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April 13, 2010

By Electronic Delivery

Jennifer J. Johnson, Secretary,
Board of Governors of the Federal Reserve System
20th St. and Constitution Ave., NW
Washington, DC 20551

RE: Regulation Z; Docket No. R–1384 (Proposed Rule)

Dear Ms. Johnson:

In the following comments, we respond to the Board's Proposed Rule under Regulation Z, published at 75 FR 12334 et. seq. (March 15, 2010), according to new requirements found in the Credit CARD Act of 2009. A summary of our comments begins on the following page.

The Pew Health Group's Safe Credit Cards Project began in 2007 as a research-based effort to protect consumers from risky credit card practices and promote responsible consumer management of credit card debt. Based on extensive research and discussion with issuers, consumer advocates and experts, we published a set of Safe Credit Card Standards, against which we consistently evaluate regulatory responses. These Standards led Pew to support the Credit CARD Act and form the basis for our comments on the Board's proposed rules there under. Our comments are also informed by the results of our ongoing research and analysis of credit card terms and conditions. Recently, we conducted a new analysis of all credit cards offered by the largest 12 bank issuers and the largest 12 credit union issuers, using data gathered after February 22, 2010, the effective date of most of the Act. We have included in our comments selected findings from this research, which will be published soon.

As always, we are available to discuss these comments or any other aspect of our work at any time. Thank you for reviewing our comments.

Sincerely,

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Introduction and Summary of Comments

The Credit CARD Act is designed to improve price transparency and protect consumers from unfair, misleading or deceptive practices – many of which were identified as such by the Board.[1] The Board's implementing rules should serve those goals to the greatest extent possible. For example, the Board should narrowly interpret the justification factors for penalty fees and charges under the Credit CARD Act, and allow penalty fees and charges only to the extent that they further the Act's primary goals. Similarly, because the law is designed in favor of market efficiency and strengthening the competitive price function in the credit card market, the Federal Reserve's rules generally should err on the side of constraining the proliferation of confusing or potentially "rent seeking" fee and interest rate structures.

In many respects, we think the Board has succeeded in this task; however, as explained below, we have several suggestions and critical concerns. A summary of our comments follows.

I. § 226.52 Limitations on Fees 5

A. Comments on the general rule, 52(b)(1) 5

1. We commend the Board's statement that "losses and associated costs (including the cost of holding reserves against potential losses) are not costs incurred by a card issuer as a result of violations of the account terms or other requirements for purposes of § 226.52(b)(1)(i)." 5

2. We encourage the Board to clarify in the staff commentary or elsewhere that no overhead costs of any kind are to be included in an issuer's justification of cost for purposes of § 226.52(b)(1)(i). 6

3. Specifically, the Board should prohibit cost justifications based on the expense of authorization systems. 7

4. Likewise, the Board should clarify that any adjustment based on reasonable estimates of future changes in cost must not include cost increases due to the card issuer's business strategy 7

5. We urge the Board to eliminate the deterrence model provisions under 52(b)(1)(ii) altogether. Alternatively, if keeping these provisions, the Board should require regulatory pre-approval for any issuer model purporting to show the deterrence effect of penalty fees under the 52(b)(1)(ii) analysis, and carefully monitor testing efforts 7

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[1] For a discussion of the legislative goals underlying the CARD Act of 2009, see, e.g., "Amending the Consumer Protection Act, to Ban Abusive Credit Card Practices, Enhance Consumer Disclosures, Protect Underage Consumers, and for Other Purposes," submitted by Senate Banking Committee Chairman Chris Dodd, May 4, 2009, available at http://www.thomas.gov/cgi-bin/cpquery/T?&report=sr016&dbname=111& ("The 'Credit Card Accountability Responsibility and Disclosure Act of 2009' was developed to implement needed reforms and help protect consumers by prohibiting various unfair, misleading and deceptive practices in the credit card market"). The Board labeled certain practices as "unfair or deceptive" in previous rulemaking. See 74 FR 18 at p. 5498 et. seq.

6. Testing models under 52(b)(1) may be appropriate, but only with strong safeguards including regulatory approval of testing schemes. 9

7. The Board should require all issuer justifications and models under § 226.52(b)(1) to be made public. 9

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1. We generally support the prohibition of penalty fees that exceed the amount of the violation – 52(b)(2)(i)(A). 10

2. We note, however, that the general prohibition as applied to late fees will only affect a minority of credit cardholders. 10

3. We support the Board's prohibition of penalty fees for declined transactions, account inactivity, account closure and other penalty fees with no corresponding dollar violation, but request certain clarifications – 52(b)(2)(i)(B). 11

C. Safe harbor, 52(b)(3) 13

1. A safe harbor is appropriate, but only if reduces the size of penalty fees in the market today. 13

2. The proposed safe harbor approach should be calibrated to include an allowable floor of $10, with the proposed 5% proportional penalty option and a maximum overall penalty fee of $40. 14

3. The Board should not include additional consumer conduct-related tiering structures or incremental fees in the safe harbor rule. 16

4. The Board should not allow any safe harbor thresholds to adjust automatically according to fluctuations in the consumer price index or other benchmarks. 17

II. Penalty interest charges and deferred interest penalties should be part of the Board's rules for "Reasonable and Proportional" penalties. 18

A. The Board should create "reasonable and proportional" requirements for penalty interest charges within § 226.52(b) or a similar section, limiting penalty interest rates to a maximum of seven percentage points above base (non-penalty) interest rates. 18

1. The Board's sense that Congress did not intend to apply the "reasonable and proportional" standard to annual percentage rates is unfounded with respect to penalty interest rate increases; and in fact, there is strong evidence indicating that Congress specifically wanted the Board to include penalty interest rate increases within the "reasonable and proportional" framework. 19

2. Penalty rate increases, especially those on existing balances, impose potentially drastic penalties on the most vulnerable cardholders. 21

3. For penalty rate increases applicable to existing balances, the Board should limit penalty APRs to no more than seven percentage points above base (non-penalty) APRs. 22

4. "Reasonable and proportional" rules for penalty rate increases applicable only to *future* transactions may not be warranted at this time; however, the Board should collect information about the practice and evaluate the need for additional rules within 12-18 months. Specifically, the Board should require issuers to provide information detailing issuer repricing practices tied to late or over-the-limit transactions or other forms of penalty repricing, and this information should be publicly available. 24

5. The developing trend of eliminating penalty APR disclosures (1) adds urgency to the need for Board regulation of penalty rates; and (2) suggests the need for additional disclosure rules (at a minimum, issuers should be required to disclose the maximum penalty rate that may apply to existing balances in case of delinquency). 25

B. The Board should declare that all penalty charges triggered by late payments or similar account violations in conjunction with deferred interest programs, are penalty fees subject to the requirements of § 226.52(b). 26

III. § 226.59 Reevaluation of Rate Increases 27

A. General comments on the rule, § 226.59 27

B. The Board should establish clear, generally applicable guidelines for removing penalty interest rates when account violations have ceased. 27

1. Just as the correlation between specific events – such as a late payment or an over-limit transaction – and the imposition of a penalty rate is clear and direct, so Congress intended a clear path to removal of the penalty. Therefore, the Board should state clear and direct guidance in § 226.59 regarding the removal of penalty rate increases once the underlying violations have passed. 28

2. For any account that incurred penalty rates on January 1, 2009 or later, the Board should require a return to any non-penalty, advertised rate when the account becomes free from violations for six months or more. 28

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I. § 226.52 Limitations on Fees

A. Comments on the general rule, 52(b)(1)

1. We commend the Board's statement that "losses and associated costs (including the cost of holding reserves against potential losses) are not costs incurred by a card issuer as a result of violations of the account terms or other requirements for purposes of § 226.52(b)(1)(i)."

The Board's comment implicitly recognizes that such costs are part of the general overhead of a lending operation, with compensation derived from the "price" of the account, i.e. the rate of interest charged on loans or perhaps certain account access fees. When making purchase decisions, consumers rely heavily on these up-front price points, particularly the interest rate.

The Board specifically requested comments about the inclusion of losses and associated costs in the 226.52(b)(1)(i) determination. We offer the following input:

In the Credit CARD Act, the cost factor for assessing penalty charges is specifically constrained to include only those costs the creditor incurs for the "omission or violation" for which the penalty is being imposed. By limiting costs to those incurred for the omission or violation specifically, the legislation makes it clear that any costs related to normal business operations, such as general overhead, risk exposure, customer service, billing and account maintenance costs, must not be included. The only costs that remain to be considered are whatever actual marginal costs may be attributable to any extraordinary efforts an issuer makes in response to the omission or violation, such as sending a special letter or email, making a phone call or suspending a delinquent account.

An estimation of these costs should *not* include an accounting for the marginal risk an account may pose because of the omission or violation. To allow issuers to "double recover" marginal risk costs from customers not only through interest rates but also through penalty charges would make the most risky customers the most profitable, producing moral hazard and incentives for unreasonable risk taking.

Issuers control and derive compensation for risk through their general rate structures and business models. Compared to commercial and investment banking, the risk involved with retail lending portfolios is both more diverse and more predictable. Though risk concentrations can vary in retail portfolios, risks tend to be spread widely, with credit delivered in small pieces, over an extended period of time, to thousands or millions of borrowers. Consequently, retail lenders can confidently estimate future losses based on their initial underwriting policies. "The high predictability of retail credit losses mean that the expected loss rate dominates retail credit risk and can be built into the price charged to the customer," notes the authors of *The Essentials of Risk Management*.[2]

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[2] Crouhy, Michel, Dan Galai and Robert Mark, *The Essentials of Risk Management* (McGraw-Hill, 2006), at p. 209.

Though it may be possible for an issuer to demonstrate that accounts with certain violations (such as a late payment) have a higher incidence of chargeoffs, it is not reasonable to translate that risk into a punitive fee or charge that will apply when an account demonstrates the supposedly risky behavior. At a portfolio-wide level, card issuers create complex pricing models that are intended to account for a number of factors, including risk as well as corporate goals such as profitability and market share. In fact, the book *The Essentials of Risk Management* advises that a "well-designed RBP [Risk-Based Pricing] strategy allows the bank to map alternative pricing strategies at the credit score level to key corporate metrics (e.g., revenue, profit, loss, risk-adjusted return, market share, and portfolio value…."[3] Depending on the overall mix of these corporate metrics, creditors will accept more or less risk, set more or less aggressive pricing, and market their products more or less broadly.

It is at the portfolio level, not the specific account level, where issuers make these determinations. Thus, the risk associated with omissions and violations of account agreements may be factored into the price of a credit card account at the front end, so that by the time an omission or violation occurs, risk is not part of the new costs the issuer will incur. Every day, as issuers earn interest on outstanding balances, they are compensated for risk and the costs of doing business in the context of their overall marketing, pricing and risk management strategies.

2. **We encourage the Board to clarify in the staff commentary or elsewhere that no overhead costs of any kind are to be included in an issuer's justification of cost for purposes of § 226.52(b)(1)(i).**

A clear intention behind the Credit CARD Act was to constrain the size of penalty fees, the rapid growth of which many members of Congress criticized.[4] While the proposed rule clearly states that fees based on cost can only be justified by an issuer's determination "that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation," the staff commentary leaves too much uncertainty over the extent to which issuers may include ordinary overhead costs in their determination.

For example, proposed comment 52(b)(1)(i)(1)-6 would seem to allow issuers to justify penalty over-the-limit fees based on costs of determining whether to authorize over-limit transactions, or notifying the consumer and arranging for payments to reduce the balance below the credit limit.[5] Without further clarification, this guidance would tend to suggest an overly broad set of allowable costs, to include basic costs of authorization, billing and general notification systems. A definitive statement from the Board about general overhead costs would minimize confusion and strengthen the rule.

The Board has requested more information on whether card issuers incur costs other than

[3] Ibid., at p. 228.
[4] See, e.g., Representative Carolyn Maloney's statement, Congressional Record, "Credit Cardholders' Bill of Rights Act of 2008," at pp. H6391-H6393 (July 10, 2008).

[5] 75 FR12372.

those listed in the proposed rule, for late payments, returned payments and over-the-limit transactions. As in our discussion above regarding inclusion of losses and associated costs, **we strongly encourage the Board to articulate a clear presumption against allowing anything but the special costs directly attributable to cardholder acts or omissions – such as special phone calls or separate mailings – to apply.**

3. **Specifically, the Board should prohibit cost justifications based on the expense of authorization systems.**

The Board has noted that it "understands that card issuers generally use a single automated system for determining whether transactions should be authorized or declined."[6] But the Board also suggested that issuers may seek to recoup costs for designing and administering these systems through over-the-limit-fees.[7] We strongly encourage the Board to reconsider this suggestion. Rather, what follows from the recognition that issuers use a single automated system for transaction authorization is that such systems, designed to improve cost efficiency, are part of the general cost of doing business for a credit card company. Issuers may reasonably expect to be compensated for these costs in the up-front prices of their products, but it would not be appropriate to seek compensation for such costs from penalty fees.

4. **Likewise, the Board should clarify that any adjustment based on reasonable estimates of future changes in cost must not include cost increases due to the card issuer's business strategy.**

Issuers may from time to time lower the credit limits on accounts in their portfolios. Though it would be reasonable to anticipate a higher call volume or other costs associated with over-the-limit transactions in such a scenario, the issuer should not be allowed to benefit by assessing large over-the-limit fees during a transitional period following such credit line reductions.

5. **We urge the Board to eliminate the deterrence model provisions under 52(b)(1)(ii) altogether. Alternatively, if keeping these provisions, the Board should require regulatory pre-approval for any issuer model purporting to show the deterrence effect of penalty fees under the 52(b)(1)(ii) analysis, and carefully monitor testing efforts.**

The Board has proposed to allow a credit card issuer to justify a penalty fee if the issuer has "determined that the dollar amount of the fee is reasonably necessary to deter that type of violation" using empirically derived and statistically sound models.

The Board should eliminate the deterrence model provisions altogether. The efficacy of penalty fees for deterrence is questionable, and the corresponding size of fee necessary to achieve a deterrence effect is largely unknown. While the Board may wish

[6] 75 FR 12345
[7] Ibid.

to consider deterrence factors in its own rulemaking, such as in the § 52(b)(3) safe harbor, it is not an appropriate basis for free-standing penalty justification models.

There is little available research to help identify the deterrence value of fees, or how to distinguish between a fee that is used to discourage behavior versus one that is primarily a revenue tool. Companies have a powerful incentive to allow, or even encourage, their customers to trigger fees as a way of boosting revenue. As a recent *Harvard Business Review* feature noted, "a company is less likely to help customers make good choices if it knows that it can generate more profits when they make poor ones."[8] Penalty fees are a striking example of this effect. As the Board itself has noted, the percentage of issuer revenue derived from penalty fees grew in recent years, reaching approximately 10 percent by 2005. The Board also noted that the average size of penalty fees grew from $13 in 1995 to $30 in 2005 (an increase of more than 130 percent), with present levels approaching $40 per penalty fee.[9] While the size of each penalty fee grew by approximately 200 percent between 1995 and 2005, there was no clear corresponding effect on delinquency rates. Seasonally adjusted credit card delinquency rates were 3.46 percent in the first Quarter of 1995, and 3.70 in the first Quarter of 2005.[10]

A recent study, by Nadia Massoud et. al., identified a correlation between penalty fees and default risk, but found no deterrence effect. Rather, the authors identified a strong correlation between an issuer's market power and the magnitude of penalty fees. Banks with higher market share were able to leverage their market power to "extract rents" from consumers in the form of penalty fees, even after holding consumer risk constant.[11]

In another recent paper, Sumit Agarwal, et. al., found that cardholders pay "very large" fees immediately after opening an account, but learn to reduce those fees over time, such that monthly fee payments fell by 75 percent during the first four years of an account's life. The more recently a fee was applied, the less likely the cardholder was to incur the fee again in subsequent months. Agarwal called this a "learning effect."[12] However, given the strong incentive companies have to allow or encourage customers to trigger penalty fees, it is unclear whether this learning effect denotes that fees are a deterrence, or whether they are hidden or poorly understood revenue devices that consumers learn about – and learn to avoid – as a result of experiencing them directly.[13]

To be reasonable and proportional, a penalty fee or charge should be designed to allow for a modest potential deterrence effect while minimizing the negative "rent extraction"

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[8] McGovern, Gail and Youngmee Moon, "Companies and the Customers who Hate Them" Harvard Business Review, June, 2007.
[9] 75 FR 12338 (citing research from the Government Accountability Office and Mintel Comperemedia, as well as The Pew Charitable Trusts).
[10] Federal Reserve Statistical Release, available at: http://www.federalreserve.gov/releases/chargeoff/delallsa.htm.
[11] Massoud, Nadia, Anthony Saunders and Barry Scholnick, "The Cost of Being Late: The Case of Credit Card Penalty Fees" (March 2006), AFA 2007 Chicago Meetings Paper (see p.29-32 for a discussion of the correlations among penalty fees, risk and market share). Available at SSRN: http://ssrn.com/abstract=890826.
[12] Agarwal, Sumit, John C. Driscoll, Xavier Gabaix and David I. Laibson, "Learning in the Credit Card Market" (Februray 8, 2008). Available at SSRN: http://ssrn.com/abstract=1091623.
[13] For an overview of scholarly studies exploring how sophisticated firms may attempt to exploit consumer ignorance or biases, see: Gabaix, Xavier and David I. Laibson, "Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets" (April 11, 2005), MIT Department of Economics Working Paper No. 05-18 (at footnote 1). Available at SSRN: http://ssrn.com/abstract=728545.

factors. To accomplish this balance, penalties generally should be kept to a *de minimis* level, particularly absent compelling evidence from issuers that larger fees are both necessary for deterrence *and* can be designed with sufficient safeguards to minimize risks of rent extraction.

Alternatively, if the Board retains the deterrence model provisions of 52(b)(1)(ii), the Board should require pre-approval of any issuer penalty fee deterrence model from its banking regulator before relying on such fee. Approval should only be given if the regulator is convinced that there is a proper balance between deterrence and rent extraction motivations, and in general only as justification for *de minimis* fee levels, as discussed below.

6. Testing models under 52(b)(1) may be appropriate, but only with strong safeguards including regulatory approval of testing schemes.

The Board requested comment regarding the propriety of allowing issuers to test the effect of penalty fee amounts that exceed the amounts otherwise permitted by §226.52(b)(1). While we recognize the value of empirical testing, we are concerned that penalty fee experiments could be manipulated or compromised, particularly given the strong rent extraction motivations involved. Therefore, we urge the Board to proceed with great caution. Any such test should be subject to prior regulatory approval. Also, issuers should not be allowed to test fees at levels higher than otherwise allowed. We understand that testing at price points *below* existing levels, combined with regression analysis or other analytical techniques would be sufficient to learn about the performance of various fee levels.

7. The Board should require all issuer justifications and models under § 226.52(b)(1) to be made public.

Any issuer relying on the general rule when setting penalty fees will have great leeway to justify its actions based on assessments of costs and deterrence. In many cases, these assessments will be based on information and analysis solely in the control of the issuer, making them difficult to verify or critique.

We request that the Board require any issuer to publish, for each such penalty fee assessment, (1) a concise (two pages or less) explanation of the issuer's basis for the penalty fee; and (2) detailed data and analytical material sufficient for outside parties to recreate and review the issuer's determination. Publication of such models should take place even for any model that is pre-approved by a relevant banking regulator. Not only would such a requirement assist the Board and other regulators in enforcing the general rule, but it would serve a significant public policy benefit by allowing objective third parties to review, critique and learn from the issuers' evaluations.

B. Prohibited Fees, 52(b)(2)

1. **We generally support the prohibition of penalty fees that exceed the amount of the violation – 52(b)(2)(i)(A).**

The Board's commentary makes it clear that the relevant comparison for late fees and returned payment fees is the minimum amount due in conjunction with the payment. Because the minimum payment due is the only required payment in a given month, it is the most appropriate threshold for evaluating proportionality. Likewise, the Board has wisely chosen to limit over-the-limit fees based on the amount by which the account balance exceeds the previously stated credit limit. Though we continue to disagree with the Board that over-the-limit fees may be justified based on factors outlined in the Credit CARD Act, and believe they should be eliminated,[14] we recognize the strong safeguards the Board has proposed.

The proposed general prohibition would limit penalty fees to 100 percent of the amount in violation. This rule would adequately address problems of extremely disproportionate penalty fees for small over-the-limit transactions, such as when a cardholder inadvertently exceeds the limit when making a small purchase (such as a two dollar cup of coffee) and incurs a penalty fee (now $39 in most cases, but only $2 under the Board's proposed rule). We strongly support this change.

Likewise, the proposed general prohibition would stop extremely disproportionate late fees. Pew's research has shown that the vast majority of accounts with balances exceeding $250 are subject to a $39 late fee.[15] We estimate that the minimum payment due for a $250 balance would be $5.63.[16] A $39 late fee on that account would represent a 693 percent penalty compared to the minimum payment due, raising next month's minimum payment due to $44.63. Limiting the late fee to $6 in this case, as the proposed rule would do, represents a marked improvement in proportionality and would raise next month's minimum payment due only to approximately $11.75.

2. **We note, however, that the general prohibition as applied to late fees will only affect a minority of credit cardholders.**

As mentioned above, Pew's research shows that the vast majority of accounts are subject to a $39 late fee right now, meaning the general rule's 100 percent maximum penalty fee would affect only those accounts with less than a $39 minimum payment due each month. Even the most lenient lenders require more than $39 in minimum monthly payments for anyone with balances of roughly $1,700 or more (assuming a minimum one

[14] See, e.g., Bourke, Nick, "Reasonable and Proportional Rules under Credit CARD Act of 2009 (Pub L. 111-24)" (The Pew Charitable Trusts, June 25, 2009), available at www.pewtrusts.org/news_room_detail.aspx?id=53840.
[15] See, e.g., The Pew Charitable Trusts, "Still Waiting: 'Unfair or Deceptive' Credit Card Practices Continue As Americans Wait for New Reforms to Take Effect " (October, 2009), available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=55627&category=630
[16] We estimate the minimum payment due assuming payment of all current interest charges plus a principal reduction of one percent.

percent principle reduction). Most people have higher balances than that. Consider that on a typical credit card with a balance of $3,000 (roughly the average balance per active account in the U.S.), most lenders will require a monthly minimum payment of $70 or more.[17] So far, we have not seen $70 late fees, which is the maximum fee this part of the rule would allow on such accounts.

Further, it is common for credit card issuers to set minimum payment levels that have a floor, such as $10 or $15. Thus, in terms of late fees, most cardholders would not be helped by the proposed 100 percent rule, and issuers could easily circumvent the rule by establishing minimum payments closer to the current $39 late fee level. Particularly with respect to late fees, the Board could do more to protect those with lower balances by limiting fees to 50 percent of the violation and/or setting a maximum allowable late fee applicable to all balances below a certain threshold. Though our Safe Credit Card Standards did not include such a maximum late fee, we did discuss the idea with various consumer groups and card issuers. **Consequently, we suggest that the Board consider amending 52(b)(2) to mandate a maximum $5 or $10 late fee for any account with less than $1,000 in outstanding balances, as part of its overall framework for ensuring reasonable and proportional penalties on low-balance accounts.**

In sum, while we support the general prohibition found in § 226.52(b)(2)(i)(A), we note that the specific prohibitions of 52(b)(2)(i)(B) and, especially, the safe harbor rules in 52(b)(3) will for most cardholders be the keys to ensuring reasonable and proportional penalty fees and charges.

3. **We support the Board's prohibition of penalty fees for declined transactions, account inactivity, account closure and other penalty fees with no corresponding dollar violation, but request certain clarifications – 52(b)(2)(i)(B).**

The proposed prohibition on fees for declined transactions is especially appropriate – 52(b)(2)(i)(B)(1). The Board requested comment on whether the proposed prohibition on penalty fees for declined transactions is appropriate. The Board noted that fees for declined transactions are not widespread in the market.[18] In fact, in Pew's research covering cards from issuers controlling more than 91 percent of all credit card outstandings, we have never seen such a fee.

Still, we agree with the Board that addressing this potential "penalty" fee is prudent, and we agree it should be prohibited. Such a fee could not be justified under the new parameters set forth by the Credit CARD Act and the Board. As the Board noted, declined transactions have no extension of credit associated with them, and no dollar value. Also, they rely on a single automated authorization system used throughout an issuer's business. Moreover, there is no cardholder "act or omission," other than the fundamental act of using the credit card. In the event an issuer incurs costs related to

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[17] See: Bucks, Brian K., Arthur B. Kennickell, Traci L. Mach and Kevin B. Moore, "Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances," Federal Reserve Bulletin, vol. 95, (February 12, 2009), at p. A45.
[18] 75 FR 12344-45.

fighting theft or fraud, these costs should be considered part of general overhead and not tied specifically to subsequent transaction refusals or account closures.

The proposed prohibition on inactivity fees is appropriate but requires clarification – 52(b)(2)(i)(B)(2). The Board requested comment on this proposal as well. To be justified, a penalty fee for account inactivity would have to be based on an "act or omission" of the cardholder – i.e. a penalty for not buying goods or services or borrowing money through cash advances and balance transfers. It is difficult to imagine how such a justification could be made.

While it may be said that issuers will incur costs for maintaining accounts generally, we agree with the Board that such costs are common across issuers' entire businesses. Such general overhead costs should be accounted for in up-front pricing. Further, we note that any account with a revolving balance will generate interest revenue from month to month. Thus minimum balance requirements would not be necessary or justified.

The Board may wish to note that Pew's research shows that penalty fees for account inactivity have been extremely rare in recent years. Just one issuer, accounting for fewer than five percent of the 400 cards we studied in July of 2009, disclosed any fee resembling an inactivity fee.[19] Since then, it appears as if these few examples of inactivity fees have disappeared from mainstream application disclosures. Instead, we have recently seen some examples of issuers listing annual fees but waiving those fees in years when the cardholder makes a transaction using the credit card.[20]

Anecdotal evidence suggests that issuers have recently experimented with inactivity fees in the form of contingent annual fees that will be waived if the cardholder charges several thousands of dollars on the card during the year.[21] We have also seen examples of annual fees that will be waived after the first purchase of the year.[22] However, we have not seen such fees in mainstream application disclosures for any card offered by a top 12 bank or top 12 credit union credit card issuer.

We suggest that the Board clarify its prohibition of inactivity fees. If the Board intends to bar all forms of inactivity fees, it should clarify that and note specifically

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[19] In July 2009, some U.S. Bank application disclosures included a $2.50 Closed Account Management Fee if you "voluntarily close your account with a balance." A small number of U.S. Bank cards also included annual fees that would be waived if the cardholder completes one or more transactions during the year. The Pew Health Group studied the application disclosures of all cards offered online by the largest 12 bank and largest 12 credit union issuers. See www.pewtrusts.org/creditcards for information and reports. Pew research conducted in March, 2010, suggests that U.S. Bank has abandoned the $2.50 closed account fee, though their cards continue to include inactivity fees in the form of contingent annual fees that will be waived after the first transaction of each year.

[20] Ibid.

[21] See, e.g., Northrup, Laura, "Avoid Credit Card Annual Fees: Just Charge $2,400 Per Year" (Consumerist.com, February 12, 2010) (discussing an issuer's imposition of a contingent annual fee that will apply if cardholder spends less than $2,400 per year on the card). For more on inactivity fees generally, see: Frank, Josh, "Dodging Reform: As Some Credit Card Abuses Are Outlawed, New Ones Proliferate" (The Center for Responsible Lending, December 10, 2009) at p. 22; Plungis, Jeff, "Card Firms Add Inactivity Fees to Slow Default Losses" (Bloomberg.com, December 1, 2009); and "Credit Card Rewards: Use Them… Or Lose Them?" (Associated Press, April 7, 2010) (discussing inactivity fees including loss or prejudice of rewards program benefits for inactivity or account violations).

[22] See note 19, supra.

that the prohibition includes the types of annual fee waivers we have identified above. Though we understand that issuers may incur costs for dormant or low-volume accounts, they may avoid those costs by closing the accounts, or be compensated for those costs through interest charges. Imposing inactivity fees on the large number of dormant accounts in the credit card market could lead to confusion or abuse as well as potential widespread disruptions in credit scores as consumers react to these fees and request the accounts be closed. We tend to agree with the Board that general account maintenance costs do not have dollar amounts associated with a "violation." Given these concerns, as well as the requirements of the Credit CARD Act and the clear absence of such fees to date in the market, we believe the Board has struck the proper position in barring inactivity fees generally.

C. Safe harbor, 52(b)(3)

The Board requested comments on the proposed safe harbor approach generally. As explained below, we believe the Board should adopt its proposed safe harbor rule, with the specific fee amounts discussed below but *without* addition of tiered, incremental or escalating fee options. The Board's proposed safe harbor, with properly calibrated dollar and proportional limitations, would be both simple and flexible enough to serve the interests of transparency, flexibility and fairness to both cardholders and issuers.

1. A safe harbor is appropriate, but only if reduces the size of penalty fees in the market today.

We agree with the Board's finding that establishing a generally applicable safe harbor rule may facilitate compliance with § 226.52(b)(1) (as well as the Act generally) and increase consistency and predictability for consumers. However, these goals and the requirements of the Credit CARD Act will only be met if the safe harbor is properly designed to correct the lack of proportionality Congress identified in the credit card market.[23]

We believe the Board has recognized this need, and that its safe harbor rules will be calibrated such that the size of penalty fees would generally decline significantly. As the Board noted, late and over-the-limit penalty fee amounts increased markedly in recent years, from an average of approximately $13 in 1995.[24] Pew's research indicates that the overall range of bank penalty fees is $15 to $39. Because of the way that bank penalty fees are usually tiered, such that the maximum penalty fees applies to accounts far below the average account balance, the vast majority of bank cards are subject to late and over-

[23] Senate Banking , Housing and Urban Affairs Chairman Christopher Dodd, who was a lead architect of the Act, summed up the problem as follows (emphasis added): [W]e write laws to protect those people against those who would do them harm. So we are trying to shut down a practice that goes on too often: when there are 70 million accounts whose rates have gone up in an 11-month period; when there are fees and penalties that have brought in billions of dollars, ***exorbitant fees and penalties, way beyond any proportionality to the offense committed***…." Congressional Record, "Credit Cardholders' Bill of Rights Act of 2009," at p. S5428 (May 13, 2009).
[24] See note 9, supra.

the-limit penalty fees of $39. As the Board (and Pew's research) noted, smaller issuers such as community banks and credit unions charge "significantly lower" penalty fees. Most credit union accounts are subject to penalty fees of $20 (with a range of $10 to $39).[25]

2. **The proposed safe harbor approach should be calibrated to include an allowable floor of $10, with the proposed 5% proportional penalty option and a maximum overall penalty fee of $40.**

We encourage the Board to adopt its proposed safe harbor rule with certain revisions. Below, we reproduce the proposed rule with additions noted in bold text and redactions noted with strikethrough text:

> (3) Safe harbor. Except as provided in paragraph (b)(2) of this section, a card issuer complies with paragraph (b)(1) of this section if the dollar amount of a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan does not exceed the greater of:
>
> (i) **$10.00** ~~[$XX.XX], adjusted annually by the Board to reflect changes in the Consumer Price Index~~; or
>
> (ii) Five percent of the dollar amount associated with the violation, provided that the dollar amount of the fee does not exceed **$40.00**~~$[XX.XX], adjusted annually by the Board to reflect changes in the Consumer Price Index~~.

We understand that under this suggested safe harbor, an account with a $3,000 balance – roughly equal to the median household credit card debt according to the Board's latest Survey of Consumer Finances[26] – would pay a late fee of $10 (the suggested floor fee, which is higher in this case than the $3.38 to $6.38 charge that the safe harbor formula otherwise would allow – see the table below). An account with a $10,000 balance would pay a late fee of between $11.25 and $21.25. A maximum late fee of $40 would apply for accounts with balances ranging from approximately $20,000 to $35,000 and above.

[25] Relevant portions of the Board's discussion may be found at 75 FR 12346. For Pew's summary of current credit card market conditions and information about our research, see Appendix A.
[26] Bucks, supra note 17

Allowable Late Fee Based on Five Percent of Violation

Avg. Daily Balance	Min payment due @ 1% Principal Reduction	Fee @ 5% of Violation	Min payment due @ 2% Principal Reduction	Fee @ 5% of Violation	Min payment due @ 3% Principal Reduction	Fee @ 5% of Violation
$3,000	$67.50	$3.38	$97.50	$4.88	$127.50	$6.38
$4,000	$90.00	$4.50	$130.00	$6.50	$170.00	$8.50
$5,000	$112.50	$5.63	$162.50	$8.13	$212.50	$10.63
$6,000	$135.00	$6.75	$195.00	$9.75	$255.00	$12.75
$7,000	$157.50	$7.88	$227.50	$11.38	$297.50	$14.88
$8,000	$180.00	$9.00	$260.00	$13.00	$340.00	$17.00
$9,000	$202.50	$10.13	$292.50	$14.63	$382.50	$19.13
$10,000	$225.00	$11.25	$325.00	$16.25	$425.00	$21.25
$15,000	$337.50	$16.88	$487.50	$24.38	$637.50	$31.88
$20,000	$450.00	$22.50	$650.00	$32.50	$850.00	$42.50
$25,000	$562.50	$28.13	$812.50	$40.63	$1,062.50	$53.13
$30,000	$675.00	$33.75	$975.00	$48.75	$1,275.00	$63.75
$35,000	$787.50	$39.38	$1,137.50	$56.88	$1,487.50	$74.38
$40,000	$900.00	$45.00	$1,300.00	$65.00	$1,700.00	$85.00
$45,000	$1,012.50	$50.63	$1,462.50	$73.13	$1,912.50	$95.63
$50,000	$1,125.00	$56.25	$1,625.00	$81.25	$2,125.00	$106.25

*Minimum Payment Due = Average Daily Balance * (APR/12) + Balance * [Required Principal Reduction]*

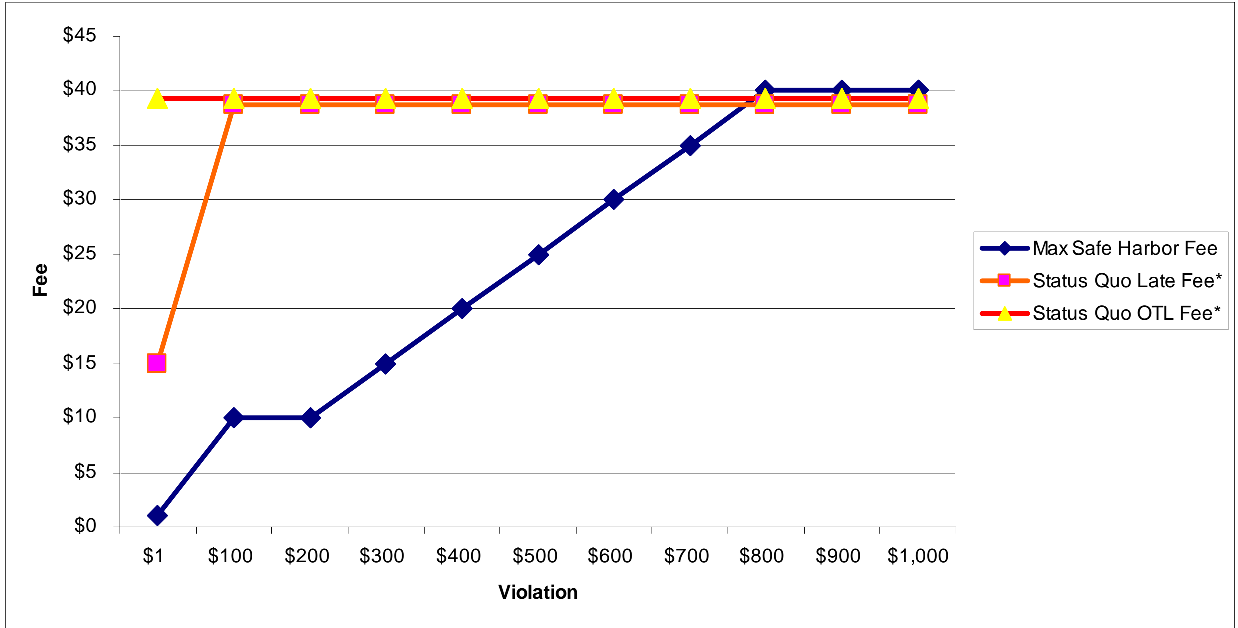
As demonstrated in the following table, this simple safe harbor would compare favorably with status quo penalty schemes and would be consistent with the goal of making penalty fees more proportional across the spectrum of accounts. It would allow for a floor fee of $10 for relatively minor violations, with fees escalating directly with violation amounts up to $800, when the maximum $40 fee would apply. The $10.00 / 5% or $40 calibrations would yield a significant reduction in applicable late fees for consumers with low balances. Those with moderate size balances (approximately $10,000) would be subject to late fees roughly equivalent to those currently charged on a majority of credit union and small bank accounts (i.e. about $20). Those with larger balances will experience fees roughly equivalent to the status quo.

Similarly, over-the-limit fee levels would generally be lower for consumers (especially those with over-limit transactions of less than $500).[27] Though a very small number of accounts with credit lines between $500 and $800 could experience higher levels of over-

[27] Though Pew has consistently argued that over-the-limit fees are not justifiable, especially given the factors identified in the Credit CARD Act, we anticipate that the Board will not take action to ban over-the-limit fees entirely. Therefore, we believe the results of this recommended safe harbor, combined with the over-the-limit fee opt-in protections in the Act, combined also with the simplicity arguments in favor of a single safe harbor formula offset any hypothetical deficiencies the safe harbor may have relative to status quo penalty schemes

the-limit fees under the safe harbor compared to the status quo, this impact would be rare and minor compared to the overall benefits of the safe harbor.[28]

Suggested Safe Harbor Penalty Fee vs. Status Quo Late and Over-the-Limit Fees



** Source: The Pew Charitable Trusts (2009).[29]*
Note: The chart above assumes a maximum safe harbor penalty fee of $1 for a $1 violation, due to the concurrent limitations that would apply due to proposed §226.52(b)(2)(i)(A).

3. The Board should not include additional consumer conduct-related tiering structures or incremental fees in the safe harbor rule.

The Board requested comments about whether additional methods for regulating penalty fee amounts should apply within the safe harbor, such as tiering (e.g. allowing a higher fee to apply to the second late payment during a 12-month period) or incremental escalation based on how late a cardholder becomes (e.g. $5 if one day late, more if five days late). We strongly urge the Board to reject these approaches. The Board has already proposed a simple safe harbor that would allow for an appropriate level of penalty escalation based on the size of the violation. On the whole, this simple structure would balance the many interests and goals involved very well. We strongly support the Board's proposed safe harbor structure without changes, and with the suggested $10 / 5% or $40 calibration amounts discussed above.

[28] A minority of large issuers currently tier their over-the-limit fees such that accounts with credit lines between $500 and $800 are subject to over-the-limit fees of $15 to $30, meaning these accounts could experience slightly higher over-the-limit fees under the safe harbor in cases where the over-limit transaction is very large (i.e. starting between $300 to $600 over-limit). Because it would generally be inappropriate to allow accounts to exceed their limits by such a large proportion, there is little cause for concern over this potential outcome.
[29] See The Pew Charitable Trusts, supra note 15. See also Pew's summary of market conditions in Appendix A.

When we developed our Safe Credit Card Standards, we thoroughly evaluated the inclusion of leniency periods, as well as tiered or escalating penalty fee structures. However, we rejected this approach. So has the market to date. We have seen no examples of escalating fee structures based on cardholder behavior. Further, with the exception of a few credit unions that offer a leniency period of between five and fifteen days before a late fee could apply, we have observed no instances of setting late fees based on anything other than the simple fact of being late and the size of the account balance.[30]

Introduction of tiering or escalation structures would add enormous complexity to regulatory structures and cardholder disclosures, with unclear benefits and potentially significant drawbacks. While such escalation structures might seem to offer additional deterrence or punitive (cardholder behavior) value, there is no evidence of a correlation. In fact, available research suggests that the fact of receiving a penalty fee – as opposed to the actual size of the fee itself – is what leads consumers to change their behaviors.[31] Nor is there any correlation between fee escalation and correspondingly escalating costs (particularly if the Board continues to exclude basic overhead costs such as losses and associated costs from the analysis, as it should).

In particular, the example incremental fee discussed by the Board ($5 late fee for each day an account is past due) would open the possibility of egregious late penalties – up to $150 per month in this case, or $300 by the time an account is 60 days past due. Such an outcome would undermine the solution Congress had in mind when it narrowly preserved penalty interest rate increases only for seriously delinquent accounts. It would also leave many of the most vulnerable, financially impaired households – those who are often struggling in the wake of job loss or other household emergency – subject to an alarming and unchecked inflation of their minimum monthly payments. The powerful revenue incentive associated with such high levels of fees would lead to ever-tightening standards of escalation, as has been seen with penalty fees and penalty rate increases in the past.[32] In addition to seriously undermining the goals of the Act, the types of fee tiering and escalation structures on which the Board invited comments would seem to contradict the Board's own position, in **proposed § 226.52(b)(2)(ii)**, that penalty fees should be charged only once per event or transaction (which we support).

4. The Board should not allow any safe harbor thresholds to adjust automatically according to fluctuations in the consumer price index or other benchmarks.

The fixed floor limit in the safe harbor ($10) should only be adjusted to the extent that the Board establishes, through regulatory fact-finding, that the level of penalty fees allowed under the safe harbor do not match the criteria and goals of the Act. The law requires

[30] Schools First Credit Union applied their late fee only once accounts were 15 days past due. Suncoast Schools Credit Union applied their late fee on the fifth day of delinquency. Vystar Credit Union would not apply a late fee until an account was 10 days past due.
[31] See Agarwal, supra note 12.
[32] Existing late fee tiers have tended to be compressed over time such that the highest balance threshold before the highest late fee amount could apply has been pushed down to $250. Similarly, issuers have tended over time toward pushing penalty interest rate triggers to the lowest threshold possible (i.e. a single late payment).

penalty fees to be reasonable and proportional to the underlying act or omission. There is no indication that cost, deterrence value or cardholder behavior characteristics increase steadily over time. Nor is there any relationship demonstrated between all the relevant factors and benchmarks such as the consumer price index. Therefore, the only appropriate way to adjust the allowable floor fee or other safe harbor thresholds is through agency fact finding and new regulation.

II. Penalty interest charges and deferred interest penalties should be part of the Board's rules for "Reasonable and Proportional" penalties.

A. The Board should create "reasonable and proportional" requirements for penalty interest charges within § 226.52(b) or a similar section, limiting penalty interest rates to a maximum of seven percentage points above base (non-penalty) interest rates.

While Congress acted with a sense of urgency to help correct perceived imbalances in the credit card market and add a variety of new consumer protections, it left critical implementation tasks to the Board. In particular, Congress tasked the Board with developing the "reasonable and proportional" limitations on penalty fees and charges found in new TILA § 149, essentially *de novo*. Limiting penalty fees and charges to those that are "reasonable and proportional" represents a significant innovation in the credit card market and should lead to a dramatic reversal of penalty schemes that have become costly and ubiquitous over the past decade, generating an ever-higher percentage of issuer revenues.[33]

While we appreciate the need to proceed with deliberation in such a new undertaking, we think the Board has acted too cautiously regarding *penalty interest rate increases*, which apply to the vast majority of credit card accounts.[34] A penalty interest rate increase occurs when an issuer raises the annual percentage rate on some or all of an account's balances in response to delinquency or, in the case of future transactions, any other account violation. As the Board has recognized, the Credit CARD Act narrowly constrained *when* penalty interest rate increases may be imposed with respect to existing balances (i.e. only for delinquencies of 60 days or more). As we explain below, we believe Congress also intended for the Board to address the *size* and *duration* aspects of penalty interest rate increases, though it left the Board discretion in how to do that. Accordingly, we offer the following comments and suggestions.

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[33] The Board has recognized this growth; see, e.g., discussion supra note 9.
[34] In July 2009, all of the largest 12 bank issuers used penalty rate provisions, affecting 90 percent of their card offerings. At the same time, seven of the largest 12 credit union issuers imposed penalty rate terms, accounting for 52 percent of credit union cards. See: The Pew Charitable Trusts, supra note 15, at p. 6. See Appendix A of this comment letter for an overview of market data. Our latest review of penalty interest rate terms, in March 2010, suggests that issuers generally continue to employ them as commonly and under substantially the same rate terms as in 2009.

1. **The Board's sense that Congress did not intend to apply the "reasonable and proportional" standard to annual percentage rates is unfounded with respect to penalty interest rate increases; and in fact, there is strong evidence indicating that Congress specifically wanted the Board to include penalty interest rate increases within the "reasonable and proportional" framework.**

In its discussion of the proposed rule, the Board cited several new and revised sections of TILA that explicitly addressed penalty interest rate increases:

- § 171 (penalty rate may only apply to existing balances if account is 60 days past due, and only for 6 months if cardholder resumes on-time payment immediately);

- § 172 (limits penalty rates with respect to new transactions during the account's first year);

- § 127 (requires at least 45 days notice before applying a penalty rate to new transactions).

In addition, new TILA Section 148 requires periodic reviews of interest rate increases generally. The Board interpreted the presence of these specific protections, and the fact that the new TILA Section 149 "reasonable and proportional" rules contain no explicit reference to penalty interest rates, to indicate that Congress did not intend the "reasonable and proportional" limitation to apply to "increases in annual percentage rates."[35]

With respect, we disagree. The sections of TILA to which the Board cited refer only to *when* a penalty rate may apply, and *when* an issuer is *absolutely required* to remove it. Conversely, TILA Section 149 addresses itself to the "*amount* of any penalty fee or charge" in connection with "any omission with respect to, or violation of, the cardholder agreement" (emphasis added). This focus is reiterated later in the Section, in language directing the Board to promulgate rules regarding "whether the *amount* of any penalty fee or charge" is "reasonable and proportional" (emphasis added). The emphasis on "amount" in TILA Section 149 establishes a clear purpose that is separate from the other sections the Board referenced. It would not be appropriate to assume that TILA Section 149 had nothing to say about the amount of penalty interest rate increases simply because other sections of TILA discussed when such penalties could apply.

The Act endowed TILA Section 149 with new requirements for "*any* penalty fee *or charge*" (emphasis added). Standard rules of legislative construction strongly favor the conclusion that "charge" has meaning independent of "fee." The addition of the phrase "or charge" conveys an intention that both financial institutions and regulators address themselves to ensuring that *all* penalty fees and charges are reasonable and proportional. A penalty interest rate increase must be subject to the reasonable and proportional requirements because it is imposed in response to a cardholder's "act or omission" violating the account agreement and would not qualify as any other type of fee or charge.

[35] 75 FR 12341

Finally, though the Board noted that an earlier draft of this section of the law specifically included the phrase "increase in the applicable annual percentage rate" in a list of example penalties subject to the requirement,[36] there is no indication that the removal of this phrase in subsequent drafts was anything other than a streamlining of redundant text or harmless editorial revision. The previous draft cited by the Board, Section 103(o) of S.414-IS (introduced February 11, 2009), was different in several ways with the final text of the law. Notably, the text of the prior draft section did not include the word "penalty" nor the phrase "any other penalty fee or charge" as is found in the final law, and it did not specifically direct the Board to establish reasonable and proportional penalty rules. If anything, these revisions suggest that Congress wanted to focus the Board's attention on the reasonability and proportionality of *penalty* interest rate increases specifically, not on increases in the "applicable annual percentage rate" generally.

Reasonable minds may differ over the specific intention of new TILA Section 149 under the Credit CARD Act. It is very clear however that Congress was responding to what it perceived as a set of serious problems, specifically including disproportionate penalty charges that could double or triple the monthly minimum payment levels. This concern is exemplified in the following statements from two of the leading architects of the Credit CARD Act (emphasis added):

- "The range of abusive practices is as long as it is appalling: retroactive rate increases on existing balances; double-cycle billing that charges interest on balances the consumers have already paid; deceptive marketing to young people; changing the terms of the credit card agreement at any time, for any reason, on any balance; ***skyrocketing penalty interest rates***, some as high as 32 percent." – Senator Christopher Dodd[37]

- So we are trying to shut down a practice that goes on too often: when there are 70 million accounts whose rates have gone up in an 11-month period; when there are *fees and penalties* that have brought in billions of dollars, ***exorbitant fees and penalties, way beyond any proportionality to the offense committed***. – Senator Christopher Dodd [38]

- "In the past 12 years, penalty fees for late payments have more than doubled, from an average of $13 in 1995 to $28 now. Make just one late payment, and you can face a ***penalty interest rate of more than 30 percent***. The fine print in most disclosure statements says that issuers can change the terms of the cardholder's agreement at any time, for any reason. There is no

[36] Id. at footnote 16.
[37] Congressional Record, "Credit Cardholders' Bill of Rights Act of 2009" (May 11, 2009) at p. S5314. Senator Dodd made numerous statements about the size of interest rate increases, penalty and otherwise. He and Senator Charles Schumer lamented the practice of doubling or tripling interest rates in a recent letter to the Board and other regulators, available at: http://banking.senate.gov/public/index.cfm?FuseAction=Newsroom.PressReleases&ContentRecord_id=d3e780e7-0d8c-9d5f-678e-e0a45a23707e&Region_id=&Issue_id.
[38] Congressional Record, "Credit Cardholders' Bill of Rights Act of 2009" (May 13, 2009) at p. S5428.

other contract in the world that can change its terms at any time." – Congresswoman Carolyn Maloney[39]

Given these express concerns over the need to reduce penalty rates, TILA Section 149's specific provision of authority to the Board to "establish different standards for different types of fees and charges, as appropriate" is best understood as directing the Board to use its expertise to ensure that all penalty fees and charges – including penalty interest rate increases – are reasonable and proportional.

In sum, the Board should reconsider its sense that Congress *did not want* the Board to address penalty interest rate increases. Rather, the legislative focus on eliminating high penalty rates, comprehensively regulating all penalty fees or charges and granting of Board authority to establish various standards strongly suggests that Congress *specifically directed* the Board to include penalty interest rate increases within its "reasonable and proportional" rules. At a minimum, Congress indicated great concern about the size and impacts of penalty rate increases and left the Board free to address them. **The board should revise comment 52(b)-1 to reflect that Congress was concerned with penalty interest rate increases and did not constrain the Board from considering appropriate "reasonable and proportional" standards for such increases.**

2. Penalty rate increases, especially those on existing balances, impose potentially drastic penalties on the most vulnerable cardholders.

Pew's latest published research showed that as of July of last year, 90 percent of bank credit cards included penalty interest rate terms, with a median penalty APR of 28.99 percent. For credit unions, 52 percent of cards included penalty interest rates, with a median rate of 17.90 percent. In all cases, penalty rate increases could overlap with other penalties, such as late or over-the-limit fees.[40] Even after the effective date of the Act's provisions restricting penalty interest rate increases on existing balances, penalty rate terms remain ubiquitous in the market. Pew's preliminary observations based on comprehensive reviews of credit card terms and conditions gathered in March 2010 show that of the 12 largest bank credit card issuers, all 12 issuers reserve the right to change terms, including raising the interest rate, at any time in accordance with law.

Penalties can significantly increase the size of the minimum payment due, making it difficult or impossible for a struggling cardholder to resume on-time payment. For a typical balance of $3,000, accruing interest at 15 percent annually, a cardholder must pay a minimum of about $70 per month. However, application of a 28.99 percent penalty interest rate would add a penalty of 52 percent higher interest charges every month. The minimum payment due would increase to $102. For balances of $10,000, the monthly minimum payment would be $342 ($225 base plus $117 penalty interest). For balances of $20,000, the monthly minimum payment would be $683 ($450 base plus $233 penalty interest). In each case, concurrently applied penalty fees could result in increases to the minimum payment of 100 percent or more.[41]

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[39] Congressional Record, "Credit Cardholders' Bill of Rights Act of 2008" (July 10, 2008) at pp. H6391-H6393
[40] See Appendix A for a summary of credit card market conditions.
[41] See Appendix B for explanation of these calculations.

The Credit CARD Act and the Board's implementing regulations have significantly narrowed the potential application of penalty interest rate increases regarding *existing balances*. Perhaps fewer than five percent of accounts will be in retroactive penalty status during any given year.[42] However, those cardholders who do become affected by retroactive penalty interest rate increases will be among the most vulnerable consumers, those falling into serious delinquency, often struggling in the wake of job losses or other setbacks. It is unclear how adding tens or hundreds of dollars per month to the minimum payment due amounts of these vulnerable consumers would result in a return to on-time payment; but it is easy to see how it would result in pushing these consumers over the brink of financial failure.

The fact that Congress limited penalty rate application to cardholders least able to afford steep increases runs counter to the Board's perception that Congress did not intend for or empower the Board to hold penalty rates within reasonable and proportional guidelines. Without the Board's action, these most vulnerable consumers will remain the sole subjects of potentially unlimited and overwhelming penalty rate increases, which surely was not the intent of Congress.

3. **For penalty rate increases applicable to existing balances, the Board should limit penalty APRs to no more than seven percentage points above base (non-penalty) APRs.**

Penalty interest rate increases on *existing balances* can only be justified as "reasonable and proportional" to the extent they compensate the issuer for actual marginal costs caused by the cardholder's violation. In general, where separate penalty fees are imposed for late payments, those fees should be looked to first for cost recovery. Penalty interest rates may then compensate for extraordinary costs, such as provision of credit counseling or establishment of workout arrangements, for seriously delinquent accounts.

To the extent that deterrence is a legitimate argument that penalties are "reasonable," fees should be looked to for deterrence, not rate increases. The deterrence value of penalty rate increases on existing balances is not shown. Nor is it reasonable to allow creditors to have the power to use retroactive price increases (in effect, a rewriting of the past agreement after the cardholder has incurred the debt) as a tool for deterrence.

The Board may consider providing issuers with an option to justify the size of penalty interest rate increases through use of cost models, as in the case of penalty fees under proposed § 226.52(b)(1)(A). However, as with that proposed section, we urge the Board not to allow such deterrence models.[43] Instead, the Board should establish a clear rule governing how high penalty interest rates may rise relative to base (non-penalty) interest rates. Specifically, the Board should limit penalty interest rate increases on existing balances to no more than a seven percentage point premium above base (non-penalty) APRs. **While the Board may consider either a mandatory rule or a safe harbor, we believe a mandatory rule would be most appropriate.**

[42] See Associated Press, infra note 45.
[43] See discussion in section I(A)(5) of this letter, starting at p. 7.

In our judgment, this seven-point threshold establishes a simple rule that will in most cases allow for a reasonable and proportional penalty charge, when imposed in connection with the Board's other rules related to *when* and *for how long* penalty rate increases may apply. We selected this threshold, which is part of Pew's Safe Credit Card Standards, after considering a wide variety of factors and discussing the issue with industry and consumer groups. The seven-point threshold was also suggested in several proposed pieces of legislation in the 110th Congress, including those from Senator Levin (S.1395) and Senator Menendez (S.2753).

Some of the considerations are outlined below. See **Appendix B** for further analyisis.

- Impact on cardholder. A seven percentage point premium would significantly reduce the overall amount of penalties a cardholder may be required to pay compared to today's conditions. A seven-point premium would add nearly $6.00 in interest charges, per month, for every $1,000 borrowed.[44] For a typical cardholder carrying a $3,000 balance, the seven-point penalty would add nearly $18. By comparison, an average cardholder today is subject to a penalty interest rate premium of 14 percentage points – double the proposed maximum. See Appendix B for a comparison of the effects of status quo penalty rate practices vs. proposed maximum penalty rate increases.

  While current penalty premiums can increase the monthly minimum payment due by 50 to 100 percent, a seven-point premium would represent an increase of only about 26 percent. Penalty fees, which may apply concurrently, would increase the monthly minimum as well. See Appendix B.

  The seven-point premium would significantly reduce the risk of imposing drastic cost increases on cardholders, by noticeably reducing monthly penalty charges compared to their current levels. Restricting such cost shocks can help cardholders to return to responsible payment behavior and effectively work toward eliminating their debts.

- Impact on issuer. In developing our Safe Credit Card Standards we created an issuer revenue model and tested the Standards to determine their impact on issuer revenue streams. Our estimates show that issuers would receive a significant amount of penalty interest income even under a proposed seven-point maximum penalty rate premium.

  An example calculation illustrates that issuers can earn significant income even from constrained penalty interest charges. For every one million credit card accounts held by an issuer, several thousand will be delinquent at any given time. Fitch Ratings has estimated that 4.5 percent of credit card accounts are 60 days or more past due.[45] To calculate potential penalty rate

[44] $1,000 * (.07/12) = $5.83
[45] Associated Press (March 3, 2009)

revenue from these accounts, we will use a conservative of 2.5 percent.

If 2.5 percent of accounts are 60 days past due, 25,000 accounts per million would be subject to a penalty interest charge. If the average monthly penalty interest premium were $18 as noted above ($6 per thousand for an average balance of $3,000), the issuer's revenue on the penalty interest rate increase would be $450,000 per month per million accounts. That would equal $5.4 million per year per million accounts, or a total of $108 million or more for the largest issuers with at least 20 million active accounts.

A certain percentage of these charges would not be collected due to chargeoffs or removal of penalty rates due to the Act's 6-month cure provisions. However, the example illustrates that issuers may expect to receive an amount of revenue from the new safeguarded penalty charges that is significant enough to cover marginal costs such as those associated with workouts or counseling of seriously delinquent accounts. We are unaware of any data showing otherwise.

Finally, we note that at least one large issuer has begun employing a penalty rate formula that explicitly matches the design of our proposed penalty rate premium, and even offers a premium that is two percentage points lower than our suggested maximum. Discover's *Motiva* cards include a penalty rate premium of no more than five percentage points, as shown in the following excerpt (emphasis added):

> *Each time you fail to make a payment when due, we may, in accordance with applicable law, (i) terminate the availability of any introductory/promotional APRs on new transactions, and (ii) increase your APRs for new transactions to variable Default Rates which will be determined *by adding up to an additional 5 percentage points to the otherwise applicable APR.* Your Default Rate is determined based on your creditworthiness and other factors such as your current APRs, and your account history. See Cardmember Agreement for details.[46]

4. "Reasonable and proportional" rules for penalty rate increases applicable only to *future* transactions may not be warranted at this time; however, the Board should collect information about the practice and evaluate the need for additional rules within 12-18 months. Specifically, the Board should require issuers to provide information detailing issuer repricing practices tied to late or over-the-limit transactions or other forms of penalty repricing, and this information should be publicly available.

Interest rate increases on *future balances* have different characteristics than those that may apply to *existing balances.* The Board may find it prudent to limit its promulgation of substantive pricing restrictions applicable to future transactions, and Congress gave the Board flexibility to do so. Go-forward rate increases may be justified based on a variety of factors, including cost, cardholder behavior factors and risk factors. It is also more

[46] Discover Motiva card application disclosures, obtained March 2, 2010, from www.discovercard.com.

difficult to delineate penalty motivations from market-driven motivations in the case of go-forward rate increases (by contrast, the Credit CARD Act makes clear that retroactive rate increases may no longer be justified by anything but penalty motivations for serious delinquencies). Further, unlike the case of rate increases on existing balances, with appropriate disclosure (see discussion below) cardholders could evaluate any prospective price increase before incurring debt or making purchasing decisions.

Therefore, we believe the appropriate first steps for the Board to take to ensure that penalty rate increases on *future transactions* are "reasonable and proportional" are (1) to set clear guidelines for reviewing these interest rate increases for subsequent reductions (discussed in our comments on § 226.59 interest rate reviews, starting at page 27, below)**; and (2) to regulate disclosure of penalty rates** (discussed in the next bullet point).

However, we encourage the Board to review how the use of penalty interest rate increases on *future transactions* evolves over the coming 12 to 18 months and whether additional rules become necessary. To facilitate this review, the Board should require issuers to provide detailed information detailing issuer repricing practices tied to late or over-the-limit transactions or other forms of penalty repricing. This information should be publicly available.

As noted above, penalty rate terms remain ubiquitous in the market even after implementation of the Credit CARD Act. Pew's analysis of credit card terms has shown that issuers generally retain the right to impose go-forward penalty rates of approximately 29 percent for simple transgressions such as a late payment or over-the-limit transaction. Though notice requirements now exist before these rate increases may take effect, cardholders may still be at risk of abuse in cases where issuers use what the Board has previously referred to as "hair trigger" repricing mechanisms.[47] Industry-wide reliance on hair trigger repricing for new transactions could require further action by the Board.

5. **The developing trend of eliminating penalty APR disclosures (1) adds urgency to the need for Board regulation of penalty rates; and (2) suggests the need for additional disclosure rules (at a minimum, issuers should be required to disclose the maximum penalty rate that may apply to existing balances in case of delinquency).**

Pew's ongoing research shows that as of March 2010:

- 9 of the 12 largest issuers explicitly include penalty rate terms in their application disclosures, including disclosing a penalty APR.

- 2 of the 12 (Bank of America and US Bank) appear to use penalty interest rate increases, but do not disclose a penalty APR.

- Only one issuer (USAA) provides application disclosures indicating that there is no penalty rate on their cards. However, this issuer reserves the general right to change terms and pricing within the bounds of the law.

[47] 74 FR 5527

Given the recent credit card reforms, including the 45-day notice requirements for penalty rate increases and all other rate increases, it appears that at least two of these issuers have concluded that there is no longer a reason to disclose a penalty APR. Prior to the Credit CARD Act and the Board's recent regulations, issuers had an incentive to disclose penalty APRs because it facilitated instant rate increases on all balances in the event of late payment, over-the-limit transactions or for other default or penalty triggers

This development, which hides the existence and size of penalty rates from cardholders, calls into question the deterrence value penalty APRs may have. It also leaves penalty APRs theoretically unconstrained in how large they may become. Cardholders carrying a balance and unable to close the account to avoid high penalty APRs will be particularly vulnerable to skyrocketing penalty rates and, potentially, harassment by bill collectors.

B. The Board should declare that all penalty charges triggered by late payments or similar account violations in conjunction with deferred interest programs, are penalty fees subject to the requirements of § 226.52(b).

Deferred interest programs allow consumers to finance purchases at little or no interest, provided that they incur no violations and repay the entire financed amount within an agreed period of time, such as within one year. If the consumer does not repay the balance in full by then, the issuer may charge interest on *the entire amount financed,* retroactively to the original transaction date, without regard to any amounts that the consumer has actually repaid to that point. These accounts are structured so that interest accrues on the account each month but is deferred, not charged unless and until the consumer fails to meet the terms of the account.

Our Safe Credit Card Standards would prohibit deferred interest offers, and we have urged in the past that policymakers should ban all credit card deferred interest programs. While the Act does not impose a ban, its reasonable and proportional requirements do demand regulation of one aspect of deferred interest programs. Issuers often cancel deferment offers when the account becomes late or over-limit – even after just one such violation. Moreover, the issuer may then charge a penalty fee equal to the entire amount of accrued interest.

This penalty may greatly exceed the size of any other penalty fee on credit cards. For example, the penalty imposed on a deferred $1,000 transaction, assuming the cardholder is one day late in the sixth month of the program, would be approximately $100, or a **1,000 percent penalty** compared to a $10 minimum payment past due.[48] The cardholder would also lose the entire benefit of the deferral period and would have to pay interest charges every month until the balance is fully repaid.

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[48] We estimate the penalty charge based on accrued interest at 20 percent APR. Deferred interest credit cards typically have higher rates compared to mainstream credit cards. The minimum payment due is estimated assuming a one percent principal reduction, with no billed interest charges. Our informal review of credit card deferred interest programs suggests that this minimum payment calculation method is common – see, e.g., the deferred interest credit card offer available at: http://www.bestbuy.com/site/null/Financing+Benefits/pcmcat97200050032.c?id=pcmcat97200050032.

To protect cardholders from these disproportionate penalties, the Board should clarify that the § 226.52(b) requirements cover deferred interest programs. Deferred interest should never be charged except when a cardholder fails to pay the entire balance by the agreed end date, and only to the extent that the deferred interest rate is no higher than seven percentage points above the account's base purchase rate. Cardholders would still be required to repay the original balance in full by the program end date, or be charged the entire accrued interest amount as per the original deferral agreement.

III. § 226.59 Reevaluation of Rate Increases

A. General comments on the rule, § 226.59

New TILA Section 148 is intended to give cardholders who have been affected by rate increases – whether due to fluctuations in credit scores, market conditions or other factors – the corresponding benefit of rate reductions when such factors turn in their favor. Yet the Board's proposed § 226.59 contains few clear rules regarding how and when credit card issuers must review and reverse prior interest rate increases. In particular, by permitting issuers to raise an account's rates using one set of factors, and later evaluate rate reductions using a different set of factors, § 59(d) leaves issuers with little if any guidance as to what the law really requires of them.

We understand the Board's stated concerns with respect to prescribing mandatory rules for interest rate reviews under TILA § 148. ("The Board believes that a more prescriptive rule could unduly burden creditors and raise safety and soundness concerns for financial institutions").[49] However, we disagree that these concerns prohibit the Board from formulating clear requirements for compliance with the rule.

In particular, to effectuate the requirements of TILA § 148, it is necessary to add detailed guidance on how issuers will comply with the law's interest rate reduction requirements in cases where penalty rates apply in response to specific violations of the account terms.

B. The Board should establish clear, generally applicable guidelines for removing penalty interest rates when account violations have ceased.

Credit card accounts are often assessed higher interest rates in response to certain violations, such as delinquencies or over-the-limit transactions. It has been customary for credit card issuers to incorporate special interest rates – variously called "penalty," "delinquency" or "default" rates – that will apply in such cases. In Pew's analysis, these penalty rates are

[49] 75 FR 12349

virtually always higher than any advertised base (non-penalty) purchase, balance transfer or cash advance rate otherwise applicable to the account.

Issuers typically offer multiple credit card products, differentiated by status (platinum, signature), types of rewards, co-branded relationships or otherwise. Each product disclosure includes its own range of applicable interest rates, which may be categorized by balance type (e.g. purchases, cash advances, balances transfers). For each product, it is easy to determine the maximum advertised rate per balance type. Any interest rate that exceeds the maximum advertised interest rate, for each balance type, is properly understood as a penalty rate.

1. **Just as the correlation between specific events – such as a late payment or an over-limit transaction – and the imposition of a penalty rate is clear and direct, so Congress intended a clear path to removal of the penalty. Therefore, the Board should state clear and direct guidance in § 226.59 regarding the removal of penalty rate increases once the underlying violations have passed.**

2. **For any account that incurred penalty rates on January 1, 2009 or later, the Board should require a return to any non-penalty, advertised rate when the account becomes free from violations for six months or more.**

   The Board should require issuers to reduce any penalty interest rate to a non-penalty rate whenever an account has experienced no violation of terms (i.e. late payments or over-the-limit transactions) for six consecutive months. Unlike new TILA § 171 and the Board's implementing rules there under, this rate review would not require restoration of original interest rates that applied to the account before the penalty rate increase was imposed. Rather, the issuer would be required to reduce the rate to within the range of advertised non-penalty rates for each balance type. This requirement should apply to all accounts and to all forms of interest rate increases otherwise subject to § 226.59.

   This rule would create clear, tangible guidance on the implementation of new TILA § 148 without prescribing particular business procedures or adversely affecting underwriting or business strategies. Given the strong correlation between certain violations, such as late fees, and the imposition of penalty rates, and the ease with which issuers can determine if an account has experienced further violations, the Board should make this suggested rule mandatory. At the bare minimum, the Board should offer it as guidance or a form of safe harbor regarding accounts subjected to penalty rates.

   Application of this suggested rule could readily be reconciled with the rest of the Board's proposed § 226.59. For example, provided that they otherwise meet the timing requirements of § 59(c), issuers could be allowed to review accounts only once per six-month period, and reduce penalty rates only for those accounts that, at the time of review, have been free of violations for six months or more.[50]

[50] Some accounts could pay penalty rates for nearly a year before because of this review cycle. However, this eventuality should not discourage the Board from issuing the rule, which would benefit many cardholders and provide clear guidance to issuers. The Board may wish to consider additional remedial options, such as crediting accounts that have paid penalty rates for between seven and 12 months at the time of the second six-month review.

Appendix A: Selected Market Data and Analysis

Included below are selected findings from Pew's research on commonly deployed fees and charges in the credit card market.[51] These findings are based on our review of credit card terms of the country's 12 largest bank issuers and 12 largest credit union issuers, which together hold more than 91 percent of outstanding credit card debt.[52] In July, 2009, researchers gathered available online disclosures for all of the approximately 400 Visa®, MasterCard®, American Express® and Discover® branded consumer credit card products offered by these top issuers.

Late Fees

All 24 bank and credit union issuers and 99 percent of the cards they offered charged a penalty late fee. **For bank cards, the median late fee applicable to most accounts was $39. For credit unions, the median fee was $20.** Late fees on some cards are flat fixed fees, while on other cards they are tiered based on the outstanding account balance (for example, a late fee may be $29 for account balances up to $499.99 and $39 for balances $500 and up). All credit union late fees were fixed, with a range of $10 to $39.[53]

Only five percent of bank card late fees were fixed, with a range of $30 to $39. The late fee was tiered based on account balance on 95 percent of bank cards. For these cards, the amount of fee is demonstrated in the table below. Most cards included three tiers of fees, with the lowest fee ($15) applying only to accounts with balances of $100 or less and the highest fee ($39) charged on accounts with balances exceeding $250.

Table A-1: Credit Card Late Fees, Banks (Tiered Accounts)

	Median Balance Threshold	Median Late Fee	Range of Late Fee
Low tier	$0 to $100	$15	$15 to $25
Middle tier	$100 to $250	$29	$15 to $29
High tier	$250 or above	$39	$35 to $39

Note: Late fees on cards with tiered arrangements are based on the outstanding account balance. In the table above, the minimum late fee ($15 median) applies to accounts with balances up to $100 and the highest late fee ($39 median) applies to accounts with balances exceeding $250. The average outstanding balance per active credit card account is $2901 (Nilson Report, April 2009). Ninety-five percent of bank cards had tiered late fees, and 5 percent were fixed (median $39). All credit union late fees were fixed (median of $20).

[51] The Pew Charitable Trusts, supra note 15.
[52] The largest twelve issuers included the top-10 Visa / MasterCard issuers, American Express and Discover (issuer size is measured by outstanding balances based on data available as of December, 2008). See The Pew Charitable Trusts, supra note 15, at p. 32.
[53] America First credit union late fees were expressed as 5 percent of the *past due amount* (i.e., the minimum required payment), with a minimum of $10. We treated this fee as a $10 fixed fee since the vast majority of accounts would never be subject to a higher or a lower late fee.

Over-the-Limit Fees

Ten of 12 bank issuers and 10 of 12 credit union issuers charged a penalty fee for cardholders who exceeded their credit limits. Overall, fees for exceeding the credit limit applied to 81 percent of cards in the sample (80 percent of the bank cards and 89 percent of the credit union cards).

As with late fees, all credit union overlimit fees were fixed. Among banks, approximately two-thirds of credit card overlimit fees were fixed, with the remainder tiered based on account balance or credit limit, as shown in the table below. **Overall, the median overlimit fee applicable to most bank issued accounts was $39. For credit unions, the median fee was $20.**

Table A-2: Credit Card Over-the-Limit Fees, Banks (Tiered Accounts)

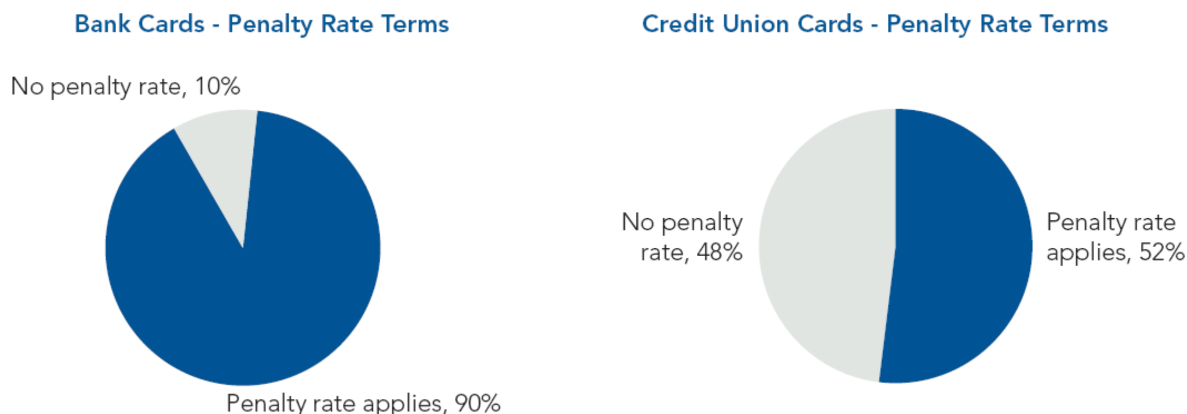
	Median Balance Threshold	Median Late Fee	Range of Late Fee
Low tier	$0 to $500	$15	$15 to $19
Middle tier	$500 to $1,000	$25	$15 to $29
High tier	$1,000 or above	$39	$35 to $39

Note: Overlimit fees on cards with tiered arrangements are based on the outstanding account balance. In the table above, the minimum late fee ($15 median) applies to accounts with balances up to $500 and the highest late fee ($39 median) applies to accounts with balances exceeding $1,000. The average outstanding balance per active credit card account is $2901 (Nilson Report, April 2009). Two-thirds of bank cards had fixed overlimit fees (median $39). Among credit unions, all overlimit fees were fixed (median $20).

Continued on next page:

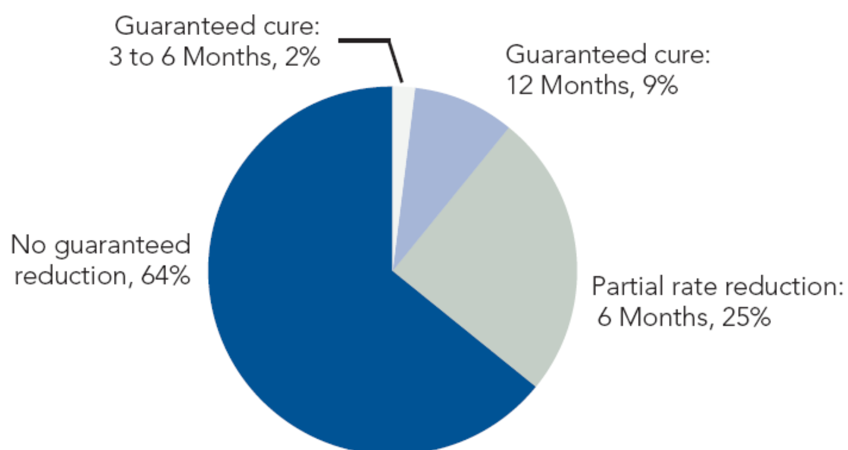
Penalty Interest Rate Increases

Figure A-1: Credit Cards with Automatic Penalty Interest Rate Increases, July 2009



Note: Data represents all consumer credit cards offered online by the 12 largest bank and 12 largest credit union issuers, which together control more than 91 percent of credit card outstandings. Percentage of cards expressed as portion of all surveyed cards by type of issuer. All observed penalty rates applied to all balances (future and outstanding).

Figure A-2: Cure Provisions on Credit Cards with Penalty Rates, July 2009



Note: Chart represents the portion of all cards that included penalty rates (based on study of all consumer credit cards offered online by the 12 largest bank and 12 largest credit union issuers, which together control more than 91 percent of credit card outstandings). All assessments based on issuer-provided application disclosures. A "guaranteed cure" indicates that the issuer will restore the original non-penalty rate of interest automatically after receiving a given number of consecutive on-time payments. Percentage of cards expressed as portion of all surveyed cards.

Cumulative Penalties

For all cards surveyed, penalty fees and charges could be cumulative. A penalty interest rate increase, a late fee and an overlimit fee could all apply concurrently to an account during any given time period (in addition to any other applicable fee or charge).

Appendix B: Effects of Penalties on Minimum Payment Due

The following tables show the effects of penalty fees and interest rates on the minimum payment due. In addition to dollar costs, the tables show the percentage increase represented by each penalty charge compared to the non-penalty cost. Minimum payment calculation formula:

*Interest [Balance * (Non-Penalty APR / 12) + Balance * (Penalty APR Premium / 12)] + Penalty Fees + Principal Reduction [Balance * Required %]]*

Two scenarios are given to compare status quo penalties with proposed penalty thresholds.

Scenario A: Status Quo w/ 14 Percent Penalty Rate Premium and $39 Late Fee

Assumptions:[54]

- Base (non-penalty) APR: 15.00%
- Penalty APR: 28.99%
  - *(calculated penalty premium):* 13.99%
- Required principal reduction (%): 1.00%
- Penalty Late Fee: $39

	Average Daily Balance				
Monthly Minimum Payment	**$1,000**	**$3,000**	**$7,000**	**$10,000**	**$20,000**
Base (non-penalty) interest:	$13	$38	$88	$125	$250
Required principal reduction:	$10	$30	$70	$100	$200
Min. Payment w/o Penalties	*$23*	*$68*	*$158*	*$225*	*$450*
Penalty interest:	$12 + 52%	$35 + 52%	$82 + 52%	$117 + 52%	$233 + 52%
Penalty Late Fee:	$39 + 173%	$39 + 58%	$39 + 25%	$39 + 17%	$39 + 9%
Total Min. Payment w/ All Penalties:	**$73** + 225%	**$141** + 110%	**$278** + 77%	**$381** + 69%	**$722** + 60%

[54] Notes on assumptions: 15.0% is roughly the average between the median high and median low advertised purchase rates according to Pew's research. 28.99% is the median penalty rate and $39 is the median late fee. See Appendix A.

Scenario B: Seven-Point Maximum Penalty Rate Premium w/ Proposed Safe Harbor Penalty Late Fee

Assumptions:[55]

- Base (non-penalty) APR: 15.00%
- Penalty APR: 22.00%
  - *(calculated penalty premium):* 07.00%
- Required principal reduction (%): 1.00%
- Safe Harbor Penalty Late Fee: $10 or 5% / Max $40

Monthly Minimum Payment	**$1,000**			**$3,000**			**$7,000**			**$10,000**			**$20,000**		
Base (non-penalty) interest:	$13			$38			$88			$125			$250		
Required principal reduction:	$10			$30			$70			$100			$200		
Min. Payment w/o Penalties	*$23*			*$68*			*$158*			*$225*			*$450*		
Penalty interest:	$12	+	52%	$35	+	52%	$82	+	52%	$117	+	52%	$233	+	52%
Penalty Late Fee:	$10	+	44%	$10	+	15%	$10	+	6%	$11	+	5%	$23	+	5%
Total Min. Payment w/ All Penalties:	**$44**	+	96%	**$112**	+	67%	**$249**	+	58%	**$353**	+	57%	**$706**	+	57%

Note: Accounts could be required to pay higher principal reduction amounts. At a 3.00% principal reduction amount, the required minimum payment without penalties would range from $43 (for $1,000 balance) to $850 (for $20,000 balance), and the penalty late fee under the proposed safe harbor would range from $10 to $40.

[55] Notes on assumptions: 15.0% is roughly the average between the median high and median low advertised purchase rates according to Pew's research. See Appendix A. The Safe Harbor Penalty Late Fee represents the thresholds discussed in Section I.C, starting on page 13.