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Ms. Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551  
Via email transmission and overnight delivery

Re: Regulation Z; Docket No. R-1370  
Proposed Rule: Implementation of the Credit Card Act  
12 CFR §226.51. Ability to Pay

Dear Ms. Johnson:

Zoot Enterprises, Inc. (“Zoot”) appreciates the opportunity to comment on the Federal Reserve Board’s proposed changes to Regulation Z, which implements the requirements of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the “Credit Card Act”).

Zoot is an independent provider of services to the financial services industry, including third-party services for consumer credit prescreening. Prescreening is one of the most common methods by which consumers open credit card accounts. Prescreening is a process permitted by the Fair Credit Reporting Act (“FCRA”), and involves a credit transaction which is initiated by the card issuer rather than the consumer. Typically, the card issuer provides a list of consumers to a credit reporting agency, and asks the credit reporting agency to edit the list to supply the names of the consumers on the list who meet the creditworthiness criteria established by the credit card issuer. The consumer reporting agency compares the creditworthiness criteria to the information in its database about each consumer, and supplies the card issuer with the names of the consumers who met the creditworthiness criteria.<sup>1</sup> The

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<sup>1</sup> The Appendix to 16 CFR Part 600, Comment Section 604(1)-6, states:

**Prescreening.**

Prescreening means the process whereby a consumer reporting agency compiles or edits a list of consumers who meet specific criteria and provides this list to the client or a third party (such as a mailing service) on behalf of the client for use in soliciting these consumers for the client's products or services. The process may also include

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FCRA allows this procedure if the card issuer makes a firm offer of credit to the consumers identified by the consumer reporting agency as having met the creditworthiness criteria and if the consumer reporting agency provides to the card issuer only the name and address of the consumer and other limited information that does not include credit information.<sup>2</sup>

**1. Prescreening.**

**Zoot requests the Board to revise section 226.51(a) and/or the Commentary to that section to clarify that a credit card issuer complies with section 226.51(a) when it makes a firm offer of credit to a consumer, based on information in a consumer report (prescreening), if the prescreening process considers the consumer's ability to make the required payments based on methods which reasonably establish, estimate or predict the consumer's income or assets and current obligations. These could include information in the card issuer's records, information in the consumer reporting agency's database,<sup>3</sup> and information from third party databases which contain predictive profiles that need not contain individual-specific data about the particular consumer.<sup>4</sup>**

As set forth above, prescreening is one the most common methods of opening retail credit card accounts and it is a process expressly permitted by the FCRA. The prescreening process is most

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demographic or other analysis of the consumers on the list (e.g., use of census tract data reflecting real estate values) by the consumer reporting agency or by a third party employed for that purpose (by either the agency or its client) before the list is provided to the consumer reporting agency's client. In such situations, the client's creditworthiness criteria may be provided only to the consumer reporting agency and not to the third party performing the demographic analysis. The consumer reporting agency that performs a "prescreening" service may furnish a client with several different lists of consumers who meet different sets of creditworthiness criteria supplied by the client, who intends to make different credit offers (e.g., various credit limits) to consumers who meet the different criteria.

A prescreened list constitutes a series of consumer reports, because the list conveys the information that each consumer named meets certain criteria for creditworthiness. Prescreening is permissible under the FCRA if the client agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit. In these circumstances, a permissible purpose for the prescreening service exists under this section, because of the client's present intent to grant credit to all consumers on the final list, with the result that the information is used "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to \* \* \* the consumer."

<sup>2</sup> FCRA section 604(c), 15 USCA §1681b(c).

<sup>3</sup> For example, some credit reporting agencies offer tools with predictive analytics which estimate consumer's income and debt to income ratios.

<sup>4</sup> Commentary paragraph 34(a)(4)(ii)(A)-4 states that information from databases that do not contain individual specific data may not be used to verify a consumer's income, but verification is not required by section 226.51(a).

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convenient and beneficial to the consumer, and most effective for the card issuer, if the consumer can essentially accept the offer of credit without having to go through an additional application process to do so.

Section 109 of the Credit Card Act prohibits a card issuer from opening a consumer credit card account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of the account.<sup>5</sup> Proposed section 226.51(a) implements section 109 of the Credit Card Act by prohibiting a card issuer from opening a credit card account for a consumer under an open-end (not home-secured) credit plan, unless the card issuer considers the consumer's ability to make the required minimum payments, based on the consumer's income or assets and the consumer's current obligations. The proposed section requires card issuers to have reasonable policies and procedures in place to consider this information. Proposed Comment 51(a)-2 states that the card issuer complies with this rule if it bases its decision regarding the consumer's ability to pay on the facts and circumstances known to the card issuer at the time the consumer requests an account. Neither the proposed section 226.51(a) nor the proposed Commentary states that the information the card issuer considers concerning income or assets must be provided by the consumer.<sup>6</sup> Section II.B of the Supplementary Information states that the card issuer may rely on information provided by the consumer or the consumer's credit report for information about the consumer's income or assets. 74 F.R. 54127. This statement should be included in paragraph 51(a)-5 of the Commentary. Section V of the Supplementary Information, which is the Section-by-Section Analysis of the proposed regulation, states that a card issuer is not required to verify income or asset information on which it relies before opening an account, and no such requirement is contained in the proposed regulation or the Commentary.

As stated above, nothing in the Credit Card Act, the proposed section 226.51(a) or the proposed Commentary requires that the consideration of the consumer's ability to pay be based on information provided by the consumer. To the extent that tools are available to card issuers that can reasonably establish, estimate or predict the consumer's income or assets, with reasonable accuracy, the card issuer should be able to rely on such tools as part of the prescreening process to satisfy the requirements of section 226.51(a).

## **2. Underwriting.**

**Zoot requests the Board to revise section 226.51(a) and/or the Commentary to that section clarify that a credit card issuer complies with section 226.51(a) if it has policies and procedures in place to consider the consumer's ability to make the required payments based on methods which reasonably establish, estimate or predict the consumer's income or assets and current obligations.**

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<sup>5</sup> Compare section 109 with section 301, which prohibits establishing an open-end account for a person under the age of 21, unless that person submits a written application that contains financial information indicating the means to repay the debt by the consumer or by a co-signer.

<sup>6</sup> Compare proposed section 226.51(a) with proposed section 226.51(b), which applies to consumers who are under the age of 21 years. With respect to underage consumers, the creditor must require a written application with financial information that supports the ability to pay the account.

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**These could include, for example, information provided by the consumer, information in the card issuer's records, information provided by consumer reporting agencies,<sup>7</sup> information from third parties such as employers, and information from third party databases which contain predictive profiles that need not contain individual-specific data about the particular consumer.<sup>8</sup>**

A. Account opening.

Section 109 of the Credit Card Act prohibits a card issuer from opening a consumer credit card account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of the account.<sup>9</sup> Proposed section 226.51(a) implements section 109 of the Credit Card Act by prohibiting a card issuer from opening a credit card account for a consumer under an open-end (not home-secured) credit plan, unless the card issuer considers the consumer's ability to make the required minimum payments, based on the consumer's income or assets and the consumer's current obligations. The proposed section requires card issuers to have reasonable policies and procedures in place to consider this information. Proposed Comment 51(a)-2 states that the card issuer complies with this rule if it bases its decision regarding the consumer's ability to pay on the facts and circumstances known to the card issuer at the time the consumer applies to open the account. Neither the proposed section 226.51(a) nor the proposed Commentary states that the information the card issuer considers concerning income or assets must be provided by the consumer.<sup>10</sup> Section II.B of the Supplementary Information states that the card issuer may rely on information provided by the consumer or the consumer's credit report for information about the consumer's income or assets. 74 F.R. 54127. This statement should be included in paragraph 51(a)-5 of the Commentary. Section V. of the Supplementary Information, which is the Section-by-Section Analysis of the proposed regulation, states that a card issuer is not required to verify income or asset information on which it relies before opening an account, and no such requirement is contained in the proposed regulation or the Commentary.

To the extent that third-party income estimators and income prediction models are shown to be as reliable in predicting consumer's incomes as the consumer's self-declared income without verification, it should be reasonable for card issuers to use such tools and models in the consideration of the consumer's ability to pay.

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<sup>7</sup> For example, some credit reporting agencies offer tools with predictive analytics which estimate consumer's income and debt to income ratios.

<sup>8</sup> Commentary paragraph 34(a)(4)(ii)(A)-4 states that information from databases that do not contain individual specific data may not be used to verify a consumer's income, but verification is not required by section 226.51(a).

<sup>9</sup> Compare section 109 with section 301, which prohibits establishing an open-end account for a person under the age of 21, unless that person submits a written application that contains financial information indicating the means to repay the debt by the consumer or by a co-signer.

<sup>10</sup> Compare proposed section 226.51(a) with proposed section 226.51(b), which applies to consumers who are under the age of 21 years. With respect to underage consumers, the creditor must require a written application with financial information that supports the ability to pay the account.

B. Increasing a credit limit.

Section 109 of the Credit Card Act prohibits a card issuer from increasing the credit limit on a credit card account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of the account. Proposed section 226.51(a) implements section 109 of the Credit Card Act by prohibiting a card issuer from increasing the credit limit on a credit card account for a consumer under an open-end (not home-secured) credit plan, unless the card issuer considers the consumer's ability to make the required minimum payments, based on the consumer's income or assets and the consumer's current obligations. The proposed section requires card issuers to have reasonable policies and procedures in place to consider this information. Proposed Comment 51(a)-2 states that the card issuer complies with this rule if it bases its decision regarding the consumer's ability to pay on the facts and circumstances known to the card issuer at the time when the card issuer considers increasing the credit line on an existing account. Neither the proposed section 226.51(a) nor the proposed Commentary states that the information the card issuer considers concerning income or assets must be provided by the consumer. Section II.B of the Supplementary Information states that the card issuer may rely on information provided by the consumer or the consumer's credit report for information about the consumer's income or assets. 74 F.R. 54127. This statement should be included in paragraph 51(a)-5 of the Commentary. Section V of the Supplementary Information, which is the Section-by-Section Analysis of the proposed regulation, states that a card issuer is not required to verify income or asset information on which it relies before increasing the credit limit on an account, 74 FR 54161, and no such requirement is contained in the proposed regulation or the Commentary.

To the extent that third-party income estimators and income prediction models are shown to be as reliable in predicting consumer's incomes as the consumer's self-declared income without verification, it should be reasonable for card issuers to use such tools and models in the consideration of the consumer's ability to pay.

**3. Intent of the Credit Card Act.**

**The clear intent of the Credit Card Act is to require card issuers to consider the consumer's ability to pay based on reasonably available information about the consumer's income and assets, and to require that the income and asset information be provided by the consumer in a written application only in the case of an underage consumer.**

Section 109 of the Credit Card Act does not require or authorize the Board to prohibit card issuers from opening a credit card account unless the card issuer obtains income or asset information from the consumer. That section prohibits a card issuer from opening a consumer credit card account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of the account. Section 301 of the Credit Card Act prohibits a card issuer from opening a consumer credit card account<sup>11</sup> for a consumer under the age of 21 years, unless the consumer or a co-

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<sup>11</sup> Section 301 also applies to other open-end consumer credit plans.

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signer has submitted a written application that contains financial information indicating the means to repay the obligation. Section 109 applies to all consumers, including consumers under the age of 21 years; section 301 applies only to underage consumers. Section 301 clearly states that the card issuer's consideration of the underage consumer's ability to pay must be based, at least in part, on information provided by the consumer in a written application. No such requirement was included in section 109, indicating a clear intent that card issuers may rely on information provided by the consumer or on information from other sources with respect to the consumer's income and assets. To interpret section 109 to require card issuers to consider only income and asset information provided by the consumer would essentially cause section 109 to subsume section 301 and make section 301 mere surplusage, except for accounts that are not covered by section 109. The more reasonable interpretation is that card issuers may comply with the requirements of section 109 by relying on methods which reasonably establish, estimate or predict the consumer's income or assets and current obligations. These could include, for example, information provided by the consumer, information in the card issuer's records, information provided by consumer reporting agencies, information from third parties such as employers, and information from third party databases which contain predictive profiles that need not contain individual-specific data about the particular consumer.

Respectfully submitted,



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