American Bankers Association
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Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

January 3, 2010

Re: Docket No. R-1393
Regulation Z
Truth in Lending Act
75 *Federal Register* 67459

Dear Ms. Johnson,

The American Bankers Association (ABA)[1] appreciates the opportunity to provide our comments to the Federal Reserve Board's (Board) proposed changes to Regulation Z (Truth in Lending Act) to clarify certain provisions of Regulation Z's provisions related to credit plans connected to the Credit Card Accountability Responsibility and Disclosure Act of 2009. ABA supports and appreciates many of the proposed revisions and clarifications. Our primary concern relates to the proposal to prohibit creditors and applicants over the age of 21 from relying on household income in order to obtain a credit card, instead requiring that they have 'independent" income or assets. If adopted, the result of this provision will be that many non-income producing spouses and partners, including stay-at-home parents, will not be able to have a credit card in their own name nor build a credit history without relying on their spouse's or partner's approval or control. We also do not agree with the Board that the cessation of finance charge or fee rebates and waivers constitutes an increase in a rate or fee.

Below are our comments about specific proposed changes and additions.

226.9 Subsequent disclosure requirements.

(c)(2) Rules affecting open-end (not home secured plans).
(v) Notice not required.

The regulation currently excepts from the general 45-day advance notice of significant changes temporary rates that expire after a period of time (e.g. introductory rates) if, prior to the commencement of the time period, the lender discloses the length of the period the introductory rate is in effect and the APR that will apply after the period. Specifically, that information must be disclosed in close proximity and equal prominence to the first listing of the disclosure of the rate that applies during the specified period of time. Proposed new comment 10 clarifies the proximity and prominence

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets."

requirements for the disclosure of introductory rates that are disclosed at account opening. Specifically, providing in the account-opening table the length of the temporary rate period and the APR that will apply after that period complies with change of terms exception requirements if the listing of the introductory rate in the table also is the first listing as described in comment 9(c)(v)-6. That comment provides that the first statement of the temporary rate is the most prominent listing on the front side of the first page of the disclosures.

We agree that information about the time period and the APR in effect after the end of the period should be highlighted so that consumers notice and clearly understand this information. However, we believe that the final rule can provide flexibility without compromising the effort to ensure customers notice and understand. Many co-branded and private label programs include a cover page provided at account opening, which often includes a summary of benefits of the credit program, including a reference to the temporary offer. Thus the table may not be the "first" listing. We suggest that the final rule permit lenders to comply with the disclosure requirement for temporary and introductory rates by including the required information in the table, even if it is not the first listing. As the Board testing found, consumers know to and do look at the table for important information. That it is included in the table should be sufficient to alert them to this important information.

226.10 Payments.

(a) Specific requirements for payments.

The proposal amends comment 226.10(b)-2 to provide that if a creditor "promotes" a specific payment method, any payments made via that method are generally conforming payments and must be credited on the day received if received before 5 PM. The proposal includes two examples: if a creditor promotes payment by telephone, (for example, by including the option to pay by telephone in a menu of options provided to consumers at a toll-free number disclosed on its periodic statement), payments made by phone would generally be conforming payments for purposes of Section in 226.10(b); if a creditor promotes in-person payments, for example, by stating in an advertisement that payments may be made in person at its branch locations, such in-person payments made at a branch or office of the creditor generally would be conforming payments for purposes of Section 226.10(b).

Under the proposal, payment channels that are "promoted" are considered conforming and thus must be credited on the date of receipt if received prior to 5 PM. However, the examples suggest that simply disclosing an option is the equivalent of promotion. The Board should either clarify with additional examples of when an unsolicited disclosure of a payment method does not render payments using that method a conforming payment or be more explicit and state that any unsolicited disclosure of a payment channel renders the payment using that channel a conforming payment. As proposed, the language raises compliance risks that any unsolicited disclosure of a payment method means payments made through that method are conforming payments and must be credited by 5 PM of the date of receipt.

We believe that most banks credit payments on the same day if they are received by 5 PM, regardless of payment channel. However, there are exceptions. For example, some institutions, particularly small institutions that batch electronic payments at the end of the day, report that the processor's cut-off is 4 PM or 4:30 PM. In other cases, the branch might close at 4 PM, but the drive-up remains open until 6 PM to accommodate customers after work hours. The options under the proposal are to (1) back-date payments made after processing hours, a cumbersome process that adds an expense that all customers pay for, or (2) not inform customers about their options unless the customer takes the initiative to inquire, not a customer-friendly solution. It is not clear why clearly disclosing with any payment method any cut-off time is not sufficient to alert customers about when their payment will be processed and credited.

In any case, the final Commentary should make clear that creditors may choose not to accept electronic payments unless they are scheduled a certain amount of time in advance (e.g., 3 days) or only on week-days, so long as those conditions are clear and the system does not permit customers to schedule them on those days.

Section 226.16. Advertising.

(g) Promotional rates.
(3) Stating the term "introductory."

The Board is proposing to amend Section 226.55 to permit card issuers to permit introductory and promotional fees by excepting such offers from the general prohibition against increasing rates or fees. It also proposes to amend the corresponding advertising requirements in Section 226.16(g). Specifically, it requires that the term "introductory fee" to be in immediate proximity to each listing of the introductory fee. While we agree that it is important to highlight to consumers the temporary nature of the reduced or waived fee, we do not believe that with regard to fees, use of the term "introductory" or "promotional" is the best way to convey the concept to consumers. "No annual fee for first year" is better understood than "Introductory annual fee of $0," which seems to be clumsy technical legalese. We suggest that the Board include other examples of acceptable language, such as "No annual fee for first year" rather than compel less clear language.

Section 226.51. Ability to Pay.

(b) General Rule.
(1) Consideration of ability to pay.

Under Section 150 of TILA, card issuers may not open a credit card account for any consumer "unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account." Section 127(c)(8) provides a different standard for those under 21. It prohibits credit card issuers from opening a credit card account for those under the age of 21 unless the applicant has provided information showing the applicant's "independent means of repaying any obligation" under the credit account. The Board is proposing to clarify that ***all*** consumers, regardless of whether they are over 21 years of age, must indicate an "independent" means of repaying, and consideration of household income or assets does not by itself satisfy the requirement to consider the over 21 consumer's independent ability to pay.

We understand the Board's reasoning for requiring that borrowers have "independent" income or assets to qualify for a credit card account, that borrowers have absolute and exclusive control over the income and assets on which the creditor relies for repayment. This approach has merit in theory. However, we believe that there are overriding practical, policy, and social considerations, as well as specific statutory language that compel an interpretation to allow creditors to consider household income over which the borrower might not have exclusive or absolute control. Simply put, the result of the Board's proposal, if adopted, will mean that non-income producing spouses and partners will not be able to have a credit card in their own name nor build a credit history without relying on their spouse's or partner's approval or control.

First, the statute itself unequivocally supports allowing consideration of household income for those over 21. As the Board acknowledges, Congress made a distinction between those under 21 who must have an "independent" ability to repay and those over 21 who must have an "ability to repay" -- without the modifier "independent." Congress must have meant something by drawing that very explicit distinction. The Board cannot simply white-out the word "independent" and ignore clear Congressional intent to apply two different standards based on the applicant's age. Indeed, the statutory distinction is based on an assumption that those under 21 are less mature and, accordingly, potentially less able to manage credit cards. That lack of maturity and responsibility should not be assumed for those over 21 simply because they are married, lack or have limited independent income or assets, and may rely on a spouse or partner financially.

The Board dismisses Congress's explicit distinction on the basis that the statutory phrase, "the ability of the ***consumer*** to make the required payments," (Emphasis added.) must mean the applicant's ability to repay, that is, the applicant's ***"independent"*** ability to repay. But such an interpretation flatly contradicts Congress's explicit distinction between those who must have an "independent" ability to repay and those who do not.

Moreover, "ability to repay" is not necessarily contingent on the borrower's independent assets or income. In effect, non-income producing spouses and partners directly contribute to the household finances as they are frequently the ones managing the household (labor which has an identifiable market value) and even the household finances. In effect, the proposal assumes their productive work has no financial value. "Ability to repay" can be interpreted to mean ability (and willingness, as illustrated by credit history) based on others' income that they might manage, share, or control in whole or in part, as one tends to in a marriage or partnership. Indeed, that is precisely what Congress appears to have contemplated when it inserted the word "independent" with regard to those under 21, but declined to do so for those over 21.

Second, there are legitimate policy reasons for Congress to have adopted this position, consistent with its fair lending policies as reflected in the Equal Credit Opportunity Act (ECOA). ECOA not only prohibits discrimination on the basis of sex and marital status, it also is intended to promote credit history building, access to credit, and financial independence for non-income producing spouses, who still tend to be women and who had historically encountered discrimination in credit on the basis of their gender and marital status -- even when they had independent income. Prior to ECOA, generally, married women simply could not obtain credit in their own name. ECOA recognizes that non-income producing spouses often make significant contributions to the household management and may exercise significant control over and manage household finances and therefore should be recognized in their own right. Indeed, ECOA departs from a strict approach that only those whose income is used to make loan payments should get credit for doing so. It provides that creditors must report the contribution of the non-income producing spouse to the credit bureau.

Moreover, in passing ECOA, Congress recognized that lack of ability to build a credit history and access to credit reinforced non-income producing spouses' financial as well as psychological dependence on the income-producing spouse. As a result, in the case of divorce, incapacitation, or death of the income-producing spouse, they suffered financial hardship. Moreover, financial dependence and control can be used to isolate and keep dependent the non-income producing spouse, of particular importance in the case of spousal abuse, as it means it is more difficult for the abused spouse to exit the relationship.

That the non-income producing spouse or partner may still obtain credit and build a credit history by applying jointly with the income producing spouse does not advance the purposes of ECOA. It merely reinforces the non-income producing spouses' and partners' dependence and lack of equal standing with the income-producing spouse. The income-producing spouse or partner still controls whether they may obtain a credit card or build a credit history.

The Board notes in the Supplementary Information that creditors are not required to verify that the applicant's income does not include household income, suggesting that if applicants are dishonest or are liberal in what they consider "their" income, the creditor may take them at their word and provide an account. While there are exceptions, most applicants are honest and would decline to suggest that their spouse's income is exclusively theirs, so we are not sure that this is beneficial except to those who are less honest or precise in reporting their income.

There may be unusual cases where creative applicants might mischaracterize "household income" which is not shared, e.g., roommates who have no financial ties beyond sharing basic expenses such as rent and utilities, but those cases are rare and do not justify denying non-income-producing spouses and partners, who represent the majority of cases.

For these reasons, we strongly urge the Board to permit issuers to consider household income for applicants older than 21 as statute envisioned.

Section 226.52 Limitations on Fees.

(b) Limitations on Penalty Fees.
(2)(i) Fees That Exceed Dollar Amount Associated with Violation.

Section 226.52(b))2)(i)(B)(2) prohibits issuers from imposing a fee based on account inactivity. The proposal adds a statement to the Commentary that if a card issuer does not promote the waiver or rebate of an annual fee, the regulation does not prohibit a card issuer from considering the account activity along with other factors when deciding whether to waive or rebate annual fees on individual accounts (such as in response to a consumer's request). We support this proposed clarification. The flexibility will ensure card issuers will be able to compete, take steps to retain customers, and reward good customers.

Section 226.53 Allocation of Payments.

b) Special Rules.

The Board proposes to adopt a special rule for payment allocation when one of the balances is secured. Specifically, the rule would provide that, when a balance on a credit card account is secured, the card issuer may at its option allocate any amount paid by the consumer in excess of the required minimum periodic payment to that balance if requested by the consumer. We agree with this addition as it gives customers ability to eliminate more quickly the balance subject to a security.

226.55 Limitations on increasing annual percentage rates, fees, and charges.

(b) Exceptions.
(1)Temporary rate, fee, or charge exception.

The Board is proposing to amend Section 226.55(b)(1) so that the exception for promotions to the general rule against increasing an APR or fee applies not only to promotional APRs, but also promotional fees and charges. For example, under the proposal, card issuers could increase an annual fee after a specified period of time if the card issuer provides the consumer in advance with a clear and conspicuous written disclosure of the length of the period and the fee or charge that will apply after expiration of the period.

We commend the Board for expanding the exception for promotional APRs to fees and charges. The expansion will encourage such promotional programs which promote competition and benefit customers. There simply is no reason to inhibit or prohibit promotions that reduce costs for customer.

(6) Servicemembers Civil Relief Act Exception.

The proposal clarifies that the card issuer is generally permitted to increase a fee or charge once the Servicemembers Civil Relieve Act (SCRA) no longer applies and would also apply the section to decreases imposed pursuant to "a similar federal or state statute or regulation." The proposal would also clarify that if an issuer decreases all rates, fees, and charges consistent with SCRA, the issuer may increase those rates once SCRA no longer applies. We agree with this clarification as it reflects the intent of SCRA to provide servicemembers the statutory rate while on active duty.

(c) Treatment of protected balances.
(1) Definition of protected balance.

The regulation currently provides than an increase to a fee or charge may only apply to active accounts. The Board proposes to clarify in the Commentary that an increased fee or charge cannot be applied to an account while the account is closed or "while the card issuer does not permit the consumer to use the account for new transactions." We believe that this definition of active account is too narrow as it excludes accounts that are just temporarily suspended, e.g., because of suspected fraudulent activity or a temporary delinquency or even because the customer has reached the credit limit. The suspension may only last a few hours or days, but would significantly disrupt implementation of pricing changes as all temporarily suspended accounts would have to be identified, separated, and then monitored for when they become "active" again. Given that customers are well protected by the right to reject a change, it is not necessary to impose this costly, complicated compliance burden. Accordingly, we recommend that the Board delete the proposed insertion.

(e) Promotional Waivers or Rebates of Interest, Fees, and Other Charges.

The proposal provides that if a card issuer "promotes" the waiver or rebate of finance charges, annual fees, fixed finance charge, minimum interest charges, and certain insurance and debt cancelation fees any cessation of the waiver or rebate constitutes an increase in a rate, fee, or charge for purposes of Section 226.55. The Commentary provides examples of what does and does not constitute "promote."

We disagree that a credit card program that rewards customers for good credit management though rebates or waivers of finance charges or fees constitutes an increase in a rate or fee when the rebates or waivers are not awarded because the customer has not complied with the terms by, for example, making on-time payments. In contrast with interest rate increases on existing balances, which Congress was addressing, under rebate and waiver programs, the customer knows – and pays – the rate or fee as disclosed and agreed. There is no “surprise” increase. Rather, any “surprise” is the rebate or waiver, which customers welcome. The reward program presents a positive, attractive incentive for customers to manage their credit and develop good habits. In effect, the proposal eliminates practical tools that promote good credit management. The end result is that those who manage credit well even more subsidize those who do not.

The Commentary offers examples of circumstances that do not constitute “promoting” a waiver or rebate. We recommend that the Board add to the examples of circumstances that do not constitute promotion of waivers or rebates a request initiated by the customer.

Customers often will simply call to request a rebate of finance charges or waiver of a fee, sometimes based on recommendations in the press or from friends. To retain the customer, issuers often agree to the request. While comment 2 ii B to Section 226.55(e) explains that a card issuer does not promote waivers or rebates if it is in “relation to an inquiry or dispute about a specific charge . . .,” it appears to mean that the “inquiry” must be related to a specific charge or transaction. In addition, “request” is different from “inquiry” as it is more definitive and may be closer to a demand. Such requests for waivers might also not be covered under the example in Comment 2 ii A (card issuer has waived or rebated interest fees, or other charges and discloses the waiver or rebate on the period statement or by telephone, letter or electronic communications) because the waiver, for example, might not be disclosed in a periodic statement or other communication. To ensure that card issuers may respond to customers’ requests for waivers or rebates and that the regulation does not restrict a card issuer’s ability to waive or rebate interest or fees to retain customers, as the Board indicates in the Supplementary Information is its intent, the final Commentary should include any customer initiated “request.”

In addition, we suggest that the Board specifically state that waivers or refunds disclosed in connection with work-outs are not promotions. Otherwise, the regulation will limit the ability of card issuers to assist struggling customers.

Section 226.59 Reevaluation of Rate Increases.

(a) General Rule.

Under the proposed Commentary, a change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate generally is a rate increase triggering obligations to review the rate unless the rate in effect immediately prior to the change is equal to or greater than the rate in effect immediately after the change. The proposal creates a significant administrative and compliance burden as card issuers will be required to monitor, document, and review accounts in perpetuity (at least as long as the account is opened), even though in many cases, the exercise will not lower the customer’s rate.

Under the proposal, if a rate has changed from a fixed rate to a variable rate, and the variable rate increases to a rate higher than the original fixed rate, the card issuer must review the rate increase, evaluate certain factors, and reduce the rate if appropriate. If, for example, the factors that prompted the original conversion to a variable rate have not changed, card issuers may apply the higher rate. The final Commentary should make clear if the card issuer is basing its review on “factors on which the increase in an annual percentage rate was originally based” (pursuant to Section 226.59(d)(i)) and the only factor that has changed is the index, the higher rate may apply. Otherwise, the variable rate is no longer a variable rate beyond the issuer’s control, as it is required to be under the regulation.

In addition, the Board should clarify that the review should not result in issuers having to revert to the original rate type (either variable or fixed). Issuers should have flexibility to determine and retain the rate type appropriate for their customers based on their business model and market and other considerations.

Section 226.59. Reevaluation of rate increases.

(f) Termination of Obligation to Review Factors.

The Board is proposing to clarify that if a rate is raised and a subsequent review determines that a new customer would be entitled to a rate lower than the rate before the increase, the issuer is only obliged to reduce the rate to the rate applied prior to the increase, not to the lower rate that would apply to new customers. We agree that this clarification is appropriate and fair.

Conclusion.

ABA appreciates the opportunity to comment on these important clarifications. While we support many of the proposed amendments and revisions, we strongly urge the Board to rejects its proposed prohibition against allowing applicants over the age of 21 to rely on household income when applying for a credit card. The result will be that those without “independent” income will be unable to obtain their own credit card and build a credit history, ensuring their dependence on their spouses and partners, contrary to Congressional intent under ECOA. In addition, we suggest that the Board reconsider its proposal to equate cessation of rebates and waivers of finance charges and fees with rate and fee increases. Rewarding customers for good credit management is not the equivalent of attempting to correct them for bad credit management.

Regards

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