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September 21, 2009

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

Re: **Docket Number R-1364**
Interim final rule
Regulation Z
Truth in Lending Act
74 *Federal Register* 36077 July 22, 2009

The American Bankers Association (ABA)[1]is pleased to provide our comments on the Federal Reserve Board's (Board) interim final rule implementing provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act) that became effective August 20, 2009. The interim final rule primarily pertains to advance notice of rate increases and changes in terms for credit cards and the time consumers are given to make their payments on open-end consumer credit plans.

The industry, having already implemented these provisions that went into effect on August 20, 2009, are reviewing practices and redesigning their products in anticipation of the next phase of the Credit CARD Act related to the provisions that go into effect February 22, 2009. While rules are not yet clear, the industry is endeavoring to manage their businesses within the spirit of the law. Several major credit card companies, for example, have recently announced new products that are simpler and more basic or are specifically designed to assist customers in manage their spending and debt.

Section 226.5(b)(2)(ii) General disclosure requirements: Time of disclosure: Periodic statements.

The interim final rule requires creditors to adopt reasonable procedures designed to ensure that periodic statements are delivered at least 21 days prior to the payment due date and the date on which any

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

grace period expires. The Commentary provides that the "payment due date" means the date by which the creditor requires the consumer to make the required minimum periodic payment in order to avoid being treated as late for any purposes with two exceptions: if the creditor provides a "courtesy period," that is, a lender-provided additional period after the due date during which a late payment fee will not be assessed, or a period required by a state or other law during which no late fee may be imposed until after a certain period after the due date.

Definition of "grace period." In implementing this provision, there was much confusion between "grace period" and "courtesy period." Under Regulation Z, grace period refers to the period during which credit extended may be repaid without interest being charged and typically applies to credit cards. However, state laws often use the term grace period to mean the period ***after*** the due date during which a late fee may not be imposed. Some banks mistakenly believed that the interim final rule requirement that statements be provided 21 days prior to the "date on which any grace period expires" meant that statements had to be sent 21 days prior to the end of the period *after* the due date, as that period is typically referred to as a grace period. Indeed, the Board found in its testing of consumers in 2007 that some participants "incorrectly thought that the 'grace period' referred to the amount of time after the due date during which they could make a payment without being charged a late fee."[2]

We again recommend that the Board identify the period during which no interest is charged as the "interest-free" period, as this is a more accurate description and more likely to convey the true nature of the time period and the nature of the transaction. It will also avoid confusion with the more common understanding of the term "grace period." Indeed, participants in the Board's Denver, Colorado interviews favored this term "because it was more descriptive."[3] The Board should then re-label "courtesy period" as "grace period" and also include within that term the period required under state or other laws during which late fees are prohibited.

Definition of "payment due date." We also note that the exceptions to the definition of "payment due date" related to these periods may cause consumer confusion because of the delay in relaying the notice of a late payment fee. Under the interim final rule, lenders will not know whether a late fee will be assessed until after it must send the next billing statement. For example, if a payment is due the 21st of January, but a late fee may not be assessed until the 7th of February, the notice that must be sent February 1st will not include the notice of a fee for a late

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[2] *Design and Testing of Effective Truth in Lending Disclosures,* (Macro) pp.11, 23
[3] *Ibid.* 31.

January payment. The fee for the January late payment will not appear until the March statement. This may cause confusion or irritation for customers. At this time, we are not recommending that the Board change the final rule, but that it review at a later time if it appears customers are confused.

Section 226.9(c)(2) Subsequent disclosures requirements: Change in terms.

Under the interim final rule, subject to certain exceptions, card issuers must send out written notice of any significant change in terms or an increase in the required minimum periodic payment 45 days prior to the effective date of the change. The notice must include instructions for rejecting the changes. Exceptions to the rule include:

- Termination of the account or suspension of future credit privileges;
- Promotional rates where advance written disclosures are provided;
- Variable rates so long as the index is not under the control of the creditor and is available to the general public; and
- Increases in the APR due to the completion of a workout or temporary hardship arrangement so long as the rate does not exceed the original rate and pursuant to a written agreement.

Application to credit card accounts. The interim final rule applies the change in terms rules only to "credit card accounts" and excludes other types of open-end consumer credit such as home equity lines of credit. We agree with the Board that this approach is consistent with the statutory language and the Board's historical treatment of home equity lines of credit and other non-credit card open-end credit. Section 127 (c) of the statute requires certain disclosures to be provided on applications and solicitations offering a "*credit card account*. . . under an open end consumer credit plan." (Emphasis added.) In implementing this provision, the Board, in Section 226.5a(a)(5) of the regulation specifically excludes certain accounts such as home equity lines of credit accessible by credit card. In contrast, other sections of the statute addressing credit card protections (e.g. Sections 132, 133, and 134) related, for example, to liability limitations for unauthorized use of credit cards, apply to "credit cards," not "credit card accounts." Under the regulation, "credit card" is defined as "any card, plate. . .that may be used from time to time to obtain credit" even if, for example, the card is accessing a home equity line of credit. Thus, they are subject to the credit card liability limitations and other protections, but not the application disclosure requirements applied to credit card accounts.

Moreover, the statute already contains protections for home equity lines of credit that are inconsistent with the new provisions in the statute. Applying the statute's protections make no sense for home equity lines of credit. Section 127A of the statute already imposes strict requirements on home equity lines of credit, including prohibitions on interest rate increases that are even more limited than those the statute applies to credit card accounts. For example, default rate increases are not permitted for home equity lines of credit as they are under the bill. Further, the minimum payment disclosures make no sense for home equity lines of credit. Finally, during hearings and the legislative process, both Congress and the President were exclusively focused on credit card accounts and gave no indication of any intent to apply any of the provisions to home equity lines of credit or other open-end loans that are not credit card accounts.

Workout or temporary hardship arrangements. Under the interim final rule, for the exception for work-out arrangements to apply, the card issuer must provide written notice prior to the commencement of the work-out plan. This means that any work-out arrangement, including a reduction in the minimum payment amount or the interest rate, may not commence, as a practical matter, until written notices are provided. However, card issuers often will provide immediate relief to customers by phone and follow up with a written confirmation. The delay caused by the interim rule harms consumers who often need immediate relief. To allow customers to have immediate relief, we suggest that the final rule not require a written agreement prior to commencement of the relief and instead require that written confirmation be provided after the agreement is made.

In addition, the final rule should permit the exception to apply when other significant terms other than the APR are involved. For example, the minimum payment amount might increase upon completion of a workout arrangement. Advance notice should not be required.

The Board should also clarify that the provision only applies to work-out arrangements made after August 20, 2009, the effective date of the rule. Lenders should not be penalized, for example, for not providing a written agreement or confirmation when they in good faith provided relief to customers on the basis that interest rates or other provisions would apply upon completion of the work-out plan.

We also suggest that the final rule specifically except from the provision or include under the meaning of "temporary hardship" rates decreased pursuant to the Servicemembers Civil Relief Act (SCRA) for the reasons outlined in the Board's and OTS's proposed amendments to Regulation AA (Unfair or Deceptive Acts or Practices) published May 5, 2009. Under SCRA, interest rates for loan obligations made before entering military service are subject to a 6 percent ceiling during a borrower's period of active military duty. The agencies observed that not permitting the rate to revert to the original rate after the end of active military duty would be "inconsistent with the plain language of the SCRA." We agree and strongly suggest that the Board adopt the same approach with regard to implementation of the Credit CARD Act.

The Credit CARD Act does not specifically include this proposed exception as its interest rate restrictions largely reflect Regulation AA as adopted in December 2009 and in effect when the House and Senate passed their bills and the President signed the final bill. It was only subsequent to the Act's passage in the House that the Board and OTS proposed to include an exception for rate increases related to SCRA. Comments were not due until June 4, 2009 -- after passage of the Credit CARD on May 22, 2009. Final rules were never adopted given passage of the Credit CARD Act. While the Senate passed its version of the bill on May 19, 2009, after the proposal was released, it may have been relying on rules already adopted by agencies and did not consider rules that were only in proposed form. We believe that if the rule had included the SCRA exception, given that SCRA's plain language, the bills would have included an exception. In any case, the Board has the discretion under Truth in Lending Act to add this exception.

Promotional rates. The exception for promotional rates requires that prior to commencement of the promotional rate, the creditor must disclose in writing the length of the period the promotional rate is in effect and the APR that would apply after the expiration of the period. However, there are instances when it may not be possible to provide the disclosures in writing, which may discourage popular promotional rates. Accordingly, the Board should provide flexibility for these situations.

For example, the requirement that disclosures be provided "in writing" means that the creditor must comply with the Electronic Signatures in Global and National Commerce Act (E-Sign Act). However, most retail store websites which may offer promotional rates on certain purchases, do not comply with the E-Sign Act in order for customers to make purchases, as it is not necessary and is time-consuming and inconvenient to customers. Customers receive disclosures online and after the transaction is completed. A requirement to comply with the E-Sign Act will discourage popular promotional rates because it adds cost, slows the transaction, and is inconvenient to customers.

For these reasons, we recommend that the Board make an exception to the requirement to comply with the E-Sign Act as it has for certain other disclosures under Regulation Z. (Sections 226.5a, credit and charge card applications and solicitations, 226.5b, disclosures for home equity lines of credit; 226.16, advertisement requirements for open-end credit; 226.17(g) disclosures for mail and telephone orders; 226.19(b) disclosures for adjustable rate mortgages; 226.24, advertisements requirements for closed-end credit).

In addition, it is not possible to provide disclosures in writing for catalog and phone promotional offers at the time of the offer. This means that under the interim final rule, the promotional rate must be delayed until the written disclosures have been provided. Accordingly, the Board should not require that the disclosures be provided in advance in these instances, so long as they are provided subsequently, for example, in a billing statement. This will allow promotional offers to take place immediately.

Finally, for point of sale promotional offers and direct mail solicitations, it may not be possible to disclose the annual percentage rate that will apply after the end of the promotional period because that rate may be determined subsequently and may vary depending on the customers' profile. The final rule should allow the creditor to provide the highest APR that might apply, even if the customer may qualify for a lower rate.

Other exceptions. The interim final rule requires that the 45-day advance notice of the change in terms also include instructions on how customers may reject the changes. However, there are instances when the option to reject is simply not applicable or practical. Accordingly, the final rule should not require disclosures of an option to reject the terms.

First, the final rule should make clear that lenders need not provide a notice of a right to reject an interest rate increase if the increased rate is only to apply to transactions made 14 days after transmittal of the notice. Since there is no right to reject the increased interest rate for transactions made 14 days after transmittal of the notice, it makes no sense to provide a notice of a right to reject.

Second, the final rule should make an exception and not require an advance notice of a change in terms if a lower rate than the once disclosed in the application and contract is initially applied in error, and the issuer applies the disclosed rate going forward.

Section 226.9(g)(2) Subsequent disclosures requirements: Increases in rate due to delinquency or default or as a penalty.

Under the interim final rule, with limited exceptions, card issuers generally must provide a 45-day advance notice of a rate increases due to delinquency or default and allow the customer to decline the new rate and pay off the balance over time at the original rate. However, if the customer fails to make a required minimum periodic payment within 60 days after the due date, the new rate may apply to the existing balance. We recommend that the final rule clarify that card issuers may provide a notice that combines the rate increases on existing and on future balances so that card issuers may provide one notice advising the customer that the rate will be increasing in 45 days on new transactions and also on existing balances if a minimum payment is not paid within 60 days.

Under final comment 3 to Section 226.9(g) of Regulation Z adopted in December 2009, the 45-day notice of change in term required under Section

226.9(c)(2)(iii) may be combined with the notice required under Section 226.9(g) when a rate is increased due to a penalty. This would occur when penalty pricing has been triggered by a late payment, for example, and other terms are changing, for example, the APR on new transactions. In addition, proposed changes to the Commentary to Section 226.9(g) (Comment 1.iii) published on May 5, 2009 clarified in an example that if a customer triggers a penalty rate, for example, by making a late payment, the card issuer may combine its notice that a penalty rate will apply to future transactions with its notice that the penalty rate will also apply to existing balances if the customer is more that 30 days late (60 days under the Credit CARD Act). However, the interim final rule could be read to require that the 45- day notice of a rate increase due to a penalty rate cannot be given until the customer is at least 60 days late, in effect extending the advance notice from 45 days to 105 days. We suggest that the Board in the final regulations clarify that the notices may be combined as provided in the final rule and earlier proposed amendments to the Commentary.

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ABA appreciates the opportunity to provide our comments to these important clarifications to Regulation Z.

Sincerely,

Nessa Feddis

Nessa Eileen Feddis