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May 26, 2009

VIA EMAIL: regs.comments@federalreserve.gov

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

Re: Proposed Rule Implementing Title X of the Higher Education Opportunity Act of 2008, Docket # R-1353

Dear Ms. Johnson:

This letter is submitted by Sallie Mae[1] in response to the publication by the Board of Governors of the Federal Reserve System (the "Board") of a request for public comment in connection with proposed regulations, 74 Fed. Reg. 12464 (the "Proposed Rule"), implementing certain requirements of Title X of the Higher Education Opportunity Act of 2008, P. L. 110-315, 122 Stat. at 3478-3490 (August 14, 2008) ("Title X" or "HEOA").

We wish to commend the Board and Board staff for the excellent Proposed Rule. Although we have specific comments as set forth below, we are supportive of the thoughtful way in which the Proposed Rule dealt with practical difficulties while carrying out the intent of the legislation to provide consumers of private student loans with the information needed to make good borrowing choices.

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[1] Sallie Mae®, the nation's leading provider of student loans and administrator of college savings plans, has helped millions of Americans achieve their dream of a higher education. The company primarily provides federal and private student loans for undergraduate and graduate students and their parents.

In addition, Sallie Mae offers comprehensive information and resources to assist students, parents, and guidance professionals with the financial aid process. Sallie Mae owns or manages student loans for 10 million customers and through its Upromise affiliates, the company also manages more than $17.5 billion in 529 college-savings plans, and is a major, private source of college funding contributions in America with 10 million members and $450 million in member rewards. Sallie Mae employs approximately 8,000 individuals at offices nationwide.

Sallie Mae understands that a comment letter regarding the Proposed Rule has been submitted on behalf of the Consumer Bankers Association and the American Bankers Association and their respective members and Sallie Mae expressly endorses that submission. In addition, Sallie Mae submits the following comments on the Proposed Rule for the Board's consideration.

We have divided our comments into two groups: significant issues and additional comments and concerns.

Significant Issues

I. Approval

a. *Timing of Approval Disclosures.* We appreciate the flexibility the Proposed Rule provides regarding what event is an "approval." However, since approval of private education loans is almost invariably *conditional*, that is, dependent on the future satisfaction of conditions, including school certification, the regulation should make it clear that such conditional approval should be treated as "approval" for purposes of triggering the lender's obligation to provide the Approval Disclosures. Lenders typically condition their approval on a range of factors, including those that affect underwriting, security, identity, school certification, and—for consolidation loans—confirmation of the loan amounts involved. Among others, these conditions may include:

- School certification of enrollment and financial need
- Income verification
- Proof of citizenship
- Visa and passport information from foreign students
- Validation of underlying loan amounts on consolidation loans
- Validation of co-borrower's identification
- Validation of co-borrower's income
- Compliance with USAPATRIOT Act requirements
- Compliance with requirements of the Office of Foreign Asset Control (OFAC)

Lenders take steps to verify this information in order to comply with relevant regulations, prevent overborrowing and adhere to safe and sound banking practices. If lenders were unable to condition their approvals on verification of these factors, they would be unable to make loans. It is frequently the case, due to the financial inexperience of the consumer applicant, that private education loan conditions are not satisfied, resulting in the need to decline or modify the loan.

If the conditions are satisfied, the lender reaches a "final" approval, but to treat the latter event as the approval for purposes of triggering the lender's obligation to provide the Approval Disclosure would be problematic. Final approval, when all conditions are satisfied, may not occur until a time close to the beginning of the school enrollment—possibly not until late August in a typical school calendar – because schools often wait until students are enrolled to finalize their financial aid.

The Approval Disclosure triggers a 30-day period to accept the loan terms, which would be too long in many cases to accommodate the time for disbursement to the borrower and school. The purpose of the 30-day window is to permit the consumer to shop for alternatives, and we believe that it is important to encourage shopping for loan terms. It would make little sense –and would have no real value to the consumer--to provide a shopping opportunity so late in the process.

We therefore recommend that conditional approval should be treated as "approval" for purposes of triggering the lender's obligation to provide the Approval Disclosures.

b. *Effect of Events Following Approval Disclosure.* The Proposed Rule specifies that, after the applicant's receipt of the disclosure required in proposed 12 C.F.R. § 226.38(b) (the "Approval Disclosure"), no changes may be made to the loan terms other than changes: (a) due to a change in the index used to compute the interest rate on the loan; (b) requested by the consumer; and (c) that are unequivocally beneficial to the consumer. 12 C.F.R. § 226.39(c); 74 Fed. Reg. 12484-85. In addition to this list, there are instances in the application process that should qualify as permissible changes. Sallie Mae requests that the Board consider additional categories of changes that may be made by the lender during the period after the applicant's receipt of the approval disclosures without running afoul of the requirement not to alter loan terms disclosed in the Approval Disclosure.

If the conditional approval is the "approval" event for purposes of the Approval Disclosure, it would also be necessary for the Board to clarify that changes made following the Approval Disclosure but pursuant to the articulated conditions are permissible, and would form an acceptable basis for declining the loan and/or making a counteroffer to the consumer. Therefore, we request that the Board clarify that, if the lender receives information at any part of the application or loan processing process that 1) suggests fraud or identity theft on the part of one or both of the loan applicants, 2) suggests overborrowing on the part of the loan applicant(s) in excess of the funds needed to attend the student's school 3) suggests in any way that the application submitted does not comply with the lender's Customer Identification Process, OFAC processes or USAPATRIOT Act process or 4) results in the failure to meet a standard underwriting condition that was disclosed to the applicant, the lender may cancel the loan application or present the applicant with a counteroffer despite providing the notice in the Approval Disclosure that the terms of the loan offer would be available for 30 days.

c. *Specific Exception for School-Initiated Changes.* We further request that if after the lender provides the approval disclosures, whether before or after acceptance by the applicant, the student's school requests changes to the loan (e.g. adjustments to the loan amount, loan disbursement dates or amounts, changes to the student's year in school or other changes) that such changes do not require the lender to provide revised approval disclosures to the applicant, do not result in a new 30-day acceptance period and do not require an additional acceptance by the applicant, if

one has already been obtained, because any resulting changes to the loan terms would be disclosed in the Final Disclosures sent to the applicant. After that time, the applicant would still be able to cancel the loan during the cancellation period.

Changes to the loan made by the lender as a result of a request from the school are important both to prevent the student from excessive and unnecessary borrowing and to comply with general safe and sound banking practices. Our extensive experience in the private student loan industry has shown that it is a common occurrence (nearly 30% of all private student loans we originate) that a school certifies a lower loan amount during school certification than the amount the borrower requested on his or her application. Because 1) these changes occur so frequently, 2) occur very late in the loan origination process (because schools delay certification until they are sure that a student will enroll), 3) the reduction in the loan amount is beneficial to the consumer and 4) final disclosures will be provided to the student, changes to the loan as a result of a request from the school should not trigger a requirement to provide a new approval disclosure, a new 30-day acceptance period or to obtain a new acceptance from the borrower.

School certification is a unique factor, unlike any other contingency that may arise. The school is independent of both the borrower and the lender, but it holds the ability to determine the precise amount that the lender can and should be lending. By certifying the loan amount, the school ensures that students do not borrow more than absolutely necessary. This serves an important public policy goal, and it is critical that the regulation does not interfere. If lenders were required to restart the 30-day clock if the certified loan amount differs from the amount previously approved, it could be a disincentive for schools to make modifications in their funding, or to make changes that result in the appropriate amount of aid.

For the reasons set forth above, we respectfully request the Board to state in the final rule that a change to the loan offer based on information from the school (e.g. loan amount, disbursement date, year in school, and adjustments to such items and other changes) after the Approval Disclosures have been provided does not (i) require the lender to provide revised Approval Disclosures, (ii) result in a new 30-day acceptance period, and (iii) require the applicant to accept the revised loan offer. Changes based on school information ensure proper borrowing amounts tailored to need and consumers are protected by final disclosures and the associated right to cancel.

d. *Changes to the Model Form to Accommodate Conditions.* If the Board adopts our recommendation to clarify its commentary and require that approval disclosures be required at conditional approval, we further recommend that the Board modify forms H-19 and H-22 to title them "Private Education Loan Conditional Approval", to provide space in which to list lender-specific conditions and amend the text of that form to reflect the conditional nature of the approval.

Therefore, the regulation or commentary should clarify that the Approval Disclosure model forms may contain any institution-specific conditions without affecting the safe harbor protection, so long as they are included in a manner that does not affect the substance, clarity or meaningful sequence of the forms and clauses. We also recommend that the following language be included on the form as examples of model conditional language that would be acceptable on the Approval Disclosure form:

Our approval of your application is subject to:
(1) our verification of the information provided on or in connection with your application and that there have been no material changes prior to disbursement of your loan;
(2) information provided by your school, if applicable, and any changes to such information; and
(3) such other conditions or requirements that arise under applicable law.

The current language in the "Next Steps and Terms of Acceptance" section indicating that the loan offer cannot change should be revised accordingly. The regulation should clarify that disclosures regarding conditions relevant to the approval may be made separately or together with the segregated disclosures.

II. Multi-Purpose Loans. Title X of the HEOA defines "private education loan" as a loan made "expressly" for qualified higher education expenses. Truth-in-Lending Act § 140(a)(7), 122 Stat. 3480. In the Proposed Rule, the Board classified multi-purpose consumer loans as private education loans if the consumer indicates in the loan application that the proceeds will be used "in whole or in part" for qualified education expenses, and the Board requested comment on whether the disclosure requirements of Title X should apply to such loans. 12 C.F.R. § 226.37(b)(5) 74 Fed. Reg. 12471, 12492.

The inclusion of multi-purpose loans creates compliance problems for both large and small financial institutions. Large lenders typically do not have integrated processing and operational systems for all loan products the "lender" offers. The system that processes multi-purpose consumer loans will not have the operational infrastructure to support the detailed disclosure requirements, and it would be unduly burdensome to require that such infrastructure be built. In addition, extensive training of branch representatives would be required for the recognition and processing of such loans because the requirement creates the operational necessity of scrutinizing each application for an indication that it will be used for education expenses, and then forwarding such applications for specialized processing. Small institutions, especially those without existing student loan programs, are unlikely to know that the proposed requirement exists for multi-purpose loans, will not have the capability to deliver the required disclosures, and in all likelihood will not deliver them.

In addition, including multi-purpose general installment loans also creates a significant burden for schools in establishing preferred lender lists for private education loans. The

HEOA, and the Secretary of Education's proposed regulations thereunder, obligates each school to provide detailed information on the private education loan offerings from each lender it recommends. It would be extremely burdensome for schools to gather information about all of the multi-purpose loans used "in part" for higher education expenses from each preferred lender, as that would involve collecting information from numerous and disparate operational units within a bank which do not ordinarily interact in any respect with schools. A school could rarely be confident it has obtained all necessary information about each multi-use loan available through a "preferred lender" that falls under the definition of "private education loan", or relevant modifications over time to such multi-use loans. We believe that the overriding focus on "preferred lender lists" under the HEOA informs the meaning of "expressly" and clearly points to loan products that a school can readily identify and track as education loans and about which it can provide to its students meaningful disclosures.

For these reasons, we request that the word "expressly" in the definition was intended to include loans marketed as student or education loans and not general purpose consumer loans. Title X of the HEOA defines "private education loan" as a loan issued "expressly" for qualified higher education expenses. It does not include—and we do not believe it was intended to include—multipurpose loans. We believe the broader definition in the Proposed Rule will result in unintended and undesirable results. We request that the phrase, "in whole or in part" be removed from the regulatory definition, that multi-purpose loans be excluded from the coverage of all the new requirements for private education loans, and that the definition cover only those loans marketed for use in paying higher education expenses.

III. <u>Self-Certification.</u> The HEOA requires that lenders obtain from the consumer, prior to consummation of a private education loan, a self-certification form. Truth-in-Lending Act § 128(e)(3).

a. *School-Certified Loans.* The self-certification requirement set forth in HEOA and the Proposed Rule may often duplicate the certifications that are provided to the lender by the school, in the case of so-called "school-certified loans." The result would be redundant, unnecessary, and burdensome to all the parties. By a "school-certified loan," we mean any loan where the lender requires from the school in written or electronic form, as a condition of making the loan, a certification of the student's enrollment in the institution as well as certification of the student's need for the requested loan amount. *We request that the Board adopt one of the two following alternative requestions for addressing this problem:*

i. Alternative One. We believe the *best* approach would be for the Board to use the authority granted by the Truth in Lending Act (TILA) to eliminate the self-certification requirement for "school certified loans," as defined above.[2] We believe that the compliance burden created by

[2] Section 105(a) of TILA provides that the Board's regulations "may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the

requiring self-certification for school certified loans is significant enough to invoke the exception or exemption authority, as the Board has done in several other instances in this Proposed Rule.[3] Moreover, by securing a school certification the lender facilitates the important public policy objective of ensuring proper loan amounts, which parallels the focus on preventing over-borrowing in the self-certification process. As such, eliminating the self-certification requirement for "school certified loans" removes an unnecessary burden for schools and consumers while preserving the desired public policy outcome of responsible lending and borrowing.

As part of the above approach, we ask the Board to clarify that for loans that do not involve a school-certification that the self-certification form may be presented to the student by the lender and may be pre-populated with information available to the lender.[4] HEOA requires the school to make the self-certification form available to the borrower upon request and states that the lender may receive the self-certification form from either the student or the school. However, the Proposed Rule does not specify whether the lender may *also* provide the form for the student to complete and submit. In the case where the student has not obtained the form from the school, the lender should be able to expedite the application process by providing the form to the borrower and by pre-populating the form with information available to the lender.

For these reasons, we request that the Board use its authority to eliminate duplicative requirements by exempting from the self-certification requirement loans that the school certifies. We further request that the Board define school certification as written communication, regardless of its method of collection that contains at least the information required in the self-certification form.

Specifically, Sallie Mae proposes:

(1) adding a new definition of "school-certified loan" to proposed 12 C.F.R. § 226.37(b):

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judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." Section 105(f) permits the Board to exempt classes of transactions from coverage by TILA where, in the determination of the Board, coverage under all or part of TILA would not provide a meaningful benefit to consumers in the form of useful information or protection.

[3] See, for example, the Board's proposed definition of "private educational lender" in section 226.37(b), and the Board's proposed treatment of telephone applications under section 226.38(a).

[4] HEOA provides that the form shall be made available to the applicant by the school upon the request of the applicant - but doesn't expressly prohibit others from also providing the form. We believe that the intent of Congress was to ensure the school's cooperation with the education loan process, and was not to create a limitation as to the entities that could provide the form.

"*School-certified loan*" means a loan for which the institution of higher education provides a written communication, regardless of its method of transmission and collection, that includes the information required to be included in the form developed by the Secretary of Education under [section 155 of the Higher Education Act of 1965.]

(2) adding the following to proposed 12 C.F.R. § 226.39(e): "The lender shall not be required to obtain the self-certification form from the applicant where the private education loan is a school-certified loan."

ii. Alternative Two. If the Board does not choose to eliminate the self-certification requirement for school certified loans, an alternative would be for the Board to permit the school to certify to the lender that the consumer has completed and signed the self-certification form. Schools often provide school-certification files to lenders electronically, which may make it difficult for the school to provide the lender with the self-certification form, as signed by the consumer. If the school is certifying enrollment status and financial need to the lender anyway, it is unnecessary to require the school or the consumer also to physically or electronically provide the self-certification to the lender. Instead, we request that the Board clarify that, if the school has obtained the self-certification from the applicant, the school should then be permitted to certify compliance with this requirement directly to the lender within its school certification and receipt of this certification from the school satisfies the lender's obligation to obtain a self-certification from the consumer.

iii. Alternative Three. If the Board does not choose to adopt Alternative One or Alternative Two, we respectfully request that the Board expressly permit the lender to present the self-certification form to the student - - on all loans whether or not "school-certified" - - for the reasons stated under Alternative One, and pre-populate that form with information available to the lender.

b. *Distinction Between "Institutions of Higher Education" and "Covered Educational Institutions"*. The Proposed Rule requires receipt of the self-certification form from students attending "institutions of higher education" but not from those attending "covered educational institutions" that would be "institutions of higher education" if they were accredited. 12 C.F.R. § 226.39(e); 74 Fed. Reg. 12486. In implementing this rule, it is not clear which accrediting authorities are relevant or, accordingly, how lenders should distinguish one group of schools from the other. We request that the Board (a) specify that the lender refer to a Department of Education web site such as http://ope.ed.gov/accreditation/ to ensure uniform

application of the requirements and (b) provide lenders with a 90-day safe harbor for updating systems to accommodate periodic changes to the list.

IV. <u>Use of Estimates and Redisclosure.</u> The Proposed Rule states that, if any information required to make the disclosure is unknown to the lender, the lender must make the disclosure based on the best information reasonably available, and to state clearly that the disclosure is an estimate.

There are occasions unique to student lending when it is necessary for the lender to provide estimated disclosures, as permitted by Regulation Z, based on the best information reasonably available. The regulation should clarify that, as a general rule, when estimates are used, and new information becomes available subsequent to providing the Approval Disclosure that corrects the estimate before the Final Disclosure is provided, that event would not be a prohibited change in terms and would not require a new Approval Disclosure, a new acceptance or a new 30-day period.

In particular, we recommend that the Board provide the following two examples of when the use of estimates is permissible and the resulting discovery of information correcting those estimates does not trigger additional disclosure requirements, as illustrations only, and not as an exhaustive list:

a. Loan Disbursement Date - Unique to private educational loans is the need for the lender to estimate the Annual Percentage Rate (APR) based on the loan disbursement date(s) provided by the consumer in his or her application. The estimate is made necessary because the final disbursement schedule is determined by the school, rather than by the lender. If a new approval disclosure and a new 30-day acceptance period were triggered by a change in the APR (resulting from a change in the disbursement date(s) by the school) when the actual disbursement schedule is established, the date would potentially immediately move back an additional 30 days, and the whole process would begin again. In any case, the impact on the APR of these disbursement date changes would likely be minimal (within regulatory tolerance), and would not affect the more prominent interest rate disclosure.

b. Consolidation Loan Amounts - In the case of consolidation loans, the lender may not know the requested loan amount until very late in the application process and therefore would be required to base much of the information in the Approval Disclosures on estimates. Therefore, we recommend that the Board acknowledge that the principal amount and related terms in the Approval Disclosure for consolidation loans may need to be estimates. Again, for the reasons stated above, it should also be made clear that the lender need not redisclose the Approval Disclosure, triggering an additional 30 day acceptance period, when the lender obtains the final payoff amounts from the lenders of the underlying loans. It would

be of no value to the consumer, and would be a potentially time-consuming and wasteful process, if the disclosure must be repeated.

Accordingly, we ask the Board to delete the proposed carve-out language for "Approval Disclosures" in section 226.17(e) to clarify that: (i) lenders do not incur any liability for providing inaccurate "Approval Disclosures," and (ii) lenders are not required to provide new "Approval Disclosures" if a subsequent event makes them inaccurate before consummation, provided the disclosed term(s) is based on an estimate and is labeled as an estimate in the "Approval Disclosure."

V. Effective Date. The Board has estimated that it will take lenders 40 hours to update systems to incorporate the new disclosure requirements, 74 Fed. Reg. 12488, and has asked for comment on whether the implementation time for the new requirements should be shorter than six months. 74 Fed. Reg. 12487. The new disclosure requirements present a major operational and technological undertaking that will consume many times in excess of 40 hours. Therefore, we strongly urge the Board to allow the greatest possible time to permit lenders to begin complying with the regulation and we urge the Board to publish final requirements no earlier than August 14, 2009.

In regard to loans that are in process (e.g. applications have already been received by the lender) during the transition period between publication of the final rules and the deadline for compliance, we request that the Board adopt clear transition rules that minimize the cost and burdens, and limit the confusion, of the transition. We propose that the new rules be mandatory for applications received after the effective date and optional for applications that have not been consummated by the effective date. It may be necessary, as lenders begin to shift to new forms and systems and adopt new procedures, for customers with loan applications in process who may have been initiated under the old system to receive an Approval disclosure or a Final disclosure under the new system. If this is not permissible, all lenders would have to maintain parallel systems during the transition period, at great cost.

Additional Comments and Concerns

I. Definition of Business Day. Regulation Z contains two definitions of "business day"— one that includes only days on which the lender's offices are open to the public, and one which includes all calendar days except Sundays and specified federal holidays. 12 C.F.R. § 226.2(a)(6). The Proposed Rule would adopt the latter definition "in providing presumptions of when consumers receive mailed disclosures, and for measuring the period during which consumers have the right to cancel a private education loan." 74 Fed. Reg. 12467. Elsewhere in the commentary, the Proposed Rule states that the latter definition is also used "for purposes of § 226.37(d)," 74 Fed. Reg. 12473, which includes not only the presumption for consumer receipt of disclosures, but also the requirement for the lender to deliver disclosures to consumers within three business days following a telephone application or an approval. (We assume that the description at 74 Fed. Reg. 12467 should be expanded to include the period during which the lender must mail required disclosures.)

Many private student loan lenders do not have processing centers open on Saturday, even if customer service is available. Counting Saturday as a business day would, for these lenders, reduce timing requirements from three days to two days. Student lending is by its nature seasonal, with an overwhelming proportion of annual loan volume processed between June 1 and September 30. During this peak period, providing required disclosures within two business days may be impossible to achieve. We request that, for purposes of new Subpart F of Regulation Z, the Board adopt the more general definition of business day under Regulation Z.

II. Telephone Applications

a. *Phone Applications "Initiated by the Consumer".* The Proposed Rule provides that, in the case of a telephone application "initiated by the consumer" that is approved, the lender may provide the Approval Disclosure in lieu of the application disclosure if it can do so within 3 business days following the telephone application. 74 Fed. Reg. 12472; 12 C.F.R § 226.37(d)(1)(ii). The Board requests comment on the treatment of solicitations initiated by the lender. *Id.* For the purpose of providing required disclosures it is not clear why the identity of the initiator of the application call, for the same loan application on the same terms, would make a difference. In addition, verbal delivery of the required disclosures would not be meaningful to the consumer.

   We believe the majority of telephone applications for private education loans are actually initiated by the *consumer*, not the lender. Students who are in need of postsecondary educational loans reach out to lenders to obtain financing. Often that is done by phone. There is no reason to treat an application that is taken over the phone differently if the phone call was initiated by the consumer. More importantly, the inability to employ one or both of the enumerated exceptions in section 226.37(d)(1)(ii) would make compliance with the requirements of the regulation virtually impossible in the case of most telephone applications, and would be a severe hindrance to both lenders and consumers.

   Accordingly, we request that the Board either delete the words "initiated by the lender" from its commentary, 74 Fed. Reg. 12472, and proposed 12 C.F.R § 226.37(d)(1)(ii) or revise the phrasing to read "whether initiated by the consumer or the lender." Either change would make the telephone application disclosure rules uniform for all telephone applications.

b. *Denied Phone Applications.* In lieu of providing disclosures on or with any application or solicitation, the Board is proposing to give the lender several options in the case of certain telephone applications or solicitations. As proposed, the lender may, at its option, disclose the information in section 226.38(a) orally, or, "the lender must provide the disclosure or place them in the mail no later than three business days after the consumer requests the credit." This is a reasonable approach to the treatment of telephone applications, and—subject to our comment

below about who initiates the call— we support the Board's exercise of its authority to provide these alternatives.

We believe that clarification is needed to address the circumstance in which a telephone application is denied within three business days of the telephone call. In that situation, the application disclosures should not be required. Without such an exception, the consumer would be provided with an application disclosure contemporaneously with an adverse action notice. We believe this would cause nothing but confusion (the consumer will be left wondering whether or not the loan has been denied) and would serve no useful purpose.

Our recommendation should be viewed as analogous to the Board's Proposed Rule (which we support) to permit the lender to mail the Approval disclosures within three business days of application, rather than providing the unnecessary Application disclosures, if the loan has been approved. As noted in the supplementary information, in such a case "the application disclosure requirements would not provide a meaningful benefit to consumers in the form of useful information or protection." The same would be true on the flip side, if the loan is promptly denied.

Accordingly, we request that the Board clarify that, for denials of telephone applications, the requirements of proposed Subpart F of Regulation Z do not apply.

III. **226.38—"As Applicable".** Proposed comment 38-1 states that disclosures required under section 226.38 need to be provided only as applicable, except where it specifically states otherwise. The example provided in the Commentary is that the disclosure of the availability of federal student loans in 38(a) and (b) disclosures is not required for consolidation loans, where the disclosure is inapplicable.

We recommend that the Board provide in this Commentary section a more thorough, *nonexclusive* list of disclosures that do not need to be provided because they would be inapplicable in certain cases.

The Board has stated in the section-by-section analysis under section 226.39(e) that the disclosure regarding the self-certification form in section 226.38(a)(8) need not be provided for consolidation loans nor for loans to students attending covered educational institutions that do not meet the definition of institution of higher education. This should be made explicit in the Commentary.

Further clarification is also needed to address loans where the self-certification disclosure in section 226.38(a)(8) is not necessary, and where other disclosures, including those required by sections 226.38(a)(6) and (b)(4), are not required. We recommend that the Board state in the Commentary that these disclosures are inapplicable for the following categories of loans:

- Consolidation Loans

- Loans to cover past due amounts
- Bar study loans
- Residency loans
- Relocation loans

However, as we are unlikely to have thought of every situation that may arise, it is important that the Board state that the list is nonexclusive.

IV. Disclosure of Interest Rates on Web Sites. Title X and the Proposed Rule requires the disclosure of interest rates as part of the Application Disclosure. Truth-in-Lending Act § 128(e)(1)(A); 122 Stat. 3483. For web sites and telephone applications, the disclosure is required to be in "real time"—accurate when viewed or disclosed. Proposed Comment 38(a)(1)(i)-1; 74 Fed. Reg. 12475. This requirement will be very difficult to implement.

As a practical matter, changes to web sites occur on scheduled release dates that, in all likelihood, will not match up with interest rate change dates. Although rates can change frequently, the systems cannot make the change so promptly on the web page such that it is concurrent with the actual change in the rate being offered. As a result, there would be many times during transitions between offered rates that the rate "being viewed" on the web is no longer the current rate. If many different private loan products are being originated, as has historically been the case for Sallie Mae, this is difficult to do system-wide in a day's time. Historically, in connection with web sites regular updates have been made, but "as of" dates have been used to disclose rates.

Accordingly, Sallie Mae requests that, the interest rates presented on web sites be permitted to be "as of" a particular date not more than thirty (30) days prior to the date when the rate is viewed. An alternative approach might be to require that it be stated as "good as of" a particular date, with a means of contacting the lender to determine the current rate.

V. Payment Deferral Options. The Proposed Rule requires that the Application Disclosure and the Approval Disclosure contain "a description of the length of the deferment period, the types of payments that may be deferred . . . a description of any payments that are required during the deferment period [and] disclos[ure] of any conditions applicable to the deferment option, such as that deferment is permitted only while the student is continuously enrolled." 12 C.F.R. 226.38(a)(3)(ii), 226.38(b)(3)(iii); 74 Fed. Reg. 12476; Comment 38(a)(3), 74 Fed. Reg. 12511. Deferment policies memorialized in the borrower credit agreement or promissory note typically contain nuances for unusual situations and specific details about calculation of the deferment period, and grace period, and additional deferment permitted for additional schooling, internships, and/or once repayment begins. We request that the Board clarify that the required details for the Application Disclosure and the Approval Disclosure (in addition to information included in the table in the model form) are: (a) length of maximum initial in-school deferment period for the loan program; (b) enrollment requirements for maintaining chosen deferment options, and (c) an instruction to consult the credit agreement or promissory note for further details.

VI. Disclosure of Forbearance Policies. The Proposed Rule requires the disclosure of any deferment or forbearance available after a private student loan enters repayment. Proposed Comment 38(a)(3)-2, 74 Fed. Reg. 12476, 12511. Lender deferment and forbearance policies during repayment periods (such as return-to-school deferment, armed forces deferment and hardship forbearance) typically have detailed eligibility and other requirements. In addition, because of their varied requirements, granting these deferments and forbearances is commonly reserved to the discretion of the lender. Given their varied nature and detailed requirements, we believe that disclosure of these policies is not feasible beyond a statement of their general availability. We request that the Board clarify that the lender needs to disclose only whether forbearance and/or deferment policies may be available during loan repayment and if they may be, include a direction to contact the loan servicer for more details.

VII. Borrower Benefits. Some private loan lenders offer borrower benefits in the form of interest rate reductions provided in return for making a scheduled number of payments, making payments via automatic debit or some other desired behavior on the part of the borrower. These benefits are post-closing incentives that actually come into play only based on subsequent events triggered by consumer performance, which cannot be known by the lender at the time of disclosure. Given the significant uncertainty about whether such post-closing incentives will be apply to a loan, we believe it is inappropriate to include such items as part of rate disclosures.

In order for consumers to be able to use the disclosures under Subpart F for the intended purpose of comparing loan offerings from different lenders, we request that the Board prohibit lenders from taking such benefits into account in calculating and making any of the required disclosures. Specifically, we request that the Board clarify that disclosure of the interest rate in the Approval Disclosure and the Final Disclosure not include the effect of any borrower benefits. Likewise, with respect to the disclosure of the total cost examples in all three required disclosures, we request that the Board specify that in calculating total cost examples in any of the disclosures that Subpart F requires not take borrower benefits into account in calculating such examples.

VIII. Acceptance and Cancellation

a. *Ability to Exercise Rights to Accept and Cancel.* The Proposed Rule states that if there are multiple applicants for a loan, the required disclosures may be delivered to any primary obligor on the loan. 12 C.F.R. § 226.37(f); 74 Fed. Reg. 12473. The Rule does not, however, clarify which of the applicants may exercise the rights to accept and cancel the loan. The primary obligor, who receives the disclosures, will be the applicant best informed of the approval and cancellation rights and therefore in the best position to exercise those rights. We request that the Board clarify its comments to Sections 226.37(f), 226.39(c), and 226.39(d) by specifying that only the applicant receiving the required disclosures may exercise the right to accept and

the right to cancel set forth in the Approval Disclosure and the Final Disclosure, respectively.

b. *Methods of Acceptance.* The commentary to the Proposed Rule states that lenders may specify methods of loan acceptance, and requires that the lender disclose the permitted methods to the applicant. Proposed Comment 39(c)-2. 74 Fed. Reg. 12484, 12513. The only restriction placed on methods of acceptance is that electronic acceptance may not be the sole method offered. *Id.* According to the supplementary information, the reason for this restriction is that "the Board believes that not all consumers have access to electronic forms of communication and that a form of acceptance in addition to electronic communication is appropriate."

   Increasingly, applicants prefer electronic communication with financial institutions, and the applicants applying for private educational loans are in a demographic that is disproportionately inclined that way. We believe there is no reason not to permit them to choose to communicate electronically with the institution –whether to receive disclosures electronically or to notify the institution of the acceptance of loan terms. Consent to electronic communication is typically, if not always, provided in electronic form by the consumer while interacting with the lender in an online transaction. When a consumer consents to engage in electronic transactions with the lender, whether electronically or otherwise, the consumer is clearly indicating a preference for, and the capability to undertake, electronic transactions/communications with the lender, and subsequent acceptance under section 226.39(c) should be permissible as well. In this situation, the Board's rationale for prohibiting electronic consent as the only means of consent would not be apposite.

   Therefore, we request the Board to state in the final rule that where the applicant has consented to electronic transactions with the lender, it is permissible for the lender to require electronic acceptance of the loan as the sole method of acceptance, if it so chooses.

c. *Cancellation Period.* Title X and the Proposed Rule provide for a three-day cancellation period following receipt of the Final Disclosure. No loan disbursement may be made during that period. Truth-in-Lending Act § 128(e)(7-8); 12 C.F.R. § 226.38(c)(4).

   i. Delayed disbursement. The prohibition against disbursement of funds until the end of three business days can result in as much as six days elapsing before the student can obtain the funds, since the lender must wait a reasonable time after expiration of the cancellation period to be satisfied that the consumer has not canceled. We are concerned that adding so much time to the process could be harmful to students. Because many students turn to private education loans after all other sources of aid have been exhausted, they frequently do not have much

time to obtain loan funds before they may be subjected to school-imposed late fess, restrictions on class registration, and inability to obtain transcripts or other records.

Some lenders permit students (or the school on the student's behalf) to return the loan proceeds within a defined period after the disbursement of the loan, without assessing any interest or fees. We therefore request that the regulation permit lenders the flexibility of either delaying disbursement as proposed (and as we have recommended above) or, in the alternative, establishing a policy, to be conspicuously disclosed to the consumer, allowing for the return of the loan proceeds within a defined time without being assessed any interest or fees.

IX. Date for Providing Required Disclosures to Schools. The Proposed Rule requires that lenders deliver to covered educational institutions with which they have a preferred lender arrangement the disclosures contained in the Application Disclosure (or a subset thereof) no later than January 1 of each year. 12 C.F.R. § 226.39(f). The Board has requested comment on the appropriateness of the January 1 deadline. Sallie Mae believes that disclosures provided by that date will not be meaningful to covered educational institutions because Lenders do not typically finalize product offerings for the upcoming academic year until between January and April. In addition, schools operate on an academic year that typically begins in June or July, not a calendar year, and typically have not chosen their preferred lenders for the upcoming academic year until May or June. It is also the case that lenders sometimes are not aware that a school has placed them on a list of preferred lenders. Therefore, we request that Board consider allowing lenders to deliver the required disclosures no later than April 1 of each year, or, to the extent they have not been selected as of April 1, within 30 days after the lender is notified that it has been selected as a preferred lender for the covered educational institution.

X. Co-Branding and Promissory Note. In the Proposed Rule's co-branding restrictions, the Board clarifies which uses of a school's mascot, logo, name, etc. (collectively, "School Identifiers"), would use School Identifiers in a potentially misleading way. Proposed Comment 39(a)-1 and 2; 74 Fed. Reg. 12483, 12512. In its commentary, the Board makes clear that the borrower promissory note is subject to the co-branding restrictions, provides examples of uses of school names in promissory notes, and specifies conditions under which certain disclosures need to be made in connection with the use of School Identifiers. *Id.* Note, however, that all or nearly all lenders provide the school name in their student loan promissory notes or combined loan application and promissory note. We request that the Board clarify that the use of the school name in congregated loan information in the promissory note or combined application and promissory note, in a font no more conspicuous than other information displayed on the same page, is not potentially misleading and does not require any disclosure about use of the school name.

XI. Model Form Clarifications

a. Model Forms Generally. We appreciate the inclusion of sample forms, to provide greater clarity regarding the use of the models. We request that the samples be enhanced to provide examples of the use of loan origination fees, to demonstrate how the Board intends for these amounts to be disclosed as part of the itemization of the amount financed.

b. *Model Form H-21*

   i. The model Application Disclosure form H-21 provided by the Board, in the "Next Steps" section, item "2" states "[t]o Apply for this Loan, Complete the Application and the School Certification Form. We request clarification that the Board intended to refer to the "Self-Certification" form in this instance as that is the language used elsewhere in the Proposed Rule.

   ii. The Proposed Rule requires a lender to disclose that a covered educational institution may have school specific education loan benefits and terms not detailed on the disclosure form. However, model form H-21 provides a statement after this disclosure that directs an applicant to contact his or her financial aid office or visit the DOE for more information on these benefits. This is potentially misleading to consumers as the DOE website will not contain information on school specific education loan benefits.

c. *Model Form H-22*

   i. The Proposed Rules and Model Form H-22 contemplate providing the applicant with the specific date on which the terms of the offer made by the lender will expire. Both the Proposed Rule and the Form also provide for a paragraph of text that states that the terms of the offer are "Good for 30 days." These two requirements are redundant and we encourage the Board to specify that lenders need only provide the date on which the terms of the offer will expire, with an explanation that the terms of the offer may change if not accepted by that date, along with information regarding the method(s) of acceptance. In the alternative, we request that providing a specific date through which the offer is "good" and a statement that reads "you have 30 days from the approval date to accept this offer" may be confusing to consumers and therefore the first sentence provided for in form H-22 in the Next Steps section, paragraph # 2 be revised to read "you have until the date set forth on the left to accept this offer." This will help to avoid any confusion between the specific date provided and "30 days from the approval date" as the consumer may not know the "approval date."

ii. The proposed language in model form H-22 in the third sentence in the Variable Rate section under Reference Notes refers to "certain fees you must pay to obtain this loan." We request that the Board change "must pay" to "may be required to pay" as many lenders will offer loans without fees.

XII. Administrative Matters

a. *Formatting of Disclosures*

i. *Double-Sided Printing.* Proposed Comment 25 to Appendix H of Regulation Z ("Comment 25") contemplates that the disclosures will printed on two 8 ½ x 11 inch sheets of paper. 74 Fed. Reg. 12514. In order to reduce paper usage and paper and mailing costs, we request that the Board clarify in Comment 25 that the disclosures may be printed on one double-sided piece of paper. We also believe that any reduction in usability will be mitigated if the first page of the disclosure directs the applicant to review the other side.

ii. *Adding Additional Information.* Although we have heard commentary from the Board that it has concerns about lenders adding additional information to the disclosures beyond what is specified in the Proposed Rule and the Model Forms, in Sallie Mae's experience, there are additional data elements that will assist in the applicant(s)' understanding of the terms of the loan without detracting from the integrity of the disclosure or the existing information in the disclosure. Such information includes: date printed, loan identifier, loan type/program, loan acceptance methods, primary applicant's account number, the name and address of the cosigner and a disbursement schedule containing dates and amounts of the loan disbursements requested by the student and certified by the school's financial aid office. We request clarification that the addition of such information to the disclosures is permissible. This information, which is useful to the consumer, should be permissible on the form without the loss of the safe harbor protection, provided that it is included in a manner that does not affect the substance, clarity or meaningful sequence of the forms and clauses.

Thank you for the opportunity to share our views with the Board regarding the Proposed Rule. If you have any questions or wish to discuss these requests and comments, please do not hesitate to contact me.

Respectfully submitted,

Dana Albertini
Senior Vice President and Associate General Counsel
Sallie Mae