Wells Fargo & Company
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April 14, 2010

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

Re: Regulation Z; Proposed Rule; Request for Public Comment
Federal Reserve System Regulation Z; Docket No. R-1384

Dear Ms. Johnson:

This letter is submitted on behalf of Wells Fargo & Company and its affiliates ("Wells Fargo") in response to the Proposed Rule implementing provisions of the Truth in Lending Act, in particular provisions added by the Credit CARD Act of 2009, published in the Federal Register on March 15, 2010 at 12 CFR Part 226 (the "Proposed Rules"). Wells Fargo appreciates the opportunity to comment and respectfully requests the members of the Board of Governors of the Federal Reserve System ("Board") consider adopting the suggestions set forth herein.

The Wells Fargo vision to satisfy all of our customers' financial needs and to help them succeed financially is a driving force in the way we do business. Engaging in responsible lending practices, encouraging consumers to make responsible and successful financial choices and conducting business with honesty and integrity, are already at the heart of our vision. It is our practice to build our business processes and strategies in compliance with all applicable laws and regulations.

This letter provides Wells Fargo's comments to the Proposed Rules as well as further requests for additional clarification based upon the Proposed Rules.

Summary of Key Comments:

226.52(b): LIMITATION OF FEES

- The rules should specify that when establishing fee amounts under 226.52(b), creditors may consider the costs of losses (or at least a portion thereof).
- Limiting late fees or returned check fees based on the amount of the minimum payments will not result in proportional fees.
- The $XX limits in the safe harbor proposal must be amounts that allow creditors to recoup costs.
- Wells Fargo urges the Board to clarify that when determining fee amounts based on deterrence, creditors must find a correlation rather than a causal relationship between the fee amount and the deterrent impact.
- Wells Fargo urges the Board to provide that creditors may test fees at different levels to determine deterrent effect.
- Creditors should have the right to charge both a returned check fee and a late fee if the payment was both late and there were insufficient funds to cover the check.
- Wells Fargo urges the Board to allow inactivity fees or annual fee waivers based on activity, so that consumers may choose to pay a fee rather than have their credit line closed.
- Wells Fargo requests that creditors have additional time (60 days) to make adjustments when the fee amounts change.

226.59: RE-EVALUATION OF RATE INCREASES

- Wells Fargo commends the Board on showing an understanding in the Proposed Rules of the need for creditors to have flexibility to continually update the factors that impact current creditworthiness based on creditors' use of sound evaluation and modeling.
- Wells Fargo urges the Board to clarify that it did not intend for creditors to have to use the same factors in looking at all accounts.
- Creditors should be limited to two years of six month reviews on an account after a rate increase.
- Wells Fargo believes that creditors will need at least 60 days to make rate adjustments to systems and billing statements.

Comments:

226.52(b): LIMITATION OF FEES

CONSIDERATION OF LOSSES:

The Proposed Rules regarding setting reasonable penalty fees specifically prohibit creditors from considering losses in determining fees based on costs under section 226.52(b)(1)(i). However, the Board solicits comment on whether card issuers should be permitted to include losses in the 226.52(b) determination. Wells Fargo urges the Board to reconsider the exclusion of losses in the calculation of costs. In making rules, the

CARD Act requires the Board to consider "the cost incurred by the creditor from such omission or violation." While perhaps not all losses are a direct result of each omission or violation, some percentage of the losses that creditors experience does flow directly as a result of such omissions and violations. Our data shows accounts with a pattern of behavior that breaches the terms of the cardholder agreement (late payments and over limit incidents) are more likely to exhibit serious delinquency and subsequently are more likely to result in a loss to the creditor. Regardless of the circumstances that cause a violation of the credit agreement and eventually a loss, the cost to the creditor of that loss is still a significant cost of doing business that is directly related to those credit agreement violations. Losses represent a large cost to creditors of extending credit, and are certainly associated with the behavior of not abiding by the terms of the contracts that the consumer signed (in particular, not making the timely payments that the consumer promised to make). Wells Fargo urges the Board to consider the losses that are incurred by creditors from violations and omissions as required by CARD Act in determining the safe harbor and allow creditors to consider at least a portion of those costs in an issuer's proprietary analysis of costs for such violations and omissions.

The Board cites that a loss may be caused by a number of different factors (such as unemployment, illness and divorce) and seems to be asserting that losses from these types of personal circumstances are not a direct result of omissions or violations of credit agreements. While these personal circumstances can coincide with omissions or violations of credit agreements, most creditors, including Wells Fargo, have established hardship programs to assist people in those times of distress. Creditors assist by modifying the contractual terms of credit agreements so that consumers who are willing and able to continue addressing their obligations are not at risk of violating the terms of the agreement by paying late, etc. The impact of those hardship situations on the incidence of contract breach or delinquency should therefore be lessened. If the Board believes losses related to such hardship arrangements should not be considered in the cost equation, creditors could be required to exclude losses related to hardship plans from the total costs while still including other losses as an appropriate component in the cost equation.

The Board also stated that "it appears that most violations of the account terms do not actually result in losses." While this may be accurate in some cases, all losses sustained by a creditor as a result of a violation of the account terms are in fact part of a creditor's costs related to the violation and should be considered as the CARD Act directs. Wells Fargo understands that there may be some limits on what losses the Board believes are reasonable to include. Above we propose one reasonable limitation may be excluding losses attributable to accounts in hardship plans. Alternatively, the Board could limit creditors to including only the percentage of losses attributable to accounts that violate their credit agreement terms twice in a twelve month span and then charge off during the subsequent twelve months. In footnote 17 on page 32 of the Proposed Rules, the Board cites a statistic regarding accounts that charged off that had delinquencies or over limit amounts in the last 12 months and notes that industry data that was presented to the Board previously indicates that would be about 7%. However, that statistic is based on general industry data. For purposes of the cost calculations in 226.52(b), the data or statistic could be derived from the individual creditor's data, which may differ from creditor to creditor, because the cost equation under this Subsection is otherwise based on the creditor's individual data.

Additionally, the Board states in footnote 17 on page 32 that "because collections generally continue after the account has been charged off, an account that has been charged off is not necessarily a total loss." Most creditors do not recover a high percentage of losses after charge off. In fact, average recovery amounts for the industry are typically only 10% of the outstanding balance on charged-off accounts, so charged-off accounts actually result in a near total loss. However, if the Board feels that creditors should not be allowed to consider charged off amounts that are later collected; they could require creditors to reduce the total losses that they are permitted to consider by the average percentage of losses they recovered after charge off in the previous year.

While no creditor can recoup all losses via late fees or penalty fees in general, it is an important tool for doing so, and it puts an appropriately higher burden on those who do not abide by the terms of their agreement. The proposal states that "the Board is concerned that – if card issuers were permitted to begin recovering losses and associated costs through penalty fees rather than upfront rates – transparency in credit card pricing would be reduced." Allowing losses to be factored into costs would not result in reduced transparency in pricing. Penalty fees as a consequence for violations are clearly and conspicuously disclosed up front to all borrowers. Also keep in mind that the CARD Act has restricted a creditor's ability to effectively re-price an account based on increasing risk. If a person becomes delinquent or their creditworthiness otherwise declines, creditors are unable to effectively price for that additional risk by raising the rate. For example, raising a rate with a change-in-terms notice can no longer impact existing balances, and imposing a penalty rate to existing balances now takes significantly longer due to new notice requirements. It is unlikely that creditors can ever fully anticipate losses by setting rates up front, because credit profiles of borrowers and the economic environment change over time. If creditors are unable to recoup some of the cost of losses through appropriate late fees, fewer new credit cards will be issued, existing lines will be reduced, and rates on new and existing credit will be increased on all consumers, even those who abide by their contractual terms to reduce and/or recoup the cost of losses. For consumers experiencing hard times due to circumstances beyond their control (such as unemployment, divorce, or illness), Wells Fargo believes that hardship plans will accommodate these situations. However, other consumers who are violating the terms of their contracts ought to take responsibility for their actions and bear the brunt of the cost of losses that result from their behavior, rather than subjecting consumers who have complied with the terms of their account to higher rates and reduced credit availability. Additionally, increasing the rate up front has the unintended consequence of burdening consumers who choose to maintain a balance on their account (rather than those who pay off each month and are not subject to a finance charge). Consumers who maintain a balance but do not pay late will pay a disproportionate share of the costs associated with losses.

At a minimum, the Board should permit card issuers to consider a portion of losses when determining costs. For example, the Board should consider allowing card issuers to add a portion of their losses to other costs each year to determine a reasonable and proportional fee amount that could be transparently disclosed to consumers up front, or by using a change in terms notice. This is a viable and reasonable alternative because losses, just like other costs, could be allocated based on a reasonable proportion of the overall total costs the creditor experienced in a prior period or reasonably expects to experience in the future.

Therefore, when determining reasonableness of fees, creditors should be able to consider the costs of losses (or a reasonable portion thereof) in evaluating their costs for purposes of determining an appropriate late fee. This would create a more equitable result for all parties involved and avoid unnecessarily penalizing those consumers who have not violated their account terms.

MINIMUM PAYMENT NOT A LIMITER OF COSTS:

Proposed section 226.52 creates a relationship between the minimum payment the creditor requires and the amount of late fees and NSF fees by prohibiting creditors from charging a fee that exceeds the minimum payment and by establishing a safe harbor for fee amounts that includes a fee amount derived from taking a percentage of the minimum payment. Basing the allowable fee amount on the amount of the minimum payment will not result in a fee proportional to the violation insofar as that proportionality relates to the costs the creditor incurs. Wells Fargo urges the Board to recognize that when determining that a fee is "proportional" to the violation or omission the rules should consider proportionality to the harm caused by the violation which, in the case of a late payment, is often not directly linked to the amount of the minimum payment due.

Regardless of the amount of the minimum payment, if the account is delinquent, creditors incur similar collection costs. The collection costs would still involve paying a collector and maintaining collection facilities to contact the consumer, regardless of the size of the minimum payment. In fact, contacting consumers often requires many attempts, but how much time a collector may have to spend is not directly related to the amount of the minimum payment. Even for accounts that may only be late once in a great while or only for a short period of time, there are still costs involved in modeling a collections strategy to determine whether that particular account is at risk of being late or in default in the future and to determine what collective action to take. There are system and programming costs associated with analyzing and tracking the account and in sending letters or programming statement messages. Whether the strategy involves letters, statement messaging, calls, etc., every delinquency, irrespective of the amount of the minimum payment, is treated seriously and there are costs to creditors in looking at each delinquency and designing collection strategies.

Wells Fargo urges the Board to reconsider capping the fees that are charged based on the amount of the minimum payment. Such a proposal is not an optimal or proportional way of allowing creditors to recoup the costs associated with late payment. It is also not ideal for consumers in that it will force creditors to recoup costs associated with collection by tightening credit or raising rates on all consumers (even those who abide by their contractual terms) to reduce losses and/or recoup the cost of losses.

Additionally, the use of minimum payment as a limiter of the fee amount compromises the logic of the cost calculations allowed under 226.52(b)(1)(i) by restricting the creditor from recouping its costs by means of a fee amount that was properly determined under 226.52(b)(1)(i). For example, if a creditor's cost calculations indicate that the cost associated with a late payment is $25, and $25 dollars is therefore the fee amount the creditor will use, the creditor will not be able to recoup costs on consumers with minimum payments below $25. For instance, if the required minimum payment is $15, there will be a $10 shortfall. Therefore, in order to really have a cost equation that allows the creditor to recoup costs, the cost equation would have to allow creditors to somehow determine what percentage of minimum payments will reasonably be below the cost amount and adjust the fee amount upward (for example to $27) to account for the shortfalls the creditor will experience from the consumers whose minimum payments are lower than the fee amount determined in accordance with the cost equation in 226.52(b)(1)(i).

Another problem with the use of the minimum payment as the dollar amount of the transaction to which the fee must be proportional is that for a returned check fee there may not always be a relevant minimum payment due. Under the Proposed Rules, the dollar amount associated with a returned payment is the amount of the required minimum payment due during the billing cycle in which the payment is returned to the card issuer. In some cases, payments are made more than one time in a cycle, so it is possible that a person may write a check to pay the minimum payment due in a given cycle (and that check did not result in a returned payment). However, subsequently, in the same cycle, the person may decide to pay down more of their debt (even though a minimum payment is no longer due in that cycle). If that check is returned for insufficient funds, the creditor has still incurred costs. Therefore, if the Board decides to keep the concept of minimum payment as the amount associated with the transaction, Wells Fargo urges the Board to clarify that even if the minimum payment due in the cycle has been paid, a fee may still be charged (proportionate to that minimum payment amount) for a later check that is returned in that cycle.

PARTIAL PAYMENTS:

Proposed Comment 52(b)(2)(i)-1 provides that the dollar amount associated with a late fee is the "amount of the required minimum periodic payment on which the fee is based." This would seem to indicate that the entire amount of the required minimum payment could be considered in establishing the late fee amount even if the creditor receives a partial payment on or before the due date. However, the Comment also says "the dollar amount associated with a late payment is the amount of the required minimum periodic payment that was not received on or before the payment due date." This sentence could be read two ways: (1) that the fee can be based on the entire minimum payment if that entire amount is not received by the due date or (2) that the fee can only be based on the portion of the minimum payment not received by the due date. As discussed above, creditors' costs do not diminish based on the amount that the consumer is delinquent, if the minimum payment is preserved in the final rules as the dollar amount associated with the violation, Wells Fargo urges the Board to clarify that the receipt of a partial payment does not reduce the amount of the minimum payment that is associated with the violation by amending the proposed comment as follows: "the dollar amount associated with a late payment is the full amount of the required minimum periodic payment that was not received in full on or before the payment due date."

INADEQUATE SAFE HARBOR:

In Proposed Rule section 226.52(b)(3) the Board proposed a formula of $XX or 5% of the amount of the missed minimum payment (whichever is greater). If followed without the benefit of a reasonable number in the $XX limit, that 5% formula would not allow creditors to recoup costs, because it grossly underestimates the costs. The proposal uses an unrealistic example of a $500 minimum payment. Consistent with OCC guidance most issuers require a minimum payment of at least 1% of principal to ensure positive amortization occurs. A 1% minimum payment would mean that the balance would need to be $50,000 in order to have a $500 minimum payment. Most balances are not that large. Using a more realistic scenario of a $5000 balance and a $50 minimum payment, the fee under the safe harbor would be $2.50. It is unrealistic for creditors to utilize such a safe harbor, because costs will far exceed $2.50 in this case. As discussed above, when losses are excluded from the equation, creditors still incur similar collection costs for delinquent accounts regardless of the amount of the minimum payment. Therefore, it is imperative that the $XX numbers in the proposal are consistent with amounts that realistically approximate actual costs. Otherwise, the safe harbor will not be a provision that creditors will be able to utilize and they will be forced to use 226.52(b)(1) instead, which will likely increase litigation risk and disputes, because it is based on individual creditor data and evaluation rather than a legally approved safe harbor. Additionally, using 226.52(b)(1) rather than the safe harbor will be more expensive for both issuers and regulators as the basis of the issuer's calculation will have to be examined and validated on a periodic basis.

DETERMINING DETERRENT EFFECT:

If a creditor chooses to base fees on deterrence under the Proposed Rules, creditors must use an empirically derived, demonstrably and statistically sound model that reasonably estimates the effect of the amount of the fee on the frequency of violations. The Proposed Rules provide that the dollar amount of a fee is reasonably necessary to deter a particular type of violation if the model reasonably estimates that, independent of other variables, the imposition of that lower fee would result in a substantial increase in the frequency of the violations. Creditors need to have the latitude to test the effect of charging a fee vs. charging no fee and the size of the fee in order to develop a statistically sound model demonstrating the effectiveness of the fee in reducing the incidence of the behavior. Therefore, Wells Fargo urges the Board to provide that creditors may test fees at different levels in a manner reasonably designed to make statistically sound estimates using representative samples of accounts and reasonable time periods to test.

Additionally, while creditors that use statistically sound models can often show a statistically significant correlation between two events (for example, the imposition of a lower fee and a substantial increase in the frequency of that type of violation), such a correlation can never prove causation between the events. By specifically stating that a model estimating a correlation between imposing a lower fee and an increase in violations is insufficient to satisfy the deterrent test in section 226.52(b)(1)(ii), the proposed rule has created a logically impossible burden for issuers. Accordingly, Wells Fargo urges the Board to clarify that creditors may meet the deterrence test by demonstrating a statistically significant correlation between the fee amount and the resulting substantial increase in the frequency of the violation, so that creditors are not challenged with the impossible task of proving causation.

ALTERNATIVE METHODS FOR CHARGING LATE FEES:

The Board requested comments on two alternative proposals (charging a fee per day the consumer's payment is late or charging a higher amount for each successive violation in a given time period). While Wells Fargo believes that creditors should have as many options for structuring fees as the Board deems appropriate, these proposed methods will not produce substantially better results for creditors or consumers than methods that allow creditors to determine what the correct fee amount should be using cost or deterrence methods. These proposed methods based on severity or frequency of the violation would put a relatively higher fee burden on cardholders who are less likely to pay or have ability to pay the fees (cardholders who are showing signs of financial distress or disinterest by making repeated violations or missing payments by many days). Additionally, charging a reasonable fee amount for the first violation is very important for deterrence. If the fee charged up front is relatively small and only increases over time, the likelihood of deterring future violations also deteriorates and if it costs only a small amount per day to be late, people may not be deterred from sloppy payment habits. Such methods of determining fees could actually increase the incidence of violations and do not contribute to simplification of fee structures for consumers.

MULTIPLE FEES:

While Wells Fargo agrees with the Proposed Rules that more than one fee should not be charged for a single violation of a credit agreement, separate fees for distinct violations should be permitted. For example, creditors should have the right to charge both a returned check fee and a late fee if the payment was both late and was remitted on a check for which the underlying deposit account did not have sufficient funds, because these are clearly separate and distinct violations. This is especially evident in a context in which a returned check does not cause a payment to be late. The check that is later returned may arrive at the creditor's address after the payment due date. However, regardless of the order in which the violations took place (whether the delinquency occurred before or after the returned check), the creditor incurs costs for both violations.

The Board itself recognizes two sets of costs for these two different fees: one set of costs from returned checks involving the costs of processing, representing and reconciling the returned payment and notifying the customer/arranging for new payment; and one for the collection costs – including the cost of establishing any hardship plans etc. – associated with late payments. Creditors ought to be able to recoup both sets of costs, because two agreement violations occurred. For the Board to treat a returned check event and a subsequent late charge as a single event arising out of one missed payment is unreasonable given the two sets of costs imposed on the creditor. If the fee is to be reasonable and proportional to the violation, then two violations should result in the ability to charge two fees. Not allowing creditors to recoup all of the costs associated with the two separate violations will force creditors to recoup costs by tightening credit or raising rates on all people (even those who abide by their contractual terms) to reduce losses and/or recoup the cost of losses.

Furthermore, deterrence is weakened if no fee is permitted in the case of either of the two violations. For example, if there is no separate fee for presenting a check with insufficient funds, then there is no deterrent to discourage similar behavior in the future. The time the check is tendered does not affect either the costs incurred as a result of the violation nor effective deterrence of future violations.

Additionally, if the rules in this area are adopted as proposed, a transition rule will be necessary to ensure that creditors can comply. Section 226.52(b)(2)(ii) indicates that this rule may be followed by imposing no more than one fee per cycle. Because this rule is most easily complied with by looking at whether multiple penalties are incurred in a single cycle, and because there will be little time available for complex programming solutions since final rules are expected close to the effective date, it is important that this prohibition be effective for billing cycles beginning on or after August 22, 2010 rather than for all fees charged after August 22, 2010. Wells Fargo urges the Board to draft a transition rule allowing for this contingency.

COMBINING COST AND DETERRENCE ANALYSIS:

The proposal indicates creditors can do either a cost or deterrence analysis to determine a reasonable fee. Recouping costs and deterring behavior are both key reasons for charging penalty fees. It may be that some portion of a fee is cost-based and another portion is deterrence-based. However, if you can only choose one method, even if a portion of the fee is based on costs and a small amount is added to increase deterrence, the entire amount must be justified by a deterrence model. Creditors view fees as a combination of cost and deterrent effect and would like the opportunity to justify the fee amounts they charge using either or both strategies. We urge the Board to consider allowing creditors to use either cost or deterrence or both to justify the fees they charge. We note that the CARD Act uses the conjunctive "and" when listing factors to be considered (cost, deterrence, conduct, and other factors) suggesting that the several types of factors should be combined together to derive an appropriate penalty fee, not separated into mutually exclusive buckets as if the statute used "or" instead.

INACTIVITY FEES:

The Proposed Rules prohibit the charging of certain fees due to the fact that the fees do not have a dollar amount associated with them. These fees include fees for account inactivity. While account inactivity does not involve a transaction amount to the consumer, it does involve a cost to the creditor that the creditor must recoup in some way. Inactive accounts produce no revenue for creditors. However, maintaining an account has costs in that the account must be retained on the system of record, must receive regular administrative notices (privacy notices, change-in-terms notices etc.), capital is allocated based on the aggregate line amount and funds must be reserved in case the account is used. If creditors cannot charge inactivity fees or alternatively waive annual fees based on levels of activity, creditors may be forced to recoup those costs in other ways by increasing rates or by closing accounts that are inactive earlier, thereby eliminating accounts that may be maintained by consumers as back up credit for a rainy day or as an overdraft protection line for a related deposit account. Consumers who maintain an account solely as an overdraft protection line for a related deposit account do so because the fees associated with overdraft protection tend to be more affordable than fees charged by a merchant for a bounced check when such a credit line is not maintained. Consumers would likely rather have the choice of paying an inactivity fee than have their account closed for inactivity.

Additionally, Wells Fargo notes that annual fees are not subject to 226.52(b) "except to the extent that such fees are based on account inactivity". Wells Fargo urges the Board to reconsider the conclusion that an inactivity fee or the refusal to waive an annual fee based on inactivity is a penalty to the consumer for "violating the terms or other requirements of the credit card account." Creditors do not view an inactivity fee (or lack of an annual fee waiver based on inactivity) as a penalty for violating the credit card agreement. Instead, it functions as a type of access fee. Credit card agreements typically do not include provisions requiring a person to use the account for a certain number or dollar amount of transactions. Instead, when the consumer reserves access to credit by opening an account they sign an agreement and are charged a standard annual fee plus regular interest and fees based on the assumption that they will be an average user of the account, but if they desire not to be an average user they impose a dormancy cost on the creditor that the creditor appropriately allocates to the consumer rather than closing his or her account. Under such circumstances, a consumer always retains the choice of closing their account rather than paying an inactivity or annual fee to keep it open.

The Board itself acknowledges in the Section by Section analysis that "the Board does not believe that [the costs a creditor incurs on an inactive account] constitute a dollar amount associated with a violation." Wells Fargo agrees. Because the CARD Act limits the "reasonable and proportional" standard to fees imposed for violations of the account terms and because the Board acknowledges inactivity fees are not imposed for violations, inactivity fees should not be subject to a "reasonable and proportional" requirement. The costs creditors incur are normal costs associated with maintaining open accounts. A fee based on inactivity is a fee to keep the account open so the consumer will have future access to the credit if they need it. It is not a penalty for violating the terms of the agreement or account. Additionally, waiving the annual fee when an account is not inactive is a way of benefiting consumers who choose to utilize the product, and prohibiting that customer service would not have a positive impact on consumers. Wells Fargo urges the Board to allow inactivity fees or annual fee waivers based on activity as a consumer benefit, so consumers can choose to pay a fee to retain access to a stand by line of credit that would otherwise have to be closed due to the costs and risk imposed on the issuer that receives no additional consideration for that increased risk and cost.

TIME TO MAKE CHANGES AND EXCEPTION FROM OPT OUT:

The Proposed Rules indicate in section 226.51(b)(1)(iii) that adjustments to fee amounts should be made within 30 days. Wells Fargo requests that the Board provide creditors additional time for making adjustments when fee amounts change, whether for adjustments to safe harbor amounts based on the Consumer Price Index per 226.52(b)(3) or for adjustments based on creditor cost or deterrence reevaluations per 226.52(b)(1)(iii). Because of the complexity involved with making such changes, creditors will need at least 60 days to make such adjustments to systems and account documentation (statements, agreements, tabular disclosures etc.). This need for adequate time is further compounded when "take one" applications/agreements are used. In the private label credit card context, agreements are often preprinted and distributed to merchants. In order to print new forms and distribute them to all merchants, creditors will need time for printing and shipping. Wells Fargo feels that 60 days would be a more appropriate time frame to ensure that creditors have time to make changes so consumers receive accurate disclosures.

Additionally, when creditors are making changes to fees either as a result of their annual reevaluation of costs or deterrence under 226.52(b)(1)(iii) or as a result of a change in the safe harbor amount due to a change in the Consumer Price Index under 226.52(b)(3), such changes should not be subject to an opt out by the consumer. Consumers retain the right to close their accounts at any time. They also retain the ability to stop making new purchases at any time. The limitations in 226.52(b) will ensure that creditors are not arbitrarily raising fee amounts unreasonably, so there would be no need to require that creditors give consumers an opt out to protect consumers from unreasonable increases. Therefore, Wells Fargo urges the Board to incorporate an exception to the requirements of 226.9(h) to require an opt out if a fee is being raised pursuant to 226.52(b)(1)(iii) or 226.52(b)(3).

COST DATA TO CONSIDER:

It appears from the Commentary to Section 226.52(b)(1) that when determining fees based on costs, creditors must look to costs incurred "during a prior period." However, the examples seem to use year one cost data to determine fees for year two. Wells Fargo urges the Board to clarify that the period a creditor uses in determining the costs need not be immediately prior to the period in which the fee is imposed due to the delay in processing and compiling cost data. In other words, if a creditor must reevaluate their fee based on costs every January, in January 2011 the creditor will likely not have accurate and compiled data for the immediately previous November or December 2010. Therefore, the creditor may need to use data for the cost analysis from the fourth quarter of 2009 through the third quarter of 2010 when doing an evaluation in January 2011. It is important that the rules clarify that creditors may use reasonably recent data if data is not available for months immediately preceding the review.

IMPACT OF CONCURRENT FCC PROPOSAL UNDER THE TCPA:

Wells Fargo notes that collection costs for most creditors are likely to increase if new rules proposed by the FCC under the Telephone Consumer Protection Act (TCPA) become final. Those proposed rules would make collection costs materially higher by inhibiting creditors' ability to contact delinquent customers in an efficient manner. It is unclear in looking at the Commentary to Section 226.55(b)(1) (in particular 226.52(b)(1)(i)-1(C) and the corresponding examples) whether such an increase could be anticipated and added to the costs taken into account in the year those rules become effective. In the examples in the Commentary the anticipated future increases are based on "past changes in costs incurred as a result of [the violation] and other factors relevant to potential costs". While it seems that an anticipated increase in collection costs due to new rules would be a factor relevant to potential costs, the rules under the TCPA will be new for creditors and creditors will not have a lot of data from past changes of this nature on which to base estimates. Wells Fargo urges the Board to clarify that when such a change is anticipated, it will be reasonable for a creditor to estimate the impact and include such an impact in its cost equation even though there may not be much data from the past on which to base such estimates.

<u>226.59: REEVALUATION OF RATE INCREASES:</u>

FACTORS USED TO RE-EVALUATE ACCOUNTS:

Wells Fargo commends the Board on showing an understanding in the Proposed Rules of the need for creditors to have flexibility to change the factors that impact creditworthiness and are relevant to economic and market conditions based on creditors' use of sound evaluation and modeling. It is also important that creditors have the ability to alter what factors they use to evaluate credit to ensure factors are predictive of creditworthiness at the time of review. Wells Fargo feels that the Board has appropriately reflected that in the Proposed Rules. The Proposed Rules allow creditors the choice of which factors to use while restricting that choice to factors either relevant at the time the decision was made or at the time the review is taking place.

Wells Fargo urges the Board to clarify the meaning of Comment 226.59(d)-1 as it relates to the creditor's choice of factors. That comment specifies, that "When a creditor changes factors it considers in determining the annual percentage rates applicable to its credit card accounts from time to time, it may comply with 226.59(a) by reviewing the set of factors it considered immediately prior to the change in factors for a brief transition period, or may consider the new factors." While Wells Fargo commends the Board on offering creditors flexibility by providing a "brief transition period," Wells Fargo urges the Board to clarify that this "brief transition period" only applies if the original factors that the rate increase decision was based on are not being used in the review. It seems that is probably what the Board intended by the first sentence that reads "A creditor that complies with 226.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to its credit card accounts may change those factors from time to time." However, Wells Fargo recommends that the Board add text to clarify that if creditors use the original factors, they may do so any time without regard for whether factors have changed over time, such as: "Unlike a creditor that complies with 226.59(a) by reviewing the factors it originally used in making the decision to raise the annual percentage rate, a creditor that complies with 226.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to its credit card accounts may change those factors from time to time."

Wells Fargo also urges the Board to clarify that creditors have the flexibility to look at different factors for variable rate accounts than for fixed rate accounts or to weigh factors differently when looking at variable and fixed rate accounts, because there are different economics (funding costs, in particular) associated with the type of rate on the account. Likewise, creditors should be able to look at different factors for closed accounts and open accounts or have the flexibility to weigh those factors differently, because on closed accounts, unlike open accounts, there is no ability on the part of the creditor to consider revenue from new activity in their analysis of account profitability. Wells Fargo urges the Board to clarify that they did not intend for creditors to have to use the same approach or the same factors in looking at all accounts as long as the factors used are reasonable for the type of account to which they are being applied.

Additionally, Wells Fargo notes that a creditor may also have reasons for using different factors to review accounts based on whether interest rates were adjusted on particular accounts for general market reasons or for individual credit characteristics. For example, if the change was based on general market conditions and impacted a portfolio as a whole, the creditor may wish to look at factors regarding market conditions in reviewing those accounts (whether those are the original market factors or new more predictive ones that the creditor currently uses). However, if an increase was based on individual account behavior or characteristics then the factors considered upon review could be individual factors or market based factors (whether those are the original factors or new more predictive ones that the creditor currently uses). Wells Fargo urges the Board to clarify that they did not intend for creditors to have to use the same approach or the same factors in looking at all types of rate increases as long as the factors used are reasonable for the type of account to which they are being applied.

REASONABLE LIMITS ON NUMBERS OF REVIEWS:

The Board is requesting comment on whether there is a point at which the creditor should no longer be required to review an account every six months even if the account's interest rate has not been reduced. It is unreasonably burdensome for creditors to continue to conduct reviews throughout the life of an account when it has repeatedly shown that the rate is appropriate. Creditors should be limited to two years of six month reviews on an account after a rate increase and should not be required to review an account every six months for the life of an account due to one rate increase that may have occurred years prior. Creditors are subject to competitive forces that will naturally cause them to adjust price in order to compete in the market place if necessary even after the time period where reviews are required. Additionally, based upon our experience, when accounts are adjusted based on the individual characteristics or behavior of the borrower, only a relatively small percentage of accounts qualify for subsequent decreases in rates based on the same factors.

AMOUNT OF RATE ADJUSTMENTS:

The Commentary to Proposed Rule 226.59(b) indicates that the amount of any rate reduction need not be commensurate with the amount of the original rate increase. Instead, the rate decrease may be a fraction of the rate increase based on the evaluation of the factors pursuant to 226.59. Wells Fargo commends the Board on this approach. It is important that the amount of any reduction be based on the current analysis or review (including any market or risk factors).

TIMING OF ADJUSTMENTS:

The Board is soliciting comment on whether 30 days is an appropriate time frame to make changes to rates if the rate is to be adjusted based on a re-evaluation of a prior increase. Wells Fargo requests that creditors have additional time for making adjustments when the re-evaluation indicates that an adjustment is necessary. Wells Fargo believes that creditors will need at least 60 days to make such adjustments to systems and billing statements.

DE MINIMIS ADJUSTMENT AMOUNT:

The Proposed Rules do not include a de minimis amount below which an adjustment need not be processed and communicated. For example, if a re-evaluation would indicate that an adjustment of only 0.01% was warranted, it would not be worth the burden of adjusting systems and documentation to make such an adjustment as it is unlikely to provide a substantial benefit to the consumer. For that reason, Wells Fargo urges the Board to set a de minimis amount below which adjustments need not be made or to allow creditors to set such an amount as part of their reasonable written policies and procedures pursuant to 226.59(b).

PENALTY RATE RE-EVALUATION:

Wells Fargo notes that the Proposed Rules require that, if after six months of being subject to a penalty rate pursuant to 226.55(b)(4), an account has not cured, the creditor must begin doing six month reevaluations of the penalty rate. We note that while not required by Regulation Z, some creditors have instituted a rolling six month cure for accounts in penalty pricing. This means that anytime a consumer in penalty pricing makes six consecutive on-time payments the account cures and is taken back to the regular account pricing. Wells Fargo urges the Board to clarify that if a creditor has implemented such a rolling cure period that regular six month reevaluations are not required.

RATE INCREASED BETWEEN JANUARY 1, 2009 AND AUGUST 22, 2010:

Wells Fargo commends the Board on the Comment (226.59(c)-3) indicating that the first review for any rate increases that occurred between January 1, 2009 and August 22, 2010 would need to be conducted prior to February 22, 2011. This gives creditors the needed time to put review policies and procedures in place based on the final rules prior to conducting the first rate re-evaluations. Wells Fargo urges the Board to adopt this comment as proposed.

Conclusion

Wells Fargo strives to provide our customers with flexible, wide-ranging and competitive credit products, superior service and education while fully complying with all applicable laws and regulations. We respectfully urge the Board to consider all of the comments and suggestions herein.

If you have any questions or would like to discuss any of the issues herein, please do not hesitate to contact me at (515) 557-6289 or martineolson-daniel@wellsfargo.com.

Sincerely,

/s/ MARTINE T. OLSON-DANIEL

Martine T. Olson-Daniel
Senior Counsel