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December 20, 2010

Jennifer J. Johnson
Secretary of the Board
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 – Proposed Amendments to Regulation Z

Dear Ms. Johnson:

Citigroup, one of the largest U.S. financial services holding companies, respectfully submits these comments in response to the proposed revisions by the Federal Reserve Board (the "Board") to the open-end credit rules of Regulation Z, 12 C.F.R. § 226. The proposal was published in the *Federal Register* on November 2, 2010. 75 Fed. Reg. 67458. This proposal would amend the final rules published February 22, 2010, 75 Fed. Reg. 7658, and June 29, 2010, 75 Fed. Reg. 37526, which implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act").

For the most part, the proposal clarifies the existing rules. We largely agree with these clarifications, although in some cases we believe refinements are appropriate. The amendments to the ability to pay provision, however, are not clarifications. They reflect substantial new rulemaking—rulemaking which goes beyond the language of the CARD Act and will have far reaching implications for consumers, retailers, and creditors. We urge the Board to reconsider its proposed approach with regard to this provision. Because of its significance, our letter addresses the ability to pay provision first and follows with our comments on other provisions in the proposal. With regard to aspects of the proposal on which we do not comment, we generally support the changes.

Ability to Pay

§ 226.51

The proposed amendments regarding use of household income are not warranted, will harm consumers, and should not be adopted. The dramatic change in the legal landscape, combined with changes in the economic climate, have substantially reduced available credit. The Board's amendments will unnecessarily further restrict consumers' access to credit. At its center the ability to pay provision in the CARD Act was designed to prevent poor underwriting practices. It was not intended to require a higher standard than sound underwriting or to impose formulaic standards that could impact an issuer's flexibility to make sound credit determinations. We are concerned that doing so could potentially prevent many Americans who are sound credit risks from having meaningful access to credit.

Moreover, these amendments are neither required nor supported by the CARD Act or its legislative history. They will force families to change how they obtain and use credit. They will distort the underwriting process. They will disproportionately impact protected classes of individuals. They include "mitigants" that are impractical for consumers, retailers, and issuers. Finally, they reflect a "safe harbor" interpretation of the Equal Credit Opportunity Act which belongs in formalized guidance issued under Regulation B. For all these reasons, we believe that the Board should withdraw the proposed amendments to the ability to pay provision.

1. The proposed changes are neither required nor supported by the language of the CARD Act or its legislative history. Section 109 of the CARD Act prohibits an issuer from opening a credit card account unless the issuer "considers the ability of the consumer to make the required payments." This language differs from similar language used in Section 301 of the CARD Act for consumers who are under 21 years of age. Section 301 prohibits an issuer from opening a credit card account for a young consumer without a written application that is either co-signed by someone over 21 or accompanied by "submission by the consumer of financial information indicating an *independent* means of repaying any obligation arising from the proposed extension of credit ..." (emphasis added). The legislative history indicates the additional "independent" standard referred to independent of the *parent's* ability to pay. *See, e.g.* statement of Senator McCaskill.[1] Congress could have inserted the word "independent" in Section 109, but did not. Nonetheless, the Board proposes to adopt the "independent" standard from the provisions affecting young consumers and apply it as the general ability to pay standard for consumers who are over 21. We believe, however, that the express differences in the statutory language have meaning and should be honored.

2. The Board's proposal will force families to change how they obtain and use credit without any legislative history indicating Congress intended to do so. The typical American consumer lives in a household.[2] Members of households often pool income to meet household

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[1] See, e.g. "They send these cards to kids because they know their parents, if they are in college, don't want them to get into trouble and they will bail them out if they get in too deep." 155 Cong. Rec. S5488 (daily ed. May 14, 2009) (statement of Sen. McCaskill).

[2] 72.7% of American consumers live in a household with more than one person. OECD Family Database, Table SF1.1.A. http://www.oecd.org/dataoecd/62/22/41919509.pdf.

members' needs. In most households, chores—including shopping and applying for credit to pay for purchases—are divided among household members.[3] Thus, an individual consumer will appropriately draw on household income for household expenses, and rely on household income when opening a credit account, regardless of whether the account is an individual or joint account.

The impact of the proposed rules on a household can most easily be understood in the context of a traditional household with a married couple. By preventing a non- or low-earning spouse from using household income to open an account, the proposed amendments would place this spouse in a subordinate role. He or she would no longer have the ability to obtain credit without the higher-earning spouse, although the higher-earning spouse could obtain independent credit. This inequality conflicts with the rights, obligations, and benefits generally understood to be conferred by marriage, one of which is the sharing of income and property acquired during the marriage. These same concerns and impacts would also apply to same sex and other types of household relationships. The statutory language does not require that the ability to pay determination disregard the customary sharing of income within households, but by undue emphasis on *independent* income, the Board's rule would.

3. The proposed guidance would distort the underwriting process by creating a mismatch between income and debt. Under the proposal, in determining ability to pay, an issuer must consider only the individual income for an applicant in a household, which for a nonworking spouse could be zero. At the same time, the rule requires issuers to consider the applicant's current obligations. The applicant's current obligations would include not only the individual obligations of the applicant, but also any joint household obligations such as mortgage or car loans that were entered into based upon household income. This mismatch in evaluation of individual income and joint obligations distorts the underwriting process and will deprive many creditworthy consumers of access to credit simply because they entered into joint obligations based on joint incomes, or based on one income but with a spirit of shared household endeavor. It will hurt families by improperly denying many of them the credit they need to manage cash flow, spread out the cost of major purchases, and cope with emergencies.

4. The distortions in the underwriting process are likely to have a disproportionately negative impact based on gender, ethnicity, marital status, and national origin. We have significant concerns about the potential discriminatory effects of the Board's proposal. While the Board indicates in the Supplementary Information that issuers would not violate Regulation B by virtue of complying with the ability to pay requirements, 75 Fed. Reg. 67474, we do not believe that the Board fully appreciates the disparate impact that the proposal is likely to have on Regulation B protected classes.

Impact on women. It remains the case that in families where only one spouse is in the labor force, women are vastly more likely to be the spouse at home, and consequently the spouse without an "independent" source of income.[4] As a result, women will disproportionately suffer

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[3] Gallup Poll http://www.gallup.com/poll/106249/wives-still-laundry-men-yard-work.aspx.
[4] U.S. Census Bureau, *America's Families and Living Arrangements: 2010, Table FG2; Married Couple Family Groups, by Family Income, and Labor Force Status of Both Spouses.* http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (last visited Dec. 10, 2010).

the effects of this new requirement. For example, a couple may decide that the mother will give up her employment to take care of domestic responsibilities and the father will remain in the labor force. As a result of that decision, the proposal would take away the woman's ability to obtain credit in her own name. All too often, the cumulative effect of the proposed rule will be to financially disadvantage women and place them in a subordinate role.

Impact on minorities. It is also remains the case that income distribution across races is not equal. For example, on average, two income African American families have lower incomes than two income white families.[5] Thus, they will be disproportionately adversely impacted by the inability to combine incomes for purpose of obtaining household credit. A smaller percentage of African American families than white families will be able to divide the responsibility for shopping for household items that require credit to make the purchase – both spouses will have to be present to open an account over the phone, at point of sale, or over the internet.

Other impacts. To the extent the makeup of households, the propensity to have joint obligations, and the need to rely on two incomes for household expenses, tends to vary on the basis of race, national origin, or marital status, the proposed amendments will have a disparate impact on these bases.

5. The Board's attempts to address the concerns raised by its new requirement are impractical.

Obtaining Additional Information. The option of requesting "household income" and obtaining "additional information about an applicant's independent income" is not practical. Credit card issuers are able to extend unsecured credit broadly with relatively low cost and relatively thin margins because the card issuing process is highly automated. A manual underwriting process will significantly increase the cost of originating new accounts, costs which would be passed along to consumers. Even if the considerable expense of manual underwriting were absorbed by application fees or increased rates, it is unclear what information the issuer would need to request from the applicant in order to fulfill its due diligence obligation with respect to the make up of the income on the application. If the end result is that only the consumer's individual income can be considered, this alternative would not mitigate the concerns with the Board's amendment.

Joint Accounts. The Board also suggests that these concerns can be addressed by opening a joint account. This solution ignores the practical reality of how accounts are opened

[5] According to the Census Bureau's Current Population Survey, in 2008 median income for households with two earners was $83,598 for whites and $63,386 for blacks. U.S. Census Bureau, *Current Population Survey: Table HINC-01; Selected Characteristics of Households by Total Money Income in 2008.* http://www.census.gov/hhes/www/cpstables/032009/hhinc/new01_000.htm (last visited Dec. 10, 2010). To find the median income for white households with two earners: (1) click on "White alone, not Hispanic;" (2) scroll down to the fourth table; (3) locate the major heading in the first column entitled "NUMBER OF EARNERS", subheading "2 earners;" (4) "Median Income" is stated in the fourth column from the right. The median income for black households with two earners is found by clicking on "Black alone" and following steps (2), (3), and (4) above.

and how households obtain and use credit card accounts. For example, in the retail context, it is often the case that only one member of a household will come to a store to make a purchase. The consumer may wish to open a retail credit card account to finance the purchase, often to take advantage of promotional financing terms. If that member of the household does not have sufficient individually earned income, he or she will not be able to open an account and will be declined at point of sale, notwithstanding the fact the household has sufficient income to support the credit. Requiring that a joint applicant come to the store or be available at the time of sale is a great inconvenience, and often unrealistic. Similar considerations apply with respect to accounts originated over the phone and internet. Finally, since the overwhelming majority of our credit card accounts are individual, not joint, accounts there would be significant additional costs in establishing processes and procedures for originating joint accounts. These costs would include management information systems updates as well as ongoing costs, such as multiple credit reports.

Use of Income in Community Property States. Finally, the proposed addition to comment 51(a)(1)-4.i states that an issuer may consider a spouse's income only in connection with a joint account or "to the extent that a federal or state statute or regulation grants the consumer an ownership interest in the spouse's income or assets." Credit card accounts are originated with very little consumer contact and thus issuers are not in a position to obtain the detailed information necessary to make the decisions required to apply community property and other similar laws. It would not be feasible to have different applications depending on the applicable state law, or to expect that applicants have sufficient knowledge of state law to determine the types of income to which they have a legal claim for purposes of properly completing a credit application.

6. The Board's statements in the Supplementary Information with respect to the Equal Credit Opportunity Act and Regulation B are misplaced. The Board asserted in the Supplementary Information that compliance with the new ability to pay requirements would not result in a violation of Regulation B. 75 Fed. Reg. 67474. As outlined above, we have significant concerns that the application of the new requirement proposed by the Board may in fact have a disparate impact on protected classes. As a result, issuers could be faced with exposure to fair lending claims under the Equal Credit Opportunity Act, Regulation B and potentially other federal or state fair lending laws. If the Board chooses to adopt any ability to pay amendment that could have the potential impacts noted in this letter, we ask the Board to confirm its "safe harbor" interpretation in formal guidance issued pursuant to Regulation B prior to any mandatory compliance date for that amendment. In addition, the Board's statements in the Supplementary Information about Regulation B's requirements are internally inconsistent and can be read to impose new requirements under Regulation B. We request that the Board retract these statements.

We respectfully request that the Board withdraw its proposed amendments to the ability to pay provision. The Board should make clear that there is no single formulaic way for issuers to meet the ability to pay requirements of the Act, so long as issuers take into account income or assets and obligations in determining sound underwriting standards. The Board should also clarify that an issuer may request and use in its ability to pay analysis household income that the consumer indicates he or she can rely on. The Board should also clarify that issuers can rely

on a consumer's representations in this regard, just as an issuer can rely on the consumer's representations about his or her income generally. *See* comment 51(a)(1)-4.

When a $35 Penalty Fee Can be Charged Under the Safe Harbor

§ 226.52(b)(1)(ii)(B) and Comment 52(b)(1)(ii)-1.i

Citi strongly urges the Board to clarify that a $35 fee can be imposed for a subsequent violation of the same type during the relevant time period even if, for the first violation, the fee was waived or was lower than $25. As the Board has recognized, a repeat offender poses risks and costs that a consumer with a single violation, such as one late payment, does not. *See* 75 Fed. Reg. at 67476. An issuer cannot easily predict whether a consumer will become a repeat offender. If a consumer claims a single violation was a rare lapse, an issuer should have the flexibility to waive a penalty fee. The proposed changes would effectively impose a $10 cost on the issuer for doing so if the consumer repeats the violation within six months. If issuers change their policy as a result, consumers will be harmed; if they do not, issuers will bear increased costs. Either outcome is bad. The proposed changes could also be interpreted to prevent the imposition of the $35 fee for a subsequent violation if the fee for the first violation was lower than $25 (for example if the minimum due were less than $25). However, the risks and costs of a repeat offender remain. Whether the issuer voluntarily waived all or part of the $25 fee, or was not permitted to impose the full $25, the Board should clarify that $35 can be imposed for subsequent violations within the relevant time period.

When an Account is Considered "Open"

§ 226.52(a)(1) and § 226.55(b)(3)(iii)

In response to the Board's request for comment, Citi urges the Board to revise the amendments to § 226.52(a)(1) and § 226.55(b)(3)(iii) to provide that an account is considered open on the date it is opened on the issuer's system. The Board's proposal that an account is considered open no earlier than the "date on which the account may first be used" will create an excessive burden on issuers with little, if any, corresponding benefit to consumers. Currently, the only date that most issuers systemically track is the date that an account is opened on their systems. Issuers have in place policies and procedures to deliver account-opening disclosures as required by § 226.5(b)(1)(i) based on this date. Requiring issuers to track a different date would entail excessive cost and programming resources without a significant benefit to consumers.

Furthermore "the date on which the account may first be used by the consumer to engage in transactions" is also not the correct date under the CARD Act. TILA § 127(n)(1) refers to the "first year during which the account is opened." The date the account may first be used is a different date and can be much later for reasons outside the issuer's control. For example, to protect consumers against unauthorized transactions, many issuers require consumers to activate cards that they receive in the mail. A consumer may delay doing so for many reasons, although the credit is available. The account is open although the consumer has not chosen to activate it so it can be used. Thus, the proposed amendment to § 226.52(a)(1) should be revised to clarify

that an account is considered open when the account is opened on the issuer's system. Citi urges the Board to make the same change to the proposed language in § 226.55(b)(3)(iii).

<u>**Promotional Fees**</u>

§ 226.9(c)(2)(v)(B), § 226.16(g) and § 226.55(b)(1)

Citi strongly supports the proposed revisions to § 226.9(c)(2)(v)(B), § 226.16(g) and § 226.55(b)(1) and corresponding changes to the commentary, which clarify the treatment of promotional fees. Citi agrees that promotional fees should be disclosed in the same manner as promotional rates. Although the Board previously stated that promotional fees were permissible if notice that a fee would be increased was given at the same time as notification of a temporary fee decrease, *see* 75 Fed. Reg. at 7699, in the absence of specific guidance, many questions remained regarding the content of the notice. The proposed clarifications provide that guidance, facilitating the continued availability of temporary fee reductions.

Citi urges the Board to clarify that issuers may continue to offer temporary waivers and reductions as a public service or customer accommodation, without regard to the notice requirements in § 226.9(c)(2)(v)(B) or § 226.55(b)(1). Issuers traditionally waive fees, minimum amounts due, and finance charges, on occasion, as a customer service. At times, an issuer may do this on a wide scale, and may inform customers of this via an "advertisement." For example, after a natural disaster, an issuer may waive ATM transaction fees, late fees, and/or minimum payments due in the affected area, and inform the affected consumers by announcing the policy in the media. Although the new guidance on promotional fees could be read to encompass such fee waivers, we do not believe that was the Board's intent. Accordingly, we urge the Board to adopt consistent guidance in § 9(c) and § 55 clarifying that these types of waivers or reductions, whether individual or broad based, and whether announced or unannounced, are not subject to the notice requirements in § 226.9(c)(2)(v)(B) or § 226.55(b)(1).

<u>**Disclosure of Grace Period Conditions in Promotional Offers**</u>

Comments 5a(b)(5)-1 and 6(b)(2)(v)-1 and -3

Citi requests clarification in comments 5a(b)(5)-1 and 6(b)(2)(v)-1 and -3 that conditions placed by a promotional offer should only be disclosed as part of that offer. Some promotional offers place limitations on the grace period. For example, a promotional offer may provide that the grace period is eliminated for purchases under that offer; even if the customer pays in full. If the promotion is part of the account opening offer, it is appropriate to include the specific limitations in the account opening table. If the promotion is not offered at account opening, it would not be appropriate to include the specific limitations in the account opening table because they may never apply. Such unnecessary disclosure would be confusing to consumers and potentially incorrect and misleading. Rather, the applicable grace period disclosures should be given with the promotional materials. Disclosures will be relevant and accurate if made close to the time they go in effect. Consumers will also be more likely to pay attention to disclosures if they apply to the transaction at hand. Thus, for example, restrictions on the grace period made in connection with a promotional check offer should be disclosed in the promotional check table in the "Paying Interest" row.

Internet Posting of Credit Card Agreements

§ 226.58

Citi urges the Board to exclude lines of credit accessed by debit cards that can be used only at ATMs. Although these lines of credit are subject to the substantive restrictions applicable to credit cards, it does not make sense to require that the agreements governing these lines of credit be included among the agreements subject to the internet posting requirements. Although open end credit, these products do not function like credit cards and consumers will not expect to find them on credit card websites. Moreover, the agreements will not be useful for comparison shopping purposes. Instead, the extra information will just make it harder for credit card customers to find the card agreements they are looking for. This information overload will burden consumers and creditors alike with no apparent benefit.

Reevaluation of Rate Increases

Comments 59(d)-6 and 59(f)-2

Citi supports proposed new comment 59(d)-6, but requests that the Board clarify that the analysis applies to any rate increase based on factors specific to the consumer, not only to penalty rates. The proposed comment states that: "If the review of the factors described in § 226.59(d)(1)(i) indicates that it is appropriate to continue to apply a *penalty rate as a result of the consumer's payment history or other behavior on the account*, § 226.59 permits the issuer to continue to impose the penalty rate, even if the review of the factors described in § 226.59(d)(1)(ii) would otherwise require a rate decrease" (emphasis added). However, the same analysis applies to any type of consumer specific rate increase, for example, an increase based on a deterioration of a consumer's risk profile. Thus, the proposed comment should be amended to clarify that the reference to "penalty rate" is only an example of a consumer specific rate increase.

Aspects of the proposal which Citi generally supports, but requests technical clarification:

Citi generally supports the proposed changes to § 226.6 and its commentary, but requests clarification in § 226.5a(g) that issuers can use the phrase "(including new transactions)" in the application table as well as in the account-opening table, as appropriate. Citi supports the proposed changes to comment 6(b)(2)(vi)-1, which provide that if all balances are under the same balance computation method, the issuer can disclose that method uniformly. This flexibility will facilitate compliance and will reduce current confusion. Citi urges the Board to conform § 226.5a(g) so that issuers can use the same phrase for both the application and account-opening tables. Specifically, since the daily balance method, including new transactions, is among the most common methods, it would facilitate compliance if the Board would revise § 226.5a(g) to clarify that an issuer may disclose either "daily balance (including new purchases)" or "daily balance (including new transactions)" on the application table.

Citi requests that the definition of "promotional fee" in § 226.16(g)(2)(iv) be revised to clarify that a promotional fee may be limited to a specific balance or transaction. The definition of promotional rate includes the concept that the rate is "applicable to one or more balances or transactions." § 226.16(g)(2)(i). The definition of promotional fee as proposed in § 226.16(g)(2)(iv) is limited to a fee "applicable to ... [a] plan." There is nothing in the Supplementary Information suggesting that the Board intended promotional fees be treated any differently than promotional rates. Because promotional fees may also be applicable to only certain transactions or balances and not the plan as a whole, Citi requests that the proposed definition of promotional fee be clarified as follows to avoid confusion:

> Promotional fee means a fee required to be disclosed under § 226.6(b)(1) and (b)(2) applicable to an open-end (not home secured) plan, or to one or more balances or transactions under that plan, for a specified period of time that is lower than the fee that will be in effect at the end of that period or for other transactions.

Citi generally supports the proposed clarifications to § 226.55(b) and its commentary, but suggests that the Board revise the proposed new language in § 226.55(b)(3)(iii) and in comment 55(c)(1)-3 to clarify that an issuer is not prohibited from using advance notice to raise fees on an open account if the account is only temporarily unavailable for new transactions and to clarify when an account is open. The Board's proposed revisions to § 226.55(b)(3)(iii) exclude from the advance notice exception increases in rates or § 226.6(b)(ii), (iii), and (xii) fees "while the account is closed, or *while* the issuer does not permit the consumer to use the account for new transactions" (emphasis added). This language could be interpreted to mean that the advance notice exception cannot be used when an account is temporarily unavailable for new transactions, such as when the account balance is over the credit limit or is subject to a temporary hold because of suspected fraud. This result does not appear to be the Board's intent and would be very difficult and expensive for issuers to track. Thus, Citi requests that the Board change the proposed phrase "while the issuer does not permit the consumer to use the account for new transactions" to "when the account is no longer open for new transactions." Citi requests that same change be made to comment 55(c)(1)-3.

Citi supports the proposed revisions to comment 55(c)(1)-3, but suggests that the Board revise the proposed new language to clarify that an increased fee can be applied to an open account, even if the account is temporarily inactive or unavailable for new transactions. The revised comment clarifies that, consistent with the advance notice exception, an issuer may add or increase an annual fee for an "active" account. Citi believes that the word "active" should be changed to "open." The word "active" is ambiguous. For example, if a consumer had the ability to use an account, but did not make a purchase for several consecutive months, the account could be considered inactive. However, the consumer still has the option to use the account at any time; thus, the fee increase should be permitted.

Citi supports the proposed new comment 55(c)(1)-4, and suggests that the Board clarify that the same analysis underlying comment 55(c)(1)-3 applies to an increase in the minimum due. If a change applies to an open account as a whole, the change is not a prohibited change to the terms of a protected balance.

Other aspects of the proposal which Citi specifically supports:

- The proposed clarifications to **§ 226.2(a)(15)(ii)(B)** and comment **2(a)(15)-2.ii.C.**
- The proposed new guidance in comment **5a(b)(1)-5.i** regarding disclosure of the penalty rate cure.
- The proposed new guidance in comments **5a(b)(5)-1** and **6(b)(2)(v)-1 and -3**, concerning disclosure of the grace period.
- The proposed changes to **§ 226.7** and its commentary, particularly **§ 226.7(b)(14)** and comment **7(b)(5)-1.iv**.
- Proposed **§ 226.9(b)(3)(iii)** and comment **9(b)(3)(i)-2.**
- Proposed **§ 226.58(b)(7)** (formerly (b)(6)).
- Proposed comment **59(f)-2**.

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On behalf of Citigroup, I thank you again for this opportunity to comment on the Board's recently proposed clarifications to Regulation Z's open-end credit rules. If you have questions on any aspects of this letter, please call Joyce Elkhateeb at (212) 559-9342 or me at (212) 559-2938.

Sincerely,

Carl V. Howard

cc: Joyce Elkhateeb
Viola Spain