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Subject: Truth in Lending

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I am writing to you because of what I perceive to be an increasing problem with respect to the issuance of unsolicited credit cards. While it is clear that under 15 U.S.C. § 1642 a credit card issuer cannot send an unsolicited credit card, at least two major credit card issuers have begun selectively "upgrading" certain cardholders from their proprietary credit card to a network credit card (e.g., Visa, MasterCard, etc...). From what I have been told, I can refuse this "offer" or "upgrade" by calling the card issuer and telling them I do not want the new credit card. When the card issuer was confronted with my belief that they sent me an unsolicited credit card in violation of 15 U.S.C. § 1642, they told me that the new card was sent as a "substitution." After looking at the Official Staff Interpretations (herein "OSI") regarding what is a substitution and legislative history of 15 U.S.C. § 1642, I am convinced that what is occurring via this "upgrade" process is not a "substitution" as intended by Congress. It is my hope that the Federal Reserve will either amend the OSI or issue some other sort of legal interpretation or bulletin to credit card issuers that clearly states that credit cards cannot be sent on an unsolicited basis as offers to existing cardholders.

First, if you review the congressional record as it discusses the problem of unsolicited credit cards, Congress identified several problems with unsolicited credit cards, they include: unsolicited credit cards being responsible for the increasing number of bankruptcies, a violation of consumer's privacy, an unnecessary burden on the consumer to destroy and a major facilitator of unauthorized charges. Contrary to the credit card industry's view that activation of credit cards via an 800 number solves these problems, the activation of a credit card is a rather flimsy security measure that can be easily defeated (e.g., more than just the account holder is capable of retrieving the mail and activating the card from the phone number that they share and that the issuer is using to validate receipt of the card.) Even where the card issuer requests additional information (e.g., date of birth, social security number, mother's maiden name, etc...), this information is readily available on the Internet to strangers, and probably already known by family and/or cohabitants. Further, nothing short of not sending the unsolicited credit card(s) will stop the perceived invasion of privacy and the hassle the consumer faces in destroying the card and closing the account.

I would like to briefly point your attention towards the statements of members of Congress as they were discussing the competing measures aimed at combating the problem of unsolicited credit cards.

"The mere receipt of such a card means that the recipient who does not wish the card must be troubled with the necessity of deciding how to get rid of the card." Cong. Rec. H.R. 16939, 4/14/1970 P. 11764. (Statement of Hon. Florence P. Dwyer of New Jersey)

"The bill before us eliminates what is known in the trade as "the negative pre-mailer." Using this device creditors can indiscriminately compile list of names from their own customers, from credit bureaus, from other general lists or name sources, and even from the phone book and send the unsuspecting consumer a letter saying he is one of the chosen few who will receive a credit card within a certain period unless he takes the initiative and returns a form saying he does not want it. In such a case the burden is on the consumer to either say he does not want the card or destroy the card when it arrives." Cong. Rec. S.721, 4/15/1970 P. 11829 (Sen. Proxmire).

"Elimination of the unsolicited credit card reduces the likelihood that a family member will get a card without the knowledge of the head of the household. And the possibility of card theft from the mails and fraudulent use is considerably reduced." Cong. Rec. S.721, 4/15/1970 P. 11829 (Sen. Proxmire).

"The mailing of unsolicited credit cards invites theft and fraud, and exposes consumers to unnecessary threats against their solvency and credit standing." Cong. Rec. S.721, 4/15/1970 P. 11831 (Sen. McIntyre).

"Some felt that they were being encouraged to expand their debt against their will." Cong. Rec. S.721, 4/15/1970 P. 11841 (Sen. Percy).

"In addition, some consumers find the receipt of unsolicited credit cards annoying. There is a feeling that these cards represent an invasion of privacy." Cong. Rec. S.721, 4/15/1970 P. 11843 (Sen. Scott).

"[T]he mailing of unsolicited credit cards is a gross invasion of privacy.... Individuals with financial problems have been enticed to go even more deeply into debt when an unsolicited card fell into their laps like manna from heaven." Cong. Rec. H.R. 16542, 10/9/1970 P. 30886 (Rep. Hanley).

"This amendment would also cover situations where an issuer, because of a change in its corporate structure or because new services are being offered, issues a substitute card for one which has been accepted and is currently outstanding. In the instances, card holders should not be required to go through the further inconvenience of reapplication.

Clearly my amendment would not permit the issuance of unsolicited credit cards. Consumers who have not applied for cards would be fully protected. This amendment only covers those cases where the card has been requested, or where the consumer signs the card, or uses it. In these instances we should not unduly interfere with well established mutually satisfactory business relationships between card issuers and users." Cong. Rec. S.721, 4/15/1970 P. 11832 (Sen. Williams).

I italicized a portion of the last quote because I believe that the intentions of Senator Williams are the most important, or a close second to those of Senator Proxmire. It was Senator Williams's amendment that removed the explicit definition of substitution, a definition that limited substitution to "a new credit card issued in substitution for an accepted credit card as a result of a change in the corporate structure or ownership of a card issuer." Besides being a bad business practice, the sending of the unsolicited "upgrade" interferes with the "well established mutually satisfactory business relationship." I find the issuer's behavior particularly problematic because rather than force me to call them and tell them I did not want the upgrade which they were attempting to force on me, they could have asked me on my monthly statement if I wanted their other credit card. If I was an infrequent user, they could have sent me a mailing informing me of their other card(s) with their different terms, and offered

to switch my cards without the inconvenience of having to fill out an application.

Second, if you look at the existing OSI, it seems clear to me that a credit card issuer cannot selectively choose credit card accounts for substitution. The OSI provides:

Substitution encompasses the replacement of one card with another because the underlying account relationship has changed in some way—such as when the card issuer has:

- Changed its name.
- Changed the name of the card.
- Changed the credit or other features available on the

account. For example, the

original card could be used to make purchases and obtain cash advances at teller windows. The substitute card might be usable, in addition, for obtaining cash advances through automated teller machines. (If the substitute card constitutes an access device, as defined in Regulation E, then the Regulation E issuance rules would have to be followed.) The substitution of one card with another on an unsolicited basis is not permissible, however, where in conjunction with the substitution an additional credit card account is opened and the consumer is able to make new purchases or advances under both the original and the new account with the new card. For example, if a retail card issuer replaces its credit card with a combined retailer/bank card, each of the creditors maintains a separate account, and both accounts can be accessed for new transactions by use of the new credit card, the card cannot be provided to a consumer without solicitation.

- Substituted a card user's name on the substitute card for the cardholder's name appearing on the original card.
- Changed the merchant base. However, the new card must be honored by at least one of the persons that honored the original card.

None of these examples suggest that a card issuer can "substitute" a card for a select portion of their portfolio. After all, card issuers do not change their name or the card's name for only some customers. Additionally, card issuers do not change the features on an account or expand the merchant base for only some of their cardholders.

One concern I have is that as written, the OSI seems to allow substitution whenever the merchant base is expanded, regardless of whether the card needs to be replaced in order to be used at the expanded merchant base. Seeing as every major credit card issuer/network is always expanding the merchant base at which its cards are accepted, a literal reading of this example allows for continuous sending of replacement credit cards. I also cannot believe that the OSI allows for an issuer to send a replacement credit card anytime the name of the card is changed or the issuer changes its name. If this were the case, an issuer could send unsolicited credit cards on a regular basis to existing cardholders so long as something had changed (e.g., even though the features have not changed, the cards name is changed so that in January the card is the "XYZ Visa," in March the card is called the "XYZ Gold Visa," and by May the card is the "XYZ Platinum Visa.") Surely these scenarios are not the result intended by the OSI and certainly not by Congress in enacting § 1642. Given that some credit card issuers are interpreting the OSI in the aforementioned manner, clarification of this

point would be appropriate.

Another argument that has been raised by the card issuer is that, even if their "upgrade" offer was not a "substitution," they followed the one-for-one rule because if I had accepted their offer, my old credit card would have been disabled and my account balance would "transfer" to the new account that is to be accessed by the "upgraded" card. It is just appalling to me that an unlawful sending of a credit card as an offer can be made lawful by claiming that had I accepted their offer, they would have followed the one-for-one rule. Even assuming it was not an offer but a forced upgrade (i.e., I will have to reapply for another card/account of the type I am being "upgraded" from because even though the card/account will continue to exist and be offered, the issuer will not allow me to keep mine), the issuer's action does not seem to be consistent with the substitution concept for two reasons. The first being that the new card accesses a new account (i.e., different: account number, card number, credit limit, APR, and other charges), and the OSI specifically states that a credit card may be issued on an unsolicited basis because of a change in the "underlying account relationship." The second is that the "upgrade" is actually interfering with my "well established" and satisfactory business relationship. If I am not profitable enough for the card issuer such that they want to switch me to a card with a higher APR and late fees, the law as written, only allows the card issuer one unilateral action; close my account.

As an attorney who does residential real estate closings, I see consumers being deluged with papers requiring their signature at closing. I have seen banks include in this mountain of paper credit card applications. I call them "applications" even though they are included in documents that require a signature and are less than clear that the document authorizes the opening of a credit card account and issuance of credit cards.

I realize the comment period on R-1217 closed back in March but I would like to make one comment with respect to Q. 46 which asks:

Should the Board consider revising Reg Z to allow creditors to issue additional credit cards on an existing account at any time, even when there is no renewal or substitution of a previously issued card? What conditions or limitation should apply? E.g., should the Board require that the cards be sent unactivated? If activation is required, should the Board allow issuers to use alternative security measures in lieu of activation, such as providing advance written notice to consumers that additional cards will be sent?

I have reviewed the comments and found that while all of the industry submitted comments stated the Board should amend Regulation Z, none bothered to ask the preliminary question, "Does the Board have the ability to amend Regulation Z to allow the sending of additional credit cards outside of a renewal or substitution?" I do not believe the Board has the power when § 1642 unambiguously states, "No credit card shall be issued except in response to a request or application therefore. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card." Further, alternative security measures do not protect the consumer from the inconvenience of having to contact the issuer to prevent the card from being sent.

In closing I believe it is important for the Federal Reserve to take the following actions with respect to clarifying "substitution," the "one-for-one" rule and the methods for terminating a replaced card:

-Explicitly state what the OSI already implies, a credit card issuer cannot send an existing cardholder one of the issuer's other credit cards on an unsolicited basis as an offer, either for a new account or as a replacement for the existing account. Substitution requires that the old card is being discontinued for all cardholders, not just those the issuer wants to "upgrade" or move to another card.

-Substitution is only permissible when all cardholders of a given type of card (i.e., ABC Platinum Visa) are given access to their cash advance line of credit via the new technology, or when the merchant base is being expanded for all ABC Platinum Visa cardholders.

-Consistent with the "one-for-one" rule, credit card issuers may only send substitute cards on an unsolicited basis when a change in the merchant base or change in the features available on the existing account requires a new card be issued.

-Termination of the replaced card is immediate and permanent upon activation of the new card. Issuers are arguing that since they deactivated the old card in their system upon activation, they are not violating the OSI's termination requirements when the cardholder calls up and asks for the old card to be reactivated, even after the new card is active.

-Requiring credit card applications to be set forth on a separate page from other documents when being included in a packet of financial documents.

While some of the concerns addressed in this letter may need to go through the public comment process, it is my hope that the Board will take immediate action with respect to the problem of unsolicited credit cards being sent to existing cardholders as an offer to switch cards. This is something already prohibited by the OSI, but apparently needs to be explicitly stated for some issuers.

Sincerely,

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