February 10, 2009

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Via email: regs.comments@federalreserve.gov

Re: Regulation Z, Docket No. R-1340

Dear Ms. Johnson:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the proposal (73 Fed. Reg. 74989)(December 10, 2008) ("Proposal") issued by the Board of Governors (the "Board") to amend Regulation Z, 12 C.F.R. Part 226 ("Regulation Z" or the "Regulation") which implements the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA" or the "Act"). The proposed revisions to Regulation Z contained in the Proposal implement the provisions of the Mortgage Disclosure Improvement Act of 2008.[1]

Bank of America operates the largest and most diverse banking network in the United States with $1.8 trillion in total assets and over $800 billion in worldwide deposits. We offer full-service consumer and commercial services in 33 states and the District of Columbia, with over 6,100 retail branch locations and nearly 18,700 ATMs.

We are proud to be one of the leading home finance providers in the nation. In 2008, we served more than 4.3 million households holding mortgage and home equity loans. With the completion of the purchase of Countrywide Financial Corporation in July, 2008, Bank of America became the largest residential mortgage lender and servicer in the United States.

We support the on-going legislative and regulatory efforts to provide mortgage consumers with more information earlier in the shopping process relating to what is for many consumers the largest and most important investment of their lifetime. We believe, however, that some of the changes contained in the Proposal may have unintended adverse effects on consumers, resulting in unnecessary delays and additional costs. While the changes in the Regulation are, for the most part, dictated by statute and must be implemented by the Board, we urge the Board to employ its rulemaking authority under the Act to address the unintended consequences of some of the new requirements. Our comments and suggestions related to the Proposal are set forth below.

[1] Pub. L. 110-289, 122 Stat. 2654, Div. B, Title V. (July 30, 2008)("MDIA").

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Timing of Delivery of Early Disclosures; Definition of "Business Day"

The Board has requested comment on whether the more precise definition of "business day" should be used to calculate the seven-business-day waiting period after delivery of the early disclosures under section 226.19(a)(1)(i). We believe that the Board should adopt the more precise definition for the reasons set forth below.

Under section 226.19(a)(1)(i), the delay of consummation until after receipt of the early disclosures is similar to the delay of disbursement under the rescission provisions of section 226.23(c), the prohibition of the collection of fees other than for a credit report under section 226.19(a)(1)(ii),[1] and the delay of consummation until after the receipt of re-disclosure under proposed 226.19(a)(2).[2] Each of the foregoing rules sets forth restrictions on *actions* by creditors (*i.e.,* disbursement, fee collection, consummation). Of course, each of the actions is conditioned upon and preceded by the delivery of disclosures, the timing of which is set forth separately in the Regulation. The Board has indicated that it seeks consistency in the application of the timing of delivery of the early disclosures.[3] We agree with that approach, and we urge that the Board strive for consistency in the rules relating to the delay of consummation whether the delay follows the delivery of the early disclosures under section 226.19(a)(1)(i) or the delivery of revised disclosures under section 226.19(a)(2) in the event the annual percentage rate becomes inaccurate. In either case, the delay of consummation relates to the delay of a creditor's actions, not the timing of delivery of disclosures.

We also believe that the length of delay of consummation after the delivery of early disclosures should not depend upon whether the creditor's offices are open for business. Once the disclosures are delivered, whether the creditor is open for business is immaterial to the length of time the consumer should have to review the disclosures or the length of time the consumer must wait to consummate the transaction. A consumer who receives disclosures on a Tuesday from Creditor A, whose business days do not include Saturday, Sunday or legal holidays, would have to wait until the 9th calendar day to consummate the transaction. If the disclosures delivered on that Tuesday were from Creditor B, whose business days include Saturday, the consumer could consummate the transaction as early as the 8th calendar day. If Creditor B's business days include Sundays and legal holidays, consummation could occur even earlier. The consumer who does business with Creditor A is disadvantaged because of a delay in consummation for reasons that have nothing to do with the content or requisite time for consideration, of the disclosures. Likewise, Creditor A is at a competitive disadvantage because its transactions cannot be consummated as quickly as Creditor B because of the difference in their respective business days.

There appears to be no rationale for measuring the waiting period prior to consummation after delivery of one set of disclosures by one rule and measuring the waiting period after delivery of a corrected set of those disclosures by a different rule. Such distinctions make maintenance of controls and training difficult and result in inadvertent errors. Moreover, trying to explain the differences in time allotted to review different sets of the same disclosures to a consumer will be difficult. The inconsistency in the measurement of waiting periods will be confusing to both creditors and consumers alike. We urge the Board, therefore, to adopt a consistent rule for the measurement of the waiting periods in consummation under sections 226.9(a)(1)(i) and 226.19(a)(2).

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[1] 73 Fed. Reg. 44600, 44601(July 30, 2008); 73 Fed. Reg. 74990.

[2] 73 Fed. Reg. 74996.

[3] 73 Fed. Reg. 74991(using the general timing requirement under proposed section 226.19(a)(1)(i) for delivery of the early disclosures "would insure consistency with RESPA's requirement that creditors provide good faith estimates of settlement costs not later than three business days after the creditor receives the consumer's application for a federally related mortgage loan.").

We also urge the Board to adopt an exception to the rule regarding the delay of consummation under section 226.19(a)(2) in the case of transactions that are subject to the right of rescission. In those transactions, if a revised disclosure is delivered by the creditor under section 226.19(a)(2), consummation of the transaction must be delayed by three business days. In addition, under section 226.23(c), disbursement of funds in the transaction must be delayed until the three-day rescission period following consummation has expired. Thus, the final disbursement of funds to the consumer could be delayed by six business days. Since there is already a delay in disbursement under the rescission rule, during which time the consumer may review disclosures, elect to rescind the transaction and incur no costs, it seems that the protection afforded under section 226.19(a)(2) is already afforded in those transactions. The additional three-business-day waiting period seems unnecessary, and it will be very difficult to explain and justify to consumers, many of whom balk at the three-day right of rescission.

Inaccuracies in APR; Redisclosure

As proposed, section 226.19(a)(2) would require that, if the annual percentage rate in the early disclosures is no longer accurate as calculated under section 226.22, the creditor must furnish an additional, corrected disclosure to the borrower. The revised disclosure must be delivered not later than three business days before the date of consummation of the transaction and contain an accurate annual percentage rate and all changed terms. Under the general rule in section 226.22, the annual percentage rate is deemed to be accurate if it is not more than 1/8 of 1% above or below the actual annual percentage rate. Thus, even where the annual percentage rate decreases after the early disclosures are delivered, the creditor would be required to deliver a corrected disclosure, and consummation of the transaction would have to be delayed by three business days.

Most creditors deliver a final Truth-in-Lending disclosure statement at closing even where the annual percentage rate has not changed or where it is still accurate as defined under section 226.22. In a large percentage of transactions, however, the annual percentage rate disclosed on the early disclosures does differ from the annual percentage rate disclosed at consummation because changes have made one or more of the disclosures inaccurate. A variation in the annual percentage rate can result from any number of factors, including, a change in the principal amount of the loan due to a change in the estimated value of the property, a change in the borrower's choice of loan program with differences in associated costs, a change when the borrower elects to move from a floating-rate to a locked-rate, or incentives offered by sellers that reduce finance charge costs to borrowers. In many cases, the annual percentage rate will, in fact, decrease from the rate that was disclosed within three business days of application. We see no reason to postpone the consummation of a transaction where the annual percentage rate has decreased from the annual percentage rate reflected in the early disclosures.

The rationale underlying the requirement that consummation be postponed if the annual percentage rate reflected in the early disclosures becomes inaccurate is to provide borrowers with the opportunity to reconsider consummation of the transaction as a result of the change. In the event terms change resulting in increased cost, there is presumably greater risk to the consumer and the consumer should be afforded additional time to reflect on the economics of the transaction. If the first they learn of the change is at the closing table, the pressure to finalize the transaction may be too great, and consumers may feel that they have no choice but to complete the transaction. The three-day delay in consummation serves to provide them with the time to reconsider. Where the costs of the transaction are reduced, however, that increased risk does not exist, and the rationale for the delay in consummation is absent. It is notable that the disclosure of an amount or percentage greater than that required to be disclosed is not even a violation of TILA. 15 U.S.C. § 1602(z).

There appears to be no rationale for the delay of consummation of a transaction when the change in the annual percentage rate is a reduction in the annual percentage rate. There is no added risk to the consumer, but the delay may result in added costs to the consumer, particularly in those cases in which a rate lock expires due to the failure of the transaction to close within the effective period of the rate lock. The consumer would likely be required to pay a fee for an extension of the rate lock or, if the rate lock cannot be extended, the consumer could face an increase in the interest rate. We understand that the Proposal is based on the provisions in MDIA which refer to the accuracy of the annual percentage rate as determined under section 107(c) of TILA.[4] We would urge the Board, however, to exercise its authority under section 105 of TILA to provide an exception to the rule requiring redisclosure and a delay in the date of consummation where the inaccuracy in the annual percentage rate reflects a decrease from the annual percentage rate reflected in the early disclosures.

Under the Proposal, if the annual percentage rate does not become inaccurate after the early disclosures are delivered, no corrected disclosures are required under section 226.19(a)(2). Most creditors deliver a final Truth-in-Lending disclosure statement at closing even where the annual percentage rate has not changed or where it is still accurate as defined under section 226.22. We would urge the Board to make clear that the duty to redisclose and to delay consummation until after the revised disclosures are received is triggered **only** when the annual percentage rate becomes inaccurate as defined by section 226.22. Thus, even if a creditor delivers a final disclosure in which the annual percentage rate differs from the annual percentage rate disclosed in the early disclosure, there is no obligation to deliver the disclosure three business days before the date of consummation if the annual percentage rate disclosed in the early disclosure would still be considered accurate under section 226.22.

Notice

The Proposal contains a provision implementing the new requirement contained in MDIA that the early disclosures and any required re-disclosure under section 226.19(a) of the Regulation contain a statement (“Notice”) advising the consumer, "You are not required to complete **this agreement** merely because you have received these disclosures or signed a loan application." 73 Fed. Reg. 74996 (emphasis added). Although the language of the Notice contained in the Proposal is set forth in revised section 128(b)(2)(B) of TILA as amended by MDIA, we urge the Board to modify the language of the Notice so that the Notice does not imply that the disclosure is an “agreement” and to clarify that the consumer is not required to enter into the transaction that is reflected in the disclosure.

The statutory and proposed regulatory language of the Notice refers to “this agreement.” Referring to the early disclosure as “this agreement” is misleading since the early disclosure is not an “agreement,” but only a disclosure related to a proposed transaction. The term "this agreement" may not be understood by consumers, particularly in light of the fact that the disclosure is provided on the early disclosures provided within three days of receipt of the credit application at a time when there is no agreement. We suggest that the Board amend the language of the Notice to refer to

[4] Section 105(a) of TILA provides that regulations prescribed by the Board to implement TILA “may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title . . . or to facilitate compliance therewith.”

"the loan transaction reflected in these disclosures" or some other similar phrase that refers to completion of the transaction contemplated by or reflected in the disclosures.

MDIA requires that in addition to the other required disclosures, the Notice must be included in the early disclosures in "conspicuous type size and format." To avoid claims that the specific type size and format utilized by a creditor are not "conspicuous" as required by MDIA, we urge the Board to further define the statutory requirement by adopting specific requirements as to the location, type size and format requirements. In the absence of specific rules, we would urge the Board to adopt guidance in the Official Staff Commentary on Regulation Z ("Commentary"), as the Board has done in connection with disclosures related to credit cards (*see* 12 C.F.R. Part 226, Supp. I ¶ 5a(a)(2)-1) or provide specific guidance by the adoption of model forms in Appendix H.

The lead time required for system programming will have compelled most creditors to finalize and submit specifications for reprogramming the TILA disclosure form to include the Notice in advance of the final promulgation of the rule. We assume that most creditors, in the absence of the final rule, will provide the Notice as set forth in the statute. Because of the effective date of the final rule and the fact that final changes to forms will already have been in process before the final rule is published, we would urge the Board to make clear in the final rule that creditors may use either the original statutory language for the Notice or may adopt the revised Notice as provided in the final rule. The use of the statutory language for the Notice should be optional until a date certain, at which time use of the language adopted in the final rule would be mandatory. Due to required lead time for system programming, we recommend that such date be no less than 180 days after publication of the final rule.

Before the adoption of the requirement to include the Notice in the early disclosures under section 226.19, the TILA disclosures required for the early disclosures were the same as the final TILA disclosures delivered under section 226.18 of Regulation Z. The addition of the Notice to the early disclosures now creates a difference between the content requirements under section 226.18 and section 226.19(a)(4) for the two forms. As indicated above, creditors generally provide a Truth-in-Lending disclosure at closing. In some cases, that disclosure will contain changes that do not trigger the re-disclosure requirements under section 226.19(a)(2). In that event, the disclosure delivered is subject to the requirements of section 226.18. The requirement to deliver the Notice is not applicable to such disclosures. We urge the Board to provide that the inclusion of the Notice on the final TILA disclosure form is permissible as additional information under section 226.17(a) so that creditors will not be required to incur the cost of developing two disclosure statements. Permitting creditors to use one form will also avoid confusion and the possibility of errors arising from the use of the wrong disclosure form.

<u>Waiver or Modification of Waiting Periods</u>

The Proposal provides that a consumer may shorten or waive the seven-business-day waiting period before consummation required by section 226.19(a)(1)(i) or the three-business-day waiting period required by section 226.19(a)(2) if the consumer has determined that the credit extension is needed to meet a *bona fide* personal financial emergency and the consumer has received the disclosures required by section 226.18 before the time of the waiver or modification. 73 Fed. Reg. 74996. To waive the waiting period(s), the consumer must provide a dated written statement describing the emergency and specifically waiving or modifying the waiting period. *Id.*

Proposed section 226.19(a)(3) requires that the written statement be signed by "all the consumers entitled to receive the disclosures." We assume that the Board intends to require that all consumers who are obligated on the loan sign the modification or the waiver. There may be some confusion, however, as to which consumers are "entitled" to receive the disclosures required under section 226.18. Section 226.17(d) provides that "[i]f there is more than one consumer, the disclosures [required under subpart C] may be made **to any consumer who is primarily liable on the obligation.**" 12 C.F.R. § 226.17(d)(emphasis added). Thus, it could be argued that the signature of the primary obligor is the only signature required on the waiver or modification, since section 226.17(d) indicates delivery of disclosures to that person alone is sufficient. That section does indicate specifically that, in the case of rescindable transactions under section 226.23, disclosure must be made to each consumer who has the right to rescind. The Board may wish to clarify that all consumers who will become obligated on the loan should sign the modification or waiver.

The modification or waiver of the waiting periods under section 226.19(a)(1)(i) and 226.19(a)(2) are substantially similar to the provisions for the waiver of the right to rescind under section 226.23(e) and the three-business-day waiting period in connection with high-cost mortgage loans under section 226.31(c)(1). Because early disclosures are required for "any extension of credit that is secured by the dwelling of a consumer,"[5] the number of transactions affected by the section 226.19(a) provisions will be vastly greater than the number of transactions affected by the rescission or high-cost mortgage provisions. Bank of America does not make high-cost mortgage loans. Moreover, there are no exemptions from coverage as are provided under the rescission provisions of section 226.23(f) of the Regulation. Thus, early disclosures are required for all purchase, refinance and home equity loan transactions whether or not the dwelling is the principal dwelling of the consumer. Based on our experience with customers in connection with the delay in funding of rescindable transaction, we anticipate much more customer dissatisfaction with delays in closings under these provisions and a large increase in the numbers of requests from consumers to modify or waive the waiting periods. This will be true particularly where the reason for delay in consummation is triggered by a decrease in the annual percentage rate.

Determining whether a *bona fide* personal financial emergency exists in a vastly increased number of transactions will place an enormous burden on creditors. There is little guidance in the Regulation on making a determination of the *bona fides* of an asserted emergency, although the imminent sale of the consumers home at foreclosure is given as an example in the Commentary to section 226.32(c)(1)(iii). That example is repeated in the proposed Commentary in paragraph 19(a)(3)-1. 73 Fed. Reg. 74998. Moreover, there is very little guidance in case law in this area. One court has said, however, "The regulations clearly require **that a real financial emergency exists**. Hence, to be safe a lender **should inquire into any claimed emergency before he accepts a waiver**." 511 F.2d 935, 943 (9th Cir. Cal. 1975)(emphasis added). The Commentary indicates that the existence of a consumer's waiver does not automatically insulate a creditor from liability for failure to provide the right of rescission. Thus, because of the possible penalties and exposure in connection with a violation of the rescission provisions, creditors have been reluctant to accept assertions of personal financial emergencies by consumers, and may have adopted such conservative policies to allow no waivers at all. It has been our experience that the majority of requests for waivers have been declined because of the inability to establish with certainty that a *bona fide* financial emergency exists.

[5] MDIA, Sec. 2502(a)(2)(to be codified at 15 U.S.C. § 1638(b)(2)).

Creditors will now be faced with a significantly larger number of requests for waivers and, in order to meet the expectations of consumers to close their transactions in a timely fashion, creditors will need greater and more detailed guidance from the Board with respect to the determination of what constitutes a *bona fide* personal financial emergency.

The Board has provided the following guidance in the proposed Commentary:

> Whether a personal financial emergency must be met before the end of the waiting period is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure during the waiting period is one example of a personal financial emergency.

73 Fed. Reg. 74998. We urge the Board to expand upon the examples provided in the proposed Commentary to assist creditors in determining the basis upon which the request for a waiver can be granted. Additional guidance is necessary to lessen the burden on creditors who will have to make a much larger number of determinations of the validity of claims of personal financial emergencies, but also to ensure that consumers' expectations and desires are not frustrated by a standard that is difficult to ascertain. We would suggest that the Board consider the addition of a list of examples that would include the following circumstances:

- One or more of the consumers will be unavailable to sign documentation after a certain date due to a military deployment, medical procedures, relocation, vacation or any number of other reasons resulting in absence from the jurisdiction or inability to attend a postponed closing.

- Delay in closing and disbursement of funds that result in a missed opportunity which is dependent upon funds from the delayed transaction

- Increased costs or penalties incurred as a result of inability to perform on a contract or transaction contingent upon close of the current transaction by a date certain.

- Missing the opportunity to close a loan at a lower cost, due to increased fees or rates attributable to the loan as a result of the delay (e.g., not closing within a lock-in period).

In any of the foregoing examples, the situation may not be such that the individual circumstance would be viewed objectively as a *bona fide* personal financial emergency. In the mind of the consumer, however, the determination of such an emergency is not objective. It is very subjective. Creditors are being required to make that determination in what will undoubtedly be a much larger number of cases with little or no guidance. We would urge the Board to provide assistance to creditors and consumers by outlining broad categories of circumstances that would be considered to qualify as *bona fide* personal financial emergencies pursuant to which modifications or waivers of the waiting periods could be safely granted without the risk of second-guessing and later liability.

We would also urge the Board to broaden the rule so that even where the emergency itself does not occur within the waiting period, the consumer may waive or modify the waiting period. Again, because of the volume of transactions affected by the rule, we believe the Board should take into account the likelihood that there will be large numbers of consumers who will want to waive the waiting period and whose expectations and desires will be thwarted by a narrow application of the waiver or modification provisions.

Timing of Disclosures for Home Equity Lines of Credit

Home equity lines of credit are not subject to the proposed revisions to section 226.19(a)(1)(i); however, the Board has requested comment on the timing of HELOC disclosures in connection with the review of content and format requirements for HELOC disclosures that is currently underway.[6] Specifically, the Board has asked whether transaction-specific disclosures should be required after application but significantly earlier than account opening. As an example, the Board states that many consumers take a major draw on the account as soon as the account is opened. The Board asks whether a requirement to disclose the final terms of the HELOC, including the annual percentage rate and fees, three days before account opening would substantially benefit consumers who plan to draw down the line immediately. While we do not disagree with the fundamental premise that early disclosure is beneficial to consumers, we do believe that there are limitations on the application of the principle to open-end credit.

Unlike closed-end credit in which the principal amount of the loan is, generally speaking, the amount of credit extended at the date of consummation,[7] the amount of credit drawn by a consumer in an open-end line of credit is entirely at the discretion of the consumer. There are, of course, exceptions, as when a “piggy-back” line of credit is established in connection with a purchase transaction and the amount of the initial draw is known in advance, or when a creditor requires the draw down of a line of credit at account opening. But those situations are exceptions, not the rule. Absent a contractual provision that limits the initial usage of an open-end credit line, creditors have no way of predicting what that initial use will be or providing disclosures based on it. Even where the initial draw is known or required, however, other factors that impact the disclosure of the finance charge and annual percentage rate cannot be known in advance.

The determination of the periodic finance charge and the calculation of the annual percentage rate are dependent upon a known loan amount or balance outstanding, the applicable rate and the period of time that the loan or balance is outstanding. Generally speaking, there are no additional advances in closed-end credit, additional finance charges do not accrue after consummation and payments are made in equal installments on certain dates. Variations after consummation are treated as “subsequent events,” and disclosures that may be rendered inaccurate by those variations are not treated as violations. Thus, transaction specific disclosures are possible in advance of consummation in closed-end credit.

In open-end credit, however, additional draws may be taken at any time as long as credit is available, other types of finance charges may be incurred by different types of transactions and payments or credits that reduce the outstanding balance can occur at any time during a billing cycle. All of the forgoing activity is taken into account during the billing cycle in the calculation of the finance charge and annual percentage rate, and all of the foregoing activity is entirely dependent upon the consumer’s pattern of usage of the account. Since at or before account opening there has been no activity on the plan on which to base transaction specific disclosures, and since any disclosures provided could be rendered inaccurate and misleading based on the actual usage of the consumer upon or immediately after account opening, we do not believe that transaction specific disclosures are possible in advance of account opening. The nature of open-end credit simply does not lend itself to a predetermination of the pattern of the consumer’s usage upon which early transaction specific disclosures would be based.

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[6] 73 Fed. Reg. 74990.

[7] Clearly there are exceptions in the case of multiple-advance construction loans where a series of draws over the construction period is anticipated. Those loans are, however, closed-end loans, and there are specific rules and assumptions in connection with the disclosures of those loans that take into account the fact that future advances will be made.

Again, we appreciate the opportunity to provide comments on the Proposal. If you have any questions about any aspect of this comment letter, please contact the undersigned at (202) 442-7573 (office), (202) 731-1363 (cell), or via email at gregory.a.baer@bankofamerica.com.

Sincerely,

Gregory A. Baer
Deputy General Counsel