Huntington

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March 24, 2005

By e-mail to: regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Attn: Docket Number R-1217

Re: Advance Notice of Proposed Rulemaking—Regulation Z Open-End Credit Disclosures
69 *Fed. Reg.* 70925 (Dec. 8, 2004)

Dear Ms. Johnson:

This letter is submitted on behalf of The Huntington National Bank, a national banking association ("Huntington"),[1] in response to the above referenced Advance Notice of Proposed Rulemaking (the "Notice") with respect to the open-end disclosure provisions of Regulation Z published by the Board of Governors of the Federal Reserve System (the "Board"). Huntington appreciates the opportunity to provide the following comments with respect to this Notice:

Rulemaking in Stages

The Board is proposing to undertake its review of Regulation Z in what appears to be four separate stages: open-end credit not secured by a home, predatory mortgage lending, closed-end fixed-rate mortgage lending (and perhaps also non-mortgage closed-end lending), and home equity credit lines and closed-end adjustable rate mortgages. We understand that

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[1] The Huntington National Bank ("Huntington Bank") is the principal subsidiary of Huntington Bancshares Incorporated, which is a $33 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington Bank has more than 139 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 300 regional banking offices in Indiana, Kentucky, Michigan, Ohio and West Virginia. Huntington Bank also offers retail and commercial financial services online at huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of approximately 700 ATMs. Selected financial service activities are also conducted in other states including: dealer sales offices in Florida, Georgia, Tennessee, Pennsylvania and Arizona; private financial group offices in Florida; and mortgage banking offices in Florida, Maryland and New Jersey. International banking services are made available through the headquarters office in Columbus and an office located in the Cayman Islands and an office located in Hong Kong.

reviewing all of Regulation Z at one time is a complex and lengthy undertaking, but we urge the Board to consider doing just that (or at least all of it at one time except for the special rules and disclosures applicable to HOEPA loans which are more easily severable) because of the difficulty of isolating in a staged review many of the important concepts which span the entire regulation.

In particular, the definition of "finance charge" is fundamental in the regulation and covers all types of credit for which disclosure is required. One of the major issues in the Board's current review of Regulation Z is about the scope of this term. While some of the Board's recent rulemaking and discussion of this issue under Regulation Z has concentrated on non-home secured open-end credit, some of the same fees which have been the subject of those considerations are also applicable to home equity credit lines and closed-end credit. For example, in 2003 the Board determined in the context of open-end credit that a fee for arranging a special payment was not an "other charge" (and thus presumably also not a finance charge), but such fees are also common for closed-end loans and home equity credit lines. The Board did not address the fee in the context of closed-end loans or provide any guidance as to how the imposition of the fee on a home equity credit line related to the more restrictive change-in-terms rules applicable to home equity credit lines. Any attempt to clarify the scope of the "finance charge" concept solely in the context of non-home secured open-end credit runs the risk of the same kind of isolated treatment for one type of credit without addressing the same issue in connection with other types of credit covered by the regulation.

An additional concern in the context of the "finance charge" definition arises from the purely forward-looking nature of closed-end disclosures under Regulation Z as compared to the both forward-looking and historical disclosures applicable to open-end credit. For example, if the Board had determined in 2003 that the fee for arranging a special payment was a finance charge, that would not have impacted the corresponding annual percentage rate for initial open-end credit disclosures, and the fee when charged would have been included in the historical annual percentage rate disclosed on periodic statements. However, if this fee were a finance charge and it was charged in connection with a closed-end loan, it would have been required to be disclosed in the annual percentage rate for closed-end credit. Since that annual percentage rate disclosure is made at the beginning of the loan, no one would know at that time whether or not the fee would ever be assessed and thus the correct annual percentage rate could never be determined in advance. This would have made it impossible to charge the fee for closed-end credit. There is a risk that this difference in perspective between open-end and closed-end credit can be overlooked in the context of a review focussed solely on what is a "finance charge" for purposes of non-home secured open-end credit.

Yet another concern with a staged review focussing solely on non-home secured open-end credit is the impact of any changes to the "finance charge" and "other charge" concepts on home equity credit lines, which are subject to many of the same open-end credit disclosure rules, and yet are subject to other rules that are very different. For example, home equity credit lines are subject to very restrictive rules regarding changes in terms, and those rules are not applicable to non-home secured open-end credit. Thus, providing answers about whether or not a fee is or is not a finance charge or an other charge may not be sufficient in the home equity credit line context without also considering the impact of the characterization in the context of the change-in-terms limitations applicable to home equity credit lines.

Format Changes

A major concern about any format changes for open-end disclosures is the cost of systems and forms changes to meet any new disclosure format. We do not believe that any major new format requirements are called for in order to enhance the usefulness of disclosures or for other reasons.

Most of the disclosures required in the initial disclosure pursuant to §226.6 of Regulation Z are also contractual terms which must be disclosed anyway as a contractual matter as part of the account agreement. Permitting those disclosures to be integrated with the other provisions of the account agreement, as is the rule today, permits an orderly structuring of the agreement which may be lost if particular contractual terms that are also required Regulation Z disclosures must be pulled from their natural positions in the agreement and artificially placed in some specified location. Additionally, requiring such disclosures to be placed in a separate "executive summary" or similar concept will generally result in longer documents and more paper for the reason that these items will still have to be disclosed again in the contract as part of the contractual terms of the account agreement. An "executive summary" disclosure could have the unintended effect of encouraging consumers not to read the normal disclosures, thinking that all he or she needs to know is in the "executive summary". Furthermore, both credit cards and home equity credit lines already have their own special separate disclosure requirements applicable at the time of solicitation (Schumer box for credit cards) or application (early disclosures for home equity credit lines) when those disclosures are most useful for influencing the consumer's product choice. Thus, the more important terms required by those disclosures are already provided in a separate and specialized format. While there may be issues about whether certain additional or different information should be included in those specialized disclosures, there does not appear to be a need for any major revamping of the format of open-end credit disclosures.

With respect to statement disclosures, statements are already fairly compact and focussed with respect to important information the consumer needs to know, and would require the most extensive system changes and costs if new formatting or segregation requirements were imposed, and there seems to be little reason to impose new statement disclosure formatting requirements that would trigger this extensive cost.

Classifying and Labeling Fees; Historical Annual Percentage Rate

We do not think that the labeling of particular fees as in the "finance charge" or "other charge" or neither-of-the-above categories is very useful or helpful in the context of open-end credit disclosures, and that the labeling and/or categorization requirements create opportunities for unnecessary and wasteful litigation. The real issue should be disclosing the fees so the consumer knows what to expect, rather than technical rules over how to classify or label them. Having said that, however, the labeling and classification requirements appear to originate with the underlying statute, and thus are probably beyond the authority of the Board to eliminate. The same can be said for the historical annual percentage rate, which is more misleading and confusing than it is helpful or meaningful, and yet it too is part of the underlying statutory requirements that appear to be beyond the authority of the Board to eliminate.

Furthermore, at this point in the history of the Truth in Lending Act and Regulation Z creditors and consumers have gotten reasonably used to the existing requirements and there does not seem to be any compelling reason to reopen the statute to legislative changes. Doing so creates the possibility that any legislative fix to the perceived problems will actually add more requirements and create additional issues, and inviting that possibility is not warranted in the absence of compelling reasons for change.

We do believe, however, there is need for the Board to provide better guidance with respect to which fees fall into which of the three open-end credit categories. This is a complex matter and we are unable to address it here in any depth, other than to make a few observations. We think that with respect to the term "finance charge" the answer is not as simple as saying that if the fee is not required as a condition of obtaining the credit, then it is not a finance charge. That ignores the "incident to" portion of the "finance charge" definition. On the other hand, "incident to" cannot mean any fee in any way connected to the extension of credit. As the United States Supreme Court has written in the *Pfennig* case, "the phrase 'incident to' does not make clear whether a substantial (as opposed to a remote) connection is required."[2] We would expect that the more a particular service is severable from or independent of or additional to the extension of credit, the more likely the fee for it should not be a finance charge. However, we recognize that the concepts of "required" or "incident to" in connection with the finance charge, like the concept of "significant" in connection with other charges, may not provide a bright line in many cases, particularly considering the consequences in the way of damages, civil penalties and attorney fees that are applicable when a creditor guesses wrong. Thus, we recommend that in addition to further refining the principles of interpretation at work here, the Board consider establishing a special expedited review process for creditors to request a ruling on particular fees. Such a review process would provide a reasonable degree of certainty, as well as enable the Board to refine the applicable interpretive principles in the context of specific cases, and would avoid having to rely on the commentary process which is too slow and cumbersome to be an effective case-by-case determination mechanism for proper characterization of particular fees.

Overlimit Fees

We do not believe the Board needs to make any changes in connection with the current exclusion of overlimit fees from the finance charge. While some advances or purchases that

[2] *Household Credit Services, Inc. v. Pfennig*, 124 S.Ct. 1741 (2004), at 1749.

overdraw a credit limit may be discretionary with the creditor, others are not, and the bright line here is exactly the approach the Board has taken, namely, to exclude overlimit fees from the finance charge.

The Board asks whether overlimit fees should be treated differently depending on whether the creditor requires the consumer to bring the balance below the established credit limit. Presumably the thought is that while the initial overdraft may or may not have been something the creditor could control, allowing the consumer to stay over the credit limit month after month while continuing to assess an overlimit fee is more discretionary and thus more like assessing a fee for the ability to have an additional extension of credit. We believe adopting any such approach would be difficult to implement. For example, the consumer could have paid enough this month to cover the overlimit amount from last month but then also again go overlimit this month. Moreover, the same fee could then be a finance charge some of the time, and not a finance charge other times, depending on factors within the consumer's control, creating confusion and other difficulties of implementation. Additionally, such an approach would be adverse to consumers in that presumably failing to pay enough to cover the overlimit amount would then at some point have to be treated as a default, with the attendant adverse consequences to the consumer.

We think that the natural control in connection with overlimit fees is the amount by which the creditor allows a consumer to go overlimit. To give an extreme example, if a creditor offered a credit line of $500, but then allowed the consumer to go overlimit up to $100,000, that would raise the question as to whether the credit limit of $500 was meaningless and would suggest that the overlimit fee was really a fee for something other than going over the established credit limit and was no longer bona fide. We do not think the Board should provide particular guidance on what amount would constitute a valid overlimit amount, but clearly there is some point at which a creditor has gone too far, and the risk associated with that is a natural limitation on any abuse of this process.

Payment Allocation Method

The Board asks in the Notice whether Regulation Z should be amended to require disclosure of the payment allocation method on the periodic statement. The concern appears to be in connection with offering a promotional rate for certain advances for a limited time and having a higher rate for other advances or purchases, and the consumer may not understand that payments may first be applied to the lower rate balances, thus diminishing the value of the lower rate offer.

If the Board has determined that the above concern is a widespread problem, then it may be appropriate to require some very general disclosure in connection with a solicitation for the promotional offer along the lines that any payments made by the consumer may be applied to promotional balances before regular balances. However, anything much more specific than that, or any specific requirement in connection with the initial disclosure statement or periodic statements, would be likely to create significant problems because the exact order of payment for all of the existing possibilities is likely to be quite lengthy and complex. Thus, anything the Board does in connection with application of payments should be very targeted to a specific concern (such as solicitations for promotional offers), and be general enough to avoid the requirement to provide a large amount of detail, which would be burdensome to the creditor and not likely to be very meaningful to the consumer.

Thank you for the opportunity to provide these comments.

Very truly yours,

Daniel W. Morton
Senior Vice President & Senior Counsel