Comments
Of

NATIONAL CONSUMER LAW CENTER
On behalf of its low income clients and

CENTER FOR RESPONSIBLE LENDING
CONSUMER ACTION
CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
PRIVACY RIGHTS CLEARINGHOUSE
U.S. PUBLIC INTEREST RESERARCH GROUPS

regarding

Economic Growth and Paperwork Reduction Act
"EGRPRA"

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency
12 CFR Chap.I [Docket No. 04-05]

Office of Thrift Supervision
12 CFR Chap. V [No. 2003-67]

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
12 CFR Chap.II [Docket No. R-1180]

FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Chap. III

These comments are submitted by the **National Consumer Law Center**[1] on behalf of its low income clients, the **Center for Responsible Lending, Consumer Action, Consumer**

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[1] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws, including *Truth In Lending*, (5th ed. 2003) and *Cost of Credit* (2nd ed. 2000) and *Repossessions and Foreclosures* (5th ed. 2002) as well as

Federation of America, Consumers Union, National Association of Consumer Advocates, Privacy Rights Clearinghouse, and U.S. Public Interest Research Groups.[2] The goal of

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bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys has written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws. These comments are written by Margot Saunders, Managing Attorney, and Alys Cohen, Staff Attorney, of the National Consumer Law Center, and Shelly Curran of Consumers Union.

[2]**The Center for Responsible Lending (CRL)** is a non-profit organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. A non-partisan research and policy organization, CRL promotes responsible lending practices and access to fair terms of credit for low-wealth families. Together with other members of a coalition of organizations representing over three million North Carolinians, CRL was instrumental in helping to pass North Carolina's anti-predatory home mortgage lending statute. CRL continues to promote legislative and regulatory efforts to address predatory lending issues. CRL is also an affiliate of Self-Help, one of the nation's largest nonprofit community development lenders. Self-Help has provided more than $3.5 billion in financing to help low-wealth borrowers in forty-seven states buy homes, build businesses, and strengthen community resources.

Consumer Action is a non-profit consumer education and advocacy organization serving consumers since 1971. Consumer Action focuses on issues of concern to consumers in the banking, credit, privacy, telecommunications, financial literacy fields, among other consumer concerns that involve developing marketplace skills. CA also works in cooperation with more than 7,000 national and statewide community-based organizations on matters of concern to consumers.

The **Consumer Federation of America** is a nonprofit association of over 300 consumer groups, established in 1968 to advance the consumer interest through research, education, and advocacy.

Consumers Union is the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

The **National Association of Consumer Advocates (NACA)** is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

these comments is to ensure that the interests of consumers are paramount in the process of review required by the Economic Growth and Regulatory Paperwork Reduction Act ("EGRPRA"). Our three primary concerns regarding this review process will each be addressed separately in these comments:

I. The overarching focus of the review process required by EGRPRA should be on ensuring that consumers are fairly treated and appropriately protected from overreaching activities by financial institutions.

II. A fair review process can only result in a broad range of proposals which include updating federal regulations and laws to improve the protection of consumers under federal law.

III. The analysis of the proposals proffered by the financial services industry to reduce consumer protections shows that the potential damage to consumers from these proposals outweighs the benefit to the industry. In particular, some bankers' proposal to roll back the Truth in Lending right of rescission would do radical harm to one of the single most effective and powerful consumer protections that Congress has passed.

I. The focus of the review process required by EGRPRA should be to ensure that consumers are fairly treated and appropriately protected from overreaching activities by financial institutions.

The Economic Growth and Paperwork Reduction Act requires a review of *all* laws and regulations affecting depository institutions to determine updates and necessary changes. A fair review cannot be limited to issues which favor those institutions. A full and fair analysis of appropriate updates for the regulations and laws must include proposals to benefit consumers. The Economic Growth and Paperwork Reduction Act simply requires the regulatory agencies to review regulations and laws:

> "…in order to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions."[3]

Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy and identity theft, through a series of factsheets as well as individual counseling available via telephone and e-mail. It represents consumers' interests in legislative and regulatory proceedings on the state and federal levels.

The U.S. Public Interest Research Group is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

[3] 12 U.S.C. § 3311(a).

All of the written materials accompanying the request for comments regarding the rules display the agencies' unfortunate bias towards evaluating regulations and federal statutes *only* from the perspective of the financial institutions. Every single one of the questions posed to the participants in the focus groups to discuss this review reveals this skewed evaluation. To be fair, and to accomplish the overall goal of EGRPRA, and of underlying purposes of the regulations, the agencies must broaden their perspective, and include a full evaluation of *the impact on consumers* of all proposed changes.

Two principles should be kept in mind by the agencies during this review:

- First, that the issues reviewed should not be limited to those that would benefit the financial services industry.

- Second, and of even greater importance, before reducing the consumer protections provided by any federal laws, the agencies must agree to a stringent standard to evaluate both the burden of these protections on the industry and the benefit of the protections to consumers. In developing this standard of review to consider reducing federal consumer protections, the agencies must understand the *context* in which these federal laws operate to protect consumers.

One of the questions asked by the agencies is the extent to which the regulations may adversely affect competition. Actually, it is the removal of consumer protection regulations which would most likely reduce the competitive advantage of responsible financial institutions in the marketplace. Consumer protection requirements are imposed on depository institutions not only for the benefit of consumers, but also to ensure that competition is appropriately fostered. Without the minimum consumer protections required by federal law, institutions that choose to provide more balanced and consumer friendly products, would find themselves at a competitive disadvantage compared to institutions that choose not treat consumers in an equivalent manner.

The consumer protections provided by these laws may be the *only* tools available to consumers to balance their bargaining power with the powerful federally chartered financial institutions. After all, the broad range of consumer protections traditionally provided by state law in consumer transactions may no longer be applicable to federally chartered or insured financial institutions.[4]

It has been recognized for centuries that borrowers and lenders often do not enter credit contracts on an equal footing. The absence of equal bargaining power may manifest itself in different ways. Most obviously, a debtor who, for example, has lost his job and has defaulted on his mortgage may agree to almost any terms to obtain new credit and to avoid losing his home. However, obtaining a more expensive loan to save her home when she could not repay a more reasonable one only causes the homeowner to lose more equity while postponing the inevitable.

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[4]*See* Regulations of the Office of Comptroller of the Currency, 12 C.F.R. Parts 7 and 34; and Regulations of the Office of Thrift Supervision, 12 C.F.R. part 560.

Usury statutes have traditionally been justified as attempts to prevent the exploitation of such a needy borrower by limiting the price that he may be asked to pay for the loan.[5] However, to the extent usury statutes still apply to consumer credit transactions, many of the financial institutions subject to the current review are claiming exemption from compliance with these state laws.[6]

It is a fact of the modern consumer credit market that creditors, not borrowers, draft loan documents, and that the terms of credit contracts offered to consumers are basically non-negotiable. A potential borrower can ‘‘take it or leave it” and go elsewhere, though sometimes the ‘‘elsewhere’’ is not so easy to find. Moreover, the increased complexity of credit makes it difficult for consumers to do any meaningful comparison shopping to determine whether it is best to ‘‘leave it” or not. The ubiquity of adhesive credit contracts, combined with the ignorance of almost all consumers about the fine print contained in these contracts, leads to opportunities for the exploitation of borrowers that are just as great as those presented by the classic desperate borrower.

The consumer protections provided by the federal laws under consideration in the present review generally provide the only antidote for consumers to protect them from overcharging, complex terms, non-negotiable and adhesion contracts. In fact, as the refrain "predatory lending" should be quite familiar to the agencies, everyone should agree that the current panoply of federal consumer protections, is clearly insufficient. As a result, to promote safety and soundness, ensure fairness and protect consumers, we urge the agencies to adopt the following standard of review for recommending changes to regulations which will impact on consumers:

> **Any *reduction* in these protections, for any reason, must be justified only by the clearest showing that both the burden on the financial services industry is *unreasonably* high, accompanied an equivalent finding that the benefit to consumers is *de minimus.***

II. A truly fair review process can only result in a broad range of proposals which includes updating federal regulations and laws to *improve* the protection of consumers under federal law.

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[5]*See, e.g.,Ghirardo v.Antonioli,*883 P.2d 960 (Cal.1994)(purpose of usury law is ‘‘‘to protect the necessitous, impecunious borrower who is unable to acquire credit from the usual sources and is forced by his economic circumstances to resort to excessively costly funds to meet his financial needs.’’’); *Jersey Palm-Gross,Inc.v.Paper,* 658 So.2d 531, 534 (Fla.1995)(purpose of usury laws is to ‘‘protect borrowers from paying unfair and excessive interest to overreaching creditors ’’; and ‘‘to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans ’’); *Trapp v. Hancuh,* 530 N.W.2d 879 (Minn.Ct.App.1995)(purpose of usury laws is ‘‘to protect the weak and necessitous from being taken advantage of by lender who can unilaterally establish the terms of the loan transaction ’’; distinguishing position of corporations, presumed to be in an equal bargaining position).

[6]See note 4, *supra.*

Unfortunately, the agencies have not specifically requested suggestions for regulatory changes which would benefit consumers. However, as we have faith that the agencies will nevertheless endeavor to engage in a full and unbiased review of these issues, ensuring that all perspectives are included, we suggest below a series of regulatory changes which will foster competition and significantly benefit consumers, without being redundant or inconsistent. We also include suggestions for the agencies to make to Congress for statutory updates to federal consumer protection laws.

A. Suggestions for Regulatory Changes

1. Clarify the Application of the Truth in Lending Act to Bounce Loans

Bounce "protection"[7] is a new form of overdraft protection that some banks are using to boost their non-interest revenue.[8] It is a systematic attempt to induce consumers into using overdrafts as a form of high-cost credit. These plans offer short-term credit at triple-digit rates.[9] When a consumer uses bounce credit, the bank deducts the amount covered by the plan plus the fee by setting off the consumer's next deposit, even where that deposit is protected income, such as a welfare or Social Security check. The fee is often the same amount charged for an NSF fee on a returned check, and in some cases the bank also charges an additional, per-day fee. The Office of Comptroller of Currency has recognized that bounce loans are credit as defined by TILA.[10] Some state regulators have reached the same conclusion.[11]

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[7]Bounce "protection" is a euphemism used by banks to describe this high-cost credit product.

[8]For more information on bounce credit, see Consumer Federation of America & National Consumer Law Center, *Bounce Protection: How Banks Turn Rubber Into Gold By Enticing Consumers to Write Bad Checks* (2003), available at www.consumerlaw.org/initiatives/test_and_comm/appendix.shtml.

[9]For example, a $100 overdraft will incur at least a $20 fee. If the consumer pays the overdraft back in 30 days, the APR is 243%. If the consumer pays the overdraft bank in 14 days, which is probably more typical for a wage earner, the APR is 541%. This arrangement is much more expensive than alternatives that most banks offer, such as overdraft lines of credit, linking the account to a credit card, and transfers from savings.

[10]Daniel P. Stipano, Deputy Chief Counsel, Office of Comptroller of Currency, Interpretive Letter #914, September 2001.

[11]Indiana Department of Financial Institutions, Newsletter – Winter 2002 Edition (Nov. 2002), at 2, Clearinghouse No. (D/E: Fill in number); Letter from Assistant Attorney General Paul Chessin, Colorado Department of Law, Consumer Credit Unit, Mar. 21, 2001 (in response to referral from the Administrator for the Colorado Uniform Consumer Credit Code).

Bounce credit fees clearly meet Regulation Z's definition of finance charge. Section 226.4(c)(3) of Regulation Z, which excludes fees for traditional overdrafts, provides that overdraft fees are finance charges when "the payment of such items and the imposition of the charge were previously agreed upon in writing." Although banks offering bounce credit have sought to avoid Regulation Z's coverage by claiming that the bank's payment of an overdraft in a "bounce protection" plan is "discretionary" and that such payments have not been agreed to in writing, these assertions fail. First, bounce credit is not discretionary. These plans are administered through computer software and thus are formal, systemic programs rather than an occasional customer courtesy. Moreover, banks extend bounce credit pursuant to an agreement in writing, whether through advertisements, correspondence, or on a website. Consumer assent is not necessary; consumers often are held accountable for fees unilaterally imposed by banks.

There is considerable confusion and misunderstanding among consumers about the rules and obligations of bounce loans. Consumers often do not understand the full cost of these loans, and they do not understand the recurring nature and exorbitant cost of the ongoing use of bounce loans. Consumers would benefit enormously from application of TILA's open-end disclosure rules to these expensive and deceptive products.

This can be done easily through regulation by Federal Reserve Board.[12]

2. Apply the Electronic Fund Transfers Act to all Electronic Transfers, including Stored Value Cards and Payroll Cards

Currently the Electronic Fund Transfers Act ("EFTA") only covers some electronic transactions, leaving many consumer financial transactions without clear protections in the marketplace. For example, transfers which started as a paper check are exempt, as are pre-authorized debits. Similarly, although payroll cards are expanding in popularity as a mechanism for employers to pay workers, it may not be clear that payroll cards are covered by the EFTA. There is confusion, overlap and serious gaps in the coverage of laws on a wide variety of consumer electronic payment mechanisms. A full rewrite of EFTA is really required to ensure that all consumer payment mechanisms have the maximum level of consumer protections. However, even without statutory change, there is much that the agencies can do to harmonize the consumer protections applicable to various electronic payment mechanisms.

Providers of some electronic cards including payroll cards attempt to avoid application of the EFTA by claiming that their products are either stored value cards – not linked to funds on deposit – or that the deposit account in which the funds are held are not truly "consumer asset accounts" within in the meaning of the regulations,[13] such that EFTA governs the transaction.

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[12]We have filed extensive comments on exactly how these regulations can be written in a fair, and not unduly burdensome manner. *See,* www.consumerlaw.org/initiatives/test_and_comm/content/042803_MS.pdf.

[13] Under Reg E definitions, *"Account* means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit

Without coverage by EFTA, no meaningful consumer protections govern these cards.[14] Consumers who purchase the cards are generally unaware of the great number or risks inherent in this payment device.[15] Even worse, payroll cards are often forced on employees, who are given no alternative method of receiving their salaries.[16] In some situations, payroll cards provide real benefits for consumers. However, too often the expenses and the risks of these cards to low income employees far outweigh the benefits. Excessive fees, risk of employer insolvency, loss of privacy, lack of protections from loss, even lack of basic information regarding how the card works, remaining balances on the card, and where it is accepted, are all potential problems with these cards.

The FDIC[17] and the Federal Reserve Board[18] have previously pointed out that stored value cards could be the functional equivalent of debit card. The use of these cards is growing considerably and more consumers are vulnerable to the vagaries of the marketplace and potential unfair practices by providers and employers. Nevertheless, to date neither agency has seen fit to bestow the protections of either FDIC insurance or Reg E application to these products. Both agencies should address this hole in the law as soon as possible, and extend all FDIC insurance and Reg E protections to these products. We stand ready to work with the agencies regarding the particulars of this new coverage.

3. The Federal Reserve Board Should Aggressively Address Unfair and Predatory Practices in Reg AA

Although the Federal Reserve Board has the authority to promulgate regulations specifying and prohibiting unfair and deceptive trade practices for banks, it has not provided sufficient guidance in a variety of areas. The FRB has adopted parts the FTC Credit Practices

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plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes."12 C,F,R, § 205.2(b)(1).

[14]American Bar Association Task Force on Stored-Value Cards, *A Commerical Lawyer's Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated with Stored-Value Cards and Electronic Money,* 52 Bus. Law. 653 (1997).

[15]*See* Mark E. Budnitz, *Stored Value Cards and the Consumer: The Need for Regulation,* 46 Am. U. L. Rev. 1027 (1997); Budnitz and Saunders, National Consumer Law Center, *Consumer Banking and Payments Law* (2d ed. 2002), Chapter 7.

[16]*See* Consumers Union, *Questions for Employees to Ask About Payroll Cards*, www.consumersunion.org/pub/core_financial_services/000920.html.

[17]FDIC General Counsel Opinion No. 8, "Stored Value Card," 61 Fed. Reg. 40,091, 40,093 (1996),

[18]Electronic Fund Transfers, 61 Fed. Reg. 19696, 19699 (1996).

Rule[19] and made it applicable to depository institutions. This is good, but does not go nearly far enough.

There are other FTC rules that should also be made applicable to these institutions. For example, in 1975, the FTC passed the FTC Rule Concerning Preservation of Consumers' Claims and Defenses.[20] This rule specifies that assignees of consumer loan contracts resulting from sales of goods or services are liable for the claims and defenses that can be raised against the seller. This has been a critical mechanism to ensure that the marketplace punishes purveyors of worthless goods and services.[21]As the West Virginia Supreme Court stated in construing a state law that incorporated the FTC Holder Rule, without such a rule a financial institution could "run in effect a 'laundry' for fly-by-night' retailers."[22]

Banks should be subjected to the same prohibitions against unfair and deceptive practices. For example, the fact that the FTC Holder Rule does not specifically cover banks has allowed banks to support student loan scams and avoid liability for accepting assignments of student loans provided for worthless courses from for-profit vocational schools.

Predatory lending remains a huge problem, which has not been adequately addressed by the federal banking regulators.[23] If the federal banking regulators want to address predatory lending through their regulatory authority there is a great deal that they can do. We recommend that the Board open a regulatory docket to determine the question of the legality, fairness and morality of a number of specific, unfair, predatory practices which are arguably legal under existing law, but which do extensive harm to individual consumers, families and communities, including, but not limited to the following:

- payday lending;
- bounce loans;
- flipping special purpose mortgage loans;
- charging excessive points and fees on mortgage loans;
- mandatory arbitration agreements;

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[19]12 C.F.R. § 227.12.

[20]16 C.F.R. § 433.

[21]*See* National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (5th Ed.2001) §6.6.

[22]*State ex rel McGraw v. Scott Runyan Pontiac Buick, Inc.* 194 W.Va. 770, 461 S.E. 2d, 516, 526 (1995).

[23]*See* Comments of the National Consumer Law Center on behalf of its Low Income Clients, and Consumer Federation of America, Consumers Union and National Association of Consumer Advocates on Community Reinvestment Act Regulations, April 6, 2004, www.consumerlaw.org/initiatives/test_and_comm/040604MS.shtml#9.

- including prepayment penalties in mortgage loans which are not justified by low interest rates or low up-front fees.

Again, we stand ready to work with the Federal Reserve Board on the specifics of each of these inquiries.

4. Streamline and Improve Disclosures for Both Open-end and Variable-rate Loans under TILA

The Truth in Lending Act ("TILA")[24] is the cornerstone of consumer credit protection. The statute is Congress' effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit and thereby to enable consumers to make informed choices in the marketplace. Prior to its enactment, consumers had no easy way to determine how much credit would really cost, or how to compare among various creditors. Creditors did not use a uniform way of calculating interest, or a single system for defining what additional charges would be included in the interest rate.[25]

TILA addressed the confusion in the marketplace with a whole new, uniform system for disclosing all of the costs of credit. Closed end loans with fixed rates of interest have comprehensive disclosure schemes under TILA, which – while not perfect – do provide consumers with full information about the costs of their loans. However, credit extended under open-end credit plans (both secured and unsecured) and loans made with variable rates of interest still lack the same level of comprehensive disclosures. The Federal Reserve Board has the authority to close the loopholes in the disclosure scheme for these loans, although statutory change would provide clearer guidance.[26]

We propose three separate, but related, improvements to the disclosure requirements under TILA. First, disclosures required for unsecured open-end loans should be improved by requiring the "Schumer Box" disclosures not only at the time of application, but also before the first transaction is made. Second, open-end loans which are secured by homes need significantly improved disclosures regarding the maximum amount the payments could be, and other very relevant information about the potential ongoing costs of the transaction. Third, variable-rate, closed-end loans, also need improved disclosures about the potential costs of the transaction.

a. Additional Disclosure of Schumer Box Information for Credit Cards and Disclosure of More Information Regarding Costs of Credit

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[24]15 U.S.C. §§ 1601 et seq.

[25]*See* National Consumer Law Center, *Truth in Lending* (5th ed. 2003), Chapter 1.

[26]The Board has explicit authority to require by regulation disclosures which differ from those specifically described by the Act. 15 U.S.C. § 1604(d).

Under the current regulatory scheme, essential information about the costs of a credit card plan are disclosed in a easy to read "tabular" form, referred to as the "Schumer Box" at the time of application for the credit card.[27] The problem is that when the consumer actually is approved for the credit card, and receives the final disclosures applicable to the transaction, the exact terms may have been changed. The disclosures that the consumer receives "before the first transaction" are not in same tabular form, they are simply in text. Many consumers find it very difficult compare the information they received in the Schumer Box with the text format. A simple, but very effective, improvement to this disclosure scheme would be to require in 12 C.F.R. § 225a(b) that the Schumer Box also be provided before the first transaction as well as at application or solicitation.

Additionally, consumers need to know – both at the inception of a loan, and during the course of the loan (in the monthly statements) – the full costs of the open-end credit. The Board can and should require the following information to be provided to the consumer before the loan is made, at the time the loan is made, and in monthly statements:

- the maximum amounts the consumer would have to pay as minimum payments under the plan; and
- the amount of time the consumer would have to pay those minimum payments at the applicable interest rate to pay off the loan in full.

b. Improve Disclosures for Open-end Credit Loans Secured by Homes

The disclosures required for open-end credit loans secured by homes should be essentially the same as those for closed end loans. Instead, far less information is provided and consumers do not understand the full costs of open-end credit. When the current TILA rules for open-end credit were being designed, both the fluid nature of the product and the state of technology as it then existed reasonably prevented individualized disclosures about the predicted cost of open-end credit.

Technology has now developed to the point that an individualized disclosure is possible and reasonable. In weighing the costs and benefits of more personalized, more predictive disclosures in light of more sophisticated technology, the actual comprehensibility of the disclosures must be considered. If consumers are to be legally held to their contracts, then it is vital that we do as much as possible to make sure that there is some reality to the legal premise that contracts are binding because the parties knowingly agree to the terms.

The essence of the problem for determining rules for open-end credit is how to calculate the time and price for the outstanding extensions of credit. This is a problem for open-end lines of credit where it is not for closed end credit because of the revolving nature of these loans. Once some money is borrowed, and some paid back, some more money can be borrowed again. It is indeed impossible for the lender to predict the amount of money which will actually be extended to the borrower, the time period and amount of repayment by the borrower, and (in

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[27] 12 C.F.R. § 226.5a(b).

most cases because open-end loans are generally also variable rate loans) the applicable interest rates throughout the term of the loan.

Lenders, however, make a series of assumptions when they make disclosures on closed end loans, and on variable-rate loans in particular: they assume an interest rate, and they assume that the loan will be paid back at the times and in the amounts contemplated in the loan contract. There is no reason that the Federal Reserve Board could not choose a series of reasonable assumptions to be applicable to open-end credit disclosures which would then be used as the basis for the disclosures provided at the inception of the open-end loan.[28] Based on these assumptions – which differ in no material way from the type of assumptions that the Board has required creditors to make for closed end credit – the creditor would then be required to disclose the following additional information at the time loan is made:

- the maximum amounts the consumer would have to pay as minimum payments under the plan;
- the amount of time the consumer would have to pay those minimum payments at the applicable interest rate to pay off the loan in full;
- the total costs to obtain the loan (information which now is only disclosed on the HUD-1 Settlement statement); and
- applicable transaction fees.

c. Improve Variable-rate Disclosures for Closed End Loans

When variable-rate loans were first developed and authority for providing special disclosures rules for them were required by the Board, technology did not exist which allowed creditors to easily anticipate all of the potential costs to consumers.[29] Just as with open-end loans, the Board, limited by the technology available at the time, adopted rules which do not require sufficient disclosures regarding the risks and the costs of credit for these loans. However, times have changed, and computer programs now exist which allow the creditor to provide real

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[28] For example, lenders could assume the following:

a) The maximum amount of the line of credit would be borrowed immediately (a fairly typical occurrence) rounded up to the nearest $5,000. For instance, when a borrower is contemplating a line of credit of $37,500, information provided for a $40,000 loan is far more relevant than it is for a $10,000 loan.

b) Only the minimum required payments would be made by the borrower (also, a fairly standard scenario).

c) The interest rate over the term of the loan would be what it would have been had the loan been taken out the same number of years ago as the term is long. (In other words, if the loan term is for fifteen years, for the purposes of the initial disclosure, the interest rates for the next 15 years would be assumed to be what they had been during the past 15 years.)

[29] 12 C.F.R. § 228.18(f).

information to the consumer, which is loan specific, and which would go a long way to provide consumers with truly valuable information.

Specifically, we recommend that the Board amend Reg Z to require the following information to be provided on all closed end, variable-rate loans:

- the real maximum interest rate of the loan;
- the time period for which the first monthly payment amount is valid;
- the amount of the monthly payment if the loan reaches the maximum interest rate;
- the place on the Internet where the index on which the variable rate is fixed can be checked by the consumer;
- if the creditor uses a historical example, the example should be in addition to the loan specific information, and should be based on:
- a loan amount within $5,000 of the consumer's loan amount; and
- the same index and margin as the consumer's loan.

5. Allow Telephone Disputes for Credit Card Charge Backs and Errors

Currently, two regulatory provisions under the Truth in Lending Act allow consumers to request financial institutions to deal with questionable charges on their credit cards. Consumers have the right to question unauthorized charges or errors in the amount of the charge[30] and to raise warranty claims through the credit card holder.[31] However, both require that consumers send the notice of the dispute in writing to the credit card company, which hampers the ability of many consumers to raise these issues in a timely way.

There is no reason that the initial request to investigate the dispute cannot be made by a telephone call. If further written documentation is necessary to process the claim, that can be required. But it would be much simpler and easier for consumers to be able to initiate the request with a telephone call.

This change could be made by regulation for the warranty claims as the law does not require a writing. Statutory change would be required for the billing error disputes.

6. Improve Claim Procedures Under the Electronic Fund Transfers Act

The EFTA unquestionably places the risk of loss from unauthorized transfers on the financial institution, so long as the consumer has satisfied the statute's requirements for notifying

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[30] 15 U.S.C. § 1666(a); 12 C.F.R. § 226.13.

[31] 15 U.S.C. § 1666o(a); 12 C.F.R. § 226.12(c).

the institution.[32] These rules and procedures are clear. However, we receive constant complaints from consumers and their representatives about financial institutions placing the burden of proof on the consumer that a particular transfer was not authorized. Not only is this an illegal reversal of the risk of loss, it is too difficult a burden for consumers to meet. It impossible to prove a negative – that something was *not* permitted. Although there is a private cause of action in the EFTA for a financial institution's failure to comply with the Act, the amounts involved are generally too small to justify a law suit, so many institutions are able to get away with avoiding the requirements of the law. Financial institutions should be required to comply with the regulatory requirements by providing coverage for unauthorized transfers, unless the institution can prove that the transfer was in fact authorized.

No statutory change is required here, simply real regulatory enforcement of existing rules.

7. Prevent Rollbacks that Harm Consumers

A number of potential or recent rule changes are very burdensome to consumers. These should be withdrawn and reconsidered. These include:

- Office of the Comptroller of the Currency (OCC) Rules

The Office of the Comptroller of the Currency (OCC) has adopted a broad new rule seeking to exempt nationally chartered banks and their operating subsidiaries from nearly all state consumer protection statutes. The loss of these state laws would harm U.S. consumers, make it likely that abuses against consumers in which banks participate would have to spread nationwide before such abuses could be outlawed, place national banks at an unfair advantage as compared to their non-bank competitors, and reduce innovation in consumer protection at the state level.[33]

With this rule the OCC seeks to prevent states from enforcing consumer protection laws against illegal, unfair, or abusive practices. Not only would the OCC's success mean that state laws on predatory lending would be preempted, but potentially all parts of state laws which provide protections and balanced rules for consumers in the business of lending or depositing transactions would be affected. At the same time, federal law does not fill the void of state laws being preempted and the OCC lacks adequate resources to fill the void left by the states' inability to protect their residents. State governments have demonstrated that they are much better equipped to identify and respond to emerging consumer problems. Often, it's long after states

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[32] The risk of loss is stated unequivocally in 15 U.S.C. 1693g(b). The consumer's limitation of liability is contingent upon satisfying the notice requirements established in 12 C.F.R. § 205.6.

[33]The comments on the illegality and the danger of this new rule can be found at: www.consumerlaw.org/initiatives/test_and_comm/10_6_occ.shtml.

have begun to address abuses on the local level that such problems receive a Congressional response.

- Community Reinvestment Act Proposed Changes

The proposed changes to the rules governing enforcement of the Community Reinvestment Act (CRA)[34] will dramatically reduce the level of bank investments and services to low- and moderate-income communities and will actually perpetuate abusive lending.

In comments[35] on the proposed rule, consumer groups urged the federal banking regulatory agencies to either abandon or substantially change the proposal to include a specific predatory lending finding in an institution's CRA assessment. The regulation, as currently proposed, would actually serve to facilitate and mask predatory lending activities by banking institutions and their affiliates. This is because the proposal is to evaluate only whether institutions are complying with:

1) current federal laws, which do not themselves prohibit activities which are abusive or predatory;
2) the FTC Act prohibiting unfair and deceptive trade practices, which – without additional specific prohibitions to Regulation AA[36] – does not provide sufficient guidance to the examiners to determine whether the institution has engaged in predatory lending; and
3) the stated prohibition against equity stripping, which will not catch even the most blatant predatory loans based on the equity in the home rather than the income stream of the borrowers, because it does not require verification of income.

None of these three standards actually will enable a real evaluation of whether an institution is engaged in predatory or abusive lending. The standards do not ask the right questions to find predatory lending. If the right questions are not asked then the answers will be incorrect and misleading. The result will be that institutions will be found to have not engaged in predatory lending, even when they may have – just because the standards by which their lending activities are to be judged will not find abusive lending.

If the CRA assessment for predatory lending does not actually measure predatory lending, institutions may be given a positive grade which is incorrect – thereby justifying and

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[34] 12 CFR Part 25, Docket No. 04-06, Office of the Comptroller of the Currency; 12 CFR Part 228, Regulation B, Docket No. R-1181, Board of Governors of the Federal Reserve System; 12 CFR Part 345, RIN 3064-AC50, Federal Deposit Insurance Corporation; 12 CFR Part 563e, No. 2004-04, RIN 1550-AB48, Office of Thrift Supervision.

[35] Our comments on the agencies joint CRA rule can be found at: www.consumerlaw.org/initiatives/test_and_comm/040604MS.shtml#9.

[36] 12 C.F.R. § 227, Regulation AA.

shielding the institutions' real predatory lending activities. The result of the evaluation proposed will be that those institutions which have engaged in predatory lending will have an official assessment from their federal banking regulator finding that they have not engaged in a dangerous and abusive lending activity. This makes the proposal not only flawed, but actually affirmatively misleading. Efforts mounted in other arenas to address predatory lending by banking institutions, their operating subsidiaries, and their affiliates, will be significantly undermined by the false findings produced by this CRA measurement.

Moreover, the proposed rule would exempt mid-sized banks from the application of the more comprehensive CRA compliance examination. Currently, the less comprehensive, "small bank" exam applies only to financial institutions whose asset size is less than $250 million in assets and is independent or affiliated with a holding company with total banks and thrift assets of less than $1 billion. The proposal would increase the size of banks subject to the less stringent small bank CRA exam from $250 million to $500 million in assets, regardless of the size of the affiliated holding company. This change would reduce the number of regulated financial institutions that are subject to the broader CRA exam by about 50% (2,236 to 1,105). The change would mean that these mid-sized banks would no longer be evaluated on the extent to which they provide low and moderate income consumers with affordable banking services and are otherwise seeking to bring the unbanked into the mainstream of financial services.

- Home Mortgage Disclosure Act

The Home Mortgage Disclosure Act requires financial institutions to disclose the geographic distribution of their mortgage lending. The purpose of the act is provide the public and public officials with sufficient information to determine whether financial institutions are filling their obligations to serve the housing needs of the communities they are located or otherwise serve. Over the years it has become an indispensable data source that is used for many purposes, including by regulators and financial institutions alike. Apparently some lenders have suggested additional exemptions to HMDAs reporting requirements. Yet, Congress (and the Federal Reserve in its reviews) has wisely recognized the importance of maintaining HMDA as a comprehensive data source, which is why the statute limits reporting exemptions only to truly tiny lending institutions. Indeed, if anything needs to be changed, additional reporting requirements should be included.

8. Improve Distribution of Disclosures Required by Truth in Savings Act

The Truth in Savings Act ("TISA"), which requires disclosures about deposit accounts, needs modernization. All of the disclosures required by TISA, including its "Account Schedules," which detail all recurring and potential service fees associated with accounts, should be made available on the Internet as well as on paper. In 2001, in recognition of the benefits of

electronic communication, the Board amended Regulation DD[37] to allow certain disclosures to be made electronically. The Board said in its preamble to the Request for Comments on the Interim Final Rule that "electronic disclosures can effectively reduce compliance costs without adversely affecting consumer protections. The purpose of Regulation DD disclosures is to ensure that consumers have meaningful information about account terms so that consumers can compare savings and investment products."

Yet, the board did not go so far as to *require* that regulated institutions also provide the detailed account schedule required by Section 264 of TISA.on the Internet websites. Not all institutions make comparison shopping easy on their websites easy. Some may provide full information but most provide only limited information about the monthly service fee and balance requirements of some checking accounts. They do not provide the full account schedules required under TISA Section 264 that list, for example, bounced check fees, early account closing fees, stop payment fees, ATM and and other electronic fees.[38]

Both Section 269 of the Truth In Savings Act and the Board's general authority allow the Board to require that, if a bank or other regulated institution maintains an Internet website, all disclosures required to be made available on paper to a customer or consumer also must be disclosed on the Internet. These specific disclosures would include:

- account opening and service fees;
- fees for using ATMs; and
- overdraft fees, accounting closing fees.

After all, in the board's own words, "[t]he purpose of Regulation DD disclosures is to ensure that consumers have meaningful information about account terms so that consumers can compare savings and investment products."

B. Suggestions for Statutory Changes

1. Update Jurisdictional Limits and Statutory Damages for Truth in Lending Act and Consumer Leasing Act

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[37] *See* Docket No. R-1044, 12 C.F.R. 230.

[38] *See* U.S. Public Interest Research Group, *Big Banks, Bigger Fees: A National Survey of Bank Fees,* 1999. *http://www.pirg.org/reports/consumer/bankfees/index.html*

TILA's jurisdictional limit for non-dwelling secured consumer credit transactions was set at $25,000 in 1968. That amount in today's dollars would be over $132,000.[39] The equivalent for the statutory damages amount of $1,000 in 1968 would be over $5,000 today. The numbers in the current statute need to be updated, and an inflation factor built in. The Consumer Leasing Act requires similar treatment.

A statutory change would obviously be necessary to address this issue, and the agencies should recommend these changes to Congress.

2. Improve Disclosures Provided for Mortgage Credit

Everyone agrees that the information provided to consumers when they are obtaining a home mortgage is confusing and even misleading. Home mortgage disclosures need to be streamlined and improved. A federal legal structure[40] which would significantly assist people in maintaining homeownership, without diluting the strength of the home finance industry would be a disclosure of all costs associated with obtaining a home loan in an easy to understand and uniform manner prior to application for the loan. This would facilitate true shopping for all of the various loan terms which contribute to the costs of the loan. All of these costs should then be disclosed in the same format at closing, so the homeowner can see that the loan costs are as promised.

We propose the following changes:

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[39] *See* Consumer Price Index, Inflation Calculator, U.S. Department of Labor, Bureau of Labor Statistics, http://www.bls.gov/bls/inflation.htm.

[40] In 1998 the Federal Reserve Board and the Department of Housing and Urban Development comprehensively addressed this issue in a Joint Report to Congress concerning reform of the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). Board of Governors of the Federal Reserve System, Department of Housing and Urban Development, *Joint Report to the Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement Procedures Act*, July, 1998 (hereinafter "*Joint Report*"). http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf.

- that TILA disclosures provided at closing be in the same format, using the same terminology as the early RESPA disclosures;
- that RESPA's post application and settlement disclosures be provided in a format that also includes disclosures required by TILA;
- that the finance charge disclosure include all costs associated with the loan, regardless of whether the lender benefits from the charge; and
- that the post application disclosures (required by both RESPA and TILA) should list actual charges rather than estimated charges except in limited circumstances.

The key change here is actually the change in the definition of finance charge under TILA. To accomplish the goal of encompassing the RESPA-type disclosures as part of the finance charge disclosure, the finance charge itself should be disclosed as one number, which is derived from the sum of two other numbers: 1) the "interest" to be paid during the course of the loan, and 2) all of the charges to be paid "up front" or before the loan is closed, such as any points, the settlement charges, the appraisal fees, and the like. For example, RESPA/TILA disclosures required to be provided three days after application and again at settlement for closed-end loans. Similar disclosures, with minimal but appropriate distinctions, would be made at closing.

III. The analysis of the proposals proffered by the financial services industry to reduce consumer protections shows that the potential damage to consumers from these proposals outweighs the benefit to the industry.

There are serious concerns with a number of proposals made by the industry at the nationwide focus groups, which we will address below. First, however, we again remind the agencies that an appropriate standard of review for proposals which may harm consumers should be that articulated in Section I of these comments. To promote safety and soundness, ensure fairness and protect consumers, we urge the agencies to adopt the following standard of review for recommending changes to regulations which will impact on consumers:

> **Any *reduction* in these protections, for any reason, must be justified only by the clearest showing that both the burden on the financial services industry is *unreasonably* high, accompanied an equivalent finding that the benefit to consumers is *de minimus.***

1. Truth-in-Lending and the Right of Rescission

Bank participants claimed that they knew of few, if any, instances when a consumer exercised his or her right to rescind under the Truth in Lending Act (“TILA”) and they say that consumers are frustrated with having to wait three days for a loan proceed. Bank participants, suggesting that consumers need a broad right to waive their right of rescission, sought more exemptions or sought repeal for certain categories of transactions.

These suggestions would do radical harm to the one of the single most effective and powerful consumer protections that Congress has passed. Truth in Lending disclosures as well as

HOEPA protections provided by the federal law are largely complied with *because of* the threat of the extended right of rescission in TILA.

The right to rescind is a vital consumer protection. Even if the assertion that this right is rarely exercised is correct, it applies to the issue of whether the right is exercised within the initial three days after it is first provided. This misses the point, that under the law, this three day never begins to run if the requirements of the TILA and Reg Z have not been met.[41]

This right of rescission not only plays an essential role in making certain that the marketplace is working. It also is a primary way to save homes from foreclosure when the law has been broken, and it provides a partial check in high pressure sales tactics.

The bankers (and some regulators) are also misguided when they point to the right of rescission as a delay to an emergency home loan needed to address a true emergency. The law and the regulations already recognize that an emergency can be appropriate grounds for a waiver of the right of rescission, and establish a procedure whereby a consumer can waive the right when there is a true emergency and both parties follow the procedure to ensure that this waiver is *only* used when there is a true emergency, and not in other situations.[42]

2. Privacy Notices

Participants assert that the annual privacy notices are confusing to consumers and inefficient for bankers. They suggest that the original notice is sufficient.

Consumers strongly believe that they should control their sensitive financial information and that the current privacy protections afforded under federal law are extremely weak and should be revisited and strengthened. There is a need for stronger federal and state legislation to enhance consumer control over the sharing of financial information.

As regulators, the agencies have the ability to strengthen the notices, making them easier for consumers to understand. Some consumer organizations recently submitted comments regarding a short form for the notice required under the Gramm-Leach-Bliley Act.[43] The notices should be simplified to ensure that consumers understand them and therefore might exercise their limited rights.

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[41]"The consumer may exercise the right to rescind until midnight of the third business day following the occurrence described in paragraph (a)(1) of this section that gave rise to the right of rescission [consummation of the loan], delivery of the notice required by paragraph (b) of this section [the notice of the right to rescind], or delivery of all material disclosures, whichever occurs last." 12 C.F.R. § 226.15(a)(3).

[42]12 C.F.R. § 226.15(e).

[43]Available at http://www.privacyrights.org/ar/ftc-noticeANPR.htm

3. Expedited Funds Availability or Regulation CC

Participants in the Banker Outreach Meetings commented that they found that the current availability schedule for checks increases the loss exposure to banks and suggested that Regulation CC should be reexamined in its entirety. If Regulation CC is reexamined, we suggest that the time that checks are held should be reduced and the dollar cap on checks subject to fund availability rules be raised. Checks are clearing faster due to technological advances. Regulation CC should provide consumers the benefits of these changes.

Conclusion

As the agencies move forward with this review, we hope that the agencies keep in mind that the resources of consumer representatives and financial institutions are grossly different. In general this is a time of decreased public confidence in the banking system and increased concerns about predatory banking products and corporate misconduct. The answer from the regulators cannot be less regulation. Rather, it should be increased consumer protections. We look forward to continuing the discussion.