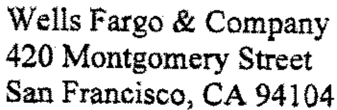

Wells Fargo & Company
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San Francisco, CA 94104

August 4, 2008

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551
regs.comments@federalreserve.gov
Facsimile: (202) 452-3819

Regulation Comments, Chief Counsel's Office
Office of Thrift Supervision
Attention: OTS-2008-0004
1700 G Street, N.W.
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Mary Rupp, Secretary of the Board
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Re: CONSUMER CREDIT CARD ACCOUNT PRACTICES SUBPART
Regulation AA; Proposed Rule on Unfair or Deceptive Acts or Practices
Federal Reserve System [Regulation AA; Docket No. R-1314]; Department of the Treasury, Office of Thrift Supervision [Docket ID. OTS-2008-0004; RIN 1550-AC17]; National Credit Union Administration [RIN 3133-AD47]

Dear Sirs and Madams:

This letter is submitted on behalf of Wells Fargo & Company and its affiliates ("Wells Fargo") in response to the joint proposed rule regarding Unfair or Deceptive Acts or Practices, published in the Federal Register on May 19, 2008 at 73 FR 28903 (the "Proposed Rule" or "Rule"). This letter will address the Consumer Credit Card Account Practices Rule found in

Subpart C of the Proposed Rule. Comments regarding Subpart D, the Overdraft Services Rule, are being submitted concurrently in a separate letter.

Wells Fargo appreciates the opportunity to comment and respectfully requests that the members of the Board of Governors of the Federal Reserve System ("Board"), the Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA") (collectively, the "Agencies") consider the suggestions set forth herein.

Wells Fargo is a diversified financial services company providing banking, insurance, investments, mortgage and consumer finance through almost 6,000 banking offices, the internet, and other distribution channels across North America, and internationally. Wells Fargo has $595 billion in assets and 160,900 employees and is one of the United States' top-40 largest private employers. Wells Fargo ranked fifth in assets and fourth in market value of its stock among its peers as of March 31, 2008. Wells Fargo Bank, N. A., the principal banking subsidiary of Wells Fargo, is the only bank in the United States to receive the highest possible credit rating, "AAA," according to Standard & Poor's Rating Service.

Our vision and values include a commitment to consider the customer in everything we do, and to "do what's right for the customer." We take a leadership role in promoting financial literacy. For example, with the help of students and teachers, we've designed a new curriculum (in English and Spanish) for online financial literacy called "Hands on Banking," which is an interactive program that helps consumers understand financial basics and smart money management through lessons, tools and checklists. We also introduced "Stagecoach Island℠," our multi-player online role playing game that provides financial education for high school and college-age students. We support innovation to provide customer choice and offer a variety of account products and features to help customers succeed financially.

This letter will begin with an executive summary of the key issues and adverse impacts of the Proposed Rule. Following will be general comments about why it may not be appropriate to classify the acts and practices in the Proposed Rule as "unfair" or "deceptive" when they do not meet the standards set forth in the Federal Trade Commission's ("FTC") three prong test for making such a designation. It will also discuss the unintended and adverse consequences of applying these labels inappropriately to long-accepted acts and practices; particularly how this Rule would likely create meritless litigation by those seeking to retroactively apply these proposed standards to past acts and practices. The general comments will conclude with explaining why it is unnecessary to utilize the Agencies' Unfair or Deceptive Acts or Practices ("UDAP") rule-making authority under the Federal Trade Commission Act ("FTC Act") to prohibit these acts and practices, and how most of the acts and practices described in the Proposed Rule can, and should be, addressed in Regulation Z which, unlike the Proposed Rule, would apply to all entities that issue credit cards, including state-chartered credit unions and non-depository institutions. Following the general comments, this letter will provide responses to the Agencies' requests for comment on specific provisions of Subpart C – Consumer Credit Card Account Practices Rule.

I. EXECUTIVE SUMMARY

A. Exercising UDAP Authority Under FTC Act is Not the Most Appropriate Way to Proceed, Is Unnecessary to Achieve the Agencies' Goals, and Will Result in Unintended Consequences

Wells Fargo supports the Agencies' goals of ensuring consumers have the ability to make informed decisions about the use of credit card accounts without being subjected to unfair or deceptive acts or practices. However, the Agencies can better accomplish these goals by regulating the acts and practices at issue through Regulation Z, without unnecessarily defining all such conduct as "unfair" or "deceptive." Unlike the Proposed Rule, Regulation Z would apply to all entities that issue credit cards and would therefore provide a level playing field, making it the preferred means for implementing these proposals. Moreover, promulgating UDAP rules under the FTC Act is not the most appropriate way to proceed, because most of the acts and practices addressed in the Proposed Rule do not meet *all three prongs* of the FTC's test for determining whether conduct constitutes an unfair or deceptive act or practice. Exercising UDAP rule-making authority will also likely create unintended consequences; most notably a proliferation of meritless claims seeking to retroactively apply the new rules to past acts and practices. The Agencies can more effectively achieve all or most of its goals through the Board's Regulation Z rule-making authority under the Truth in Lending Act, which the other Agencies have the power to enforce, without the need to unnecessarily label all acts and practices "unfair" or "deceptive."

B. Minimum Two-Year Delayed Effective Date Will be Required for Extensive Development, Testing and Implementation

Institutions will need a minimum of two years to comply with the mandates set forth in the Proposed Rule. Once finalized, these rules will require extensive resources, systems development and testing prior to implementation. This is true regardless of how the Agencies issue these rules, and especially in light of the concurrent substantial requirements in the Regulation Z Open-End Credit Rules previously proposed in June 2007.

C. Proposed Rule Will Result in Several Unintended Consequences Which Will Harm Consumers

By proposing to declare these acts and practices as "unfair" or "deceptive," the Rule will ultimately result in harm to consumers, in the form of increased costs for credit, reduced credit availability, and customer confusion. This is particularly true with respect to the proposals regarding increasing rates on existing balances and how payments are allocated.

Advances in technology have increased institutions' ability to more accurately predict future behavior and corresponding risk on credit card accounts. In fact, regulators expect institutions to utilize available information to manage the risk in their credit card portfolios.[1] One tool for doing this is risk-based pricing, which benefits consumers by allowing institutions to offer competitive pricing appropriate to each consumer, based upon the consumer's particular credit risk profile. Restricting an institution's ability to adjust the pricing on an account commensurate with a consumer's increased risk will force institutions to pass on higher costs of credit to all consumers. This form of "socialized pricing" will effectively result in consumers with good credit profiles having to pay higher prices for credit to subsidize the higher risk accounts, which institutions would be unable to re-price accordingly after account opening if risk has increased. Restricting risk-based pricing will also severely decrease credit availability for all consumers. Without the ability to appropriately re-price accounts as a consumer's risk increases, institutions will be forced to extend less credit through new accounts, and restrict or reduce credit lines on existing accounts. Improving disclosures, increasing consumer financial education, and continuing to allow consumers to opt out of re-price changes would better benefit consumers.

The proposal to mandate how consumers' payments are allocated to outstanding balances will also have an adverse impact on consumers. By limiting the manner in which payments can be allocated to outstanding balances, the Proposed Rule will lead many institutions to extend fewer (or perhaps no) balance transfer and promotional rate offers. To the extent such offers are made to consumers, institutions will likely establish new fees, increase existing fees and shorten the duration of the offers. Finally, any such offers would likely be available only to the most credit-worthy consumers.

Limiting risk-based pricing and mandating how payments are allocated to outstanding balances will reduce credit availability in an already stressed credit market, increase costs of credit for all consumers, and result in fewer innovative products.

II. GENERAL COMMENTS

A. <u>Exercising UDAP Authority Under FTC Act is Not the Most Appropriate Way to Proceed, Is Unnecessary to Achieve the Agencies' Goals, and Will Result in Unintended Consequences</u>

Wells Fargo urges the Agencies to apply prudence and restraint in exercising its rule-making authority under the FTC Act and not unnecessarily designate all of the acts and practices in the Proposed Rule as "unfair" or "deceptive." Most of the acts and practices addressed in the Proposed Rule do not meet the criteria to warrant such a designation. Unnecessarily designating all of these acts and practices as "unfair" or "deceptive" minimizes the seriousness of those terms, should be reserved for only the most egregious of acts and practices, and will lead to unintended consequences. The Agencies can more appropriately accomplish the goal of

[1] According to the "Account Management and Loss Allowance Guidance" issued by the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Board and the OTS on January 8, 2003, "[t]he Agencies expect institutions to fully test, analyze, and support their account management practices, including credit line management and pricing criteria, for prudence prior to broad implementation of those practices."

prohibiting the acts and practices described in the Proposed Rule through other equally effective means, such as Regulation Z, which would also provide a more level playing field for all institutions that issue credit cards.

1. Proposed Rule Applies "Unfair" and "Deceptive" Labels to Acts and Practices Which Do Not Satisfy the FTC's Three Prong Test

Although Wells Fargo supports the Agencies' efforts to regulate the acts and practices addressed in the Proposed Rule, such acts and practices do not meet the criteria necessary for declaring an act or practice "unfair" or "deceptive" according to the FTC's three prong test. Therefore, it would be inappropriate to regulate these acts and practices by designating them as "unfair" or "deceptive."

To be considered "unfair," an act or practice must satisfy *all three* of the following requirements: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.[2] Under the FTC's separate standards for deception, an act or practice will be considered deceptive where: (1) it misleads or is likely to mislead the consumer; (2) the consumer's interpretation of the representation, omission, or practice is reasonable under the circumstances; and (3) the misleading representation, omission, or practice is material. Further, in guidance issued jointly by the Board and the Federal Deposit Insurance Corporation ("FDIC") on March 11, 2004[3], the Board and the FDIC stated:

> Whether an act or practice is unfair or deceptive will in each instance depend upon a careful analysis of the facts and circumstances. In analyzing a particular act or practice, the [Board and the FDIC] will be guided by the body of law and official interpretations for defining unfair or deceptive acts or practices developed by the courts and the FTC. The [Board and the FDIC] will also consider factually similar cases brought by the FTC and other agencies to ensure that these standards are applied consistently.

In addition, the Board and the FDIC noted in their 2004 guidance that:

> Public policy, as established by statute, regulation, or judicial decisions may be considered with all other evidence in determining whether an act or practice is unfair. For example, the fact that a particular lending practice violates a state law or a banking regulation may be considered as evidence in determining whether the act or practice is unfair. Conversely, the fact that a particular practice is affirmatively allowed by statute may be considered as evidence that the practice is not unfair. Public policy considerations by themselves, however, will not serve as the primary basis for determining that an act or practice is unfair.

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[2] 15 U.S.C. §45(n); FTC Policy Statement on Unfairness, Letter from the FTC to the Hon. Wendell H. Ford and the Hon. John C. Danforth, S. Committee on Commerce, Science and Transportation, December 17, 1980 ("FTC Policy Statement on Unfairness").

[3] Guidance on "Unfair or Deceptive Acts or Practices by State-Chartered Banks," March 11, 2004 (FDIC FIL-26-2004).

To be considered "unfair" or "deceptive," an act or practice must meet *all three prongs* of the FTC's test; if any prong of the test is not satisfied, then the act or practice cannot properly be deemed "unfair" or "deceptive." When the three prong test for what constitutes an unfair act or practice is applied to the acts and practices addressed in the Proposed Rule, it becomes clear why this designation may not be appropriate and is contrary to the FTC's guidance. We support the Agencies' goals of protecting consumers by restricting or prohibiting some of these acts and practices through other consumer regulations. However, these goals should not be achieved by classifying these acts and practices as "unfair" or "deceptive" because they do not meet the standards set forth in the FTC three prong test. The analysis below applies the FTC's "unfairness test" to the following provisions of the Proposed Rule and demonstrates why they do not meet this standard.

a. Acts or Practices Regarding Application of Increased Annual Percentage Rates to Outstanding Balances Are Not Unfair

The practice of increasing rates on outstanding balances based on a consumer's credit risk does not meet the FTC's three prong test for being an "unfair" act or practice. Section __.24 of the Proposed Rule would prohibit institutions from increasing rates on outstanding balances unless: (a) the increase is due to operation of an index that is not under the institution's control and is available to the general public (i.e., a variable rate); (b) a promotional rate expires or is lost; or (c) the minimum payment has not been received within 30 days after the payment due date. In addition, institutions would be prohibited from requiring repayment of the outstanding balance using a method that is less beneficial to consumers than one of the following: (a) an amortization period of no less than 5 years, measured from the effective date of the increased rate; or (b) a required minimum periodic payment that includes a percentage of the outstanding balance that is no more than twice the percentage that was included before the effective date of the increased rate. Finally, institutions would be prohibited from assessing any fee or charge based solely on the outstanding balance, except for late payment fees or overlimit fees based in part on the outstanding balance. The preamble to the Proposed Rule indicates that the practice of increasing rates on outstanding balances, except in certain limited circumstances, merely "*appears* to meet the test for unfairness under 15 U.S.C. §45(n) and the standards articulated by the FTC."[4] However, this practice does not meet *all three prongs* of the FTC's three-part test necessary to be deemed unfair.

First, the practice does not cause substantial injury to consumers. According to Regulation Z, "the annual percentage rate is a measure of the *cost of credit*, expressed as a yearly rate."[5] (Emphasis added). A consumer with a good credit history will incur a lower cost for credit than a consumer with a poor or higher risk credit history. Similarly, a consumer whose credit standing has declined, resulting in a corresponding increase in credit risk, will pay more for credit after the decline than he or she paid prior to the decline. For example, if an institution closed a consumer's account due to increased risk based on a decrease in the consumer's credit profile, the consumer would likely pay a higher rate if he or she applied and was approved for a new credit card account with another institution. Similarly, if an institution allows a consumer to keep his or her account open despite increased risk due to a decrease in the consumer's credit

[4] 73 FR at 28917.

[5] 12 C.F.R. §226.14(a).

profile, the consumer would likely pay a higher rate on existing and future balances on that account. The rate charged based on risk represents the cost of credit and is not a "substantial injury."

Second, consumers can reasonably avoid the application of increased rates to outstanding balances. Whether changes to the annual percentage rate occur automatically due to the consumer's default under the terms of the customer account agreement or in connection with a change in the terms of the account, disclosures provided by institutions inform consumers that rates may increase based on consumers' behavior, creditworthiness and other factors. If, as is stated in the preamble to the Proposed Rule, consumers do not recall the circumstances that may cause their rates to increase or do not retain a copy of their customer account agreement,[6] they can contact the institution that issued the credit card and request another copy of the disclosures. Further, while the preamble states that "consumers may ignore the disclosures because they overestimate their ability to avoid the penalty triggers,"[7] to the extent this occurs, it is clearly not due to any action by the institution that "unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[8]

In addition to disclosures, some institutions, including Wells Fargo, currently provide consumers with the opportunity to opt out of increases in rates resulting from changes in the terms of customer account agreements by closing their accounts and repaying the outstanding balance under the terms in effect on the account prior to the proposed rate increase. Consumers have sole discretion in choosing whether or not to opt out of such rate increases. Although the Agencies assert that it would not be "economically rational" for a consumer to accept an increased rate on an existing balance, there are a number of reasons why a consumer may choose to keep his or her account open and pay the increased rate. If a consumer's credit standing has declined, that consumer may decide to accept the increased rate because it is likely better than any other rate the consumer could obtain with another institution. In fact, the consumer may not qualify for another credit card at all. Additionally, rewards or other account benefits may outweigh the impact of the increased rate, particularly if the consumer does not ordinarily carry a balance. Allowing consumers to opt out of rate increases accomplished by changes in the terms of customer account agreements clearly provides them with a reasonable opportunity to avoid having increased rates apply to outstanding balances. In addition, to the extent an institution seeks to increase the rates in effect on an account based on credit bureau information such as a decrease in the consumer's credit score, the consumer is provided the reasons for the increase and the name and address of the credit reporting agency. The consumer can choose to contact the credit reporting agency, review his or her credit file, and dispute and correct any inaccurate information.

Lastly, any alleged harm from risk-based pricing is far outweighed by the countervailing benefit to the majority of consumers who have good credit histories. Such consumers are recognized for their responsible credit management and accordingly rewarded with competitive pricing appropriate to their individual credit risk profiles. If institutions are not allowed to price

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[6] 73 FR at 28917.
[7] 73 FR at 28918.
[8] FTC Policy Statement on Unfairness at 3.

existing accounts based on risk, these consumers would undeservingly end up having to subsidize higher risk consumers in the form of higher rates and fees.

In fact, institutions' inability to re-price outstanding balances will have a negative impact on credit availability and the cost of credit for all consumers. Eliminating institutions' ability to re-price existing balances will lead to limited credit availability and higher credit costs to riskier consumers and to those consumers with limited credit histories, making it more difficult for such consumers to obtain credit and establish a good credit history. To manage ongoing credit risk, institutions will also be left with no option other than to decrease existing credit lines to a greater extent or close existing accounts. The fact that a higher annual percentage rate would be allowed on new balances would not eliminate the need for institutions to implement these risk mitigation actions.

b. Acts or Practices Regarding Allocation of Payments Are Not Unfair

Current methods for allocating payments made on credit card accounts are clearly disclosed to consumers and do not meet the FTC's three prong test for being an "unfair" act or practice. When different rates apply to different balances on an account, Section __.23 of the Proposed Rule would prohibit institutions from allocating amounts paid in excess of the minimum periodic payment using a method any less favorable to consumers than one of the following methods: (a) applying the entire amount first to the balance with the highest APR; (b) splitting the amount equally among the balances; or (c) splitting the amount pro rata among the balances. Regardless of the allocation method used, institutions would be prohibited from allocating amounts paid in excess of the minimum periodic payment to any promotional rate or deferred interest balances before other balances with higher rates. In addition, institutions would be prohibited from requiring consumers to repay any portion of a promotional rate or deferred interest balance in order to take advantage of any grace period offered. The preamble to the Proposed Rule indicates that these prohibited acts or practices merely "*appear* to meet the definition of unfairness under 15 U.S.C. §45(n) and the standards articulated by the FTC."[9] In fact, however, the prohibited practices do not *always* meet the definition of unfairness under 15 U.S.C. §45(n) or the standards articulated by the FTC. Therefore, these practices are more appropriately analyzed on a case-by-case basis, and should not be universally characterized as "unfair."

The Agencies' finding that current payment allocation methods cause "substantial monetary injury to consumers in the form of higher interest charges" is misplaced. Substantial injury cannot be found in instances where the amount of interest charged is consistent with applicable law, and where institutions properly disclose the amount of all interest charges, how payments are allocated to outstanding balances, when grace periods apply, and when finance charges begin to accrue.

For instance, institutions must disclose the rates applicable to each type of balance on a consumer credit card account, including rates applicable to purchases, cash advances, and balance transfers. Most institutions also disclose the typical allocation method they use, such as the fact that payments may be applied to balances with lower annual percentage rates before

[9] 73 FR at 28915.

being applied to balances with higher annual percentage rates.[10] Institutions must also disclose whether or not a grace period is offered and, in the customer account agreement, must provide an explanation of when finance charges begin to accrue on the account in connection with any offered grace period. Such disclosures are made on or with solicitation and application materials, the customer account agreement and with each subsequent solicitation that contains a promotional rate offer, as applicable. In situations where an institution offers a grace period on purchases, and also offers a promotional rate on transferred balances, the consumer would have to decide whether to take advantage of the grace period on purchases or to receive the benefit of the promotional rate on transferred balances. The fact that the consumer may desire the full benefit of both a lower rate on transferred balances and a grace period on new purchases, even though the disclosures clearly state that the grace period will apply only if there is no outstanding balance from the previous billing cycle and that payments will be applied first to balances with lower rates, does not constitute a substantial injury. As stated by the FTC, "emotional impacts and other more subjective types of harm …will not ordinarily make a practice unfair."[11]

Any purported harm caused by existing payment allocation practices is reasonably avoidable by consumers. As discussed above, many institutions disclose the fact that payments may be applied first to balances with lower rates. The consumer has sole discretion in choosing whether to apply for a particular credit card account, how to utilize the credit extended and how to make payments on the account. In other words, consumers may choose to establish a balance at a lower or higher interest rate pursuant to the terms of their customer account agreement with the knowledge of how payments may be allocated and then may choose whether to make payments in excess of the minimum payment required. Institutions that disclose their allocation method have not engaged in any "behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[12]

Lastly, allowing institutions to determine which payment allocation method to use provides countervailing benefits to competition and to consumers. Allowing institutions to determine how to allocate payments enhances competition and innovation in the credit card industry. In order to attract and retain customers, institutions must develop new products. This has led to more offers with low introductory and promotional rates and no annual fees. As with all commercial products and services, some consumers benefit more than others depending on how they utilize the products and services. If institutions are not allowed to determine how to allocate payments, it would ultimately lead to an increase in the annual percentage rates for promotional rate offers, a decrease in the duration of promotional rates, an increase in balance transfer fees and other fees, or the disappearance of such offers altogether. In effect, consumers who effectively manage their accounts would be subsidizing those who do not.

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[10] Advisory Letter issued by the OCC to national banks on September 14, 2004 ("AL 2004-10") provides that "national banks should not fail to disclose fully and prominently in promotional materials and credit agreements any material limitations on the applicability of the promotional rate, such as the time period for which the rate will be in effect, any circumstances that could shorten the promotional rate period or cause the promotional rate to increase, the categories of balances or charges to which the rate will not apply, and if applicable, *that payments will be applied to promotional rate balances first*." (Emphasis added).
[11] FTC Policy Statement on Unfairness at 3.
[12] *Id.*

c. Balance Computation Methods Are Not Unfair

Current balance computation methods are clearly disclosed to consumers and do not meet the FTC's three prong test for being an "unfair" act or practice. Section __.26 of the Proposed Rule would prohibit institutions from imposing finance charges based on balances for days in billing cycles that precede the most recent billing cycle. The Agencies propose only the following two exceptions to this prohibition: (a) the assessment of deferred interest; and (b) adjustments to finance charges following the resolution of a billing error dispute. According to the Agencies, the prohibited practice *appears* to be an unfair act or practice.[13] While the preamble to the Proposed Rule focuses on the "two-cycle" or "double-cycle" method, the language in proposed Section __.26 is much broader and cannot account for the wide variety of circumstances in which it may be perfectly appropriate to impose finance charges based on balances for days in previous billing cycles. Therefore, this practice is more appropriately analyzed on a case-by-case basis, and should not be universally characterized as "unfair."

First, the proper disclosure and imposition of finance charges does not cause substantial injury to consumers. Applications and solicitations for consumer credit card accounts must disclose the name or an explanation of the balance computation method used to determine the balance for purchases on which the finance charge is computed.[14] The "two-cycle average daily balance" method has been in existence for some time and is recognized in Regulation Z as a method that can be described by name in disclosing the balance computation method pursuant to Section 226.5a(b)(6). In addition to the disclosure required in applications and solicitations, an institution's initial disclosure statement must include a disclosure of the circumstances under which a finance charge will be imposed and how it will be determined, including a statement of when finance charges begin to accrue and an explanation of the method used to determine the balance on which the finance charge is computed.[15] The "two-cycle" or "double-cycle" billing method is simply one of several long-accepted methods utilized by institutions to administer conditional grace periods. In fact, the Agencies concede that this method does not result in additional finance charges for consumers who carry a balance from month to month or for consumers who pay their balance in full within the grace period every month.[16] While consumers who pay in full one month and then carry a balance the next month may incur greater finance charges, these charges do not constitute "injuries" under the FTC Act so long as they are disclosed to consumers.

Second, consumers can reasonably avoid the higher finance charges. As explained above, the balance computation method is disclosed and explained to consumers at the time of application and in the initial disclosure statement, which must be provided prior to the first transaction on the account. Consumers have sole discretion in deciding whether to apply for and access credit on an account that utilizes the "two-cycle" or "double-cycle" billing method. Further, consumers that choose such an account also have sole discretion in determining whether they will pay in full within the grace period every month or carry a balance on the account from

[13] 73 FR at 28923.
[14] Institutions can include the name of the balance computation method if listed in 12 C.F.R. §226.5a(g), otherwise an explanation of the method must be given. *See* 12 C.F.R. §226.5a(b)(6).
[15] 12 C.F.R. §226.6(a).
[16] 73 FR at 28922.

one month to the next. When the balance computation method is disclosed to consumers, there is clearly no action on the part of institutions to interfere with consumers' decision-making ability and consumers can reasonably avoid any increased costs.

Institutions' current practices with respect to the "two-cycle" or "double-cycle" method do not cause, and are not likely to cause, "substantial injury" to consumers. Moreover, any additional costs to consumers are reasonably avoidable. To the extent the Agencies determine it is necessary to prohibit the "two-cycle" or "double-cycle" method on a go-forward basis, this can be accomplished through other consumer regulations. However, it may be inappropriate to classify the "two-cycle" or "double-cycle" method as "unfair" because the practice does not meet *all three prongs* of the FTC's test for unfairness. It may also be inappropriate to declare as "unfair" *all* instances in which finance charges are imposed based on balances for days in previous billing cycles except for the two limited exceptions provided in the Proposed Rule. As previously stated, there are many circumstances in which it would be appropriate to impose finance charges based on balances for days in previous billing cycles, including but not limited to, instances where a consumer's payment is returned unpaid and the dishonored payment amount is credited back to the account, or in the case of cross-cycle transactions, such as cash advances, in which a transaction posts to the account in one billing cycle but interest began accruing in the previous billing cycle based on the date the transaction occurred. Therefore, this practice is more appropriately analyzed on a case-by-case basis, and should not be universally characterized as "unfair."

d. Acts or Practices Regarding Time to Make Payment Are Not Unfair

Treating a credit card payment as late, when less than 21 days is available to make the payment, does not meet the FTC's three prong test for being an "unfair" act or practice. Section __.22 of the Proposed Rule would prohibit institutions from treating a payment on a consumer credit card account as late for any purpose unless the consumer has been provided a reasonable amount of time to make the payment. Pursuant to the safe harbor provision, mailing or delivering the periodic statement at least 21 days before the payment due date would be deemed a "reasonable amount of time to make the payment." The preamble to the Proposed Rule indicates that treating a payment as late, while failing to provide a reasonable amount of time to make the payment, *appears* to be an unfair act or practice. However, this overly-broad designation does not consider long-standing accepted practices or the different methods utilized by institutions to deliver periodic statements and by consumers to make payments.

Treating a credit card payment as late, without providing at least 21 days to make the payment, does not cause, nor is it likely to cause, "substantial injury" to consumers. Current regulations permit institutions to mail or deliver periodic statements at least 14 days prior to any date by which the new balance, or any portion of the new balance, must be paid in order for consumers to avoid additional finance or other charges, including late fees.[17] In practice, many institutions use that same date to determine whether a payment is late or a consumer is in default under the terms of the customer account agreement.

[17] 12 C.F.R. §226.5(b)(2)(ii).

In proposing a 21-day period as a safe harbor in Section __.22 of the Proposed Rule, the Agencies rely heavily on a 7-day estimated mail delivery time. However, the Agencies also acknowledge that increasing numbers of consumers are receiving periodic statements and making payments electronically, and recognize that first class mail is often delivered within three business days.[18] As the Agencies correctly note, an increasing number of institutions offer consumers the ability to view periodic statements electronically, allowing consumers to review their statements sooner, without the delays associated with mailing time. In addition, consumers have the option of obtaining account and payment information by telephone, such as current balance, payment due date, or the amount of the minimum payment due. Moreover, most institutions offer consumers a number of payment options, including the opportunity to make payments by telephone, through the institution's website, or having an agreed-upon amount, ranging from the minimum payment due to the full balance on the account, automatically deducted periodically from a deposit account. There are also a myriad of alternative bill payment services that consumers can access to pay bills on time. Finally, most institutions widely promote online tools that can help consumers manage their accounts successfully by using account alert features, such as emails to consumers reminding them of their payment due date.

In light of the fact that an increasing number of institutions make periodic statements available to consumer electronically, that consumers are provided with more choices than ever today for paying their accounts, and the Agencies' own recognition that first class mail often takes no more than three business days, any purported "substantial injury" is nonexistent or speculative at best. According to the FTC Policy Statement on Unfairness, merely speculative harms do not constitute substantial consumer injury. Accordingly, the current practices do not cause, nor are they likely to cause, a "substantial injury" to consumers and therefore, cannot be deemed "unfair."

Even assuming there is some perceived injury to consumers in treating a credit card payment as late when periodic statements are mailed less than 21 days before the payment due date, any such purported injury is reasonably avoidable. The current time requirements for mailing periodic statements sufficiently allow consumers a reasonable opportunity to avoid having their payments treated as late. Since payment due dates on credit card accounts do not vary greatly from one month to the next, consumers are well aware of the time period in which their payments are due. In fact, most creditors even allow consumers to choose their payment due date. Further, as discussed above, institutions continue to provide a number of options for consumers to access their account information and to make payments on their credit card accounts, such as electronically or by telephone.

According to the FTC Policy Statement on Unfairness, most of the FTC's unfairness matters are brought "not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making."[19] Institutions are not creating or taking advantage of obstacles to the free exercise of consumer decision making. To the contrary, institutions are eliminating such obstacles by providing consumers with viable alternatives from

[18] 73 FR at 28912.

[19] FTC Policy Statement on Unfairness at 3.

which to choose. Clearly, consumers can reasonably avoid any alleged injuries due to the myriad of choices they have for obtaining account information, and the variety of options for making timely payments.

Institutions' current practices regarding time to make a credit card payment do not cause, nor are they likely to cause, "substantial injury" to consumers. Moreover, any purported injury to consumers is reasonably avoidable. The Agencies are certainly free to implement the proposed rule on "time to make payments" through other consumer regulations. However, it may not be appropriate to classify today's practices as "unfair" because such practices do not meet *all three prongs* of the FTC's test for unfairness.

In conclusion, the acts and practices described above, regarding application of increased rates to outstanding balances, allocation of payments, balance computation methods, and time to make payment, do not meet *all three prongs* of the FTC's test for determining whether something is "unfair" and therefore, it may be inappropriate to label them as such. Wells Fargo supports the Agencies' efforts to regulate these acts and practices, but opposes the Agencies doing so by exercising their UDAP rule-making authority. Regulating these acts and practices would more appropriately be accomplished without designating anything as "unfair" or "deceptive," and preferably through amendments to Regulation Z. Inappropriately declaring these acts or practices as "unfair" will result in unintended and unwanted consequences, and is unnecessary for the Agencies to achieve their goals, as detailed below.

2. Unintended Consequences Will Result from Applying "Unfair" and "Deceptive" Labels to all Acts and Practices

Designating an entire class of acts and practices as "unfair" or "deceptive," without considering each act or practice on a case-by-case basis, will lead to unintended and unwanted consequences.

a. Public Policy Considerations

While Wells Fargo understands and supports the Agencies' goal of protecting consumers, it is important to note that the acts and practices specified in the Proposed Rule have previously been explicitly or implicitly permitted by regulations or guidance issued by Federal regulatory agencies.

As previously mentioned, the OCC issued an advisory letter on September 14, 2004 ("AL 2004-10") to alert national banks about the OCC's concerns with certain marketing and account management practices. In AL 2004-10, the OCC did not prohibit the underlying practices. Rather, the OCC advised national banks not to engage in certain acts or practices without full and prominent disclosure of applicable terms and limitations. Specifically, the OCC indicated that "promotional rate offers *may be beneficial to consumers*" and that typical limitations and features, such as applying the borrower's payments during the promotional rate period first to the balances subject to the promotional rate, and applying payments to other higher interest rate balances only after such promotional rate balances are paid off, "*are not, taken alone, contrary to law.*" (Emphasis added). The OCC stated that "national banks should not fail to disclose fully

and prominently in promotional materials and credit agreements any material limitations on the applicability of the promotional rate, such as the time period for which the rate will be in effect, any circumstances that could shorten the promotional rate period or cause the promotional rate to increase, the categories of balances or charges to which the rate will not apply, and if applicable, *that payments will be applied to promotional rate balances first*." (Emphasis added). Similarly, in connection with repricing of accounts, the OCC recognized that credit card issuers may engage in a number of practices that "*may well be appropriate measures for managing credit risk*," including increasing the annual percentage rates on a consumer's account based on the consumer's failure to "make timely payments *on other accounts, including accounts with other creditors*." (Emphasis added). Again, the OCC simply stated that "national banks should not fail to disclose fully and prominently in promotional materials the circumstances under which the credit card agreement permits the bank to increase the consumer's annual percentage rate (other than due to a variable rate feature), increase fees, or take other action to increase the cost of credit, such as, if applicable, failure to make timely payments to another creditor."

In addition to Federal laws and regulatory guidance, the laws of various states permit institutions to increase annual percentage rates applicable to existing balances. For example, consumer credit card accounts issued by Wells Fargo Bank, N. A. are governed by Federal law and by applicable South Dakota law. Pursuant to South Dakota law, institutions are permitted to change the terms of a credit card agreement if the right to make such changes has been reserved in the credit card agreement. Moreover, increases in finance charges can be applied to existing balances so long as the institution provides the consumer with the opportunity to opt out of the changes.[20]

Institutions rely on the regulations and guidance issued by their Federal and state regulators in determining how to conduct their business. While it is understandable that regulations and guidance may change over time, and that practices which were once acceptable may be prohibited in the future, to characterize permitted practices as unfair or deceptive may undermine institutions' confidence in, and ability to rely on, current regulations and guidance.

b. Litigation Risk and Prospective Application of Final Rule

The Proposed Rule creates significant litigation risk for financial institutions. If the Agencies proceed with implementation of one or more of the provisions as currently set forth in the Proposed Rule, we urge them to make it clear that the Proposed Rule applies only prospectively. Such language should make it clear that any institution that engaged in any of the acts or practices specified in the Proposed Rule prior to the effective date of the final rule, but otherwise complied with applicable law, will not be deemed to have been engaged in any unfair or deceptive acts or practices. Even with the addition of specific language indicating that the final rule applies prospectively only, Wells Fargo is concerned that the courts may be sympathetic to arguments that a practice that is unfair today was also unfair in the past and that institutions may be subject to meritless claims and forced to expend significant resources defending allegations that acts and practices occurring prior to the effective date of the final rule, all of which are long-established *and permitted* acts or practices, amount to unfair or deceptive conduct. At a minimum, the Agencies should reconfirm and emphasize the statement in the

[20] SDCL §54-11-10; SDCL §54-11-11.

preamble to the Proposed Rule: "These proposals should not be construed as a definitive conclusion by the Agencies that a particular act or practice is unfair or deceptive."[21] We also reiterate that if the Agencies proceed with addressing the acts or practices in one or more provisions of the Proposed Rules, these acts or practices should (and can) be addressed through other consumer regulations, without the unnecessary and extraordinary step of designating all of them as "unfair" or "deceptive."

If the Agencies determine to adopt some form of a UDAP rule under the FTC Act, we ask the Agencies to take steps to reduce the risk that institutions will incur expenses defending against meritless claims concerning behavior occurring before the effective date of the final rule. 15 U.S.C. §57a(f)(1) gives the Agencies authority to issue a UDAP regulation prospectively without expressly concluding that a practice is unfair under the FTC standards.[22] Therefore, in addition to requesting that the Agencies make it clear that any final rule applies prospectively only, we also respectfully request that the Agencies refrain from reaching a final determination that the current practices identified in the Proposed Rule, and particularly those acts and practices that concern application of increased rates to outstanding balances, allocation of payments, balance computation methods, and time for consumers to make payments, constitute an unfair act or practice under 15 U.S.C. §45(n) and the standards articulated by the FTC.

3. It is Unnecessary to Apply "Unfair" and "Deceptive" Labels to all Acts and Practices

It is not necessary for the Agencies to declare all of the acts and practices contemplated in the Proposed Rule as "unfair" or "deceptive" in order to prohibit such acts and practices. The Agencies could more effectively accomplish its goals and promulgate rules through Regulation Z, without the challenges of having to satisfy the "unfairness" test standards or the unintended consequences that inextricably come with exercising its UDAP rule-making authority. Actually, Regulation Z is the superior mechanism for regulating these acts and practices. This is because unlike the Proposed Rule, Regulation Z would apply to all institutions, including FTC regulated entities such as state-chartered credit unions and non-depository institutions, thereby ensuring an even playing field. Accordingly, the Agencies should utilize Regulation Z, without declaring any acts or practices "unfair" or "deceptive," for addressing (1) application of increased rates to outstanding balances; (2) allocation of payments; (3) balance computation methods; and (4) time for consumers to make payments. Declaring any of these acts or practices as "unfair" or "deceptive," whether such declaration is done through the Agencies' rule-making authority under the FTC Act or through Regulation Z, will create meritless litigation risk based on claims that these rules should be applied to past acts and practices, as described above. In order to realize the Agencies' intention of not exposing institutions to such unnecessary risk, the Board should use Regulation Z to address these acts and practices, but without labeling such conduct as "unfair" or "deceptive."

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[21] 73 FR at 28912.

[22] 15 USC 57a(f)(1) provides that the Agencies "shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices."

Historically, the Federal banking agencies have effectively regulated unfair or deceptive acts or practices using a case-by case approach and by issuing guidance and bringing formal actions, despite the lack of specific regulations prohibiting broad categories of consumer credit card account practices. In addition, the Agencies have often required improved disclosures as a means to avoid the occurrence of unfair or deceptive acts or practices. For example, the vast majority of the "best practices" set forth by the FDIC and the Board in their 2004 guidance to state-chartered banks focused on the use of disclosures as a means to avoid engaging in unfair or deceptive activity.[23] Similarly, as discussed above, the OCC has indicated that national banks should not engage in certain activities, including several acts or practices prohibited by the Proposed Rule, without full and prominent disclosure of applicable terms and conditions.[24]

The Truth in Lending Act ("TILA") gives the Board authority to prescribe regulations to carry out the purposes of TILA, which are "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."[25] The Board's authority to issue regulations under the TILA does not impair the authority of other agencies, including the OTS and NCUA, to make rules in connection with their own procedures to enforce compliance with the TILA.[26] In addition, in exercising its functions under the TILA, the Board may obtain the views of "any other Federal agency which, in the judgment of the Board, exercises regulatory or supervisory functions with respect to any class of creditors subject to [the TILA]."[27] Thus, while the OTS and NCUA may not institute revisions to Regulation Z, the Board is free to obtain the views of the OTS and NCUA with regard to any revisions that are being considered by the Board.

In light of the stated purposes of the TILA and Regulation Z, the Agencies' enforcement rights with respect thereto, and the fact that Regulation Z has explicitly and implicitly provided authority for institutions to engage in many of the practices addressed in the Proposed Rule, Regulation Z would provide an appropriate forum to address many of the Agencies concerns with respect to acts or practices in connection with application of increased rates to outstanding balances, allocation of payments, balance computation methods, and time to make payment.

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[23] Guidance on "Unfair or Deceptive Acts or Practices by State-Chartered Banks," March 11, 2004 (FDIC FIL-26-2004).

[24] OCC AL 2004-10.

[25] 15 U.S.C. §1601(a). The purpose of Regulation Z is, in part, "to promote the informed use of consumer credit by requiring disclosures about its terms and cost" and to regulate certain credit card practices (*See* 12 C.F.R. §226.1(b)).

[26] 15 U.S.C. §1607(d). The TILA grants enforcement authority to various Federal agencies (e.g., the FTC is responsible for enforcing compliance with the TILA by state-chartered credit unions, the NCUA is responsible for enforcing compliance by Federal credit unions, and the OTS is responsible for enforcing compliance by savings associations whose deposits are insured by the Federal Deposit Insurance Corporation) (*See* 15 U.S.C. §§1607(c), 1607(a)(3) and 1607(a)(2) respectively). In issuing Regulation Z to implement the Truth in Lending and Fair Credit Billing Acts, the Board referred to the enforcement authority granted to the OTS, NCUA and other agencies under the TILA (*See* 15 U.S.C. §1607(a); 12 C.F.R. §226.1(e)). According to the NCUA, Regulation Z applies to federally-chartered and state-chartered credit unions (*See* Statement of The Honorable Joann M. Johnson, Chairman, National Credit Union Administration, "*Regulation Z and Credit Card Disclosure Revisions,*" before the Subcommittee on Financial Institutions and Consumer Credit, U.S. House of Representatives, June 7, 2007).

[27] 15 U.S.C. §1608.

However, to the extent the Agencies decide to proceed with rule-making under any authority, Wells Fargo urges the Agencies to consider the comments and suggestions set forth herein.

a. Application of Increased Annual Percentage Rates to Outstanding Balances – Alternative Authority; Comments.

Regulation Z prescribes various requirements with respect to supplemental disclosures, including requiring institutions to mail or deliver written notice of a change in the terms of a credit card account to the consumer at least 15 days prior to the effective date of the change.[28] In the Board's June 2007 Regulation Z Proposal, the Board proposed to increase the notice period to 45 days. If the Agencies choose to proceed with regulations concerning the application of increased rates to outstanding balances, such provisions could properly be included in Regulation Z as opposed to characterizing this long-accepted practice as unfair. However, prior to issuing final regulations under any rule-making authority, Wells Fargo urges the Agencies to survey institutions in an effort to estimate the number of accounts that would be affected, the cost to institutions, and the impact on safety and soundness.

In addition, to the extent the Agencies choose to proceed with rule-making under any authority with regard to applying increased annual percentage rates to outstanding balances, Wells Fargo urges the Agencies to consider the following comments and suggestions.

First, proposed Section __.24(a) prohibits institutions from applying increased rates to outstanding balances, with three limited exceptions. However, rather than imposing a broad prohibition on the practice, Regulation Z could be revised to require institutions to allow consumers to opt out of the application of increased rates to outstanding balances in certain circumstances, such as when the increase is not based on a default under the terms of the customer account agreement or when the rate is not disclosed initially as a preferential rate with specified conditions (for example, a preferential rate for employees of the institution). Further, increases in rates accomplished by changes in the terms of customer account agreements could be limited to no more than one per year. Consumer education and clear disclosures, coupled with an opt-out right with respect to risk-based repricing, and limiting such risk-based repricing events to no more than one per year, would more reasonably protect consumers from changes in their account terms, while permitting institutions to effectively manage risk. If the Agencies proceed with the broad prohibitions set forth in the Proposed Rule, Wells Fargo urges the Agencies to allow additional exceptions for other events disclosed to consumers, such as conduct that results in the imposition of a penalty rate (including late payment, returned or dishonored payment, and exceeding the credit limit) and for other changes in the factors that bear on a consumer's creditworthiness, such as the consumer's credit score. Finally, Wells Fargo requests an exception for specific changes that are set forth initially, such as rate increases that occur when an employee loses a preferential rate upon termination of his or her employment with the institution or when a consumer loses a preferential rate upon his or her failure to maintain a relationship with the institution at a certain monetary level (for example, maintaining a certain

[28] 12 C.F.R. §226.9(c)(1).

balance in a savings account, or maintaining a specified combined amount in deposit accounts and other loans).[29]

Second, proposed Section __.24(c)(2) prohibits institutions from assessing any fee or charge based solely on the outstanding balance, except that late payment fees and overlimit fees based in part on outstanding balances are allowed. While Wells Fargo endorses the Agencies' proposal to allow late payment fees and overlimit fees based in part on the outstanding balance, Wells Fargo suggests that the Agencies clarify that other charges based in part on the outstanding balance, and finance charges based solely or in part on the outstanding balance, are also allowed. Several types of fees other than late payment fees and overlimit fees may be based in part on outstanding balances. For example, returned payment fees, fees to make a payment by telephone, and other administrative fees may be based in part on an outstanding balance. In addition, while outstanding balances must be maintained at a lower annual percentage rate, finance charges will be calculated and assessed by applying that lower rate to the amount of the outstanding balances. In fact, it appears that the only fees the Agencies truly seek to prohibit are fees assessed based solely on the fact that the outstanding balance must be maintained by the institution from month to month.

Third, the prohibitions with respect to the application of increased rates to outstanding balances pose significant operational challenges for institutions and may cause confusion for consumers. Requiring institutions to maintain a lower annual percentage rate on outstanding balances would involve complex changes to processing systems and procedures. Disclosures to consumers would also become more complex in an effort to explain finance charge calculations and other terms. This problem would be compounded if institutions are limited in their ability to change the minimum payment calculation on the outstanding balance since it could lead to different minimum payment calculations being applied to different balances on an account. Periodic statements would be very complicated and difficult to understand given the amount of information that must be disclosed for each separate transaction type (for example, purchases, cash advances and balance transfers) and for each separate outstanding balance. The Agencies' concerns could be more appropriately addressed through consumer education and more effective disclosures.

Finally, limiting an institution's ability to re-price existing balances will likely increase the frequency of re-pricing actions with respect to new balances. Furthermore, adoption of the Proposed Rule may cause institutions with more lenient default pricing triggers to alter their practices to that proposed under the regulations. For example, Wells Fargo Bank, N.A.'s default triggers are 2 consecutive times delinquent or 2 consecutive times overlimit. If we lose the ability to re-price existing balances, we may alter our practice to match the 30 days delinquent trigger in the proposed regulation. Other unintended consequences might also include not allowing customers that triggered default pricing to "graduate" out of default pricing. Wells Fargo Bank, N.A.'s current practice is that customers that make 6 consecutive on time payments, while concurrently staying within their credit line, can graduate from default pricing back to their standard pricing.

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[29] Regulation Z does not require a change in terms notice in these circumstances. See Comment 9(c)-1 to 12 C.F.R. §226.9(c).

b. Allocation of Payments – Alternative Authority; Comments.

According to the Agencies, consumer testing indicates that consumers have difficulty understanding payment allocation disclosures. Because of this difficulty, the Agencies' goal of addressing payment allocation issues would be accomplished more appropriately through new disclosure requirements in Section 226.5a of Regulation Z.

To the extent the Agencies choose to proceed with rule-making under any authority with regard to allocation of payments, Wells Fargo urges the Agencies to consider the following comments and suggestions.

First, the Agencies' current proposal to severely limit payment allocation methods to only a few choices would not address the challenges some consumers may have with disclosures. In fact, the payment allocation requirements in the Proposed Rule do not directly address the issue of consumer confusion at all and simply require institutions to develop new disclosures. In spite of extensive payment allocation disclosure testing completed by the Board, thus far there has been limited success in helping consumers understand the payment allocation methodologies suggested by the Proposed Rule. As such, requiring institutions to implement new payment allocation methods, that will require the development of new disclosures, will likely lead to even more consumer confusion. Moreover, the payment allocation proposals would be contrary to the Agencies' long-established acceptance of current practices and acknowledgement that any issues with payment allocation methods are best addressed through improved disclosures.[30]

Second, it would be very difficult for an institution to determine whether an allocation method would be more beneficial to consumers since the impact of an allocation method on a consumer's account can vary from billing period to billing period, depending on the consumer's spending and payment habits.

Third, in proposing to prohibit certain payment allocation methods, the Agencies cite as a motivating factor that consumers should be allowed the full benefit of any promotional rate offered. The Agencies' concern would therefore not apply to other types of transactions to which different rates may apply, such as cash advance transactions, which typically have higher annual percentage rates to account for the higher risk inherent with those transactions. Institutions clearly disclose that payments may be applied first to balances with lower annual percentage rates. Accordingly, Wells Fargo requests that the Agencies at least narrow the application of any payment allocation provision to promotional interest rates and deferred interest plans, and exclude situations where rates differ based on the type of transaction.

Fourth, since institutions are not required by law to provide a promotional rate or a grace period, institutions should not be prohibited from requiring consumers to pay all or any part of a promotional rate or deferred interest balance in order to receive the benefit of an offered grace period, so long as the requirement is clearly disclosed.

Finally, any required change to an institution's current processing system will involve significant resources in terms of both time and money. Each of the allocation methods described

[30] *See* OCC Advisory Letter 2004-10.

in the Proposed Rule involve complex programming changes and thorough testing before deployment. Changes would be required in several areas including, but not limited to, payment processing, posting, and periodic statements. Wells Fargo's initial assessment has determined that the costs of compliance are significant – likely millions of dollars, which would undoubtedly be passed on to consumers.

c. Balance Computation Method – Alternative Authority; Comments

Regulation Z currently requires card issuers to disclose, on or with an application or solicitation for a consumer credit card account, the balance computation method used to determine the balance on which finance charges are computed.[31] The card issuer can disclose the name of the method listed in Section 226.5a(g) or, if not listed, an explanation of the method. The methods listed in Section 226.5a(g) include "Two-cycle average daily balance (including new purchases)" and "Two-cycle average daily balance (excluding new purchases)." To the extent the Agencies wish to prohibit the "two-cycle" or "double-cycle" method, Regulation Z should be revised to delete any reference to such methods in Section 226.5a(g) and specify that such methods are not permitted.

Unfortunately, while the preamble to the Proposed Rule focuses on "two-cycle" or "double-cycle" billing, the language in proposed Section __.26 covers much more than that and is overly broad. Allowing finance charges to be imposed based on days in billing cycles that precede the most recent billing cycle in only two circumstances (i.e., the assessment of deferred interest and adjustments to finance charges following the resolution of a billing error dispute) are not sufficient because there are other circumstances in which finance charges may properly be imposed on balances in previous billing cycles. For example, a consumer's payment may be returned unpaid due to insufficient funds or for other reasons. In the event the payment was credited to the account in the previous billing cycle, the credit will be reversed and finance charges may be imposed based on balances for days in one or more previous billing cycles. In addition, while a balance transfer or check used to access the account may post to the account in the current billing cycle, it may have a transaction date in the previous billing cycle. To the extent finance charges accrue from the date of the transaction, they will be imposed based on balances for days in one or more previous billing cycles. To the extent the Agencies are seeking to prohibit a "two-cycle" or "double-cycle" billing method, they should simply state that the method itself is prohibited rather than severely limiting the proper assessment of finance charges based on days in billing cycles that precede the most recent billing cycle.

However, to the extent the Agencies prohibit a "two-cycle" or "double-cycle" billing method, institutions will require a significant amount of time to change their systems from this method to another. In this regard, Wells Fargo also requests clarification on the impact for those institutions that must provide notice to consumers that the billing method in effect on their accounts is changing from the "two-cycle" or "double-cycle" billing method to a different method and must provide consumers with the opportunity to opt out of such changes. Specifically, if an institution is required by state law to allow consumers to opt out of changes to the billing method in effect on their accounts, the institution must honor all opt out requests and maintain the "two-cycle" or "double-cycle" billing method on those accounts. Therefore, Wells

[31] 12 C.F.R. §226.5a(b)(6).

Fargo urges the Agencies to provide a safe harbor for institutions that maintain the "two-cycle" or "double-cycle" billing method on accounts in the event consumers have opted out of the change to their billing method and for situations where institutions would not have a legal right to change terms on the account.

d. Time to Make Payment – Alternative Authority; Comments.

Section 226.5(b)(2)(ii) of Regulation Z currently requires statements to be mailed or delivered at least 14 days prior to any date by which the new balance or any portion of the new balance must be paid in order for the consumer to avoid an additional finance or other charge, including a late fee. While Wells Fargo does not believe it is necessary to lengthen the 14-day period, to the extent the Agencies believe it is necessary to do so, we request that any such change be made to Regulation Z. However, Wells Fargo urges the Agencies to first review existing practices under the current 14-day requirement to determine the extent to which payments are actually late due to delays in mail delivery, the amount of time it typically takes institutions to prepare and mail periodic statements after the close of the billing cycle, and the costs and other impacts of having a 21 to 26-day lag between the close of a billing cycle and the payment due date.

In addition, to the extent the Agencies choose to proceed with rule-making under any authority with regard to the time allowed for consumers to make periodic payments, Wells Fargo urges the Agencies to consider the following comments and suggestions.

First, an institution cannot control how long it will take a third party to deliver periodic statements to a consumer in the event a consumer elects to receive his or her periodic statements electronically through a third party. In such case, the institution would mail or deliver the periodic statement to the third party, as instructed by the consumer. Wells Fargo urges the Agencies to clarify that institutions will satisfy the requirements of Section __.22(a) and meet the safe harbor requirement if the periodic statement is mailed or delivered to consumers *or their designees* within any specified time period.

Second, Wells Fargo requests that the Agencies adopt an exemption or alternative safe harbor for institutions that make periodic statements available to consumers electronically or that provide a mechanism for consumers to make payments electronically or by telephone. For such institutions, the safe harbor period could be reduced to 14 days since mail delivery times will not have any impact on the delivery of the periodic statement to the consumer or the delivery of the payment to the institution, as applicable.

In conclusion, to maintain consistency with existing regulations, Wells Fargo urges the Agencies to revise Regulation Z to address application of increased rates to outstanding balances, allocation of payments, balance computation methods, and time for consumers to make payments, rather than including a separate provision in each of the Agencies' respective Unfair or Deceptive Acts or Practices regulations. In addition, in light of the general applicability of Regulation Z and the enforcement rights granted to other Federal agencies, including the OTS and NCUA, with respect to Regulation Z, Wells Fargo believes that revising Regulation Z will

provide uniform standards, which will ensure a level playing field and consistent practices for all creditors.

B. Delayed Effective Date

The Agencies request comment on when any final rules should be effective and whether a one-year time period is appropriate or whether the period should be longer or shorter. Based on the extent of the system and procedural changes that will be required, and extensive testing requirements, Wells Fargo asks that the time period be longer than one year and requests an effective date that is at least 2 years from the date any final rule is published in the Federal Register. The Regulation Z proposals from June 2007 ***by themselves*** already would require substantial system changes for which Wells Fargo requested a two-year implementation period. Wells Fargo asks that the Agencies be mindful of the cumulative effect of the Proposed Rule in conjunction with the Regulation Z proposals from June 2007 and May 2008, the proposed rules for Regulation DD, and various regulations recently issued in accordance with the FACT Act.

C. State Exemptions from the Proposed Rule

The Agencies request comment on whether states should be permitted to seek exemption from the Proposed Rule if the state law affords a greater or substantially similar level of protection. Wells Fargo strongly urges the Agencies not to permit states to seek exemption from the Proposed Rule. Compliance with state law would impose an undue burden on institutions in having to comply with applicable state law and is not necessary to achieve the Agencies' goals. National banks like Wells Fargo Bank, N.A. and Wells Fargo Financial National Bank, which operate in dozens of states nationwide are able to offer a high level of efficiency and customer service by adopting and integrating operating systems and procedures designed to comply with a single uniform national standard. Eroding this uniform system by permitting a patchwork assortment of state regulations – many of which would likely be inconsistent with one another – would severely undermine the banks' ability to offer customers the advantages deriving from this integrated system, with its attendant efficiencies.

III. RESPONSES TO SPECIFIC REQUESTS FOR COMMENT

Wells Fargo offers the following responses to the Agencies' specific requests for comment in the Proposed Rule.

A. Section .22 – Unfair acts or practices regarding time to make payment

The Agencies request comment on the percentages of consumers who receive periodic statements by mail and electronically. Wells Fargo offers consumer credit card customers the option of enrolling in its online banking platform with no charge imposed by Wells Fargo. Many of Wells Fargo's consumer credit card products offer customers the ability to view periodic statements online so long as the credit card account is enrolled in online banking. As of May 25, 2008, over 70% of such open credit card accounts were enrolled in online banking and have the ability to view statements online.

The Agencies request comment on the percentages of consumers who make payment by mail, electronically, by telephone, and through other methods. In March 2008, only 36% of payments were received by mail. By contrast, 47% were made electronically, and 8.5% and 8.4% were received in a bank store or by telephone, respectively.

The Agencies request comment on the number of days after the closing date of the billing cycle that institutions typically mail or deliver periodic statements. While the vast majority of Wells Fargo's periodic statements are mailed or delivered within 2 to 5 days of the closing date of the billing cycle, delays are possible, although infrequent, due to systems issues or errors.

The Agencies request comment on whether the proposed 21-day safe harbor period between mailing or delivery of the periodic statement and the due date would give consumers sufficient time to review their statements and make payment and is otherwise a reasonable amount of time to make payment. It is Wells Fargo's position that the proposed 21-day safe harbor period would provide more than sufficient time for consumers to review their statements and make payments. Wells Fargo does not believe it is necessary to provide more than the 14 days currently mandated by Regulation Z to mail or deliver the periodic statement in order for a payment to be treated as late for any purpose. In practice, many creditors routinely send the periodic statement within a few days of the closing date of the billing cycle, providing more than 14 days actual notice. In addition, a higher percentage of payments are being made by consumers online or through other means, such as automatic electronic fund transfer or telephone payments. Due to the increased pressure on institutions to prepare and mail statements in a much smaller window of time based on a 21-day requirement, Wells Fargo requests an exemption for institutions that provide access to statements electronically or that provide a mechanism for consumers to make their payments electronically or by telephone.

The Agencies request comment on whether the Agencies should adopt a rule that prohibits institutions from treating a payment as late if received within a certain number of days after the due date and, if so, the number of days that would be appropriate. Wells Fargo strongly urges the Agencies against adopting a rule that prohibits institutions from treating a payment as late if received within a certain number of days after the due date. Prohibiting institutions from treating a payment as late when received after the due date will make the actual payment "due date" meaningless, effectively increases the 21-day safe harbor period already proposed, and ultimately accomplishes nothing for the consumer.

To be effective, a payment due date needs to actually serve as a real due date; not an arbitrary date for which there are no consequences when missed. Moreover, any due date chosen becomes relative; once consumers learned that they really had until a certain number of days *after* the stated due date to make their payment, many would likely begin to send payments later to target that date as the "real" due date, which in some cases may lead to additional finance charges. In addition, such a policy would be unmanageable and would unfairly punish those customers that make timely payments, while rewarding those who do not. Such a proposal would likely have the unintended effect of conditioning consumers that other due dates are not really in fact hard due dates; it would simply send the wrong message to consumers. Whether the Proposed Rule is adopted as proposed or includes a reduced 14-day safe harbor for

institutions that make statements available electronically or provide a mechanism for consumer to make payments electronically or by telephone, the consumer would be allowed at least 14 days to review the periodic statement and remit payment to the institution. Allowing additional time beyond the payment due date would cause problems in connection with processing for the next billing cycle. Institutions require time to complete their processing after the due date to confirm whether payments are made timely as part of the next billing cycle's processing timeframes and to calculate finance charges and other charges.

The Agencies request comment on whether the Agencies should adopt a rule that requires institutions, upon the request of a consumer, to reverse a decision to treat a payment mailed before the due date as late and, if so, what evidence the institution could require the consumer to provide (e.g., a receipt from the U.S. Postal Service or other common carrier) and what time frame would be appropriate (e.g., payment mailed at least five days before the due date, payment received no more than two business days late). Wells Fargo does not believe the Agencies should adopt a rule that requires institutions, upon the request of a consumer, to reverse a decision to treat a payment mailed before the due date as late. In the Board's 2008 Regulation Z Proposal (published in the Federal Register on May 19, 2008 at 73 FR 28865), the Board stated that it did not propose a postmark rule, even though consumer groups had suggested it, due in part to the perceived difficulty for consumers to retain proof of the postmark and the fact that, in order to obtain proof in the first place, consumers would have to pay extra postage charges in many cases. The Board also noted that the postmark may be illegible when it reaches the creditor and that the operational costs and burden on creditors to capture and record the postmark dates would be significant. Wells Fargo agrees with each of these assertions and with the Board's decision not to adopt a postmark rule in the 2008 Regulation Z Proposal.

In addition, allowing additional time beyond the due date would cause problems in connection with the institution's processing for the next billing cycle. Institutions require time to perform processing functions after the due date to confirm whether payments are made timely as part of the next billing cycle's processing timeframes, to calculate finance charges, and to post payments and transactions. This would impose a very large and unreasonable administrative burden on institutions.

The Agencies request comment on the impact of the proposed rule on the availability of credit. If a rule is proposed that prohibits institutions from treating a payment as late if received within a certain number of days after the due date, the costs that institutions incur in carrying the minimum payment amount, which should have been paid by the due date, will likely be passed on to consumers. If such costs prove to be higher for categories of consumers with certain risk factors, including those with lower credit scores, it is more likely that those categories of consumers will be denied credit. In addition, consumers who pay after the due date will likely have their credit limits decreased or be denied credit because of the additional cost of funds that must be borne by the institution.

B. Section __.23 – Unfair acts or practices regarding allocation of payments

The Agencies request comment on whether other methods of allocation should be listed in proposed §__.23(a). Even if other methods of payment allocation are listed in proposed Section __.23(a), the alternative payment allocation methods are unlikely to address all of the numerous promotional rate scenarios for private label cardholders with multiple special terms subaccounts with different annual percentage rates and different deferred interest end dates. While the Proposed Rule does allow for other payment allocation methods which are "no less beneficial to consumers," no criteria are provided for measurement of the "beneficial" standard. Wells Fargo strongly recommends that a "safe harbor" provision be added to protect institutions that adopt systemic payment allocation methods which they *reasonably believe* to be no less beneficial to consumers than those listed in Section __.23(a).

The Agencies request comment on whether proposed §__.23(a) should permit institutions to apply amounts in excess of the minimum payment first to balances on which the institution is prohibited from increasing the rate (pursuant to proposed §__.24). To the extent that institutions are prohibited from increasing the rate on outstanding balances, proposed Section __.23(a) should permit institutions to apply amounts in excess of the minimum payment first to those outstanding balances. Proposed Rule Section __.24 would effectively prohibit institutions from appropriately pricing for risk in cases where an increased rate should be applied to existing and future balances based on the consumer's increased risk. Therefore, allowing institutions to apply amounts in excess of the minimum payment to those outstanding balances is necessary to allow the outstanding balance to decrease at a faster rate than it otherwise would.

The Agencies request comment on whether the requirement in proposed §__.23(b)(1)(i) that amounts in excess of the minimum payment be applied to other balances before deferred interest balances may prevent consumers from paying the deferred interest balance in full by the end of the deferred interest period. In Wells Fargo's opinion, allowing institutions to apply amounts in excess of the minimum payment to the deferred interest balance during the last 2 billing cycles of the deferred interest period will provide consumers a sufficient opportunity to pay the deferred interest balance in full by the end of the deferred interest period. Wells Fargo believes that it is very important and, depending upon the customer's payment habits, it can be in the customer's best interest that the institution be allowed to direct payment (in excess of the minimum payment) to deferred interest balances for which the deferred interest period is about to expire. This helps the customer avoid interest on the deferred interest balance either entirely, in the case in which the deferred balance is paid in full, or partially, in the case in which the deferred balance is reduced. Wells Fargo agrees with the Board's proposal, however, that the institution only needs to divert funds to the deferred interest balance right before the deferred interest period is about to expire, because up until that point there is still a distinct possibility, given the time and opportunity, that the person will pay his or her balance in full prior to the expiration of the deferred interest period and therefore pay no interest anyway. The proposal is consistent with Wells Fargo's current practices. Currently, Wells Fargo does direct payments in excess of the minimum to the deferred interest balance first if the deferred interest period is about to expire.

The Agencies request comment on the need for the exception regarding deferred interest balances in proposed §__.23(b)(1)(ii). Depending on the customer's payment habits, it can be in the customer's best interest that the institution be allowed to direct payment (in excess of the minimum payment) to deferred interest balances for which the deferred interest period is about to expire. Wells Fargo's current practices do direct excess payments toward deferred interest balances where the deferred interest period is about to expire. Without the exception proposed in Section __.23(b)(1)(ii), consumers risk not paying off the deferred interest balance on time and incurring interest for the entire period.

The Agencies request comment on whether the exception regarding deferred interest balances in §__.23(b)(1)(ii) should apply during the last two billing cycles of the deferred interest plan or during a different time period. It is Wells Fargo's position that two billing cycles is sufficient.

The Agencies request comment on whether consumers should be permitted to instruct the institution regarding allocation of amounts in excess of the required minimum periodic payment. Providing consumers with payment allocation options would be unmanageable. Such an option would require complex disclosures to explain each method since the benefit of any particular method depends on various factors, including how the account is utilized, the consumer's payment patterns and fees charged to the account. Based on the Board's testing of consumers' understanding of payment allocation disclosures, it appears that consumers may not have the ability to make a meaningful choice. Since the allocation method impacts payment processing and posting, and disclosures on periodic statements, limitations would have to be placed on the consumer's ability to change the allocation method once it is chosen. In addition, requiring institutions to accommodate more than one type of allocation method would require a significantly longer time period for compliance and involve even higher implementation and ongoing administrative costs for institutions, which would likely be passed on to consumers.

The Agencies request comment on the cost to institutions of the proposed rule and the impact on the availability of credit. The Proposed Rule will undoubtedly lead to less credit availability (in an already stressed credit environment) and increased costs of credit for all consumers; with higher risk customers enduring the brunt of these effects. If institutions are not allowed to determine how to allocate payments, it would ultimately lead to an increase in the annual percentage rates for promotional rate offers, a decrease in the duration of promotional rates, an increase in the fees charged for balance transfers or the disappearance of such offers altogether. In effect, consumers who effectively manage their accounts would be subsidizing those who do not. In addition, due to increased costs, categories of consumers that exhibit certain risk factors may be denied credit.

C. Section __.24 – Unfair acts and practices regarding application of increased rates to outstanding balances

The Agencies request comment on the extent to which institutions raise rates on pre-existing card balances. As an example, Wells Fargo Bank, N.A. engages in risk-based re-pricing on a very small portion of its existing accounts (less than 5%), and only when the risk on

the account has increased so dramatically as to warrant a re-price. All such re-prices, which are accomplished by a change in the terms of a customer account agreement afford the consumer a 30-day written notice and an opportunity to opt-out of the changes by closing his or her account and repaying any pre-existing balance under the current terms. In addition, Wells Fargo Bank, N.A. clearly notifies consumers in its application disclosures, as well as its customer account agreement, that a default rate will apply to the existing balance if (1) the consumer fails to make the minimum payment by the due date for two consecutive billing cycles; or (2) the new balance on the account exceeds the credit limit for two consecutive billing cycles. The consumer's account will automatically revert back to the rate in effect prior to the default rate if the consumer makes the required minimum payment and does not exceed the credit limit for six consecutive billing cycles.

Limiting an institution's ability to re-price existing balances will likely increase the frequency of re-pricing actions. Furthermore, adoption of the Proposed Rule may cause institutions with more lenient default pricing triggers to alter their practices to that proposed under the regulations. If we lose the ability to re-price existing balances, we may alter our default pricing cure practices for all consumer credit card accounts to match the Proposed Rule trigger--30 days delinquent. Other unintended consequences might also include not allowing customers that triggered default pricing to 'graduate' out of default pricing, irrespective of a customer's current repayment behaviors.

The Agencies request comment on the extent to which credit cards are offered pursuant to agreements that do not permit institutions to raise rates on pre-existing card balances. All of Wells Fargo's credit cards are offered pursuant to agreements that permit the application of increased rates to pre-existing card balances. However, to the extent such rate increases are due to a change in the terms of the customer account agreement, consumers are provided with prior written notice and an opportunity to opt-out of the proposed increase. For purposes of clarification, the application of default rates and loss of introductory or promotional rates, which are agreed to in the customer account agreement, are not subject to an opportunity to opt out.

The Agencies request comment on the extent to which credit cards are offered pursuant to agreements that permit consumers to reject application of increased rates to pre-existing balances and the extent to which consumers take advantage of this opportunity. To the extent such rate increases are due to a change in the terms of the customer account agreement, consumers are permitted to reject application of increased rates to pre-existing balances on all of Wells Fargo's credit cards. Specifically, consumers may reject any changes which: (1) modify the circumstances under which a finance charge will be imposed; (2) alter the method used to calculate finance charges; (3) increase finance charges, fees, and other costs; or (4) increase the required minimum payment. To reject certain types of changes, consumers must provide an opt-out notice, either by calling a toll free number or providing written notification, and close their account. In that event, consumers would be allowed to repay any balance on the account under the terms in effect prior to the change. As stated above, the application of default rates and loss or expiration of introductory or promotional rates, which are agreed to in the customer account agreement, are not subject to an opportunity to opt out.

The Agencies request comment on what consumer behavior, with respect to an account, institutions consider when determining whether to increase the rate on existing balances (other than late payment, returned payment for insufficient funds, or exceeding the credit limit). Wells Fargo does not impose penalty or default pricing on a consumer's account based solely on how they are performing with another card issuer or creditor, so-called "universal default." Wells Fargo's credit card pricing and lending practices are based on the creditworthiness of each customer, the characteristics of the transaction, "risk-based" pricing and the depth of the customer's relationship with Wells Fargo. As a normal course of business, Wells Fargo evaluates its pricing and rate structures. We take many internal and external factors into consideration when changing customer's interest rates. We work hard to ensure the best pricing for our customers while managing risk for the company. Specific risk-based calculations are considered proprietary. Customers are given at least 30 days to opt-out of the re-price by closing their accounts and paying down any existing balances under their current terms.

The Agencies request comment on the reasons institutions currently increase rates on existing balances and, for each reason, what percentage it represents of all rate increases. Wells Fargo's credit card pricing and lending practices are based on the creditworthiness of each customer, the characteristics of the transaction, "risk-based" pricing and the depth of the customer's relationship with Wells Fargo. We take many internal and external factors into consideration when changing customer's interest rates. Specific risk-based calculations are considered proprietary.

The Agencies request comment on what effect the restrictions in proposed §__.24(a) would have on outstanding securitizations and institutions' ability to securitize credit card assets in the future. The structure of any existing master trust, and various definitions, would likely have to be modified if the Proposed Rule is adopted. This would increase costs to maintain the trust as it exists today and may even require the formation of a totally new master trust structure, which would increase costs and result in additional legal fees. The ability for any master trust (in the current form and under the current regulatory rules) to be able to generate the appropriate cash flows required to support the investor payments could certainly be at risk in the future if issuers' ability to reprice or charge the appropriate penalty fees based on cardholder behavior and/or interest rates for trigger events under contractual cardholder terms and conditions in place today are affected by the provisions in the Proposed Rule. Master trust assets (new trusts) that are created in the future under any new regulations imposed upon the industry would certainly require changes and/or modifications to cashflow generation, definitions, and quite possibly the requirements for assets that qualify to be used in the trust. This may lead to the possibility of both issuers and investors needing a higher level of confidence that asset pools will not go into any default due to trigger events which could certainly increase the costs of using securitization as a funding source. In effect, the potential exists for unintended consequences in the securitization market if significant requirements imposed through regulation have a ripple effect in the quality, availability, and timing of available credit card assets for use in securitization activity in the future.

The Agencies request comment on whether the restrictions in proposed §__.24(a) would limit an institution's ability to effectively manage risk if the default rate on credit cards is greater than anticipated in light of the exceptions in proposed §__.24(b). The

restrictions in proposed Section __.24(a) would unreasonably limit an institution's ability to effectively manage risk if the default rate on credit cards is greater than anticipated in light of the exceptions in proposed Section __.24(b) because institutions would effectively be prohibited from utilizing the risk models they have developed over the years to manage the risk in their credit card portfolios. Institutions develop and revise account terms based in part on their obligation to manage risk in their portfolio. Institutions consider a variety of factors and develop models based on the internal and external data they gather and analyze. The models themselves must be tested and are subject to specific regulatory requirements designed to protect consumers. If institutions are effectively prohibited from utilizing their models, they will not be able to appropriately match risk and return on accounts where the risk has increased. This would create a safety and soundness concern for the institutions. Risk increases on the consumer as a whole – it does not increase on just one portion of the consumer's outstanding historical balances compared to future balances. Therefore, only affording institutions the ability to increase pricing on future balances does not provide the tools needed to prudently manage risk. These restrictions, if enacted, will likely restrict credit, particularly on marginal accounts, and increase the cost of credit on all accounts.

The Agencies request comment on whether the 14-day period in proposed §__.24(a)(2) is an appropriate amount of time to enable consumers to receive and review notice of a rate increase. Consumers should not be given 14 days to receive and review notice of a rate increase when the increase is due to the consumer's default, delinquency or other breach of contract. The circumstances under which default rates will apply are already clearly disclosed *twice* to consumers: once in the application/solicitation disclosures and a second time in the customer account agreement. With respect to rate increases that are not due to the consumer's default or delinquency, the 14-day period is unnecessary and too long. Since the consumer is already given a written notice before the increase in the annual percentage rate is effective (and in Wells Fargo's case, an opportunity to reject the change), there is no need to allow an additional 14-day period of time. In fact, this additional period of time may *encourage* some consumers to incur more debt on their credit card accounts.

The Agencies request comment on whether other means of protecting consumers from application of increased rates to existing balances (e.g., an opt-out) are more appropriate. It is Wells Fargo's position that consumer education and clear disclosures, coupled with an opt-out right with respect to risk-based repricing accomplished through changes in the terms of customer account agreements, would sufficiently protect consumers. With an opt-out right, consumers are allowed the opportunity to close their account and pay off the outstanding balance under the annual percentage rate in effect on the account prior to the proposed change.

The Agencies request comment on whether the exceptions in proposed §__.24(b) are appropriate or necessary and whether other exceptions would be appropriate. In particular, the Agencies seek comment on whether: (1) additional exceptions are needed to address safety and soundness concerns; (2) additional exceptions are needed for a consumer's failure to pay the account as agreed under the account terms, such as conduct that results in imposition of a penalty rate (including late payment, returned payment for insufficient funds, or exceeding the credit limit); and (3) 30 days is the appropriate measure

of a serious delinquency. In addition to the three exceptions proposed in Section __.24(b), additional exceptions are appropriate and necessary to address safety and soundness concerns and to account for a consumer's failure to pay the account as agreed.

Regulators expect institutions to manage risk appropriately. Institutions develop and revise account terms based in part on this obligation to manage risk in their portfolio. Institutions consider a variety of factors and a 30-day delinquency may only be one factor used in determining whether increased rates should be applied.

Wells Fargo requests that the Agencies adopt additional exceptions for a consumer's failure to pay the account as agreed under the account terms, such as conduct that results in imposition of a penalty rate (including late payment, returned payment for insufficient funds, or exceeding the credit limit) and for other changes in the factors that bear on a consumer's creditworthiness, such as the consumer's credit score.

The Agencies request comment on whether additional or different approaches to the repayment of outstanding balances should be considered. If some version of the payment allocation provisions in Section __.23 become effective as proposed, there would be no need to dictate the method for repayment of outstanding balances under Section __.24(c)(1). Amounts paid in excess of the minimum payment would likely not be allocated solely to balances with the lowest annual percentage rates, thus ensuring that consumers are not required to pay off the outstanding balance (with the lower annual percentage rate) in full before balances with higher annual percentage rates are paid. To the extent the Agencies still seek to implement some version of Section __.24(c)(1), Wells Fargo urges the Agencies to adopt an exception for situations involving bankruptcies or "charge-offs" of balances where the institution reduces the balance to zero and works out a separate payment arrangement with the consumer that is acceptable to a court having jurisdiction over the matter.

The Agencies request comment on whether restrictions similar to those in proposed §__.24(c) should apply when, rather than increasing the rate on future transactions, an institution declines to extend additional credit to the consumer. For example, the Agencies seek comment on whether, if an institution responds to an increased risk of default by declining to extend additional credit to a consumer, the consumer should receive the protections in proposed §__.24(c) with respect to any balance on the account. If the payment allocation provisions in Section __.23 become effective as proposed, there would be no need to dictate the method for repayment of outstanding balances under Section __.24(c)(1). Amounts paid in excess of the minimum payment would likely not be allocated solely to balances with the lowest annual percentage rates, thus ensuring that consumers are not required to pay off the outstanding balance (with the lower annual percentage rate) in full before balances with higher annual percentage rates are paid. If the Agencies determine that Section __.24(c) should apply when an institution declines to extend additional credit (including reducing credit limits), Wells Fargo urges the Agencies to adopt an exception for situations involving bankruptcies or "charge-offs" of balances where the institution reduces the balance to zero and works out a separate payment arrangement with the consumer that is acceptable to a court having jurisdiction over the matter.

D. Section __.25 – Unfair acts or practices regarding fees for exceeding the credit limit caused by credit holds

The Agencies request comment on the extent to which institutions assess more than one fee per billing cycle for exceeding the credit limit and, if so, what factors determine whether a fee is assessed (e.g., one fee for each transaction while the account is over the credit limit). Wells Fargo currently assesses only one fee per billing cycle for exceeding the credit limit.

The Agencies request comment on the extent to which institutions tier or otherwise vary the fee for exceeding the credit limit based on the number or dollar amount of transactions while the account is over the credit limit. Wells Fargo currently contracts for a flat fee for exceeding the credit limit.

The Agencies request comment on the extent to which institutions assess fees for exceeding the credit limit when the transaction that exceeded the credit limit occurred in an earlier billing cycle and the consumer has not engaged in subsequent transactions. A fee for exceeding the credit limit may be assessed for each billing period during which the consumer's balance is over the credit limit during the cycle and the consumer has not made sufficient payment to bring the balance below the credit limit.

E. Section __.27 – Unfair acts or practices regarding security deposits and fees for the issuance or availability of credit

The Agencies request comment on the dollar amount of security deposits and fees for the issuance or availability of credit typically charged to the account in the first billing cycle. Wells Fargo currently offers several unsecured credit card products that have no annual fee and one with an annual fee of $19.00. In addition, Wells Fargo currently offers a credit card that requires a security deposit and has an $18.00 annual fee. The credit limit on the credit card requiring a security deposit equals the amount of the required security deposit, ranging from $300.00 to $10,000.00. The security deposit must be made by check, money order or cashier's check, and cannot be charged to the credit card account. The annual fee is charged in the first month that the account is open.

The Agencies request comment on the percentage of the initial credit line that is typically made unavailable due to security deposits and fees charged to the account during the first billing cycle. For Wells Fargo's credit card products that have an annual fee, approximately 6% of the initial credit line would be unavailable with a minimum credit line of $300.00. For credit card accounts with a credit line higher than $300.00, a smaller percentage of the initial credit line would be unavailable.

The Agencies request comment on the degree to which consumers (including consumers with limited or damaged credit histories) can secure credit cards without high fees for the issuance or availability of credit. Wells Fargo currently offers many credit card products that have no annual fee and two products with low annual fees.

The Agencies request comment on whether the proposal would inappropriately curtail consumers' access to credit. If security deposits and fees for the issuance or availability of credit cannot be financed on the credit card account, it appears that some consumers may be denied access to credit if they cannot otherwise afford to pay the security deposit or fees and do not qualify for credit offers in which such security deposits and fees are not required or assessed.

The Agencies request comment on whether disclosure of security deposits and fees enables consumers to understand the impact of those charges on the availability of credit. To the extent that security deposits and fees are charged to the credit card account, it is Wells Fargo's position that consumer education and clear disclosures would enable consumers to understand the impact of those charges on the availability of credit.

F. Section __.28 – Deceptive acts or practices regarding firm offers of credit

The Agencies request comment on whether proposed §__.28 should contain a proximity requirement. If a proximity requirement were to be adopted, the Agencies request comment on whether the disclosure should be proximate to the first statement of the annual percentage rate or credit limit or the most prominent statement of the annual percentage rate or credit limit. It is Wells Fargo's position that any proximity requirement would need to be very specific. While a requirement that the disclosure must be proximate to the first statement of the annual percentage rate or credit limit seems very simple and straight forward, additional guidance will be required to address the different types of advertisements. For example, solicitations include an outer envelope and may contain multiple pages (including several screens or links in an electronic solicitation). Determining what is the "most prominent" statement of the annual percentage rate or credit limit is very subjective and may be extremely difficult. For example, advertisements or solicitations may include various type sizes, text colors and other graphics. Including this disclosure in Section 226.5a of Regulation Z would negate the need for any separate "proximity requirement" since the disclosure would have to be clear and conspicuous.

The Agencies request comment on whether the proposed disclosure would be effective in informing consumers that they may not receive the best terms advertised. It is Wells Fargo's position that a clear and conspicuous disclosure containing information regarding eligibility criteria for the lowest annual percentage rate or highest credit limit stated in the solicitation for a firm offer of credit would be effective in informing consumers that they may not receive the best terms advertised.

Wells Fargo ardently supports the Agencies' goal of ensuring consumers have the ability to make informed decisions about the use of credit card accounts without being subjected to unfair or deceptive acts or practices. This goal is best achieved by amending Regulation Z, not by universally declaring everything "unfair" or "deceptive." The Board has clear authority under the TILA to prescribe regulations to protect the consumer against unfair credit card practices. The Agencies should reserve the "unfair" and "deceptive" labels for only the truly egregious acts and practices. Exercising the Agencies' UDAP rule-making authority to address all of the acts and practices addressed in the Proposed Rule is undesirable because most of the conduct discussed therein does not meet the three prong tests for what is considered "unfair" or

"deceptive." Moreover, labeling these acts and practices "unfair" or "deceptive" comes with a host of unintended and very unwanted consequences, such as meritless litigation.

However the Agencies ultimately address the acts and practices in the Proposed Rule, we strongly urge them to give serious consideration to the considerable amount of time which will be required for implementation, and the resulting harm to consumers in the form of reduced credit availability and substantially higher costs for credit.

Wells Fargo appreciates the opportunity to comment on the Proposed Rule. If you have any questions or would like to discuss any of the issues raised in this letter, please contact me at (612) 667-4025 or dawn.m.mandt@wellsfargo.com.

Sincerely,

/s/ DAWN M. MANDT

Dawn M. Mandt
Senior Counsel