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By electronic delivery

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20 and C Streets, NW
Washington, D.C. 20051

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington DC 20552

Mary Rupp
Secretary of the Board
National Credit Union
Administration
1775 Duke Street
Alexandria, VA 22314-3428

**Re: Federal Reserve Board Docket Number R-1314
OTS Docket Number OTS-2009-00006
Proposed changes to Regulation AA
Unfair or Deceptive Acts or Practices
74 Federal Register 20804, 5 May 2009**

Ladies and Gentlemen,

The American Bankers Association (ABA)¹ is pleased to submit its comments to the clarifications proposed by the Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration (collectively, the Agencies) to Regulation AA, which addresses unfair or deceptive acts or practices, published in the *Federal Register* 5 May 2009. In December 2008, the Agencies adopted a final rule under the Federal Trade Commission Act to protect consumers from unfair acts or practices with respect to consumer credit accounts, published in the *Federal Register* on 29 January 2009. The Agencies have proposed amendments to provide guidance and facilitate compliance with that final rule.

¹ ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members - the majority of which are banks with less than \$125 million in assets - represent over 95 percent of the industry's \$13.3 trillion in assets and employ over 2 million men and women.

ABA believes that the Agencies' good intentions in amending Regulation AA to cover credit card practices and to propose the additional clarifications that are the subject of this proposal have been overtaken by events. Congressional passage and Presidential signing of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act) has supplanted both the policy motivation and the legal foundation for conducting credit card regulation on any basis other than the Truth-in-Lending Act. For this reason, ABA urges the Agencies to abandon this proposed rulemaking, withdraw their final amendments to their respective Credit Practices Rules, and focus their effort on implementing uniform standards imposed on all credit card creditors—whether depository institution or not—under the Credit CARD Act. As the Federal Reserve Board embarks on fulfilling this Congressional mandate, ABA offers several recommendations about how to address the practical problems encompassed by the situations contained in the current proposal as they may arise again in the new regulatory framework.

Section 227.21(c) Definitions: Consumer Credit Card Account.

The Agencies propose to clarify in the Commentary the meaning of “account.” For example, the proposed additions explain that closed accounts and accounts acquired through a merger or acquisition continue to be the same account and subject to the provisions of Subpart C with respect to the balance. Accordingly, for example, the APR could not increase on the account unless an exception applied. The proposal also explains that the account “continues to be the same consumer credit card account . . . unless the account to which the balance is transferred is an open-end credit plan secured by the consumer’s dwelling.”

The proposal illustrates with an example. A customer has a \$2,000 purchase balance on one account with a 15% APR, and that balance is transferred to another account at the same institution that applies an 18% APR. The 15% APR would have to continue to be applied to the \$2,000 balance that was transferred unless an exception applied. The proposal further describes additional circumstances in which a balance is considered transferred for purposes of this comment:

- A retail card with an outstanding balance that is replaced with another account offering different features;
- An account with an outstanding balance that is replaced with another account offering different features;
- An account with an outstanding balance that is consolidated with one or more other accounts into a single account;

- An account is replaced with a line of credit that can be accessed solely by an account number.

We strongly disagree with this proposed treatment of transferred balances, which treatment is defended on the grounds that the account receiving the transfer happens to be held at the same institution rather than at a different institution, a justification we would question when it is the customer making the express choice to transfer a balance from one account to another account. Under the proposal, customers wishing to upgrade their account or wishing to choose or use an account with different features and prices may have to continue to pay fees for one of the accounts and to monitor, make payments to, and otherwise manage two accounts rather than one. For example, assume account A has an annual fee and the customer wishes to transfer the account A balance to account B that has no annual fee, even though the account B interest rate is higher. Under the proposal, the customer may have to continue to maintain account A and to pay an annual fee until the balance is repaid.²

Most of the other examples in the proposal refer to transferring balances from accounts that are “replaced,” suggesting that the choice is the card issuers’ and not the customers’. Accordingly, in these cases, it is more reasonable that the transferred balance continue to be treated as a separate balance. However, such constraints make no sense when it is the customer initiating the transfer and expressly choosing to open or use a different account, especially when the rule would not apply if the customer were to choose the same product from a different institution.

For these reasons, we suggest that the final Commentary make clear that so long as the customer is separately initiating the balance transfer and the consumer has the option to obtain additional extensions of credit for more than 15 days after the account is opened, the card issuer may treat any transferred balance as a balance of the account receiving the transfer. This gives customers more control, choice, convenience, and flexibility. It also avoids unnecessary and expensive complications associated with, in effect, marrying certain aspects of two separate accounts and maintaining separate balances of accounts that the customer has elected to open.

We also suggest that the Agencies delete from the examples, “an account with an outstanding balance that is consolidated with one or more other accounts into a single account.” Consolidated loans are very different from open-end credit card accounts and are intended to benefit

² The card company may not allow the balance to be transferred to the new account if a different rate applies, for example, because of operational limitations or because the fees, charges, and terms for each account product are aligned in a way to balance the pricing and costs. For example, accounts with lower APRs may have annual fees and those with higher rates might not.

customers and help them to reduce their debts. Accordingly, these loans are typically closed-end loans with a single monthly payment and consistent payment amount that do not permit the customer to continue to borrow additional funds. The rate is generally lower than the combined rates of various accounts if the customer were not to consolidate.

Under the proposal, the lender would have to create somehow a closed-end amortization and payment schedule based on two separate balances with different rates and based on the fact that payments are allocated to one balance until that balance has been repaid. It is not clear that this is feasible, and even if it were, the obvious and simpler choice is to keep the credit card account separate, which defeats the purpose of the consolidation loan, that is, to keep the customer's loan management plan simple and to focus on paying a single monthly payment with a goal of eliminating the debt – not to permit additional loans on an open-end account. Moreover, it does not make sense for the lender to discriminate against itself or to move automatically the customer to a home-secured loan to avoid the limitations.

Section 227.23(b) Unfair Acts or Practices Regarding Allocation of Payments: General Rule.

(2) Pro rata method.

(b) Special rule for accounts subject to certain promotional programs.

The Agencies propose to add a new part (b) that provides that for deferred or waived interest plans the lender must allocate amounts paid in excess of the minimum payment “first to that balance during the two billing cycles immediately preceding expiration of the specified period.” It requests comment on whether proposed (b) should apply during the last two billing cycles of the deferred or waived interest period or during a longer or shorter time period. We believe that two billing cycles is appropriate.

We also recommend that the final Commentary *permit* credit card issuers to allocate payments differently based on the customer's request. For example, customers may wish payments made prior to the two billing cycles of the deferred or waived interest period to be allocated to that deferred interest balance to ensure that is repaid before the due date so as to avoid paying interest. However, we stress that accepting any customer requested alternative payment allocation for the earlier retirement of a balance on a deferred interest plan is strictly a matter of issuer discretion. The Board having created a baseline fairness rule should not whipsaw creditors by imposing idiosyncratic payment preferences without issuer consent. Yet, creditors that can accommodate

some consumer payment allocation options should be allowed to do so at their discretion.

Section 227.24 Unfair Acts or Practices Regarding Increases in APR.

Comment 4. Meaning of “account opening.”

Under Section 227.24(a) of the regulation, lenders must disclose at account opening the APR that will apply, and lenders may not increase that APR unless one of the exceptions apply. The Agencies propose to clarify in the Commentary the meaning of “account opening”:

i. Multiple accounts with same bank.

When a customer has a credit card account with a bank and the consumer opens a new credit card account with the same bank (or its affiliate or subsidiary), the opening of the new account constitutes an “account opening” . . .if, more than 15/30 days after the new account is opened, the consumer has the ability to obtain additional extensions of credit on each account.

ii. Replacement or consolidation.

A consumer credit card account has not been opened for purposes of Section 227.24 when a consumer credit card account issued by a bank is replaced or consolidated with another consumer credit card account issued by the same bank (or its affiliate or subsidiary). Circumstances in which a consumer credit card account has not been opened for purposes of Section 227.24 include when:

- A retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants;
- An account is replaced with another account offering different features;
- An account is consolidated or combined with one or more other card accounts into a single account; or
- An account acquired through a merger or acquisition is replaced with an account issued by the acquiring institutions.

Under the proposal related to multiple accounts banks may charge a higher rate on a new account than the rate applied to the customer’s existing account without triggering change in terms notices and limits on the application of the higher rate to new transactions. We agree with the proposed comment on multiple accounts with the same bank, but we

suggest that the Agencies clarify that the account is a new account if the consumer has the “option” rather than “ability” to obtain additional extensions of credit on each account. For various reasons customers may wish to close one of the accounts, e.g. if it was a joint account and they are opening a separate account or an annual fee is coming due. They should have the option to close the account.

As discussed in our comments to 227.22(c), we have concerns about the proposed restrictions on consolidation loans and the proposal not to classify them as new accounts. In effect, the lender must treat the balances of the existing credit card accounts as a balance separate from the consolidated balance. As discussed, consolidated loans are very different from open-end credit card accounts and are intended to benefit customers and help them to reduce or eliminate their debts. Accordingly, these loans are typically closed-end loans with a single monthly payment and consistent payment amount that do not permit the customer to continue to borrow additional funds. The rate is generally lower than the combined rates of various accounts if the customer were not to consolidate.

Under the proposal, the lender would have to create somehow a closed-end amortization and payment schedule based on potentially multiple separate balances with different rates and based on the fact that payments are allocated to certain balances until they have been repaid. It is not clear that this is feasible, and even it were the obvious and simpler choice is to keep the credit card accounts separate, which defeats the purpose of the consolidation loan, that is, to keep the customer’s loan management plan simple and to focus on paying a single monthly payment with a goal of eliminating the debt – not to permit additional loans on an open-end account. Moreover, it does not make sense for the lender to discriminate against itself.

227.24(b) Unfair Acts or Practices Regarding Increases in APRs: Exceptions.

(3) Advance Notice Exception.

Comment 2.

Under the regulation, a bank may apply the increased rate to any transaction that occurs after the 7th (now 14th)³ day following notice, but must wait 45 days to begin accruing interest at that rate. The Agencies are proposing to explain that the question as to whether a transaction

³ Under the recently adopted “Credit card Accountability Responsibility and Disclosure Act of 2009 (P.L. No. 111-024), card issuers may only apply the increased rate to “the amount owed on a credit card account . . . as of the end of the 14th day on which the creditor provides notice of any increase in the APR, fee, or finance charge. . .”

occurred prior to provision of a notice or within seven days after the notice, is determined by the ***date of the transaction***. The proposed comment explains that if a merchant places a hold on the available credit for an estimated transaction amount when the final amount will not be known until a later date, the date of the transaction is the date the merchant determines the actual transition amount. The Supplementary Information indicates that the transaction date is determined without regard to when the transaction is authorized, settled, or posted to the consumer's account.

We strongly recommend that the Agencies provide a safe harbor by providing banks a date certain on which to determine the protected balance (that is, the balance not subject to the increased rate). Specifically, the Commentary should provide that banks do not violate the provision if the protected balance includes transactions posted by the end of the 45 day period after the change in terms notice is sent.

While the network rules generally provide that merchants must submit transactions for processing within 30 days of the transactions, there are unusual occasions when they are submitted after that period. However, if the rule provides that the protected balance includes all transactions made but not posted within the 7-day (now 14-day period), banks will be compelled to continue monitoring accounts indefinitely for the remote possibility that a transaction may have been delayed in processing. While in these unusual instances the higher rate might apply, we believe the costs and complications of indefinite monitoring for delayed transactions outweigh any remote harm.

(5) Workout and Temporary Hardship Arrangement Exception.

The Agencies propose to clarify in the Commentary that the exception to rate increases for workout arrangements also applies to "temporary hardship arrangements." The Agencies are addressing confusion as to whether this exception applies to temporary hardship arrangements that assist consumers in overcoming financial difficulties by lowering the APR for a period of time. As the Agencies note, such arrangements can provide important benefits to consumers. In addition, excluding them will discourage banks from making such accommodations. Accordingly, they should be included in the exception.

(6) Servicemembers Civil Relief Act Exception.

The Agencies are adding to the exception to the restrictions on rate increases that apply when a servicemember no longer qualifies for the decreased rate under the Servicemembers Civil Relief Act (SCRA). Under the current regulation, a bank that complies with SCRA by lowering the rate that applies to an existing balance on a consumer credit card account when the consumer enters military service would not be permitted to

increase the rate for that balance once military service ends. We agree with the Agencies that the current regulation is inconsistent with SCRA and that the Agencies should adopt the proposed exception.

**Proposed Regulation Integration with Credit Card
Accountability Responsibility and Disclosures Act of 2009
("Credit CARD Act of 2009").**

Since publication of the proposed changes to Regulation AA, Congress has passed and the President has signed the Credit CARD Act of 2009, which amends the Truth in Lending Act so that much, if not all, of Subpart C of Regulation AA is now incorporated into the Truth in Lending Act. To expedite and make more efficient the regulatory process and thus give lenders more time to review and implement the final regulation, we suggest that the Federal Reserve Board incorporate final regulations to this current proposal into the final regulations interpreting the Credit CARD Act. We believe that a single final regulation rather than two separate final regulations will facilitate compliance. We also strongly recommend that the Agencies withdraw Subpart C of Regulation AA in its entirety as it will be replaced by and be redundant with Regulation Z, which implements the Truth in Lending Act. There is simply no reason to have dual regulatory regimes.

While the Agencies valiantly pursued an unfair or deceptive acts and practices (UDAP) approach to credit card regulation, such authority is demonstrably ill-suited to the task—as ABA argued in last year's comments and as confirmed by the absence of any UDAP analysis in fashioning the instant proposal. Although Congress has endorsed much of the Agencies' policy conclusions, it has clearly elected a different legal foundation for creating its new baseline of fairness for credit card operations.

ABA appreciates the opportunity to comment on this proposal and is pleased to provide any additional information.

Regards



Nessa Eileen Feddis