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# CARD Act: Navigating the Complex New Rules for Credit Card Lending

## Meeting Regulatory Demands for Disclosure, Notice, Billing and Interest Rates

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Michael B. Mierzewski, Partner, **Arnold & Porter**, Washington, D.C.

Beth S. DeSimone, Counsel, **Arnold & Porter**, Washington, D.C.

Ahmad Hajj, Attorney, **Arnold & Porter**, Washington, D.C.

**Tuesday, October 13, 2009**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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ARNOLD & PORTER LLP

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# CARD Act: Navigating the Complex World of Credit Card Lending



**October 2009**

**Michael Mierzewski**

**Beth DeSimone**

**Ahmad Hajj**

## Overview

- The Credit Card Accountability Responsibility & Disclosure Act of 2009 was signed into law on May 22, 2009.
- The “CARD Act” amends TILA and the Fair Credit Reporting Act.
- The CARD Act also incorporates many of the rules adopted by federal bank regulators that will become effective in July 2010 (“Final Rules”).
- Late September 2009, the Federal Reserve issued Proposed Rules in an attempt to clarify some of the rules of the CARD Act.

## Purpose of CARD ACT

- The purpose of the Act is to “establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan.”
- The Act is also intended to protect younger consumers (under the age of 21) from predatory lending practices.
- The Act also implements new provisions on gift cards including the requirement that all gift cards have at least a five-year life span, and eliminating the practice of declining values and hidden fees for cards used within a “reasonable period of time.”

## Motivation Behind New Regulation of Credit Card Industry

- The Financial Crisis and weakening credit markets uncovered many of the questionable and risky credit practices that were affecting both consumers and financial institutions.
- Legislators, banking regulators and the President were pressured to increase oversight and regulation on the credit card industry in an attempt to curtail questionable credit card lending practices.

## Motivation Behind New Regulation of Credit Card Industry (cont'd)

- Federal Reserve's "Poor Record" on Consumer Protection: On September 23, 2009, Barney Frank's office released a report card claiming that the Federal Reserve had a "poor record of using tools provided by Congress to protect consumers from abusive financial industry practices." The report asserted that only after being prodded by Congress did the Federal Reserve respond with a number of consumer protection rules and regulations. The report indicates that Congress will pressure the Federal Reserve to implement and enforce consumer protection rules in the credit card context.
- The CARD Act marks some of the most far reaching Credit Card regulations to date and signals that Congress and Federal Regulators will be taking a stronger approach to oversight of the Credit Card industry and enforcement of the Credit Card Regulations.

## Financial Institutions Affected by the CARD ACT

- Banks
- Thrifts
- Credit Card Companies
- Other Financial Entities that offer open ended credit

## Timing: When the Provisions of the CARD ACT Will Become Effective

- Two provisions of the CARD Act that have already become effective.
  - A 45-day advance written notice required to be made to a card holder of any significant change in the terms of a credit card account, accompanied by a right to cancel the account before the change in terms take effect.
  - A requirement that statements must be delivered to consumers at least 21 days before the end of any grace period, specifying the finance charges that would be assessed once the grace period ends.

## Timing: When the Provisions of the CARD ACT Will Become Effective (cont'd)

- Most of the other provisions of the new statute will become effective in February 2010.
- Finally, two provisions of the Credit Card Act addressing the reasonableness and proportionality of penalty fees and charges (new TILA Section 149) and re-evaluation by creditors of rate increases (new TILA Section 148) are effective on August 22, 2010.
- NOTE: On September 24, 2009 Barney Frank (D-MA) and Carolyn Maloney (D-NY) Introduced Legislation- H.R. 3639: Expedited CARD Reform for Consumers Act of 2009 that would move up the effective date of the remaining provisions of the Credit CARD Act which now are now scheduled to become effective February and August 2010 to December 1, 2009.

## Material Provisions of the CARD ACT: MARKETING AND OPENING CARD ACCOUNTS

- Ability of Consumer to Repay: Chapter 3 of TILA is amended by adding that a creditor may not open a credit card account or increase the credit limit on an account without considering the ability of the consumer to repay. (Section 109).

*September 2009 Rules: The Fed believes an evaluation of a consumer's current ability to pay must include a review of the consumer's income or assets as well as the consumer's current obligations.*

## Material Provisions of the CARD ACT: MARKETING AND OPENING CARD ACCOUNTS (cont'd)

- Transparency of Credit Card Agreements: Amends Section 122 of TILA by adding that a creditor must maintain websites to post its written credit card agreements with consumers. It must also submit these agreements to the Federal Reserve, which will make them available on a Federal Reserve internet site that will be easily accessible to consumers. (Section 204).

*September 2009 Rules: The September 2009 Federal Reserve Rules on the CARD Act specify that these disclosures are applicable to any card issuer that issues a credit card under a credit card account under an open-end (not home secured) consumer credit plan.*

## Material Provisions of the CARD ACT: CARD TERMS/CHANGES IN CARD TERMS

- “Fixed Rate” clarified: The CARD Act clarifies TILA’s the use of the term “fixed rate” so that when it appears with a reference to the annual percentage rate (APR) or interest rate applicable to an account, it can only be used to refer to an APR or interest rate that will not change or vary for any reason over the period specified in the account terms. (Section 103).

*September 2009 Rules: The Federal Reserve clarified in its 2009 CARD Act Rules that the term “fixed” would be consistent with the Fed’s January 2009 Regulation Z description of “fixed” in the same context.*

## Material Provisions of the CARD ACT: CARD TERMS/CHANGES IN CARD TERMS (cont'd)

- Increase in APR, Fees or Finance Charges: A Creditor may not increase an APR, fee, or finance charge on an outstanding credit card balance unless one of the following exceptions apply:
  - a previously disclosed time period for promotional rates expires
  - a variable interest rate increase measured by an external index
  - a workout or temporary hardship agreement is completed
  - payments are delinquent for more than 60 days (This is 30 days longer than the FINAL RULES)

## Material Provisions of the CARD ACT: CARD TERMS/CHANGES IN CARD TERMS (cont'd)

- Except for these four exceptions to increasing an APR fee, or finance charge on an outstanding credit card balance, a credit card balance may not experience an increase during its first year.
- Promotional Rates: Chapter 4 of TILA is amended to state that in the case of a Promotional Interest Rate, the rate cannot expire less than 6 months after it is introduced- Section 172.

*September 2009 Rules: The Fed proposes that the expiration of a temporary rate cannot be used as a reason to apply an increased rate to a balance that preceded application of the temporary rate.*

## Material Provisions of the CARD ACT: CARD TERMS/CHANGES IN CARD TERMS (cont'd)

- Review of Accounts in which APR has increased: Creditors must review credit card accounts in which the APR has increased after January 1, 2009 at least once every six months to see if factors such as credit risk and market conditions have changed to support a rate reduction. If the review supports a reduction in the APR, then the rate must be reduced. If the review supports an increase in the APR, then the creditor must provide in a written notice the reasons for the increase. (Section 148).

—The Federal Reserve must issue regulations to clarify the methodology of this review by February 22, 2010, to be effective on August 22, 2010.

- 30 Day Notice for Change in Terms upon Renewal: Section 127 of TILA amended to state that if a creditor amends or changes any term on a credit card account upon renewal, that change must be disclosed at least 30 days prior to the scheduled renewal date. (Section 203).

## Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES

- Minimum Payment Penalties: If a creditor increases the APR, fee, or finance charge on an account due to a minimum payment not being received within 60 days of the due date, that creditor must terminate the increase if the consumer pays the minimum payments for six months after the increase was imposed. (Section 171).

—The law consequently nullifies the provisions in the Final Rules, which imposed a 30-day period in which a consumer can make a late payment, and did not allow a six month consumer redemption option.

*The September 2009 Proposed Rules state that creditors will be required to provide consumers with a notice specifically disclosing a rate increase based on a delinquency of more than 60 days, at least 45 days prior to the effective date of that increase.*

## Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES (cont'd)

- Application of Excess Payments of Minimum Amount Due: Section 164 of TILA is amended to state that if a consumer makes a payment in excess of the minimum amount due, the creditor must apply the excess payment to the balance with the highest interest rate first, and then the balance with the next highest rate until the payment is exhausted. If there are balances with deferred interest rates, then the excess payments must first apply to those balances during the last two billing cycles before the deferred interest rate ends. (Section 104).

—This provision sets forth the same concepts articulated in the Final Rules, as well as the clarifications on deferred interest rates issued on May 5, 2009.

- Changes in Repayment Terms: A creditor cannot change the repayment terms of an outstanding balance unless the change matches one of the following methods: (a) a minimum amortization period of five years, beginning on the date of the change in terms; or (b) minimum payments which, as a percentage of the outstanding balance, are no greater than twice the percentage required before the change in terms. A creditor may also change the terms to a method that is no less beneficial to the consumer than the suggested methods. (Section 171).

## Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES (cont'd)

- Penalties for Payment Methods not Permitted: Section 127 of TILA is amended to state that a creditor may not charge a consumer a fee for paying by a certain method (mail, electronic transfer, telephone, etc.) unless the payment involves expedited services by a service representative of the creditor. (Section 102).
- Changes in Procedures for Handling Payments: Section 164 of TILA is amended to state that if the creditor makes a material change to its mailing address, office, or procedures for handling payments and the change causes a material delay in crediting a consumer's payment during a 60-day period following the change, then the creditor may not impose a late fee or finance charge on the account for a late payment. (Section 104).

## Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES (cont'd)

- Consistent Dates for Payment Due Dates: Section 127 of TILA is amended to state that the payment date on a credit card account must be the same date each month. If the payment date is on a day that the creditor does not receive mail, then a payment received on the next business day may not be considered late. (Section 106).
- 21 Day Delivery of Periodic Statement: Section 163 of TILA is amended to state that a creditor may not treat a payment as late for any purpose unless the creditor has adopted reasonable procedures designed to ensure that the periodic statement is mailed or delivered to the consumer at least 21 days before the due date. (Section 163).

## Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES (cont'd)

- Minimum Payment Disclosures: A creditor must disclose that a minimum payment will increase the dollar amount of interest paid, the time it takes to repay the balance, including the number of months it would take to pay the balance if only paying the minimum monthly payments, and the amount that would be required to eliminate the outstanding balance in 36 months. A toll-free number of credit counseling and debt management services must also be prominently displayed on the billing statement.

*September 2009 Rules: If the minimum payment repayment estimate is less than 2 years, a credit card issuer must disclose the estimate in months. Otherwise, the estimate would be disclosed in years.*

## Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES (cont'd)

*September 2009 Rules: A creditor would be required to provide on the periodic statement the following statements: (1) a statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement; and (2) a statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance.*

*September 2009 Rules: The following products are exempt from repayment disclosures:*

- (1) HELOC accounts even if they are accessed by a credit card device;*
- (2) overdraft lines of credit even if they are accessed by a debit card; and*
- (3) open-end credit plans that are not credit card accounts, such as general purpose lines of credit that are not accessed by a credit card.*

**G-18(F) Periodic Statement Form**

XXX Bank Credit Card Account Statement  
 Account Number XXXX XXXX XXXX XXXX  
 February 21, 2012 to March 22, 2012

Summary of Account Activity	
Previous Balance	\$535.07
Payments	-\$450.00
Other Credits	-\$13.45
Purchases	+\$529.57
Balance Transfers	+\$785.00
Cash Advances	+\$318.00
Past Due Amount	+\$0.00
Fees Charged	+\$69.45
Interest Charged	+\$10.89
<b>New Balance</b>	<b>\$1,784.53</b>
Credit limit	\$2,000.00
Available credit	\$215.47
Statement closing date	3/22/2012
Days in billing cycle	30

Payment Information	
New Balance	\$1,784.53
Minimum Payment Due	\$53.00
Payment Due Date	4/20/12
<b>Late Payment Warning:</b> If we do not receive your minimum payment by the date listed above, you may have to pay a \$35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.	
<b>Minimum Payment Warning:</b> If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:	

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	\$3,284
\$62	3 years	\$2,232 (Savings=\$1,052)

**QUESTIONS?**  
 Call Customer Service 1-XXX-XXX-XXXX  
 Lost or Stolen Credit Card 1-XXX-XXX-XXXX

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:  
 PO Box XXXX, Anytown, Anystate XXXXX

**Important Changes to Your Account Terms**

The following is a summary of changes that are being made to your account terms. You have the right to opt out of these changes. For more detailed information, please refer to the booklet enclosed with this statement.  
 These changes will impact your account as follows:  
Transactions made on or after 4/9/12: As of 5/10/12, any changes to APRs described below will apply to these transactions.  
Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.  
If you are already being charged a higher Penalty APR for purchases: In this case, any changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

Transactions					
Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount	
5884186PS0388W6YM	2/22	2/23	Store #1	\$2.05	
0544400602LV72VL	2/24	2/25	Store #2	\$12.11	
55541960705RDYD0X	2/24	2/25	Store #3	\$4.63	
55432860808W90N0G	2/24	2/25	Store #4	\$114.95	
054830708LYMRPT4L	2/24	2/25	Store #5	\$7.35	
854338203FS800QZ5	2/25	2/25	Pymt Thank You	\$450.00-	

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION  
 Page 1 of 2

Please detach this portion and return with your payment to ensure proper credit. Retain upper portion for your records.

Account Number: XXXX XXXX XXXX XXXX  
 New Balance \$1,784.53  
 Minimum Payment Due \$53.00  
 Payment Due Date 4/20/12

AMOUNT ENCLOSED: \$

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank  
 P.O. Box XXXX  
 Anytown, Anystate XXXXX



XXX Bank Credit Card Account Statement  
 Account Number XXXX XXXX XXXX XXXX  
 February 21, 2012 to March 22, 2012

<b>Transactions (cont.)</b>				
Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
564891561545KOSHD	2/25	2/26	Store #6	\$14.35
841517877845AKOJIO	2/25	2/26	Store #7	\$40.35
895848561561894KOH	2/26	2/27	Store #8	\$27.68
1871556189456SAMKL	2/26	2/27	Store #9	\$124.76
1542202074TWWZV48	2/26	2/26	Cash Advance	\$121.50
2564894185189LKDFID	2/27	2/28	Store #10	\$32.87
4545754784KOHUIOS	2/27	3/1	Balance Transfer	\$785.00
14547847586KDDL564	2/28	2/28	Cash Advance	\$196.50
2564561023184102315	2/28	3/1	Store #11	\$14.76
55542818705RASDOX	3/1	3/2	Store #12	\$3.76
289189194ASDS8744	3/1	3/3	Store #13	\$13.45
178105417841045784	3/2	3/6	Store #14	\$2.35
045148714518979874	3/4	3/5	Store #13	\$13.45
8456152156181SDSA	3/5	3/12	Store #15	\$25.00
31289105205648AWD	3/11	3/12	Store #16	\$7.34
04518478415615ASD	3/11	3/16	Store #17	\$10.56
0547810544898718AF	3/15	3/17	Store #18	\$24.50
056489413216848OP	3/16	3/17	Store #19	\$8.76
054894561564ASDW	3/17	3/18	Store #20	\$14.23
5648974891AD98156	3/19	3/20	Store #21	\$23.76
<b>Fees</b>				
9525156489SFD4545Q	2/23	2/23	Late Fee	\$35.00
56415615647OJSNDS	2/26	2/26	Cash Advance Fee	\$5.00
84151564SADS8745H	2/27	2/27	Balance Transfer Fee	\$23.55
256489156189451516L	2/28	2/28	Cash Advance Fee	\$5.90
			<b>TOTAL FEES FOR THIS PERIOD</b>	<b>\$69.45</b>
<b>Interest Charged</b>				
			Interest Charge on Purchases	\$6.31
			Interest Charge on Cash Advances	\$4.58
			<b>TOTAL INTEREST FOR THIS PERIOD</b>	<b>\$10.89</b>
<b>2012 Totals Year-to-Date</b>				
			Total fees charged in 2012	\$90.14
			Total interest charged in 2012	\$18.27

<b>Interest Charge Calculation</b>			
Your Annual Percentage Rate (APR) is the annual interest rate on your account.			
Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	\$512.14	\$6.31
Cash Advances	21.99% (v)	\$253.50	\$4.58
Balance Transfers	0.00%	\$637.50	\$0.00
(v) = Variable Rate			

**G-18(G) Periodic Statement Form**

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XXX Bank Credit Card Account Statement  
 Account Number XXXX XXXX XXXX XXXX  
 February 21, 2012 to March 22, 2012

Summary of Account Activity	
Previous Balance	\$80.52
Payments	-\$50.00
Other Credits	+\$0.00
Purchases	+\$52.13
Balance Transfers	+\$0.00
Cash Advances	+\$0.00
Past Due Amount	+\$0.00
<b>Fees Charged</b>	<b>+\$37.00</b>
<b>Interest Charged</b>	<b>+\$0.00</b>
New Balance	\$119.65
Credit limit	\$2,000.00
Available credit	\$1,880.35
Statement closing date	3/22/2012
Days in billing cycle	30

Payment Information	
New Balance	\$119.65
Minimum Payment Due	\$10.00
Payment Due Date	4/20/12

**Late Payment Warning:** If we do not receive your minimum payment by the date listed above, you may have to pay a \$35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

**Minimum Payment Warning:** If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	14 months	\$130

**QUESTIONS?**  
 Call Customer Service 1-XXX-XXX-XXXX  
 Lost or Stolen Credit Card 1-XXX-XXX-XXXX

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:  
 PO Box XXXX, Anytown, Anystate XXXXX

**Notice of Changes to Your Interest Rates**

You have triggered the Penalty APR of 28.99%. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

Transactions				
Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
<b>Payments and Other Credits</b>				
854338203FS800025	2/25	2/25	Pytm Thank You	\$50.00-
<b>Purchases</b>				
5884186PS0388W6YM	2/22	2/23	Store #1	\$2.05
054440060ZLV7ZVL	2/24	2/25	Store #2	\$2.11
55541860705RDYD0X	2/24	2/25	Store #3	\$4.63
55432860800W50M0	2/24	2/25	Store #4	\$4.95
054830789LYMRPT4L	2/24	2/25	Store #5	\$7.35
564891561545K0SHD	2/25	2/26	Store #6	\$4.35
841517877845AKQJIO	2/25	2/26	Store #7	\$2.35
895848561561894KOH	2/26	2/27	Store #8	\$7.68
1871556189456SAMKL	2/26	2/27	Store #9	\$4.76
2564894185189LKDFID	2/27	2/28	Store #10	\$2.87
55542818705RASD0X	3/1	3/2	Store #11	\$3.76
178105417841045784	3/2	3/6	Store #12	\$2.35
8456152156181SDSA	3/5	3/12	Store #13	\$2.92

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION  
 Page 1 of 2

Please detach this portion and return with your payment to ensure proper credit. Retain upper portion for your records.

Account Number: XXXX XXXX XXXX XXXX  
 New Balance \$119.65  
 Minimum Payment Due \$10.00  
 Payment Due Date 4/20/12

AMOUNT ENCLOSED: \$

Please indicate address change and additional cardholder requests on the reverse side.  
 XXX Bank  
 P.O. Box XXXX  
 Anytown, Anystate XXXXX



XXX Bank Credit Card Account Statement  
 Account Number XXXX XXXX XXXX XXXX  
 February 21, 2012 to March 22, 2012

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<b>Transactions (cont.)</b>				
Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
<b>Fees</b>				
9525156489SFD4545Q	2/23	2/23	Late Fee	\$35.00
56415615647OJSNDS	3/22	3/22	Minimum Charge	\$2.00
<b>TOTAL FEES FOR THIS PERIOD</b>				<b>\$37.00</b>
<b>Interest Charged</b>				
Interest Charge on Purchases				\$0.00
Interest Charge on Cash Advances				\$0.00
<b>TOTAL INTEREST FOR THIS PERIOD</b>				<b>\$0.00</b>
<b>2012 Totals Year-to-Date</b>				
Total fees charged in 2012				\$90.14
Total interest charged in 2012				\$18.27

<b>Interest Charge Calculation</b>			
Your Annual Percentage Rate (APR) is the annual interest rate on your account.			
Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	\$113.80	\$0.00
Cash Advances	21.99% (v)	\$0.00	\$0.00
Balance Transfers	0.00%	\$0.00	\$0.00
(v) = Variable Rate			

## Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES (cont'd)

- Local Branch Payments: Section 127 of TILA is amended to state that if a consumer payment is made at a local branch of a creditor, then the date the payment is made at the branch must be the date the payment is credited to the account for purposes of determining whether a late fee or charge may be imposed. (Section 202).

## Material Provisions regarding FEES RELATED CARD ACCOUNTS

- Double Cycle Billing: Section 127 of TILA is amended to state that a creditor may not impose a finance charge based on prior billing cycles when calculating charges for the current billing cycle (double-cycle billing). A creditor is also prohibited from imposing a finance charge on the balance of a current billing cycle that was repaid during the cycle. There are two exceptions to these prohibitions:
  - finance charge adjustments as a result of a dispute resolution, or
  - the return of a payment for insufficient funds. (Section 102).

## Material Provisions regarding FEES RELATED CARD ACCOUNTS (cont'd)

- Over the Limit Fees: Section 127 of TILA is amended to state that a consumer must expressly consent to the imposition of over-the-limit fees, and the creditor must disclose the manner and form of the fee before a consumer can consent. A consumer's consent may be revoked at any time, and a creditor must provide notice of this revocation right in any periodic statement that imposes an over-the-limit fee. Such fees may only be charged once in a billing cycle, and only once in each of the two subsequent billing cycles.

*September 2009 Rules: Although creditors must obtain consumer consent before any over-the-limit fees or charges are assessed on a consumer's account, the rule would not require that the creditor obtain the consumer's separate consent for each extension of credit that causes the consumer to exceed his or her credit limit.*

## Material Provisions regarding FEES RELATED CARD ACCOUNTS (cont'd)

- Proportional Penalties and Fees: Chapter 3 of TILA is amended to state that penalties and fees assessed by a creditor must be reasonable and proportional to the consumer's omission or violation. (Section 149).

—The Federal Reserve, in consultation with other federal banking agencies must issue regulations by February 2010 to determine standards for assessing whether the amount of any fee or charge is “reasonable and proportional,” and such regulations must become effective by August 2010. The regulations must consider the cost incurred to the creditor by the consumer violation, deterrence of the violation, cardholder conduct, and other factors that the Federal Reserve deems necessary and appropriate. The Federal Reserve may also issue a safe harbor rule under which a fee or penalty charged is presumed to be “reasonable and proportional.”

## Material Provisions regarding FEES RELATED CARD ACCOUNTS (cont'd)

- High Fee Credit Cards: Section 127 of TILA is amended to state that if a credit card (usually subprime cards) requires fees in the first year of an amount exceeding 25% of the credit limit when the account was opened, none of the payment of the fees may come from the credit made available under the account. The fees calculated for this rule do not include charges related to late payments, over-the-limit transactions, or insufficient funds. (Section 105).

## Material Provisions regarding FEES RELATED CARD ACCOUNTS (cont'd)

- Late Fee Disclosures: Section 127 of TILA is amended to state that a creditor must disclose when a credit card balance is eligible for a late fee, as well as when an increase in APR will occur because of a late payment. (Section 202).

*September 2009 Rules: The Federal Reserve proposes that credit card issuers disclose the payment due date on the front side of the first page of the periodic statement.*

## Material Provisions regarding **MARKETING CARDS TO COLLEGE STUDENTS**

- Credit Cards issued to Minors: Section 127 of TILA is amended to state that consumers under the age of 21 may not obtain a credit card unless the account is cosigned by a parent, legal guardian, spouse, or an adult above the age of 21 that has the means to repay, and indicates joint liability for the debts incurred by the consumer; or the consumer indicates an independent means of repaying the debt. (Section 301).

—The Federal Reserve is required to issue standards for determining a consumer's independent means of repaying a credit card debt. Such standards will provide a safe harbor for creditors that adhere to the regulations. Credit reporting agencies cannot issue credit reports on a consumer under 21 if that consumer did not initiate the report.

## Material Provisions regarding **MARKETING CARDS TO COLLEGE STUDENTS** (cont'd)

- Items in Exchange for Applying for a Card: Section 127 of TILA is amended to state that creditors may not offer items in exchange for applying for a credit card anywhere on or near a college campus, or at an event sponsored or affiliated with a college. Colleges must also publicly disclose any marketing contracts with creditors. (Section 305).  
  
——Creditors must submit an annual report of agreements with colleges, or college-affiliated organizations to the Federal Reserve. The first report is due by February 22, 2010.

## Materials Provisions regarding GIFT CARDS

- Minimum 5 Year Life Span on Gift Cards: The Electronic Funds Transfer Act is amended to state that all gift cards must have at least a five year life span. (Section 401).

## Materials Provisions regarding GIFT CARDS (cont'd)

- Prohibition on Imposition of Fees or Charges: It is unlawful for companies to impose a dormancy fee, inactivity charge or fee, or service fee with respect to a gift certificate, store gift card or general prepaid card unless:
  - there has been no activity with respect to the certificate or card in the 12-month period ending on the date on which the charge or fee is imposed
  - not more than one fee is charged in any given month
  - the following disclosure requirements are conspicuously stated with the card:
    - that a dormancy, inactivity or service fee may be charged
    - the amount of such a fee
    - how often the fee will be charged
    - that such a fee or charge may be assessed for inactivity
    - and that the issuer or vendor of the card or certificate notify the consumer of such charges BEFORE the cards or certificates are purchased

## Conclusion:

- It is clear Congress, the FED and other regulators will be implementing more stringent regulations with regard to credit lending policies.
- Banks, Credit Card Companies, and other Financial Lending Institutions should monitor the Proposed Rules, and prepare to implement the appropriate policies to ensure compliance with the CARD Act and its Regulations.

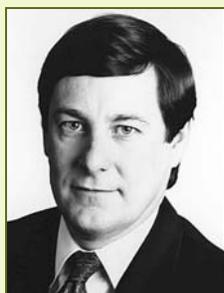
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**The Credit Card Accountability Responsibility & Disclosure Act: The CARD ACT of 2009**

**Michael Mierzewski, Beth DeSimone, and Ahmad Hajj**

**Arnold & Porter LLP\***

I. Overview

- a. The Credit Card Accountability Responsibility & Disclosure Act of 2009 was signed into law on May 22, 2009.
- b. The “CARD Act” amends TILA and the Fair Credit Reporting Act.
- c. The CARD Act also incorporates many of the rules adopted by federal bank regulators that will become effective in July 2010 (“Final Rules”)
- d. Late September 2009, the Federal Reserve issued Proposed Rules in an attempt to clarify some of the rules of the CARD Act.

II. Purpose of CARD Act

- a. The purpose of the Act is to “establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan.”
- b. The Act is also intended to protect younger consumers (under the age of 21) from predatory lending practices.
- c. The Act also implements new provisions on gift cards including the requirement that all gift cards have at least a five-year life span, and eliminating the practice of declining values and hidden fees for cards used within a “reasonable period of time”.

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### III. Motivation behind New Regulation of Credit Card Industry

- a. The Financial Crisis and weakening credit markets uncovered many of the questionable and risky credit practices that were affecting both consumers and financial institutions.
- b. Legislators, banking regulators and the President were pressured to increase oversight and regulation on the credit card industry in an attempt to curtail questionable credit card lending practices.
- c. Federal Reserve's "Poor Record" on Consumer Protection: On September 23, 2009, Barney Frank's office released a report card claiming that the Federal Reserve had a "poor record of using tools provided by Congress to protect consumers from abusive financial industry practices." The report asserted that only after being prodded by Congress did the Federal Reserve respond with a number of consumer protection rules and regulations. The report indicates that Congress will pressure the Federal Reserve to implement and enforce consumer protection rules in the credit card context.
- d. The CARD ACT marks some of the most far reaching Credit Card regulations to date and signals that Congress and Federal Regulators will be taking a stronger approach to oversight of the Credit Card industry and enforcement of the Credit Card Regulations.

### IV. Financial Institutions affected by the CARD ACT.

- a. Banks
- b. Thrifts
- c. Credit Card Companies
- d. Other Financial Entities that offer open ended credit

### V. Timing: When the Provisions of the CARD ACT will become effective

- a. Two Provisions of the CARD ACT that have already become effective.

- A 45-day advance written notice required to be made to a card holder of any significant change in the terms of a credit card account, accompanied by a right to cancel the account before the change in terms take effect.
  - A requirement that statements must be delivered to consumers at least 21 days before the end of any grace period, specifying the finance charges that would be assessed once the grace period ends.
- b. Most of the other provisions of the new statute will become effective in February 2010.
- c. Finally, two provisions of the Credit Card Act addressing the reasonableness and proportionality of penalty fees and charges (new TILA Section 149) and re-evaluation by creditors of rate increases (new TILA Section 148) are effective on August 22, 2010.
- d. NOTE: On September 24, 2009 Barney Frank (D-MA) and Carolyn Maloney (D-NY) Introduced Legislation- H.R. 3639: Expedited CARD Reform for Consumers Act of 2009 that would move up the effective date of the remaining provisions of the Credit CARD Act which now are now scheduled to become effective February and August 2010 to December 1, 2009.

#### VI. Material Provisions of the CARD ACT: MARKETING AND OPENING CARD ACCOUNTS

- a. Ability of Consumer to Repay: Chapter 3 of TILA is amended by adding that a creditor may not open a credit card account or increase the credit limit on an account without considering the ability of the consumer to repay (Section 109).

*September 2009 Rules: The Fed believes an evaluation of a consumer's current ability to pay must include a review of the consumer's income or assets as well as the consumer's current obligations. Therefore, the Fed proposes that the card issuer's consideration of the ability of the consumer to make the required minimum periodic payments must be based on the consumer's income or assets and the consumer's current obligations. It would also require that card issuers have reasonable policies and procedures in place to consider this information. A card issuer has not complied with this provision if, for example, a card issuer does not review any information about a consumer's income, assets, or current obligations, or issues a credit card to a consumer who does not have any income or assets.*

- b. Transparency of Credit Card Agreements: Amends Section 122 of TILA by adding that a creditor must maintain websites to post its written credit card

agreements with consumers. It must also submit these agreements to the Federal Reserve, which will make them available on a Federal Reserve internet site that will be easily accessible to consumers. (Section 204).

*September 2009 Rules: The September 2009 Federal Reserve Rules on the CARD Act specify that these disclosures are applicable to any card issuer that issues a credit card under a credit card account under an open-end (not home secured) consumer credit plan. Thus, consistent with the approach the Board proposed in implementing other sections of the Credit Card Act, home-equity lines of credit accessible by credit cards and overdraft lines of credit accessed by debit cards **would not be** covered by this Section.*

*Although the Federal Reserve will finalize the registration process by February 1, 2010, it anticipates that issuers will register online through the Board's Web site and that registration will capture basic identifying information about each issuer, such as the issuer's name, address, and identifying number (e.g., RSSD ID number or tax identification number), and the name, phone number and email address of a contact person at the issuer.*

## VII. Material Provisions regarding CARD TERMS/CHANGES IN CARD TERMS

- a. "Fixed Rate" clarified: The CARD Act clarifies TILA's the use of the term "fixed rate" so that when it appears with a reference to the annual percentage rate (APR) or interest rate applicable to an account, it can only be used to refer to an APR or interest rate that will not change or vary for any reason over the period specified in the account terms (Section 103).

*September 2009 Rules: The Federal Reserve clarified in its 2009 CARD Act Rules that the term "fixed" would be consistent with the Fed's January 2009 Regulation Z description of "fixed" in the same context. Specifically, the Fed will restrict the use of the term "fixed" or any similar term, to describe a rate disclosed in certain required disclosures and in advertisements only to instances when that rate would not increase until the expiration of a specified time period. If no time period is specified, then the term "fixed," or any similar term, may not be used to describe the rate unless the rate will not increase while the plan is open.*

- b. Increase in APR, Fees or Finance Charges: A Creditor may not increase an APR, fee, or finance charge on an outstanding credit card balance unless one of the following exceptions apply:
  - a previously disclosed time period for promotional rates expires
  - a variable interest rate increase measured by an external index
  - a workout or temporary hardship agreement is completed

- payments are delinquent for more than 60 days (This is 30 days longer than the FINAL RULES)
- c. Except for these four exceptions to increasing an APR fee, or finance charge on an outstanding credit card balance, a credit card balance may not experience an increase during its first year.
- d. Promotional Rates: Chapter 4 of TILA is amended to state that in the case of a Promotional Interest Rate, the rate cannot expire less than 6 months after it is introduced- Section 172

*September 2009 Rules: The Fed proposes that the expiration of a temporary rate cannot be used as a reason to apply an increased rate to a balance that preceded application of the temporary rate. For example, assume that a credit card account has a \$5,000 purchase balance at a 15% rate and that the card issuer reduces the rate that applies to all purchases (including the \$5,000 balance) to 10% for six months with a 22% rate applying thereafter. Under proposed the Proposed Rules, the card issuer could not apply the 22% rate to the \$5,000 balance upon expiration of the six-month period (although the card issuer could apply the original 15% rate to that balance).*

*Under the Proposed Rules; Promotional Rates means any annual percentage rate applicable to one or more balances or transactions on an open-end (not home-secured) plan for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period on such balances or transactions.*

- e. Review of Accounts in which APR has increased: Creditors must review credit card accounts in which the APR has increased after January 1, 2009 at least once every six months to see if factors such as credit risk and market conditions have changed to support a rate reduction. If the review supports a reduction in the APR, then the rate must be reduced. If the review supports an increase in the APR, then the creditor must provide in a written notice the reasons for the increase. (Section 148).

—The Federal Reserve must issue regulations to clarify the methodology of this review by February 22, 2010, to be effective on August 22, 2010.

- f. 30 Day Notice for Change in Terms upon Renewal: Section 127 of TILA amended to state that if a creditor amends or changes any term on a credit card account upon renewal, that change must be disclosed at least 30 days prior to the scheduled renewal date. (Section 203).

## VIII. Material Provisions regarding CONSUMER PAYMENTS ON CARD ACCOUNT BALANCES

- a. **Minimum Payment Penalties:** If a creditor increases the APR, fee, or finance charge on an account due to a minimum payment not being received within 60 days of the due date, that creditor must terminate the increase if the consumer pays the minimum payments for six months after the increase was imposed. (Section 171).

—The law consequently nullifies the provisions in the Final Rules, which imposed a 30-day period in which a consumer can make a late payment, and did not allow a six month consumer redemption option.

*The September 2009 Proposed Rules state that creditors will be required to provide consumers with a notice specifically disclosing a rate increase based on a delinquency of more than 60 days, at least 45 days prior to the effective date of that increase. The notice will state the effective date of the rate increase, which will give consumers certainty as to the applicable 6-month period during which they must make timely payments in order to return to the lower rate. If creditors were permitted to raise the rate applicable to all of a consumer's balances without providing an additional notice, consumers may be unsure exactly when their account became more than 60 days delinquent and therefore may not know the period in which they need to make timely payments in order to return to a lower rate.*

- b. **Application of Excess Payments of Minimum Amount Due:** Section 164 of TILA is amended to state that if a consumer makes a payment in excess of the minimum amount due, the creditor must apply the excess payment to the balance with the highest interest rate first, and then the balance with the next highest rate until the payment is exhausted. If there are balances with deferred interest rates, then the excess payments must first apply to those balances during the last two billing cycles before the deferred interest rate ends. (Section 104).

—This provision sets forth the same concepts articulated in the Final Rules, as well as the clarifications on deferred interest rates issued on May 5, 2009.

- c. **Changes in Repayment Terms:** A creditor cannot change the repayment terms of an outstanding balance unless the change matches one of the following methods: (a) a minimum amortization period of five years, beginning on the date of the change in terms; or (b) minimum payments which, as a percentage of the outstanding balance, are no greater than twice the percentage required before the change in terms. A creditor may also change the terms to a method that is no less beneficial to the consumer than the suggested methods. (Section 171).

- d. Penalties for Payment Methods not Permitted: Section 127 of TILA is amended to state that a creditor may not charge a consumer a fee for paying by a certain method (mail, electronic transfer, telephone, etc.) unless the payment involves expedited services by a service representative of the creditor. (Section 102).
- e. Changes in Procedures for Handling Payments: Section 164 of TILA is amended to state that if the creditor makes a material change to its mailing address, office, or procedures for handling payments and the change causes a material delay in crediting a consumer's payment during a 60-day period following the change, then the creditor may not impose a late fee or finance charge on the account for a late payment. (Section 104).
- f. Consistent Dates for Payment Due Dates: Section 127 of TILA is amended to state that the payment date on a credit card account must be the same date each month. If the payment date is on a day that the creditor does not receive mail, then a payment received on the next business day may not be considered late. (Section 106).
- g. 21 Day Delivery of Periodic Statement: Section 163 of TILA is amended to state that a creditor may not treat a payment as late for any purpose unless the creditor has adopted reasonable procedures designed to ensure that the periodic statement is mailed or delivered to the consumer at least 21 days before the due date. (Section 163).
- h. Minimum Payment Disclosures: A creditor must disclose that a minimum payment will increase the dollar amount of interest paid, the time it takes to repay the balance, including the number of months it would take to pay the balance if only paying the minimum monthly payments, and the amount that would be required to eliminate the outstanding balance in 36 months. A toll-free number of credit counseling and debt management services must also be prominently displayed on the billing statement.

*September 2009 Rules: If the minimum payment repayment estimate is less than 2 years, a credit card issuer must disclose the estimate in months. Otherwise, the estimate would be disclosed in years.*

*September 2009 Rules : A creditor would be required to provide on the periodic statement the following statements: (1) a statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement; and (2) a statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance.*

*September 2009 Rules: The following products are exempt from repayment disclosures: (1) HELOC accounts even if they are accessed by a credit card device;*

*(2) overdraft lines of credit even if they are accessed by a debit card; and*

*(3) open-end credit plans that are not credit card accounts, such as general purpose lines of credit that are not accessed by a credit card.*

- i. Local Branch Payments: Section 127 of TILA is amended to state that if a consumer payment is made at a local branch of a creditor, then the date the payment is made at the branch must be the date the payment is credited to the account for purposes of determining whether a late fee or charge may be imposed. (Section 202).

#### IX. Material Provisions regarding FEES RELATED TO CARD ACCOUNTS

- a. Double Cycle Billing: Section 127 of TILA is amended to state that a creditor may not impose a finance charge based on prior billing cycles when calculating charges for the current billing cycle (double-cycle billing). A creditor is also prohibited from imposing a finance charge on the balance of a current billing cycle that was repaid during the cycle. There are two exceptions to these prohibitions:
- finance charge adjustments as a result of a dispute resolution, or
  - the return of a payment for insufficient funds. (Section 102).
- b. Over the Limit Fees: Section 127 of TILA is amended to state that a consumer must expressly consent to the imposition of over-the-limit fees, and the creditor must disclose the manner and form of the fee before a consumer can consent. A consumer's consent may be revoked at any time, and a creditor must provide notice of this revocation right in any periodic statement that imposes an over-the-limit fee. Such fees may only be charged once in a billing cycle, and only once in each of the two subsequent billing cycles.

*September 2009 Rules: Although creditors must obtain consumer consent before any over-the-limit fees or charges are assessed on a consumer's account, the rule would not require that the creditor obtain the consumer's separate consent for each extension of credit that causes the consumer to exceed his or her credit limit. Moreover, a consumer's consent must be obtained separately from other consents or acknowledgments provided by the consumer. For example, a consumer's signature on an application for a credit card alone would not*

*sufficiently evidence the consumer's consent to the creditor's payment of over-the-limit transactions. The Federal Reserve is also contemplating whether creditors should be required to provide the consumer with written confirmation once the consumer has opted in to verify that the consumer intended to make the election. In the case of telephone or in person requests in particular, written confirmation may be appropriate to evidence the consumer's intent to opt in to the service.*

- c. Proportional Penalties and Fees: Chapter 3 of TILA is amended to state that penalties and fees assessed by a creditor must be reasonable and proportional to the consumer's omission or violation. (Section 149).

—The Federal Reserve, in consultation with other federal banking agencies must issue regulations by February 2010 to determine standards for assessing whether the amount of any fee or charge is “reasonable and proportional,” and such regulations must become effective by August 2010. The regulations must consider the cost incurred to the creditor by the consumer violation, deterrence of the violation, cardholder conduct, and other factors that the Federal Reserve deems necessary and appropriate. The Federal Reserve may also issue a safe harbor rule under which a fee or penalty charged is presumed to be “reasonable and proportional.”

- d. High Fee Credit Cards: Section 127 of TILA is amended to state that if a credit card (usually subprime cards) requires fees in the first year of an amount exceeding 25% of the credit limit when the account was opened, none of the payment of the fees may come from the credit made available under the account. The fees calculated for this rule do not include charges related to late payments, over-the-limit transactions, or insufficient funds. (Section 105).
- e. Late Fee Disclosures: Section 127 of TILA is amended to state that a creditor must disclose when a credit card balance is eligible for a late fee, as well as when an increase in APR will occur because of a late payment. (Section 202).

*September 2009 Rules: The Federal Reserve proposes that credit card issuers disclose the payment due date on the front side of the first page of the periodic statement. In addition, credit card issuers would be required to disclose the amount of any late payment fee and penalty APR that could be triggered by a late payment in close proximity to the due date. Also, the due date, late payment fee, penalty APR, ending balance, minimum payment due, and the repayment disclosures required by proposed must be grouped together.*

## X. Material Provisions regarding MARKETING CARDS TO COLLEGE STUDENTS

- a. Credit Cards issued to Minors: Section 127 of TILA is amended to state that consumers under the age of 21 may not obtain a credit card unless the account is cosigned by a parent, legal guardian, spouse, or an adult above the age of 21 that has the means to repay, and indicates joint liability for the debts incurred by the consumer; or the consumer indicates an independent means of repaying the debt. (Section 301).

—The Federal Reserve is required to issue standards for determining a consumer's independent means of repaying a credit card debt. Such standards will provide a safe harbor for creditors that adhere to the regulations. Credit reporting agencies cannot issue credit reports on a consumer under 21 if that consumer did not initiate the report.

- b. Items in Exchange for Applying for a Card: Section 127 of TILA is amended to state that creditors may not offer items in exchange for applying for a credit card anywhere on or near a college campus, or at an event sponsored or affiliated with a college. Colleges must also publicly disclose any marketing contracts with creditors. (Section 305).

—Creditors must submit an annual report of agreements with colleges, or college-affiliated organizations to the Federal Reserve. The first report is due by February 22, 2010.

## XI. Material Provisions Regarding GIFT CARDS

- a. Minimum 5 Year Life Span on Gift Cards: The Electronic Funds Transfer Act is amended to state that all gift cards must have at least a five year life span. (Section 401)
- b. Prohibition on Imposition of Fees or Charges: It is unlawful for companies to impose a dormancy fee, inactivity charge or fee, or service fee with respect to a gift certificate, store gift card or general prepaid card unless:
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