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December 20, 2010

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

Re: Docket No. R–1393 and RIN No. 7100–AD55

Dear Ms. Johnson:

We are partners in the Washington, DC office of the Hudson Cook LLP law firm. Our practice concentrates on consumer financial services, privacy, fair lending, and consumer protection issues. Together, the two of us have more than 70 years' experience working on issues under the Equal Credit Opportunity Act ("ECOA"). Each of us has served as the Associate Director for Credit Practices at the Federal Trade Commission, with responsibility for the enforcement of the ECOA and its implementing regulation, Regulation B. Because of our experience, we are aware of the circumstances for women that led to the enactment of the ECOA in 1974, and its amendment in 1976.

We appreciate the opportunity to comment on proposed amendments by the Board of Governors of the Federal Reserve System (the "Board") to the Regulation Z provisions that implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "Credit Card Act"). Our comments are directed to the proposed amendments to the "Ability to Pay" provisions in section 226.51(a), which implement the Credit Card Act requirements that card issuers assess a consumer's ability to pay before opening a new credit card account or increasing the credit limit on an existing account.[1]

[1] 12 CFR § 226.51(a).

Currently, section 226.51(a)(1) requires a card issuer to consider a consumer's ability to make the required minimum periodic payments under the terms of an account based on the consumer's income or assets and current obligations. The Board proposes changes to this requirement and related provisions to require card issuers to consider only the consumers' "independent" ability to pay. The proposed amendments would preclude the card issuers from considering the consumer's household income or assets except to the extent that a federal or state statute or regulation grants the applicant an ownership interest in the particular income or assets.

The proposed amendments would preclude a stay-at-home spouse, who is still predominantly the wife, from establishing credit in her own right. As a result, the proposals would resurrect barriers to credit for married women that Congress abolished almost forty years ago. Congress was well aware of those barriers when it first considered the enactment of the ECOA in 1973. Relying on hearings held by the National Commission on Consumer Finance in May, 1972 and Federal Deposit Insurance Corporation hearings in December, 1972, the Senate report on the ECOA identified one of the problems women faced: "Women who are divorced or widowed have trouble reestablishing credit. Women who are separated have a particularly difficult time since their accounts may still be in the husband's name."[2] The proposed "ability to pay" amendments would put many women back in that predicament.

While the percentage of married women who work outside the home has increased significantly since the ECOA's enactment, a substantial number of women do not work outside the home, or work part time and/or have incomes that are substantially less than their husbands' income. Even when women earn as much or more than their husbands, it is not uncommon for both spouses to rely on their joint incomes and assets for credit card expenditures and payments. The proposed amendments ignore these realities.

The proposed amendments would also adversely affect military families. When a member of the military is deployed overseas, that member's spouse must manage the household financial matters alone. While some service members may anticipate the potential need for a power of attorney in that situation, others may not consider it or may rely on the fact that both spouses have equal access to their joint incomes and accounts. Even if a married woman acts under a power of attorney for her deployed husband, she may not understand the negative implications of providing only her income when applying for a credit card. If a non-deployed military spouse becomes widowed or divorced and has been unable to establish her own credit history, she will face the predicament that concerned Congress prior to the enactment of the ECOA.

With the technological advancements that have refined risk assessment capabilities, factors such as a lack of a credit history may take a significant period of time to

[2] S. Rep. 93-278 (June 28, 1973).

overcome. Stay-at-home spouses and military members would suffer the greatest negative effects of the Board's proposed amendments.[3]

The Board recognizes that the proposed amendments are inconsistent with the way that creditors have interpreted Regulation B for the past 35 years:

> [T]he Board clarifies that Regulation B does not compel a card issuer to consider spousal or other household income when considering an applicant's ability to pay under either § 226.51(a) or (b), unless, for example, the spouse or household member is a joint applicant or accountholder or state law grants the applicant an ownership interest in the income of his or her spouse. Furthermore, the Board clarifies that card issuers would not violate Regulation B by virtue of complying with the requirements in § 226.51(a) or (b). Thus, to the extent that a card issuer is not permitted to consider spousal or other household income when evaluating a consumer's ability to pay under § 226.51, the card issuer's failure to consider such income when performing that evaluation does not violate Regulation B.[4]

We believe the Board's new interpretation ignores the reason why creditors have interpreted Regulation B as requiring consideration of spousal or household income. Creditors' long-standing interpretation has reflected the Congressional goal of enabling married women to establish credit in their own right by relying on household income and assets.

We recognize that the Credit Card Act Ability to Pay provisions for underage consumers reflect a Congressional policy determination that all consumers under the age of 21 warrant special protection. That policy determination is reflected in the Credit Card Act provisions that require a credit card issuer to obtain financial information indicating that an underage consumer without a cosigner has an *independent* ability to make the required payments.[5] As a result of this provision, all consumers, regardless of their marital status, must wait until they are 21 to begin to build their own credit card histories unless they have independent ability to make the required payments or they have a qualified co-signer. Although this special treatment will adversely affect married underage consumers who do not work outside the home or whose independent incomes are insufficient, it is based on a Congressional policy determination, and its adverse affect will end once they are 21.

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[3] In recognition of Congress's concern about the ability of married woman to establish their own credit histories, Regulation B requires creditors to furnish tradeline information to consumer reporting agencies on authorized user spouses. 12 CFR § 202.10. While this requirement has helped married spouses who do not work outside the home, it still requires the working spouse to obtain credit, and it does not assist spouses of deployed military servicemen who need access to credit during the deployment.

[4] 75 Fed. Reg. 67458, 67474 (Nov. 2, 2010).

[5] 15 U.S.C. § 1637(c)(8)(B).

There is no indication that Congress was equally concerned about special protection of consumers who have attained the age of 21. In fact, as the Board observes, the Credit Card Act ability to pay provisions for those consumers do not require that the consumer's financial information indicate an *independent* means of repaying the credit card obligation. Rather, the provisions require only that the card issuer consider "the ability of the consumer to make the required payments."[6] The Board recognizes that the difference in language "could be interpreted as establishing a less stringent standard for consideration of household income if the consumer is 21 or older."[7] The Board, however, rejects this interpretation in its proposed amendments, despite the fact that the statutory language supports this distinction.[8] Instead, the Board relies upon the phrase "the ability of the *consumer*" as an indication that "Congress intended card issuers to base this evaluation only on the ability of the consumer (or consumers) applying for a loan."[9] The Board ignores the plain language -- and that this phrase means only that the card issuer's evaluation must be based on the ability of the consumer to pay. The phrase does not explain *what* financial information concerning the consumer's ability to pay could be considered in the card issuer's evaluation. The Board's statement reads into the statutory language an additional requirement ("independent financial information") that is absent from the actual wording of the Act. The Board does not explain why it believes Congress would use different language in two separate ability to pay provisions enacted at the same time if Congress intended the provisions to have the same meaning.

In fact, there are clear reasons why Congress did not require card issuers to rely upon the consumer's independent income unless the consumer is under 21. First, Congress neither heard testimony nor received other evidence that consumers over 21 have experienced difficulty paying their credit card obligations when card issuers have relied on a consumer's spousal or household income in issuing a credit card or adjusting credit limits.[10] Second, as Congress apparently realized, the long-standing Congressional goals of enabling spouses who do not work outside the home are furthered by an interpretation of the ability to pay provisions that allow creditors to rely upon a consumer's household or spousal income. Finally, there is nothing to indicate that, when enacting the Credit Card Act, Congress intended to repeal or modify the ECOA Regulation B provisions that require special treatment of spousal participation in credit transactions.[11] As the Board notes, the proposed amendments will affect credit card issuers differently based on whether their credit card applications request the applicant's "household income" or

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[6] 15 U.S.C. § 1666.
[7] 75 Fed. Reg. at 67474.
[8] *Id.* (Emphasis added.)
[9] *Id.*
[10] There is no basis for imputing to the credit card industry the reported practices of mortgage lenders in approving applications that were made without adequate documentation of an applicant's ability to make payments on the promissory note and escrow payments.
[11] 12 CFR § 202.10, discussed in n. 3, *supra.*

simply ask for "income."[12] Such an arbitrary effect demonstrates that the proposed amendments are unfair, will invite some card issuers' circumvention through vague terminology, and at the very least will cause widespread confusion.

In sum, these proposed amendments are unnecessary to further the Congressional purposes behind the ability to pay requirements. The proposal undermines 35 years of progress for married women (and married men if they do not work outside the home) and may unfairly disadvantage members of the military. Because the ability to pay standards proposed are at odds with widely accepted industry standards that comply with the ECOA, they will be difficult for card issuers to implement and equally difficult for regulators to examine.

While we understand the importance of the protections of the CARD Act, we do not believe that the protections under the ECOA should be sacrificed without clearly established Congressional intent.

For these reasons, we respectfully urge the Board to reconsider these proposals. If the Board remains concerned about card issuers' reliance on a consumer's household income and assets, the Board could amend the regulation to require card issuers to consider only the income and assets which are accessible to the consumer for repayment of the credit obligations. Such a requirement would be consistent with the Board's recognition that married consumers in community property states have equal access to the couple's income and assets.[13] The requirement would also allow consumers with joint financial accounts to obtain credit cards based on their equal access to those accounts. Card issuers could comply with the ability to pay regulation by asking consumers for information about their income or the income that is accessible to the consumer for repayment of the credit obligations. In many instances, that income would be household or spousal income, but as long as the consumer has access to the income, the goals of the Credit Card Act's ability to pay provisions would be served.

We thank you for the opportunity to express our personal views on the Board's proposed amendments. If there are any questions regarding our comments, we can be reached at (202) 327-9709 (Anne Fortney) or (202) 327-9700 (Jean Noonan).

Sincerely yours,

Anne P. Fortney

Anne P. Fortney

Jean Noonan

[12] 75 Fed. Reg. at 67474.
[13] 75 Fed. Reg. at 67474; 67501.