

February 16, 2012

Ms. Marla Blow
Consumer Financial Protection Bureau
1500 Pennsylvania Avenue, N.W.
(Attn: 1801 L Street)
Washington, D.C. 20220

Re: Credit Card Agreement Prototype

Dear Ms. Marla Blow,

The American Financial Services Association (“AFSA”)¹ is grateful for the opportunity to provide comments on the Consumer Financial Protection Bureau’s (“CFPB”) credit card agreement prototype (“Prototype”).

I. Statement of Interest

AFSA member companies operate national payment card systems, issue general purpose bank credit cards, and issue proprietary retail credit cards, so we have a keen interest in the CFPB’s efforts in this area. We appreciate the CFPB’s desire to develop a shorter and simpler credit card agreement and improve consumer understanding. We have always supported clarity in disclosures dating back to our Association’s support of the Truth in Lending Simplification and Reform Act of 1980.

AFSA is pleased that the CFPB has asked for feedback on the Prototype. We believe that the proposed Prototype is useful for starting a conversation about potential changes to the current disclosure regime and we look forward to working with the CFPB to develop a shorter, simpler credit card agreement that clearly spells out the terms for consumers.

II. Concerns About the Prototype

While AFSA appreciates the work the CFPB has done in putting together the Prototype, we have some concerns we hope the CFPB will address.

In the past, Congress and regulators have focused principally on providing consumers with pertinent and understandable information prior to the time that they enter into agreements with financial services providers. These “shopping” disclosures (e.g., the so-called “Schumer Box”) provide consumers with timely summaries of key account terms that allow consumers to compare competing products and services before making a decision to use them. For that purpose, brevity and comparability of fundamental terms are key considerations. Not all terms

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Our 350 members include consumer and commercial finance companies, motor vehicle sales finance and leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

are highlighted. Only those deemed most useful for most consumers. Notably, not all consumers use their credit cards in the same way. Consequently, terms deemed very important to some are deemed unimportant to others. Most consumers do not anticipate default or late payment when opening an account, for example, and so may naturally downplay provisions relevant to these issues regardless of their prominence.

The current proposal is purportedly focused on simultaneously rewriting and compressing all of the terms of credit card agreements while enhancing consumers' understanding of the most important elements of such agreements, all within the limited confines of a two-page document that is supposed to serve as a legally enforceable contract. While AFSA supports clear disclosures, we believe that trying to include all the terms of a credit card relationship within a two-page, legally enforceable document is overly ambitious.

Inconsistencies between the Prototype and Regulation Z

AFSA's immediate concerns about the Prototype are the inconsistency between the Prototype and Regulation Z requirements and the lack of any provision for compliance with state law. The Prototype omits legally required disclosures – many of which are lengthy. For example, it does not include:²

- The account opening disclosures required by 12 C.F.R. § 1026.6;
- The tabular agreement disclosures required by 12 C.F.R. § 1026.6(b)(1)-(2);
- The billing rights notice required by 12 C.F.R. § 1026.6(b)(2)(xv), (b)(5)(iii);
- The detailed (and inherently complex) description of the balance computation method required by 12 C.F.R. § 1026.6(b)(2)(vi), (b)(4)(D); and
- The various disclosures and terms required by state laws – a particularly problematic issue for specialized retail credit cards.

No card issuer can use the present Prototype without violating Regulation Z and state laws until inconsistencies are addressed. This would likely require not just changes to Regulation Z, but a thorough legislative overhaul of the Truth in Lending Act (“TILA”),³ and a longer form.

Items Not Included in the Model Form

Credit card agreements perform multiple functions, including: (1) establishing the legal terms of long-term relationships involving multiple credit transactions (setting forth the particular terms of a continuing offer of credit and the various means of consumer acceptance), (2) describing a

² All references are to Regulation Z.

³ The Federal Reserve had rulemaking authority under TILA for years and pointed out many times it was constrained by TILA from making certain changes to disclosures without Congress modifying TILA. The same is true for the CFPB.

variety of features, options and benefits (including in some cases security provisions), (3) providing state and federally mandated disclosures under a myriad statutes (not just TILA) that govern debtor-creditor relations, and (4) serving as a vehicle for providing state and federally mandated notices.

The Prototype lacks many commonly used contractual provisions including arbitration, clauses enumerating a cardholder's duty to report lost or stolen cards, clauses regarding unauthorized use, and state-required clauses. (We understand that the CFPB is studying arbitration, and hope that it is guided by the U.S. Supreme Court's decisions in the *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, *AT&T Mobility LLC v. Concepcion*, and other recent cases.)

The Cardholder-Issuer Relationship Should Not Be Oversimplified

The terms and features of today's credit cards may not lend themselves to being reduced to a two-page contract (as distinct from being summarized or highlighted in two pages). Credit cards have evolved from their original and relatively simple purpose of enabling consumers to pay for purchases on a short-term deferred basis (like a charge card), to payment products that can be used, at the option of the consumer and throughout the life of the contract, for multiple functions (e.g., making partial payments while deferring others, obtaining cash advances, transferring balances from a higher-interest credit card to a card account with a lower interest rate, and making preauthorized payments to merchants). Different interest rates and terms may apply to each function. Retail cards may, in addition, provide different rates and terms for different kinds of retail transactions that can conveniently be accessed with the same card, such as "regular" or "everyday" purchases, large ticket or major purchases (such as large appliances or furniture), "club plans" for periodic purchases (such as building a china or glassware collection), and "special" purchases (like initial, seasonal, promotional, or holiday buys), which may be periodic or regular features for qualifying purchases. Cards may also provide incentives to users or reward specific behaviors. This variety benefits consumers by making credit more widely available on more favorable terms in certain circumstances than would otherwise be possible with a simplified agreement. Not all card issuers offer the same features.

These changes in credit card offerings over time have been beneficial and widely accepted by consumers, but explaining them has required additional language in credit card agreements. Some of these additions have been mandated by federal and state laws; others have been added to prevent misunderstandings. Reducing the legal text to a short agreement that is accompanied by a glossary, an "owner's manual" or other documents needed to spell out all of the details will not be beneficial to consumers if it requires changes in the essential terms of the agreements or the functions of the cards themselves or spreads essential terms over multiple documents.

Contractual Enforceability

AFSA is concerned about the enforceability of a two-page agreement, like the Prototype, that incorporates a multi-page addendum dealing with "definitions" and an "owner's manual" (which we understand that the CFPB is contemplating using as another separate compartment of information to be delivered to the consumer) provided separately and possibly at a different time. We further question whether a state court would find the Prototype to be an enforceable contract

absent some proof that the consumer received all parts of the agreement prior to the first transaction or any relevant subsequent transaction. Insofar as definitions are important to understanding contractual rights and obligations (especially where unfamiliar, given special meaning, or variable from state to state), separating them from the context in which they are used may not enhance consumer understanding.

Difference in Issuers' Practices

The Prototype seems to be designed for national banks that operate under a standard national bank charter. Not all card issuers operate under a national bank charter. Some card issuers operate under state law mandates that vary from state to state. The Prototype does not allow for different state laws or explain how to comply with lengthy state law captions or notices (which are often mandated to appear in all capital letters and 10-point normal or boldfaced type within an agreement).

The CFPB's definitions of terms need to be broad or detailed enough to account for differences in features and practices.

User Manual

The two-page Prototype, even when combined with the addendum dealing with definitions, still may fall short of containing all the required disclosures and appropriate contractual provisions to cover the borrower-lender relationship for a typical credit card account. We understand that the CFPB may be contemplating an additional "user manual" as yet another separate compartment of information to be delivered to the consumer. AFSA would like to know if the CFPB is indeed contemplating such a manual and if so, when the CFPB anticipates releasing a user manual draft, what the CFPB envisions as its content and purpose, and how the manual is to relate to the Prototype and definitions. It is premature for either consumers or issuers to attempt to fully evaluate the two-page Prototype or the additional glossary without the benefit of knowing what else may or will be included with, or omitted from, the overall package that the CFPB envisions a consumer should receive from a card issuer.

III. Suggested Changes to the Prototype Approach

AFSA thinks that consumers may be better served if the CFPB considers alternatives to the Prototype approach. For example, we recommend that instead of encouraging credit card agreements to be written in a CFPB-designed format that employs CFPB-approved language, the CFPB continue to encourage card issuers to simplify card agreements and enhance their understandability. Meanwhile, the CFPB could develop a short, educational document, similar to the Prototype, that provides clear information about the certain costs and features.

AFSA would like to highlight the substantial efforts that have been made over the past year by major credit card issuers, in cooperation with the CFPB, to reformat card agreements, highlight key terms, reduce word counts, and increase their readability. A comparison of the text of older agreements (posted on the Federal Reserve Board's website soon after the enactment of the Credit Card Accountability, Responsibility, and Disclosure Act or CARD Act) with the text of

the agreements in effect today demonstrates that significant progress has been made. Indeed, some card agreements currently in use are shorter than the CFPB's proposed Prototype which currently consists of a multi-page contract and glossary (a supplement that will of necessity grow longer as common terms that have been omitted, such as "annual fee" and "over limit fee" are added). (We understand that discussions between CFPB representatives and a group of major credit card issuers about simplification of credit card agreements were terminated by the CFPB before the Prototype was prepared for release. We urge the CFPB to reconvene this group and continue the discussions).

IV. Basis for Agency Proposal

In announcing the Prototype, the CFPB referred to terms that "make it hard for consumers to understand how their card works [sic]," stating that credit card agreements "often" contain language that is "long, complicated and written in legalese."

This conclusion implies that current card agreements are "often" made intentionally longer than necessary, although there is no stated basis for such a conclusion (e.g., evidence that issuers have turned formerly understandable contract language into complex and unreadable verbiage or have substituted "legalese" for plain language). Moreover, it does not acknowledge the legitimate reasons for the length of card agreements, or for the use of detailed or complex language, some of which is based on statutory requirements, or model forms that have been used for years with the approval of regulators.

We understand from remarks made by CFPB representatives in announcing the Prototype that the need for the new format is supported by complaint data collected by the CFPB and by information obtained from J.D. Power.

The CFPB has stated that the credit card complaint data it has collected over a three month period provides evidence that "difficulty in understanding the terms of their cards is a contributing factor in many consumer complaints." However, the CFPB has not provided examples of complaints that reflect a misunderstanding of the underlying card agreements. The CFPB's November 30, 2011 summary of the substance of the complaints it has received indicates that many relate to matters that have no discernible relationship to consumers' ability to understand their card agreements. For example, complaints about card issuers' "advertising and marketing," "collection practices," "collection debt disputes/customer relations," "credit reporting," "application processing delays," "customer service," "bankruptcy," "forbearance and workout plans" and "privacy" do not seem to stem from misunderstandings about the terms of card agreements. In fact, even the largest complaint category ("billing disputes," representing 13.4% of the total) is one that does not appear to reflect consumers' difficulty in understanding their card agreements, but rather addresses disputes about the price, quality or delivery of goods and services provided by merchants. (The fact that consumers are aware of, and exercise, their rights to seek resolution of these complaints by disputing such charges with their credit card issuers suggests a high level of understanding of the terms of credit card contracts).

The CFPB's announcement of the Prototype mentions a conclusion by J.D. Power that two thirds of consumers "don't completely understand the terms of the deal." However, no information is

provided about which J.D. Power information supports this conclusion or the methodology used by J.D. Power in compiling the information that led to it. There is no information as to whether the CFPB reviewed the information underlying the J.D. Power survey or attempted to validate the survey. J.D. Power is a for-profit company that issues customer satisfaction and other rankings of various products and services and licenses the results to industry members for use in their advertising (a practice discredited by other organizations that evaluate consumer products, such as Consumer Reports). J.D. Power is a very successful business, but we question whether information derived from a source like that should be used for other purposes, such as the basis for agency action. Instead, we respectfully request the CFPB to use solid, factual, and verifiable evidence as a basis for action.

V. Adoption of the Prototype

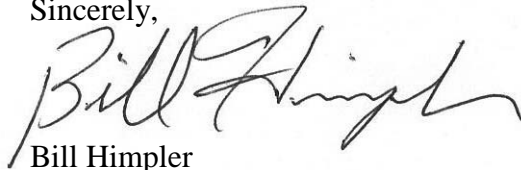
Although the CFPB has stated that the Prototype is not a model form and its use is not mandatory, AFSA is concerned about the encouragement that card issuers are getting to adopt the Prototype. If the CFPB would like issuers to adopt a form like the Prototype, we urge the CFPB to consider a formal Administrative Procedures Act (“APA”) rulemaking.

In an advance notice of proposed rulemaking (“ANPR”), the CFPB should lay out the elements or type of information that it wishes to see in a two-page summary of a necessarily longer cardholder agreement. The CFPB should also determine the optimal formatting for consumer accessibility and comprehension. Then, in a notice of proposed rulemaking, the CFPB should use the feedback it received from the ANPR to issue a model form under Regulation Z, providing a safe harbor for creditors who use the two-page summary in conformity with the regulation.

If the CFPB believes that the information in the Prototype and the format of the Prototype is optimal for the consumer, the CFPB should formally adopt it and protect those who comply after going through the regulatory process.

We look forward to working with the CFPB to resolve the concerns expressed above. Please contact me at 202-466-8616 or bhimpler@afsamail.org, with any questions.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is fluid and cursive, with the first name "Bill" being larger and more prominent than the last name "Himpler".

Bill Himpler
Executive Vice President
American Financial Services Association