Before the
Governors of the Federal Reserve System
Washington, D.C. 20551

COMMENTS OF THE NATIONAL RETAIL FEDERATION

Regulation Z
Docket No. R-1370

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On behalf of the National Retail Federation (NRF), we would like to file the following comments on the proposed amendments to Regulation Z and the commentary to implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Credit CARD Act") as published in the Federal Register on October 21, 2009. By way of background, NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees - about one in five American workers - and 2008 sales of $4.6 trillion. Many of NRF's members offer retail credit to their customers, either directly through proprietary retail credit programs, or through private label and co-branded programs in conjunction with financial institutions. The availability, flexibility and promotional opportunities that retail credit makes possible are among the reasons these programs are so desired by consumers.

Retailers and their customers have benefited from waived interest (sometimes called deferred interest or zero percent promotional periods) or low or no interest (sometimes called promotional rate) promotional programs. Therefore we are keenly interested in the Board's clarification of the treatment of these programs. Many retailers also offer their customer the convenience of "instant" credit in their stores, at the point of sale. Those retailers, and many others, also provide needed increases in credit lines for customers who have demonstrated an ability to pay their existing lines and the lines of others. The proposed rule, if not amended, would greatly curtail both these and other popular and beneficial credit programs. Finally, we ask that the Board extend the flexibility offered in the proposal in limited additional circumstances.

We very much appreciate the opportunity to address the proposed rules, especially as they pertain to ability to pay requirements. We should note that in preparing these comments, NRF gave particular emphasis to the views of its mid-sized and smaller, often regional, members. Nevertheless, NRF members of all sizes support these comments.

General Introduction

The retail community agrees with many of the changes both proposed and finalized in the Board's most recent filing. We are particularly appreciative of the clarifications advanced in order to allow most waived interest programs to continue to operate in a manner that is transparent to consumers and protective of the economic value so many receive from the low cost financing these programs make possible. As to the new proposals, the two areas in which we would ask for additional flexibility and review are the initial disclosure of information and the proposed effectuation of the ability to pay requirement. As conceived, both would present major operational challenges, if they could be implemented at all, at the point of sale.

Ability to Pay

The proposed rule seeks to implement Section 109 of the Credit CARD Act. The Act says:

"A card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account."

For purposes of our comments, the most operative words are that the card issuer should **consider** the consumer's ability to make **required payments** under terms of the account. As to the latter term, we agree with the first portion of proposed Section 226.51(a)(1) which would provide that the language "required payments" means the required minimum periodic payment. From retail credit grantors' perspectives, that is the most readily foreseeable monthly payment amount that must be made if a customer is to satisfy the terms and conditions of her account.

However, the second portion of the proposed rule appears to go further than the legislative language adopted by Congress. In fact, the proposed rule will greatly curtail or eliminate many routine credit granting practices that are safe, valued and desired by both retailers and by our customers. Thus the effect of the proposed language will be much more disruptive than we believe was ever intended or envisioned by Congress.

Before passing the Credit CARD Act, Congress revised earlier amendatory language that would have required a more specific investigation of the ability to pay than is reflected in Congress' final choice of the word "*consider*." It is reasonable to believe that the Senate, which inserted this modified provision, was wary of the original language, but still wanted to ensure that consumers were not being saddled with credit where there was no reasonable expectation that the cardholder could repay under the terms and conditions applicable to the account, and thus would incur the numerous fees and other penalties that can arise from such situations.

However, the notice's proposed language establishes a significantly higher standard than Congress adopted. Under it, before a card issuer may either open an account or extend an existing line, the issuer must determine a consumer's ability to make reasonably estimated minimum required payments by specifically assessing either the consumer's income or assets in light of the consumer's current obligations. Under the proposed rule, examination of these precise factors is mandatory. The proposed rule requires card issuers to have reasonable policies and procedures in place to consider the designated information. Such an examination (which conceivably could require the submission of a financial statement detailing the

consumer's assets and obligations) would essentially make many point of sale processes too cumbersome to continue.

As the Board may be aware, although retailers label their point of sale programs as "instant credit," in fact these programs entail essentially the same parameters employed in granting old style paper application credit in the 1980's. Comprehensive information about an applicant's ability and likelihood of repayment is gathered from credit bureaus and other sources. What has changed since then is that technology has allowed the assessment process to move so quickly that it appears to the customer at checkout as if the decision were "instant." Thus, for the past several years retail card accounts have been opened, and existing lines have been increased, on the basis of consumers' payment history with that creditor and/or other credit bureau information used to analyze existing accounts. Such assessments are the antithesis of the fly-by-night or unsubstantiated accounts referenced in the preceding paragraph, with which Congress should be rightly concerned. Rather, in the retail environment, credit bureau data has been used both directly and indirectly to create very robust predictive tools for assessing individuals' varying abilities to pay. The dynamic use of these tools not only helps to secure the quality of card portfolios, they also make possible real time ancillary benefits to consumers at the point of sale. For example, the speed of approval makes it practical for retailers to offer, and attractive for customers to accept, point of sale discounts on pricing or financing of large purchases. It also allows simple and fast customer-desired accommodations.

It is not uncommon for a good, loyal customer with a $800 credit line on her store card to be given a $200 increase in her line (following a near instantaneous review of her payment history and credit report data) in order to facilitate a purchase that takes her somewhat over her preexisting limit. With solid customers, this process is seamless and invisible. There is no indication in the final legislative language that Congress intended to eliminate that. Nor do we believe it was Congress' intention to eliminate programs that allow adults to open a quickly scored credit line at the point of sale, and receive substantial discounts or special promotional interest rates on their purchase in exchange for opening that account.

We mention "adults" because it appears that the proposed rule has somewhat conflated the CARD Act's Section 109's straightforward language with the more elaborate requirements set forth in the Act's Section 301 which governs credit granted to minors. (Addressed in Section 226.51(a)(2) of the proposed rules). Section 301 *specifically* requires a written signature of a legal guardian *or* the submission of information "through an application" indicating a minor's independent means of repaying an obligation arising from an extension of credit. The fact that Congress specifically required a detailed application when extending credit to those under 21 years of age, and did not ask for it in considering ability to pay for those older than 21, is strong evidence that Congress intended the situation between minors and adults to be treated differently.

Requiring retailers to obtain income or asset information from an adult consumer at the checkout, and to specifically require an assessment of *that* information in light of similarly requested current obligation information, despite the fact that sufficient (and probably more accurate) data resides in the consumer report and/or in the consumer's own payment history with that credit grantor, is neither consumer friendly nor does it demonstrably improve the credit granting process. Indeed, it may make it worse.

The new rule does not require, nor do we suggest that it should require, that the solicited income or asset information be verified by contacting the consumer's employer, or by some other method (such as requesting copies of tax returns). Obviously, mandating either of those would make a problematic situation even worse. It would return credit granting to a worse than 1980's process. Very few consumers carry current pay-stubs or financial statements with them to the store. Many would be disinclined to share those documents with store associates, even if they did.[1] Worse still, many who are requested to provide unsubstantiated income information may not be inclined to report it accurately. Thus, not only will the proposed rule's requirements unnecessarily slow the credit authorization process at the point of sale, the likely unreliable data, if incorporated into that process, could generate a less creditworthy decision than would be the case if the credit grantor simply relied instead on credit bureau information or attempted to combine the less reliable and more reliable data into an informed credit decision.

With exceptions, most retail credit card accounts do not carry large lines of credit (i.e. "open to buy"). Consequently, relative to the size of the accounts, issuers of retail credit grantors have for years relied on credit bureau information as a statistically valid predictor of their customers' ability to pay. The use of credit scores, which are derived from consumer reports issued by credit bureaus, are a workable alternative that also reliably predict consumers' ability to pay. So long as a credit grantor honestly makes a determination based on an adult's credit bureau information, they should be deemed to have "considered" the consumer's ability to pay as required by the Credit CARD Act[2]. NRF suggests that a similar formulation be substituted for that in the proposed rule.

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[1] Customer reaction at the point of sale is a serious concern. Many people will be reluctant to share their income or asset data with a sales associate. Indeed, since many retail credit lines are relatively modest, there is widespread skepticism in the industry as to whether individuals will treat the requests as an unwarranted intrusion relative to the lines being offered.

In light of this, we know that there will be individuals who clearly qualify for credit, based on credit bureau information, but will refuse to reveal their income. Since income is not particularly probative of ability to pay, especially in modest retail-sized line environments, the Board may want to consider allowing credit grantors to use an "assumed" income, when the information is not forthcoming (e.g. such as the national adult median income), so long as it is coupled with appropriate credit bureau information. Similarly, allowing individuals to select or announce an income range might be a marginal improvement.

[2] While the proposal assures credit grantors that they can also use credit bureau data in making credit decisions the grantor must still have reasonable procedures for collecting and reviewing the customer's income or asset information before it may provide an extension of credit. But by mandating consideration of information whose reliability is more suspect than the information to which it may optionally be conjoined increases neither the safety nor the soundness of the credit granting decision.

Disclosure at Point of Sale

There is one additional area where we would request reconsideration of the proposed rule. It is related to the account opening table requirements of Section 226.6(b)(2).[3] The proposal provides that where the APR may vary by state or depending on the creditworthiness of the applicant, the table may contain the annual percentage rate that applies to the consumer's account or the range of rates so long as the accompanying account agreement or other disclosure provided with the table specifies the consumer's rate. In general, we support the proposal. Materials provided to our customers along with their cards by mail, following an application, can fulfill these requirements.

A different situation arises, however, when the account is opened at the point of sale under a promotional program in an instant credit environment as was discussed above. In those situations, where the rate varies, it is not currently possible for the store associate who is facilitating delivery of the promotional discount or the temporary shopping card to convey the precise rate that will ultimately apply to the consumer's account. The Supplemental Information correctly identifies this difficulty and notes that while it believes the requirement is best implemented by a rule stating that a single rate must be disclosed under Section 226.9(c)(2)(v)(B), issuers offering a deferred interest or other promotional rate program at point of sale may disclose a range of rates or an "up to" rate rather than a single rate "for a brief transition period."

We are very appreciative of the flexibility offered by the Supplemental Information. Without it, there is no practical means by which retailers would be able to offer these programs once the requirements take full effect. However, in the current economic environment, and given how most retail stores are staffed, and how point of sale hardware systems are currently built, we do not see a practical alternative to the "up to" disclosure that would conform precisely with Section 226.9(c)(2)(v)(B).

It is not uncommon for even a moderate-sized retailer to have more than a dozen points of sale checkout locations within a single store location. It is highly unlikely that any of those is currently equipped to provide the information exactly in the form proposed by the rule. If one also considers the tens of thousands of store locations that provide promotional credit programs, it is apparent that this one rule provision could necessitate either considerable customer inconvenience or well over a billion dollars in expenditure for replaced equipment and software upgrades. One alternative, to train millions of full and part time store associates, to distribute the

[3] Although discussed in terms of new account opening rates, these comments should be considered in light of various customer specific promotional disclosures at the point of sale, regardless of whether it is a promotion rate or the reactivation of an account.

correct account table in every instance runs an enormous risk of inadvertent error, detrimental to both consumers and to the credit grantor. However, a slightly different approach, in this limited circumstance, could effectively implement the goals of the rule.

One option is that the transition period be extended indefinitely with the understanding that the actual rate for the customer's account would be delivered with the account documents that accompany the mailed card. By forcing the retailer to reveal the least favorable rate at point of sale (the "up to" rate), consumers would know the worst they could expect and thus would not be adversely affected when the likely more favorable rate is presented in the subsequent mailing. This approach would require store associates to be trained to explain the meaning of "up to" for those unfamiliar with the concept, but it would allow consumers to continue to easily receive the benefits of these promotional programs.

A second option would be to accompany the "up to" notice on the chart with a contemporaneously delivered receipt on which the consumer's actual rate were printed. For many retailers, current technology *does* allow for the printing of varying types of receipts at the point of sale. In this way, the consumer's precise rate could be determined at the (typically remote) location where credit decisions are made and a targeted disclosure of that rate could be facilitated. The training for the sales associate would be even simpler than in the option above. One might state, for example: "According to our chart the standard rate on these accounts will be no higher than 21% but in fact (as sales associate presents the rate printed on the receipt) your rate will be 11.9%." The receipt either could be presented separately and/or subsequently affixed to the account opening chart. As in the first option, the consumer would receive confirmation of the rate with the mailed card.

We would ask that the Supplemental Information be modified to incorporate either of these two options, only in these limited circumstances. We believe that economic necessity combined with the substantial benefits to consumers of continued access to these valued programs more than justifies the slight variation in the delivery of information that these proposals would entail.

Conclusion

NRF appreciates the Board's consideration of its comments and the Board's demonstrated willingness to take steps that address intricacies that can occur when developing rules of general applicability. The waived interest clarification is a significant benefit to retailers and to our customers. We trust it is apparent that each of the comments in this submission focuses on in-store delivery of sound, flexible credit programs that facilitate consumer economic activity. Our goal is to ensure the prompt delivery of desired credit services while preserving the availability of

promotional benefits and conveniences upon which tens of millions of consumers have come to rely.

Thank you again for the consideration of our views. Should you have specific questions please feel free to contact either Mallory Duncan or Elizabeth Oesterle at our offices (202) 783 – 7971.