



American Express
General Counsel's Office
World Financial Center
New York, NY 10285

November 20, 2009

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

Attention: Docket No. R-1370
regs.comments@federalreserve.gov

**Re: Federal Reserve Board Docket No. R-1370 – Proposed Rulemaking
Implementing the Credit Card Accountability Responsibility and Disclosure
Act of 2009**

Dear Ms. Johnson:

This letter is submitted by American Express Travel Related Services Company, Inc. on behalf of itself and its card-issuing affiliates (collectively, “American Express”) in response to the proposed rulemaking of the Federal Reserve Board (“Board”), published in the Federal Register on October 21, 2009, to amend Regulation Z and implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (“Act”).

I. Introduction

American Express appreciates the opportunity to comment on the proposed rulemaking, just as it appreciates the Board’s efforts to develop them. American Express supports the goals of the Act and the proposed rule, and believes that, on the whole, they will address many of the concerns that have been expressed about credit card practices. However, there are aspects of the proposed rule that are likely to have adverse consequences for consumers, including curtailing consumers’ right to replace a credit account with another product that more effectively meets their needs. We believe that a few changes to the rule would help address the most serious of these concerns while preserving the intent and scope of the rule. Our concerns are the following:

1. **Account Upgrades:** Proposed Section 226.55(b) prohibits charging a new fee on an upgraded account before the creditor has provided 45 days' prior written notice (pursuant to Section 226.9(c)). In cases where the customer has requested an upgrade, this will inevitably frustrate consumer expectations and lead to adverse consequences for the consumer. Consumers should not be subject to unnecessary delays in receiving requested benefits and services.

Recommendation: Proposed Section 226.55(b) should be revised to allow for account upgrades to take effect immediately, provided that: (i) the consumer requests the change; (ii) fees, rates and benefits of the new product are clearly disclosed before the consumer makes his/her decision; (iii) the consumer is provided a reasonable period of time (*e.g.*, 45 days) to revert back to the former account, with a refund of any incremental fees or interest incurred; and (iv) APRs are not increased on balances existing on the account at the time of the upgrade request.

2. **36-Month Paydown Amount:** Proposed Section 226.7(b)(12) requires, among other things, that the periodic statement include the estimated monthly payment that the customer will have to make to repay the outstanding balance in 36 months. This requirement does not allow for any tolerance in calculating the exact payment amount that would have to be paid each month in order to pay off the outstanding balance in that time.

Recommendation: To account for the complexity and near impossibility of calculating a precise amount, Section 226.7(b)(12) should be revised to expressly allow for a margin of error of up to 5% of the estimated monthly payment that the customer will need to make in order to fully repay the outstanding balance in 36 months.

3. **Consumer's Ability to Pay:** Section 109 of the Act sets forth a broad, principles-based requirement to consider the ability of the consumer to make required payments as a prerequisite to opening a credit account or increasing a credit limit. Proposed Section 225.51(a) layers on a formulaic requirement not supported by the intent of the Act. The processes imposed by the proposed rule will add little or no value but will distract issuers and their regulators from more effective underwriting and decision-making that will better protect consumers.

Recommendation: The Board should refrain from imposing a static and formulaic rule, and instead let the principled language of Section 109 control. Rulemaking is not necessary and is very likely to be counterproductive. Regulatory examiners can vigorously test, on an ongoing basis, the issuers' risk practices and models in order to demonstrate that the issuers' account-opening and credit-increase decisions are satisfying the Section 109 requirement.

4. **Subprime and Fee Harvester Accounts:** In order to combat abusive subprime and fee harvester card programs, proposed Section 226.52 prohibits the imposition of any fees (except late, overlimit, or returned check fees) during the first year after a credit account is opened to the extent those fees exceed 25% of the initially-authorized credit line. By not excluding foreign transaction fees from the list of fees subject to the 25% limitation, the proposed rule inadvertently includes accounts that are clearly not “fee harvester” or subprime accounts.

Recommendation: The Board should exercise its agency discretion in order to impose a common sense approach to the reading of Section 105 of the Act and exclude foreign transaction fees from the 25% limit.

5. **Effective Date:** The Board has solicited comments as to whether the original July 1, 2010 effective date for those provisions of the January 2009 Regulation Z rule that are not directly affected by the Act’s February 22, 2010 effective date should be accelerated. Changing the date now would impose a significant hardship on credit issuers, and the Board itself has acknowledged that 18 months would be a reasonable implementation time given the complexities involved in modifying an issuer’s operating systems to comply with the new requirements.

Recommendation: The effective date of those requirements that are not statutorily required by the Act to be in effect by February 22, 2010 should remain July 1, 2010.

We discuss in detail below each of the concerns highlighted in this introductory section, as well as our recommended revisions to the rule.

II. Discussion

1. Account Upgrades

American Express is concerned about proposed Section 226.55(b), which implements Section 101 of the Act. Specifically, American Express is concerned about the Section 226.55(b) prohibition against charging a new periodic fee on an upgraded or downgraded account before the creditor has provided 45 days’ prior written notice pursuant to Section 226.9(c) of the proposed regulations. In the alternative, an entirely new account could be opened pursuant to the consumer’s request, requiring the delivery of account opening disclosures pursuant to Section 226.6(b) of the proposed regulations. Under either requirement, the consumer will suffer adverse effects.

If treated as a change in terms, the 45-day advance notice procedure will inevitably frustrate consumer expectations. It will cause unnecessary delays in the customer’s receiving the requested benefits and services, as well as potential delays in the customer earning desired rewards points and delays in reducing costs and fees. As an illustrative example, a consumer planning a trip and desiring to upgrade to a credit card

that offers more premium travel benefits and features would need to have the foresight to request the upgrade at least 45 days in advance of the trip. As another example, a consumer wishing to downgrade to a card with a lower annual fee but with stricter late fee requirements would have to remain on the higher-annual-fee card for an additional 45 days after submitting his/her account downgrade request.

On the other hand, if the upgrade is treated as a new account opening, a credit bureau inquiry may be triggered, which will lower the consumer's FICO score. In addition, a new account opening will trigger an additional trade line on the consumer's credit report, which can lead to adverse consequences, including line reductions, account cancellations, higher borrowing costs, and increased insurance premiums. Moreover, forcing the consumer to create two or more accounts may cause unnecessary confusion and inconvenience, including interruption of recurring billing, and multiple billing statements and payment requirements. We believe that the Board's authority clearly permits it to adopt a rule permitting immediate upgrades.

In addition, the Board solicits comments on alternative approaches to determining whether a card substitution or replacement results in the opening of a new account or a change in terms of an existing account. American Express strongly urges the Board to revise proposed Comment 5 (b)(1)(i)-6 to align with a rule, as recommended above, that permits upgrades and downgrades to take effect immediately, provided that: (i) the consumer requests the change; (ii) fees, rates and benefits of the new product are clearly disclosed before the consumer makes his/her decision; (iii) the consumer is provided a reasonable period of time (*e.g.*, 45 days) to revert back to the former account, with a refund of any incremental fees or interest incurred; and (iv) APRs are not increased on balances existing on the account at the time of the upgrade/downgrade request.

2. 36-Month Paydown Amount

American Express has concerns about the Section 226.7(b)(12) requirement that the customer's periodic statement include the estimated monthly payment that the customer will have to make to repay the outstanding balance in 36 months. The 36-month paydown "estimate" requirement does not account for the mathematical complexity and the practical impossibility of providing an exact payment figure in order for the consumer to pay off the outstanding balance in thirty-six equal monthly payments. For this reason, American Express believes that Section 226.7(b)(12) should expressly allow for a margin of error of up to 5% of the estimated monthly payment. We believe the introduction of a tolerance would also better fulfill the purpose of informing the consumer of the payment he or she will need to make in order to pay off his or her obligations in three years. If a tolerance level is not introduced, the customer may have a false sense of certainty as to the exact payment amount necessary to pay off the balance in 36 months, as the consumer may not realize that a margin of error will always be inherent in such calculations. We therefore strongly encourage the Board to modify the 36-month estimate to allow for a tolerance level of up to 5% of the estimated monthly payment amount.

3. Consumer's Ability to Pay

American Express supports the requirement of Section 109 of the Act, which requires a card issuer to consider the ability of the consumer to make required payments as a prerequisite to opening a consumer credit card account or increasing a credit limit. However, American Express strongly questions the need for the Board to impose a static and formulaic rule in furtherance of this statutory requirement. American Express believes that the Board should let the principled language of Section 109 control. Issuers have every interest in ensuring that their ongoing determination as to whether their account-opening and credit-line-increase decisions are guided by the most sophisticated and appropriate risk models. Requiring additional steps will interfere with, and even hamper, issuers' efforts in this regard.

In particular, American Express has concerns about the proposal's presumption that a card issuer that assumes that an applicant uses all of the card's available credit each month and determines that the applicant's income is sufficient to make the minimum required monthly payment would be making an appropriate underwriting decision. It will come as no surprise that granting consumers credit to the point that their income just suffices to make minimum monthly payments often presents significant risk for the creditor and the consumers. This method does not serve the purpose of the broad, principled language of Section 109 of the Act, and it points out the dangers of dictating seemingly prudent risk management decisions that, in practice, may lead to unintended risk. With open-end, unsecured lending such as credit cards, a cardmember's income level is not particularly useful in predicting his or her ability or willingness to meet monthly debt payment obligations, particularly when there are much more sophisticated and helpful risk evaluation models widely used in the industry. By imposing the proposed rule, the Board will be requiring issuers to institute resource-burdening policies and procedures that will produce little or no value for card issuers or consumers.

4. Subprime and Fee Harvester Accounts

Section 226.52 implements the Act's Section 105 prohibition on the imposition of any fees (except late, overlimit, or returned check fees) during the first year after an account is opened, to the extent those fees exceed 25% of the initially-authorized credit line. In particular, American Express objects to the inclusion of foreign transaction fees in the list of fees that count towards this limit.

As the Board has indicated in the proposed rulemaking, the 25% first-year fee limit is meant to address the problem of subprime credit cards, which "often charge substantial fees at account opening and during the first year after the account is opened." Federal Register, Vol. 74, at 54164. For example, these cards often impose multiple one-time fees when a consumer with a suboptimal credit profile opens an account (such as an application fee, a program fee, and an annual fee) as well as monthly maintenance fees, fees for using the account for certain types of transactions, and fees for increasing the credit limit. Clearly, this is a practice that needs to be curtailed, and American Express applauds Congress' and the Board's efforts to do so.

However, by not excluding foreign transaction fees from the list of fees subject to the 25% first-year fee limitation, the Act and the proposed rule inadvertently include accounts that are clearly not “fee harvester” or subprime accounts. A cardmember whose first-year spending exceeds the 25% fee limitation through accumulated foreign exchange fees would in all likelihood be a frequent business or leisure traveler. American Express believes that including foreign transaction fees in the 25% first-year fee limitation does not address the Act’s express intent to limit the charges typically generated by “fee harvester” and subprime accounts.

American Express firmly believes that the Board should exercise its authority to impose a common sense approach to the reading of Section 105 of the Act by excluding foreign transaction fees from the 25% limit. Including foreign exchange transaction fees would impose a significant and costly administrative burden on card issuers without any concomitant consumer benefit. American Express therefore strongly urges the Board to revise proposed Section 226.52 to exclude foreign transaction fees from the first-year 25% limitation.

5. Effective Date

The Board solicits comments as to whether the original July 1, 2010 effective date for those provisions of the January 2009 Regulation Z rule that are not directly affected by the Act’s February 22, 2010 effective date be accelerated. The effective date for these provisions must remain July 1, 2010. From a systems and testing perspective, it is not feasible to make operating system changes of the scope required by these regulations sooner than July 1, 2010. Since the Board published its Final Rule in January 2009, the effective date for these requirements has been July 1, 2010, and American Express and other industry participants have been endeavoring to have their operations compliant by that date. Indeed, the Board itself initially determined that, given the comprehensive package of reforms that had been adopted, 18 months was a reasonable implementation time. Accordingly, the effective date of those requirements that are not statutorily required by the Act to be in effect by February 22, 2010 should remain July 1, 2010.

6. Other Matters

The proposed rule contains several provisions relating to the requirements for payment due dates. In particular, proposed Section 226(b)(11)(i) requires that the payment due date be the same numerical date each month and proposed Section 226.5(b)(2)(ii) requires that creditors adopt procedures to ensure that statements are mailed at least twenty-one days in advance of the payment due date. American Express supports both of these rules as they apply to credit card accounts under open-end consumer credit plans. At the same time, American Express strongly believes that neither the Act nor these rules should be read to require a change to the long-standing requirements that charge card payments are due when the periodic statement arrives. Section 127(o) of the Truth in Lending Act, implemented by proposed Section 226.(b)(11)(i), is not among those enumerated TILA sections that apply to charge cards.

As a result, the requirement that the payment due date be the same numerical date is inapplicable to charge cards. And proposed Section 226.5(b)(2)(ii) would require statements to be mailed twenty-one days in advance of the payment due date. Of course, a charge card account could not be treated as late earlier than twenty-one days from the date statements are mailed. Charge cards have operated this way for decades, and are well understood by consumers. And for good reason. They are well-suited to helping consumers manage their accounts responsibly. And they are among the most transparent and easy-to-understand consumer financial products. Forcing a change to these products would frustrate, not further, the purpose of the Act, by hindering the continued availability of a product uniquely suited to helping consumers manage their accounts prudently and responsibly. For these reasons, we recommend that language be added to the proposed rule or commentary clarifying the points set forth above.

On a final note, American Express believes that proposed Section 226.56 provides the robust consumer protection and opt-in processes necessary for the cardmember to be able to make an informed decision as to whether to opt in to an overlimit fee. The customer's decision to opt in to an overlimit fee should be a stand-alone decision that is not linked to, or part of, another decision, such as opening an account or opting in to another service. The Board solicits comments on whether creditors should provide consumers with written confirmation to verify the consumer's election to opt into an overlimit fee service; and whether revocation requests should be given effect within the same time period that it takes to implement opt-in requests. American Express fully supports these requirements, as we believe that written confirmation is appropriate, and that there is no reason that the implementation of a revocation request by a consumer who wants to opt out of the overlimit fee should take longer than the implementation of the consumer's original opt-in request.

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Once again, American Express thanks the Board for its work on this proposal and the opportunity to comment on it. We would also welcome the opportunity to discuss our comments further with Board staff. Toward that end, any staff member should feel free to call me at any time at 212-640-5418.

Sincerely,

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Thomas J. Ryan
Senior Counsel
American Express Travel Related
Services Company, Inc.