requirement for creditors to consider a consumer's repayment ability with respect to certain closed-end mortgage loans. The Board also proposes comment 51(a)-5 to clarify that in considering a consumer's current obligations, a card issuer may rely on information provided by the consumer or in a consumer's credit report.

Finally, for several reasons, the proposal does not require that card issuers verify information before the account is opened or the credit line is increased. First, TILA Section 150 does not require verification of a consumer's ability to make required payments. Second, verification can be burdensome for both consumers and card issuers, especially when accounts are opened at point of sale or by telephone. For example, because consumers generally do not have documentation readily available to verify their income, assets, or obligations at point of sale, a verification requirement would restrict consumers' ability to open a new credit card account at point of sale. As a result, the Board believes that card issuers need flexibility to determine instances when they need to verify information. Furthermore, since these accounts are generally unsecured, the Board believes that card issuers have reasons to verify the information when either the information supplied by the applicant is inconsistent with the data the card issuers already have or are able to gather on the consumer or when the risk in the amount of the credit line warrants such verification. While the Board has required creditors to verify information before credit is extended for certain mortgage loans, the Board's decision with respect to such loans was based on evidence that borrower income was inflated for these types of mortgage loans and that lending decisions based on overstated incomes contributed to the recent substantial increase in mortgage delinquencies. In contrast, the Board does not have evidence that this is the case in the credit card market. As a result, the Board believes a verification requirement before a credit card account is opened or credit line increased would not be necessary and could burden consumers. The Board, however, seeks comment on whether there is evidence that warrants a requirement to verify information before a credit card account is opened or a credit line is increased.

~~**51(b) Rules Affecting Young Consumers**~~

~~Currently, card issuers may grant credit to young consumers on the assumption that a parent or guardian of the consumer will pay the debt, even if the issuer does not obtain the express agreement of such parent or guardian to assume liability. Sections 301 and 303 of the Credit Card Act are meant to address this situation. Under new Section 127(c)(8)(A) of TILA, as adopted by Section 301 of the Credit Card Act, no credit card may be issued to, or open-end consumer credit plan established by, or on behalf of a consumer, who has not attained the age of 21 unless the consumer has submitted a written application to the card issuer that meets certain requirements. 15 U.S.C. 1637(c)(8)(A). New TILA Section 127(c)(8)(B) further provides that an application to open a credit card account by a consumer who has not attained the age of 21 as of the date of submission of the application shall require either: (1) the signature of a cosigner who has attained the age of 21 having a means to repay debts incurred by the consumer in connection with the account, indicating joint liability for debts incurred by the consumer in connection with the account before the consumer has attained the age of 21; or (2) the submission by the consumer of financial information, including through an application, indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account. 15 U.S.C. 1637(c)(8)(B).~~

~~(5) Envelope excluded. The requirements in paragraph (h)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.~~

~~18. Section 226.30 is revised to read as follows:~~

~~**§ 226.30 Limitation on rates**~~.

~~A creditor shall include in any consumer credit contract secured by a dwelling and subject to the act and this regulation the maximum interest rate that may be imposed during the term of the obligation~~[50] ~~when:~~

~~(a) In the case of closed-end credit, the annual percentage rate may increase after consummation, or~~

~~(b) In the case of open-end credit, the annual percentage rate may increase during the plan.~~

~~* * * * *~~

~~19. A new subpart G consisting of §§ 226.51, 226.52, 226.53, 226.54, 226.55, 226.56, 226.57, and 226.58 is added to read as follows:~~

SUBPART G – SPECIAL RULES APPLICABLE TO CREDIT CARD ACCOUNTS AND OPEN-END CREDIT OFFERED TO COLLEGE STUDENTS

§ 226.51 Ability to Pay

(a) General rule. (1) Consideration of ability to pay. A card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required minimum periodic

[50] [Reserved.]

payments under the terms of the account based on the consumer's income or assets and the consumer's current obligations. Card issuers must have reasonable policies and procedures in place to consider this information.

(2) Minimum payments. (i) Reasonable method. For purposes of paragraph (a)(1) of this section, a card issuer must use a reasonable method for estimating the minimum periodic payments the consumer would be required to pay under the terms of the account.

(ii) Safe harbor. A card issuer complies with paragraph (a)(2)(i) of this section if it estimates required minimum periodic payments using the following method:

(A) The card issuer assumes utilization of the full credit line that the issuer is considering offering to the consumer from the first day of the billing cycle; and

(B) The card issuer uses a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account, provided that:

(1) If the applicable minimum payment formula includes interest charges, the card issuer estimates those charges using an interest rate that the issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases; and

(2) If the applicable minimum payment formula includes fees, the card issuer may assume that no fees have been charged to the account.

~~D. The maximum interest rate will not exceed X%, or the state usury ceiling, whichever is less.~~

~~ii. The following statements would not comply with this section:~~

~~A. The interest rate will never be higher than X percentage points over the prevailing market rate.~~

~~B. The interest rate will never be higher than X percentage points above [a rate to be determined at some future point in time].~~

~~C. The interest rate will not exceed the state usury ceiling which is currently X%.~~

~~iii. A creditor may state the maximum rate in terms of a maximum annual percentage rate that may be imposed. Under an open-end credit plan, this normally would be the corresponding annual percentage rate. (See generally § 226.6(a)(1)(ii) and (b)(4)(i)(A).)~~

* * * * *

SUBPART G – SPECIAL RULES APPLICABLE TO CREDIT CARD ACCOUNTS AND OPEN-END CREDIT OFFERED TO COLLEGE STUDENTS

<u>Section 226.51—Ability to pay</u>

<u>51(a) General rule.</u>

1. <u>Consideration of additional factors.</u> Section 226.51(a) requires a card issuer to consider a consumer's ability to make the required minimum periodic payments under the terms of an account based on the consumer's income or assets and the consumer's current obligations. The card issuer may also consider credit reports, credit scores, and other factors, consistent with Regulation B (12 CFR part 202).

2. Ability to pay as of application or consideration of increase. A card issuer complies with § 226.51(a) if it bases its determination regarding a consumer's ability to make the required minimum periodic payments on the facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account.

3. Credit line increase. When a card issuer considers increasing the credit line on an existing account, § 226.51(a) applies when the consideration is based upon a request of the consumer or is initiated by the card issuer.

4. Income, assets, and employment. Any current or reasonably expected assets or income may be considered by the card issuer. For example, a card issuer may use information about current or expected salary, wages, bonus pay, tips and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income could include interest or dividends, retirement benefits, public assistance, alimony, child support, or separate maintenance payments. A card issuer may also take into account assets such as savings accounts or investments that the consumer can or will be able to use.

5. Current obligations. A card issuer may consider the consumer's current obligations based on information provided by the consumer or in a consumer report.

~~51(b) Rules affecting young consumers.~~

~~1. Age as of date of application or consideration of credit line increase. Sections 226.51(b)(1) and (b)(2) apply only to a consumer who has not attained the age of 21 as of the date of submission of the application under § 226.51(b)(1) or the date the credit line~~