~~education (as defined by the institution) is considered near the campus of that institution. Finally, consistent with guidance recently adopted by the Board with respect to certain private education loans, the proposed commentary would state that an event is related to an institution of higher education if the marketing of such event uses words, pictures, or symbols identified with the institution in a way that implies that the institution endorses or otherwise sponsors the event.~~

~~Disclosure and reporting requirements. The proposed rule would also implement the provisions of the Credit Card Act requiring institutions of higher education to publicly disclose agreements with credit card issuers regarding the marketing of credit cards. The proposal would state that an institution may comply with this requirement by, for example, posting the agreement on its Web site or by making the agreement available upon request.~~

D. Fees or Charges for Transactions That Exceed the Credit Limit

Consumer consent requirement. Consistent with the Credit Card Act, the proposed rule would require that a creditor obtain a consumer's express consent (or opt-in) before imposing any fees on a consumer's credit card account for making an extension of credit that exceeds the account's credit limit. Prior to obtaining this consent, the creditor must disclose, among other things, the dollar amount of any fees or charges that will be assessed for an over-the-limit transaction as well as any increased rate that may apply if the consumer exceeds the credit limit. In addition, if the consumer consents, the creditor is also required to provide a notice of the consumer's right to revoke that consent on any periodic statement that reflects the imposition of an over-the-limit fee or charge.

The proposed rule would apply these requirements to all consumers (including existing account holders) if the creditor imposes a fee or charge for paying an over-the-limit transaction. Thus, after the February 22, 2010 effective date, creditors would be prohibited from assessing any over-the-limit fees or charges on an account until the consumer consents to the payment of transactions that exceed the credit limit.

Prohibited practices. Even if the consumer has affirmatively consented to the creditor's payment of over-the-limit transactions, the Credit Card Act prohibits certain practices in connection with the assessment of over-the-limit fees or charges. Consistent with these statutory prohibitions, the proposed rule would prohibit a creditor from imposing more than one over-the-limit fee or charge per billing cycle. In addition, a creditor could not impose an over-the-limit fee or charge on the account for the same over-the-limit transaction in more than three billing cycles.

The Credit Card Act also 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. Pursuant to this authority, the proposed rule would prohibit a creditor 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. The proposed rule would also prohibit creditors from conditioning the amount of available credit on the consumer's consent to the payment of over-the-limit transactions. Finally, the proposed rule would 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 fees or charges (including accrued interest charges) on the consumer's account.

~~The Board understands from comments on the May 2009 proposal that drawing this 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 that proposal, 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. Nevertheless, the Board again solicits comment on the extent to which proposed § 226.55(d)(2) would affect card issuers' ability to make offers to their own cardholders.~~

**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.[35] In addition, the over-the-limit transaction may also be considered a default under the terms of the credit card agreement

[35] 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.

and trigger a rate increase, in some cases up to the default, or penalty, rate on the account.[36]

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 proposing to implement the over-the-limit consumer consent requirements in § 226.56.

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

**56(a) Definition**

Proposed § 226.56(a) defines "over-the-limit transaction" to mean any extension of credit by a creditor to complete a transaction that causes a consumer's credit card

[36] See id. at 25.

account balance to exceed the consumer's credit limit. The proposed 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 creditor that may cause the consumer to exceed the credit limit. See, however, proposed § 226.56(j)(4), discussed below.

**56(b) Opt-In Requirement**

General rule. Proposed § 226.56(b)(1) sets 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.

Under the proposed rule, the creditor may provide the opt-in notice orally, electronically, or in writing. Compliance with the consumer consent provisions or other requirements necessary to provide consumer disclosures electronically pursuant to the E-Sign Act would not be required if the creditor elects to provide the opt-in notice electronically. See also proposed § 226.5(a)(1)(ii)(A). However, as discussed below under proposed § 226.56(d)(1)(ii), before the consumer may consent orally or electronically, the creditor must also have provided the opt-in notice immediately prior to and contemporaneously with 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 proposed § 226.56(d)(2), discussed below.

The proposed notice and opt-in requirements would apply only to credit card accounts under an open-end (not home-secured) consumer credit plan, and would therefore 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 proposed § 226.2(a)(15)(ii). Although creditors must obtain consumer consent before any over-the-limit fees or charges are assessed on a consumer's account, the rule would not require that the creditor 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. Proposed comment 56(b)-1 also explains, however, that even if a consumer has affirmatively consented or opted in to a creditor's over-the-limit service, the creditor is not required or obligated to pay or authorize any over-the-limit transactions.

Proposed comment 56(b)-2 clarifies that a creditor that has a policy and practice of declining to pay or authorize 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. As discussed below in proposed § 226.56(b)(2), however, that if an over-the-limit transaction is paid without the consumer providing affirmative consent, the institution would not be permitted to charge a fee for paying the transaction.

Proposed comment 56(b)-3 provides 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, the proposal would require creditors to obtain consumer consent for all credit card accounts, including those opened prior to the effective date of the rule, before the creditor could assess any fees or charges on a consumer's account for paying over-the-limit transactions.

Reasonable opportunity to opt in. Proposed § 226.56(b)(1)(ii) requires 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 completed orally, electronically, or in writing, pursuant to regulations prescribed by the Board. See also proposed § 226.56(e), discussed below. Proposed comment 56(b)-4 contains examples to illustrate what would constitute providing a consumer a reasonable opportunity to affirmatively consent using the specified methods.

The first example provides that a creditor 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 proposed comment 56(b)-4.i. Alternatively, after the consumer has been approved for the card, the creditor could provide a form with the account-opening disclosures that can be filled out separately and mailed to affirmatively request the service. See proposed comment 56(b)-4.ii and proposed Model Form G-25(A) in Appendix G, discussed below.

Proposed comment 56(b)-4.iii illustrates that a creditor may obtain consumer consent through a readily available telephone line. Proposed comment 56(b)-4.iv illustrates that a creditor may provide an electronic means for the consumer to affirmatively consent. For example, a creditor 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 opt-in choice by clicking on a consent box. See also proposed § 226.56(d)(1)(ii) (requiring the opt-in notice to be provided immediately prior to and contemporaneous with the consumer's consent).

Comment is requested regarding whether creditors should be required to segregate the opt-in notice from other account disclosures. Such a requirement may 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 creditor.

Notwithstanding the manner in which notice of the opt-in right may be provided, proposed comment 56(b)-5 would clarify that the consumer's consent must be obtained separately from other consents or acknowledgments provided by the consumer. For example, a consumer's signature on an application for a credit card alone would not sufficiently evidence the consumer's consent to the creditor's payment of over-the-limit transactions. Under the proposal, the consumer must initial, sign, or otherwise make a separate request for the over-the-limit service. However, the proposed comment would not preclude a creditor from including a separate check box or signature line for requesting the over-the-limit service in the signature block on a credit application, provided that the check box or signature is used solely to indicate the consumer's opt-in decision and not for any other purpose, such as to also obtain consumer consents for other account services or features. Under Regulation Z's record retention rules, creditors would be required to retain evidence of the consumer's consent or opt-in for a period of at least two years, regardless of the means by which consent is obtained. See § 226.25.

The Board also solicits comment on whether creditors should be required to provide the consumer with written confirmation once the consumer has opted in under proposed § 226.56(b)(1)(iii) to verify that the consumer intended to make the election. In the case of telephone or in person requests in particular, written confirmation may be appropriate to evidence the consumer's intent to opt in to the service. A creditor could comply with such a requirement, for example, by sending a letter to the consumer acknowledging that the consumer has elected to opt in to the creditor's service, or, in the case of a mailed request, the creditor could provide a copy of the consumer's completed opt-in form.

Payment of over-the-limit transactions where consumer has not opted in. Proposed § 226.56(b)(2) provides 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 contains 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. 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. Proposed comment 56(b)(2)-1 contains illustrative examples of this provision.

For example, in some cases, a merchant may 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. 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.

Similarly, the proposed rule does not permit the creditor to 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, § 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.

Proposed comment 56(b)(2)-2 clarifies 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 creditor could also continue to assess interest charges for the over-the-limit transaction.[37]

**56(c) Method of Election**

TILA Section 127(k)(2) provides that a consumer may make or revoke consent to permit 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. Proposed § 226.56(c) implements this requirement. Proposed comment 56(c)-1 clarifies that the creditor may determine the means by which consumers may provide affirmative consent. The creditor could decide, for example, whether to obtain consumer consents in writing, electronically, by telephone, or to offer some or all of these options. The proposed rule recognizes that creditors have a strong interest in facilitating a consumer's ability to opt in, and thus would permit them to determine the most effective means in obtaining such consent.

Notwithstanding the creditor's choice(s), however, proposed § 226.56(c) requires that whatever method a creditor provides for obtaining consent, such method must be equally available to the consumer to revoke the prior consent. See TILA Section 127(k)(3). Proposed comment 56(c)-2 provides guidance that because consumer consent or revocation requests are not consumer disclosures for purposes of the E-Sign Act,

[37] The proposed 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.

creditors 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. Comment is requested whether the Board should require creditors to allow consumers to opt in and to revoke that consent using each of the three methods (that is, orally, electronically, and in writing).

**56(d) Timing**

Proposed § 226.56(d)(1)(i) establishes 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. For example, a creditor could include the notice as part of the credit card application. See proposed comment 56(b)-4.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 proposed comment 56(b)-4.ii.

The proposed rule would require that all consumers, including existing account holders, receive notice regarding the opt-in right if the creditor imposes a fee or charge for paying an over-the-limit transaction. The Board believes that had Congress intended to permit existing customers to continue to have over-the-limit transactions paid or authorized without their prior consent, it would have so specified. 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. As a result, the proposal would apply the over-the-limit consumer consent requirements to credit card accounts opened prior to February 22, 2010.

For credit card accounts opened prior to the effective date of the final rule, a creditor may elect to provide an opt-in notice to all of its account holders on or with the first periodic statement sent after the effective date of the final rule. Creditors that choose to do so would be prohibited from assessing any over-the-limit fees or charges after the effective date of the rule and prior to providing the opt-in notice, and subsequently could not assess any such fees or charges unless and until the consumer opts in.

Comment is requested regarding whether a creditor should be permitted to obtain consumer consent for the payment of over-the-limit transactions prior to the effective date of the final rule and, if so, under what circumstances. Such an approach could allow creditors to phase in their processing of consumer opt-ins and alleviate the compliance burden that may otherwise occur if notices could not be sent, and opt-ins obtained until February 22, 2010.

In addition to the general requirement that the creditor provide an opt-in notice prior to imposing any fee or charge for an over-the-limit transaction, proposed § 226.56(d)(1)(ii) states that if the consumer decides to consent orally or electronically, the opt-in notice must be given by the creditor immediately before and contemporaneously with a consumer's election. For example, if a consumer calls the creditor to consent to the creditor's payment of over-the-limit transactions, the creditor must provide the opt-in notice immediately prior to obtaining the consumer's consent. This proposed requirement is intended to ensure that a consumer has full information regarding the opt-in right at a time that is most likely to be meaningful to the consumer, that is, when the opt-in decision is made.

Proposed § 226.56(d)(2) provides 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 to the consumer, the proposed rule requires that the notice appear on the front of any page of the periodic statement. Proposed comment 56(d)-1 clarifies that creditors have flexibility regarding how often a revocation notice must be provided. At the creditor's option, it may, but is 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.

**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) sets forth the content requirements for both notices. See also proposed Model Forms G-25(A) and G-25(B) in Appendix G.

Initial notice content. Proposed § 226.56(e)(1) sets forth the information that must be included in the opt-in notice provided to consumers before a creditor may assess any fees or charges for paying an over-the-limit transaction. To ensure that consumers can make an informed decision regarding whether and how to affirmatively consent to a creditor's payment of over-the-limit transactions, creditors would be required to provide in the opt-in notice certain information in addition to the amount of the over-the-limit fee. The additional information would be prescribed 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).

Proposed § 226.56(e)(1)(i) would require the opt-in notice to 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 proposed 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. See, e.g., § 226.5a(b)(10). Because a creditor 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 creditors may wish to 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, the creditor may disclose the maximum fee that may be imposed or a range of fees. Proposed comment 56(e)-1 provides that the creditor may indicate that the consumer may be assessed a fee "up to" the maximum fee or provide the range of fees. Comment is requested whether additional guidance is necessary if an over-the-limit fee is determined by other means, such as a percentage of the over-the-limit transaction.

In addition to disclosing the amount of the fee or charge that may be imposed for an over-the-limit transaction, proposed § 226.56(e)(1)(ii) would require creditors 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.

Proposed § 226.56(e)(1)(iii) requires creditors to explain the consumer's right to affirmatively consent to the creditor's payment of over-the-limit transactions, including the methods that the consumer may use to exercise the right to opt in.

In addition to providing the required content, some creditors may wish to include more information about the effects of opting in, including potential benefits. Proposed comment 56(e)-2 provides that creditors may briefly describe these benefits. For example, the creditor may state that if the consumer consents, or opts in, to the payment of over-the-limit transactions, the consumer may avoid having transactions declined if a transaction may exceed the credit limit. Creditors may also wish to disclose that over-the-limit transactions may be paid at the creditor's discretion or that the payment of over-the-limit transactions is not guaranteed. Comment is requested regarding whether the rule should permit or require any other information to be included in the opt-in notice.

The Board notes that permitting creditors to include additional content in the opt-in notice could lead to the potential consequence that the additional information may overwhelm the required content in the notice. Thus, comment is also requested regarding whether creditors should be permitted to include any information in the opt-in notice beyond the content specified in the rule.

Revocation notice. Proposed § 226.56(e)(2) would implement 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. The proposed rule states that the notice must describe the consumer's right to revoke any consent previously granted, including the methods by which the consumer may revoke the service. As discussed above, creditors may include this notice on every periodic statement after the consumer has opted in to the creditor's payment of over-the-limit transactions or only on statements that reflect the imposition of an over-the-limit fee. See proposed comment 56(d)-1.

Model forms. Proposed Model Forms G-25(A) and (B) include sample language that creditors may use to comply with the proposed notice content requirement. Use of the model forms, or substantially similar notices, would provide creditors a safe harbor for compliance under proposed § 226.56(e)(3).

**56(f)-(i) Additional Provisions Addressing Consumer Opt-in Right**

Joint accounts. Proposed § 226.56(f) requires 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. This provision recognizes the operational difficulties that would otherwise arise if a creditor had 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 creditor must treat the consent as applying to all over-the-limit transactions for that account. The proposed rule also provides that a creditor shall treat a revocation of consent by any of the joint consumers as revocation of consent for the joint account. Proposed § 226.56(f) applies only to consumer consent and revocation requests from consumers that are jointly liable on a credit card account. Accordingly, creditors would not be 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 creditor's over-the-limit transaction. Proposed comment 56(f)-1 provides this guidance.

Continuing right to opt in or revoke opt-in. Proposed § 226.56(g) provides 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. Similarly, a consumer may revoke a prior consent at any time in the manner described in the revocation notice provided under § 226.56(b)(1)(iv). See TILA Section 127(k)(4).

Proposed comment 56(g)-1 clarifies that a consumer's decision to revoke a prior consent would not require the creditor to waiver or reverse any over-the-limit fee or charges assessed to the consumer's account prior to the creditor's implementation of the consumer's revocation request. In addition, the proposed rule does not prevent the creditor from assessing over-the-limit fees in a subsequent cycle if the consumer's account balance continues to exceed the credit limit as a result of an over-the-limit transaction that was completed prior to the consumer's revocation of consent.

Duration of opt-in. Proposed § 226.56(h) provides that a consumer's affirmative consent is generally effective until revoked by the consumer. Proposed comment 56(h)-1 clarifies, however, that a creditor 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 creditor may wish to stop providing the service in response to changes in the credit risk presented by the consumer.

Time to implement consumer revocation. Proposed § 226.56(i) requires that a creditor must implement a consumer's revocation request as soon as reasonably practicable after the creditor receives the request. The proposed requirement recognizes 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 Board is not proposing to prescribe a specific period of time within which the creditor must honor the consumer's revocation request, however, 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 creditor's general address for receiving correspondence or to an address specifically designated to receive consumer opt-in and revocation requests). Comment is requested whether a safe harbor for implementing revocation requests, such as five business days from the date of the request, may be helpful to facilitate compliance with the proposed rule.

The Board also solicits comment on the merits of 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. Such a timing rule could be dependent upon the method of the consumer's request. 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. However, if a creditor typically implements written consent requests within three business days and telephone requests within one business day, the alternative approach would provide that the creditor could implement a written revocation request within three business days, even if the consumer had previously opted into the service by telephone.

**56(j) Prohibited Practices**

Proposed § 226.56(j) prohibits certain creditor 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 creditor'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. Proposed § 226.56(j)(1) implements these restrictions.

Proposed § 226.56(j)(1)(i) would prohibit a creditor from imposing more than one over-the-limit fee or charge on a consumer's credit card account in any billing cycle. In addition, a creditor must not impose 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. As a further limitation, however, fees may not be imposed for 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. Moreover, as discussed below, 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. See TILA Section 127(k)(5) and discussion below.

As discussed above, the proposed rule would give a consumer until the payment due date to reduce the account balance below the credit limit to avoid over-the-limit fees during the second and third billing cycles. Although new TILA Section 127(k)(7) could be construed as providing until the end of the billing cycle to make a payment that reduces the account balance below the credit limit, the Board believes that using the payment due date as the relevant date will facilitate compliance.

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 creditor sufficient time to reflect timely payments on the subsequent periodic statement and to determine the fees and interest charges for the statement period. If the rule were to give consumers until the end of the billing cycle to reduce the account balance below the credit limit, creditors 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.

Moreover, tying the time in which a consumer could make payment to reduce the account balance below the credit limit to the payment due date would cause minimal if any adverse harm to consumers. 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 proposing to exercise its TILA Section 105(a) authority to provide that a creditor 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.

To illustrate the proposed limitation, assume that a consumer has exceeded the credit limit and is assessed an over-the-limit fee on the January billing statement for a transaction in the December billing cycle. Under this circumstance, the creditor must not assess additional over-the-limit fees on the consumer's credit card account for the February or March billing statements for the same over-the-limit transaction unless the consumer has not make sufficient payment by the January or February payment due dates to reduce the account balance below the credit limit.

Proposed § 226.56(j)(1)(ii) provides 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. The assessment of fees or interest charges by the creditor would not constitute an additional over-the-limit transaction for purposes of this exception, consistent with the definition of "over-the-limit transaction" under proposed § 226.56(a). In addition, the proposed exception would not permit a creditor 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. Proposed comment 56(j)-1 contains examples illustrating the general rule and the exception.

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

Proposed § 226.56(j) includes additional substantive limitations and restrictions on certain creditor acts or practices regarding the imposition of over-the-limit fees. These proposed 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).[38] 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).

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[38] 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).

According to the FTC, an unfair act or practice will almost always represent a market failure or market imperfection that prevents the forces of supply and demand from maximizing benefits and minimizing costs.[39] 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.[40]

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.[41] 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.[42]

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.[43] In proposing rules under TILA Section 127(k)(5), the Board has considered the standards currently applied to the FTC Act's prohibition against

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[39] 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).

[40] Id. at 7743.

[41] 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).

[42] 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.

[43] 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).

unfair or deceptive acts or practices, as well as the standards applied to similar state statutes. These proposals should not, however, be construed as a definitive conclusion by the Board that a particular practice is unfair or deceptive.

**Insufficient Time to Reduce Excess Credit**

As discussed above, proposed § 226.56(j)(1) would generally prohibit a creditor from assessing an over-the-limit fee on a consumer's credit card account in a subsequent billing cycle unless the consumer has not reduced the account balance below the credit limit by the payment due date. This provision, which implements a statutory restriction set forth in TILA Section 127(k)(7), is intended to ensure that a consumer who has been assessed an over-the-limit fee or charge in one billing cycle does not incur a second over-the-limit fee or charge in the next billing cycle solely because the consumer has not made payment on or before the due date. For example, a creditor would be prohibited from assessing a second over-the-limit fee or charge on the first day of the next billing cycle before the consumer has had an opportunity to reduce the account balance. Assessing an over-the-limit fee in a subsequent billing cycle without providing the consumer sufficient time to reduce the account balance would also appear to be an unfair or deceptive act or practice.

**Legal Analysis**

Potential injury that is not reasonably avoidable. Consumers may incur substantial monetary injury due to the fees assessed in connection with the payment of over-the-limit transactions. In addition to costly 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. 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.[44] 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.[45]

Although consumers can reduce the risk of exceeding their credit limit by carefully tracking their credit card transactions and payments made, consumers often lack sufficient information about key aspects of their credit card accounts. For example, a consumer cannot know with any degree of certainty when a payment will be credited to his or her account and the credit limit replenished or when a credit for a returned purchase will be made available. Equally, given the lack of real-time information available to the authorization system, even the creditor's decision to authorize a transaction does not necessarily indicate at the time of the authorization that the creditor has knowingly authorized an over-the-limit transaction.[46]

Potential costs and benefits. There appears to be little if any direct benefit to consumers from receiving insufficient time to bring their account balances below their credit limit. While requiring creditors to wait an additional period of time before assessing over-the-limit fees or charges may reduce revenue for some institutions and those institutions may replace that revenue by charging consumers higher annual percentage rates or fees, it appears that consumers will benefit overall from having a

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[44] 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).

[45] See id. at 25.

[46] See Household Credit Servs. v. Pfennig, 541 U.S. 232, 244 (2004) (recognizing that a creditor's "authorization" of a point of sale transaction "does not represent a final determination that a particular transaction is within a consumer's credit limit because the authorization system is not suited to identify instantaneously and accurately over-limit transactions").

reasonable period of time in which to reduce their account balances below the credit limit and avoiding additional penalties such as the assessment of an over-the-limit fee or application of a rate increase.

**56(j)(2) Failure to Promptly Replenish**

Section 226.10 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. Proposed § 226.56(j)(2) would prohibit a creditor 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.

**Legal Analysis**

Potential injury that is not reasonably avoidable. In most cases, creditors 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 once the consumer has made payments on the account balance and the available credit is restored to the account. If, however, the creditor delays replenishment on the account after crediting the payment to the consumer's account, the consumer could inadvertently exceed the credit limit if the cardholder uses the credit card account for new transactions and such transactions are authorized by the creditor. In addition to the potential assessment of over-the-limit fees, the resulting over-the-limit transaction may also cause the consumer to trigger increased rates due to default on the credit agreement. In those circumstances, it appears that consumers cannot reasonably avoid the injury caused by the over-the-limit fee and rate increase because they will be unaware of the creditor's delay in restoring the consumer's credit line particularly if the payment has been credited to the consumer's account.

Potential costs and benefits. The prohibited practice would not appear to create benefits for consumers and competition that outweigh the injury. While a creditor may reasonably decide to delay replenishing a consumer's available credit, for example, in the case of potential fraud on the account, there does not appear to be any benefit to the consumer from permitting the creditor to assess over-the-limit fees that may be incurred as a result of the delay in replenishment.

**Proposal**

Proposed § 226.56(j)(2) prohibits a creditor from imposing any over-the-limit fee or charge solely because of the creditor's failure to promptly replenish the consumer's available credit after the creditor has credited the consumer's payment under § 226.10. Proposed comment 56(j)(2)-1 clarifies that the proposed prohibition is not intended to require creditors to immediately replenish the available credit upon crediting a consumer's payment, or to prevent creditors from delaying replenishment where appropriate, for example, in cases of suspected fraud. Nor does the proposed prohibition require creditors to decline all transactions for consumers who have opted in to the creditor's payment of over-the-limit transactions until the available credit has been restored. Rather, the creditor would only be 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. Comment is requested regarding whether the rule should provide a safe harbor specifying the number of days following crediting of a consumer's payment by which a creditor must replenish a consumer's available credit.

**56(j)(3) Conditioning**

Proposed § 226.56(j)(3) would 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. The proposed provision addresses 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.

**Legal Analysis**

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 creditor'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 would appear that such consumers would be prevented from exercising a meaningful choice regarding the creditor's payment of over-the-limit transactions. Moreover, the practice of conditioning the amount of credit provided based on whether the consumer opts in to the creditor's payment of over-the-limit transactions would also appear to raise significant concerns under the Equal Credit Opportunity Act. See 15 U.S.C. 1691(a)(3).

Potential costs and benefits. There do not appear to be any significant benefits to consumers or competition from conditioning or linking the amount of credit available to the consumer based on the consumer consenting to the creditor's payment of over-the-limit transactions. While some creditors may seek to replace the revenue from over-the-limit fees by charging consumers higher annual percentage rates or fees, overall, consumers will benefit from having a meaningful choice regarding whether to have over-the-limit transactions approved by the creditor.

**Proposal**

Proposed § 226.56(j)(3) is intended to prevent creditors from effectively circumventing the consumer choice requirement by prohibiting a creditor from conditioning or otherwise linking the amount of credit granted on the consumer opting in to the creditor's payment of over-the-limit transactions. Under the proposed rule, a creditor could not, for example, require a consumer to opt in to the creditor's fee-based over-the-limit service in order to receive a higher credit limit for the account. Similarly, a creditor would be prohibited from denying a consumer's credit card application solely because the consumer did not opt in to the creditor's over-the-limit service. The proposed rule is illustrated by way of example in proposed comment 56(j)-1.

**<u>56(j)(4) Over-the-Limit Fees Attributed to Fees or Interest</u>**

Proposed § 226.56(j)(4) would 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.

**<u>Legal Analysis</u>**

<u>Potential injury that is not reasonably avoidable</u>. 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 injury from over-the-limit fees and potential rate increases would not appear to be 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.

<u>Potential costs and benefits</u>. Although prohibition of the assessment of over-the-limit fees caused by accrued finance charges and fees may reduce creditor revenues and lead creditors to replace lost revenue by charging consumers higher rates or fees, it appears that the proposal 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.

**Proposal**

Proposed § 226.56(j)(4) would prohibit creditors 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 creditor to the consumer's account during the billing cycle. The proposed prohibition is generally intended to prohibit creditors from assessing over-the-limit fees or charges on consumer credit card accounts unless the credit limit was exceeded solely by transactions or charges that were not initiated by the consumer during the billing cycle.

For purposes of this prohibition, the fees or interest charges that may not trigger the imposition of an over-the-limit fee would be considered charges imposed as part of the plan under § 226.6(b)(3)(i). Thus, the proposed rule would also prohibit 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 would constitute charges imposed as part of the plan (for example, fees for voluntary debt cancellation or suspension coverage).

The proposed prohibition would not restrict creditors 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. Comment is requested regarding the operational issues that may arise from the proposed prohibition.

~~**Notice of Reduction of the Credit Limit**~~

~~In the July 2009 Regulation Z Interim Final Rule, the Board adopted a provision applicable to credit card accounts under an open-end (not home-secured) plan that addresses notices of changes in a consumer's credit limit. As set forth in the interim final rule, § 226.9(c)(2)(vi) requires a creditor to provide a consumer with 45 days' advance notice that a credit limit is being decreased or will be decreased prior to the imposition of any over-the-limit fee or penalty rate imposed solely as the result of the balance exceeding the newly decreased credit limit.[47] The new provision is intended to protect consumers against costly surprises potentially associated with a reduction in the credit limit, specifically, fees and rate increases, while giving a consumer adequate time to mitigate the effect of the credit line reduction. See 74 FR 36077.~~

~~Neither § 226.9(c)(2)(vi) nor the restrictions proposed pursuant to the Board's authority under TILA Section 127(k)(5) would limit a creditor's ability to use line reductions to address safety and soundness concerns when a borrower's risk increases. As stated in the July 2009 Regulation Z Interim Final Rule, the Board recognizes that creditors have a legitimate interest in mitigating the risk of a loss when a consumer's creditworthiness deteriorates and that it may be appropriate in some cases for creditors to reduce the credit limit as a risk mitigation tool.~~

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[47] ~~A substantively similar provision was adopted in the January 2009 Regulation Z Rule. See § 226.9(c)(2)(v).~~

~~(2) Repayment of protected balance. The card issuer must not require repayment of the protected balance using a method that is less beneficial to the consumer than one of the following methods:~~

~~(i) The method of repayment for the account before the effective date of the increase;~~

~~(ii) An amortization period of not less than five years, beginning no earlier than the effective date of the increase; or~~

~~(iii) A required minimum periodic payment that includes a percentage of the balance that is equal to no more than twice the percentage required before the effective date of the increase.~~

~~(d) Continuing application. This section continues to apply to a balance on a credit card account after:~~

~~(1) The account is closed or acquired by another creditor; or~~

~~(2) The balance is transferred from a credit card account issued by a creditor to another credit account issued by the same creditor or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 226.5b).~~

**§ 226.56 Requirements for over-the-limit transactions**

(a) Definition. For purposes of this section, the term “over-the-limit transaction” means any extension of credit by a creditor to complete a transaction that causes a consumer’s credit card account balance to exceed the credit limit.

(b) Opt-in requirement. (1) General. A creditor shall not assess a fee or charge on a consumer’s credit card account under an open-end (not home-secured) consumer credit plan for an over-the-limit transaction unless the creditor:

(i) Provides the consumer with an oral, written or electronic notice explaining the consumer's right to affirmatively consent, or opt in, to the creditor's payment of an over-the-limit transaction;

(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the creditor's payment of over-the-limit transactions;

(iii) Obtains the consumer's affirmative consent, or opt-in, to the creditor's payment of such transactions; and

(iv) If the consumer affirmatively consents, or opts in, provides the consumer notice of the right to revoke that consent following the assessment of an over-the-limit fee or charge.

(2) Completion of over-the-limit transactions without consumer consent. Notwithstanding the absence of a consumer's affirmative consent under paragraph (b)(1)(iii) of this section, a creditor may pay any over-the-limit transaction on a consumer's account provided that the creditor does not impose any fee or charge on the account for paying that over-the-limit transaction.

(c) Method of election. A creditor may permit a consumer to consent to the creditor's payment of any over-the-limit transaction in writing, orally, or electronically. The creditor must also permit the consumer to revoke his or her consent using the same methods available to the consumer for providing consent.

(d) Timing of notices. (1) Initial notice. (i) General. The notice required by paragraph (b)(1)(i) of this section shall be provided prior to the assessment of any over-the-limit fee or charge on a consumer's account;

(ii) Oral or written consent. If a consumer elects to consent to the creditor's payment of any over-the-limit transaction by oral or electronic means, the creditor must provide the notice required by paragraph (b)(1)(i) of this section immediately prior to and contemporaneously with obtaining that consent.

(2) Subsequent notice. The notice required by paragraph (b)(1)(iv) of this section shall be provided on the front of any page of each periodic statement that reflects the assessment of an over-the-limit fee or charge on a consumer's account.

(e) Content. (1) Initial notice. The notice required by paragraph (b)(1)(i) of this section shall include:

(i) Fees. The dollar amount of any fees or charges assessed by the creditor on a consumer's account for an over-the-limit transaction;

(ii) APRs. Any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of an over-the-limit transaction; and

(iii) Disclosure of opt-in right. An explanation of the consumer's right to affirmatively consent to the creditor's payment of over-the-limit transactions, including the method(s) by which the consumer may consent to the service.

(2) Subsequent notice. The notice required by paragraph (b)(1)(iv) of this section shall describe the consumer's right to revoke any consent provided under paragraph (b)(1)(iii) of this section, including the method(s) by which the consumer may revoke the service.

(3) Safe harbor. Use of Model Forms G-25(A) or G-25(B) of Appendix G to this part, or substantially similar notices, constitutes compliance with the notice content requirements of paragraph (e) of this section.

(f) Joint relationships. If two or more consumers are jointly liable on a credit card account under an open-end (not home-secured) consumer credit plan, the creditor shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account. Similarly, the creditor shall treat a revocation of consent by any of the joint consumers as revocation of consent for that account.

(g) Continuing right to opt in or revoke opt-in. A consumer may affirmatively consent to the creditor's payment of over-the-limit transactions at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section. Similarly, the consumer may revoke the consent at any time in the manner described in the notice required by paragraph (b)(1)(iv) of this section.

(h) Duration of opt-in. A consumer's affirmative consent to the creditor's payment of over-the-limit transactions is effective until revoked by the consumer, or until the creditor decides for any reason to cease paying over-the-limit transactions for the consumer.

(i) Time to comply with revocation request. A creditor must comply with a consumer's revocation request as soon as reasonably practicable after the creditor receives it.

(j) Prohibited practices. Notwithstanding a consumer's affirmative consent to a creditor's payment of over-the-limit transactions, a creditor is prohibited from engaging in the following practices:

(1) Fees or charges imposed per cycle.

(i) General rule. A creditor may not impose more than one over-the-limit fee or charge on a consumer's credit card account per billing cycle, and, except as provided in paragraph (j)(1)(ii) of this section, may not impose an over-the-limit fee or charge on the consumer's credit card account for more than three billing cycles for the same over-the-limit transaction where the consumer has not reduced the account balance below the credit limit by the payment due date for either of the last two billing cycles.

(ii) Exception. The prohibition in paragraph (j)(1)(i) of this section on imposing an over-the-limit fee or charge in more than three billing cycles for the same over-the-limit transaction(s) does not apply if an over-the-limit transaction occurs during either of the last two billing cycles.

(2) Failure to promptly replenish. A creditor may not impose an over-the-limit fee or charge solely because of creditor's failure to promptly replenish the consumer's available credit following the crediting of the consumer's payment under § 226.10.

(3) Conditioning. A creditor may not condition the amount of a consumer's credit limit on the consumer affirmatively consenting to the creditor's payment of over-the-limit transactions if the creditor assesses a fee or charge for such service.

(4) Over-the-limit fees attributed to fees or interest. A creditor may not impose an over-the-limit fee or charge if a consumer exceeds a credit limit solely because of fees or interest charged by the creditor to the consumer's account during the billing cycle. For purposes of this paragraph (j)(4), fees or interest charges that may not trigger an over-the-limit fee or charge are charges imposed as part of the plan under § 226.6(b)(3).

~~that balance to a credit card account with a purchase rate of 17% issued by creditor B, creditor B may apply the 17% rate to the $1,000 balance. However, creditor B may not subsequently increase the rate on that balance unless permitted by one of the exceptions in § 226.55(b).~~

<u>Section 226.56—Requirements for over-the-limit transactions</u>

<u>56(b) Opt-in requirement</u>.

1. <u>Policy and practice of declining over-the-limit transactions</u>. Section 226.56 does not apply to any creditor that has a policy and practice of declining to pay any over-the-limit transactions for the consumer's credit card account when the creditor has a reasonable belief that completing a transaction will cause the consumer to exceed the consumer's credit limit for that account. For example, if a creditor generally declines any transaction that may exceed a consumer's credit limit, it is not subject to the requirement to provide consumers notice and an opportunity to affirmatively consent to the creditor's payment of over-the-limit transactions.

2. <u>Over-the-limit transactions not required to be paid or authorized</u>. Section 226.56 does not require a creditor to pay or authorize an over-the-limit transaction even if the consumer has affirmatively consented to the creditor's over-the-limit service.

3. <u>Periodic fees or charges</u>. A creditor may not impose a periodic fee for paying over-the-limit transactions that is assessed whether or not the consumer has exceeded the credit limit during the billing cycle (for example, a monthly "over-the-limit protection" service fee) unless the consumer has affirmatively consented to or opted in to the service.

4. Examples of reasonable opportunity to provide affirmative consent. A creditor provides a reasonable opportunity for the consumer to affirmatively consent to the creditor's payment of over-the-limit transactions if –

i. On the application. The creditor provides the notice on the application form that the consumer can fill out to request the service as part of the application;

ii. By mail. The creditor provides a form with the account-opening disclosures or the periodic statement for the consumer to fill out and mail to affirmatively request the service;

iii. By telephone. The creditor provides a readily available telephone number that consumers may call to provide affirmative consent.

iv. By electronic means. The creditor provides an electronic means for the consumer to affirmatively consent. For example, a creditor could provide a form that can be accessed and processed at its Web site, where the consumer can check a box to opt in and confirm that opt-in choice by clicking on a consent box.

5. Separate consent required. A consumer's affirmative consent, or opt-in, to a creditor's payment of over-the-limit transactions must be separate from other consents or acknowledgments obtained by the creditor. For example, a consumer's signature on a credit application to request a credit card would not by itself sufficiently evidence the consumer's consent to the creditor's payment of over-the-limit transactions. However, a creditor may comply with the requirement to obtain separate consent if the creditor also includes a check box or signature line on the application that the consumer can initial or sign to request the over-the-limit service, provided that the box or line is used solely to

indicate the consumer's opt-in decision and not for any other purpose, such as to also obtain consumer consents for other account services or features.

56(b)(2) Completion of over-the-limit transactions without consumer consent.

1. Examples of over-the-limit transactions paid without consumer consent. Section 226.56(b)(2) provides 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. The prohibition on imposing fees for paying an over-the-limit transaction applies even in circumstances where the creditor is unable to avoid paying a transaction that exceeds the consumer's credit limit.

i. Transactions not submitted for authorization. A consumer has not affirmatively consented to a creditor's payment of over-the-limit transactions. The consumer purchases a $3 cup of coffee using his debit card. Because of the small dollar amount of the transaction, the merchant does not submit the transaction to the creditor for authorization. The transaction causes the consumer to exceed the credit limit. Under these circumstances, the creditor is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the creditor's over-the-limit service.

ii. Settlement amount exceeds authorization amount. A consumer has not affirmatively consented to a creditor's payment of over-the-limit transactions. The consumer uses his credit card at a pay-at-the-pump fuel dispenser to purchase $50 of fuel. Before permitting the consumer to use the fuel pump, the merchant verifies the validity of the card by requesting an authorization hold of $1. The subsequent $50 transaction amount causes the consumer to exceed his credit limit. Under these circumstances, the creditor is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the creditor's over-the-limit service.

2. Permissible fees or charges when a consumer has not consented. Section 226.56(b)(2) does not preclude a creditor from assessing fees or charges other than over-the-limit fees when an over-the-limit transaction is completed. For example, if a consumer has not opted in, the creditor could assess a balance transfer fee in connection with a balance transfer, provided such a fee is assessed whether or not the transfer exceeds the credit limit. The creditor may also assess interest charges in connection with the over-the-limit transaction.

56(c) Method of election.

1. Creditor-determined methods. A creditor may determine the means available to consumers to affirmatively consent, or opt in, to the creditor's payment over-the-limit transactions. For example, a creditor may decide to obtain consents in writing, electronically, or orally, or through some combination of these methods.
Section 226.56(c) further requires, however, that such methods must be made equally available for consumers to revoke a prior consent.

2. Electronic requests. A consumer consent or revocation request submitted electronically is not considered a consumer disclosure for purposes of the E-Sign Act.

56(d) Timing of notices.

1. Revocation notice on each statement. A creditor may, but is not required to, include the notice informing the consumer of the right to revoke the consumer's prior consent to the creditor's payment of over-the-limit transactions on each periodic

statement sent to the consumer, even if the consumer has not incurred an over-the-limit fee during a particular billing cycle.

56(e) Content.

1. Range of fees. If the amount of an over-the-limit fee may vary, such as based on the amount of the over-the-limit transaction, the creditor may indicate that the consumer may be assessed a fee "up to" the maximum fee or provide the range of fees.

2. Additional notice content. In addition to the content required under § 226.56(e)(1), a creditor may briefly describe in its opt-in notice the benefits of the creditor's payment of over-the-limit transactions. For example, the creditor may state that if the consumer consents, or opts in, to the payment of over-the-limit transactions, the consumer may avoid having transactions declined when the issuer believes a transaction may cause the consumer to exceed the credit limit. Creditors may also indicate that there may be circumstances under which there creditor will decline an over-the-limit transaction even if the consumer has opted in or that the payment of over-the-limit transactions is at the discretion of the creditor.

56(f) Joint relationships.

1. Authorized users. Section 226.56(f) does not permit a creditor to treat a request to opt in to or to revoke a prior request for the creditor's payment of over-the-limit transactions from an authorized user that is not jointly liable on a credit card account as a consent or revocation request for that account.

56(g) Continuing right to opt in or revoke opt-in.

1. Fees or charges for over-the-limit transactions incurred prior to revocation. Section 226.56(g) provides that a consumer may revoke his or her prior consent at any

time. If a consumer does so, this provision does not require the creditor to waive or reverse any over-the-limit fees or charges assessed to the consumer's account prior to the creditor's implementation of the consumer's revocation request. Nor does this requirement prevent the creditor from assessing over-the-limit fees in subsequent cycles if the consumer's account balance continues to exceed the credit limit as a result of an over-the-limit transaction that was completed prior to the consumer's revocation of consent.

56(h) Duration of opt-in.

1. Creditor ability to stop paying over-the-limit transactions after consumer consent. A creditor may cease paying over-the-limit transactions for consumers that have previously opted in at any time and for any reason. For example, a creditor may stop paying over-the-limit transactions for a consumer to respond to changes in the credit risk presented by the consumer.

56(j) Prohibited practices.

1. Examples of limits on fees or charges imposed per billing cycle. Section 226.56(j)(1) generally prohibits a creditor from assessing a fee or charge due to the same over-the-limit transaction for more than three billing cycles. The following examples illustrate the prohibition.

i. Assume that a consumer has opted into a creditor's payment of over-the-limit transactions. The consumer exceeds the credit limit during the December billing cycle and does not make sufficient payment to bring the account balance back under the limit for four consecutive cycles. The consumer does not engage in any additional transactions during this period. In this case, § 226.56(j)(1) would permit a creditor to charge a maximum of three over-the-limit fees for the December over-the-limit transaction.

ii. Assume the same facts as above except that the consumer makes sufficient payment to reduce his account balance during the February billing cycle. The creditor may charge over-the-limit fees for the December and January billing cycles. However, because the consumer's account balance was below the credit limit prior to the end of the February billing cycle, the creditor may not charge an over-the-limit fee for the February billing cycle.

iii. Assume the same facts as in paragraph i, except that the consumer engages in another over-the-limit transaction during the February billing cycle. Because the consumer has obtained an additional extension of credit which causes the consumer to exceed his credit limit, the creditor may charge over-the-limit fees for the December transaction on the January, February and March billing statements, and additional over-the-limit fees for the February transaction on the April and May billing statements. The creditor may not charge an over-the-limit fee for each of the December and the February transactions on the March billing statement because it is prohibited from imposing more than one over-the-limit fee during a billing cycle.

2. <u>Replenishment of credit line</u>. Section 226.56(j)(2) does not prevent a creditor from delaying replenishment of a consumer's available credit where appropriate, for example, where the creditor may suspect fraud on the credit card account. However, a creditor may not assess an over-the-limit fee or charge if the over-the-limit transaction is caused by the creditor's decision not to promptly replenish the available credit after the consumer's payment is credited to the consumer's account.

3. Examples of conditioning. Section 226.56(j)(3) prohibits a creditor from conditioning or otherwise tying the amount of a consumer's credit limit on the consumer affirmatively consenting to the creditor's payment of over-the-limit transactions where the creditor assesses an over-the-limit fee for the transaction. The following examples illustrate the prohibition.

i. Amount of credit limit. Assume that a creditor offers a credit card with a credit limit of $1000. The consumer is informed that if the consumer opts in to the payment of the creditor's payment of over-the-limit transactions, the initial credit limit would be increased to $1300. If the creditor would have offered the credit card with the $1300 credit limit but for the fact that the consumer did not consent to the creditor's payment of over-the-limit transactions, the creditor would not be in compliance with § 226.56(j)(3). Section 226.56(j)(3) prohibits the creditor from tying the consumer's opt in to the creditor's payment of over-the-limit transactions as a condition of obtaining the credit card with the $1300 credit limit.

ii. Access to credit. Assume the same facts as above, except that the creditor declines the consumer's application altogether because the consumer has not affirmatively consented or opted in to the creditor's payment of over-the-limit transactions. The creditor is not in compliance with § 226.56(j)(3) because the creditor has required the consumer's consent as a condition of obtaining credit.