WORLD FINANCIAL NETWORK NATIONAL BANK

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January 3, 2011

By Electronic Delivery

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

Attention: Docket No. R-1393

Re: Proposed Rule to Clarify Certain Provisions of the CARD Act

Dear Ms. Johnson:

World Financial Network National Bank ("WFNNB") has over 85 private label and co-brand credit card programs; representing over 70 million cardholders and $4.6 billion of managed receivables. Our clients are predominately specialty retailers who place between 20% - 45% of their sales on our credit cards.

We are pleased to submit this comment letter in response to the proposed rule ("Proposed Rule" or "Rule") issued by the Federal Reserve Board ("Board") to clarify certain provisions of the "Credit Card Accountability Responsibility and Disclosure Act of 2009" (the "CARD Act" or "Act"). We appreciate the opportunity to comment on this proposal.

Mandatory Compliance

Given the number and frequency of changes issuers have had to implement during the past 17 months in connection with the release of the CARD Act implementing regulations in stages, as well as other changes to Regulation Z, we strongly recommend that the Board adhere to the effective date and mandatory compliance date established by the Truth in Lending Act ("TILA") itself. Specifically, Section 105(d) of TILA states, "Any regulation of the Board, or any amendment or interpretation thereof, requiring any disclosure which differs from the disclosures previously required . . . or by any regulation of the Board promulgated thereunder shall have an effective date of that October 1 which follows by at least six months the date of promulgation." Therefore, we request that the Board refrain from requiring compliance with any amendments to Regulation Z or the Official Staff Commentary ("Commentary") resulting from the final version of the Rule until at least October 2011. In this regard, it is essential that issuers be provided with adequate time to implement the requirements contained in the Rule. If the final rule is similar to the Proposed Rule, it will substantially impact current industry practices. For example, issuers would have to completely rewrite compliance policies and procedures in connection with evaluating a consumer's ability to pay the required minimum payment for a credit card obligation and, in some instances to again revise underwriting criteria, applications and account-opening disclosures. In addition, from an operational standpoint, the proposed rate reevaluation requirements—which would require an issuer to develop a system that is capable of tracking over time rate increases that are tied to a change in the index—would be extremely difficult and time consuming for issuers to implement.

Thus, we recommend that the Board follow the statutory schedule established by TILA for updating Regulation Z and related staff interpretations. Specifically, we recommend that the Board issue a final rule by April 1, 2011 and make compliance optional until October 2011.

As has historically been the case, reviewing and revising Regulation Z at a specific time each year, with a consistent mandatory effective date each year, would greatly facilitate efficient compliance programs and policies.

Transitional Guidance

Moreover, it is essential, given the impending transfer of the Board's rulemaking authority to the Consumer Financial Protection Bureau in July of 2011, that the Board implement transitional guidance that will make clear that the final rule is prospective only. In this regard, it is important for the Board to clarify that the Rule, including clarifications in the Commentary, is prospective. Specifically, the transitional guidance should make clear that the final rule only applies to accounts opened after the effective date of the final rule, and only to changes in existing accounts that occur after the effective date of the final rule. At a minimum, as discussed in more detail below, it is essential that the Board implement the following transitional guidance: (1) make clear that revisions to Section 226.51 of Regulation Z only apply to accounts that are opened, and to line increases extended, after the effective date of the final version of the Rule; (2) confirm that issuers may use, and rely on, existing applications that were in circulation prior to the effective date of the Rule as it relates to Section 226.51; and (3) include a clear statement in the text of Regulation Z, or in the Commentary to Regulation Z, clarifying that there are no notice requirements, or any limitations under Section 226.55, for any waiver or rebate of a rate or fee that occurred prior to the effective date of the final version of the Rule.

Without the adoption of appropriate transition rules, the Board would in effect require compliance with revisions to the requirements of Regulation Z prior to the effective date of the Rule, and the Rule would have the affect of imposing those requirements retroactively to disclosures, programs and account terms provided or entered into prior to the effective date of the Rule.

Ability to Pay (Section 226.51)

When opening a new account, Section 226.51 of Regulation Z requires an issuer to consider the consumer's ability to make the required minimum periodic payments on the account. The Proposed Rule, however, would significantly change this ability to pay requirement in a way that would unfairly restrict the ability of many consumers, particularly women not working outside the home, to qualify for credit in a way that undermines one of the principal objectives of the Equal Credit Opportunity Act ("ECOA"). The proposal also would substantially restrict the ability of many issuers to serve new and existing customers; specifically, the Proposed Rule would prohibit an issuer from using spousal or household income when considering whether to extend credit, unless both spouses are joint applicants or the spouse applying separately lives in a community property state.

This aspect of the Rule would have a detrimental impact on non-working spouses, who are predominantly women and who depend on credit to manage the family household.

Specifically, the Rule would not permit a card issuer to extend credit to a non-working spouse if there is no evidence that the non-working spouse has the independent ability to repay the credit obligation, without considering the income of her spouse. Under these circumstances, the requested credit likely would be declined, and such declinations will have a significant adverse impact on non-working spouses. In many—if not most—families, it is the non-working spouse who is responsible for running the household, including coordinating the finances of the household. As a result, the non-working spouse is more likely to be the person who applies for credit than the working spouse. And, this access to credit is important to enable the non-working spouse to make household purchases, including clothing, furniture and other household goods. The Rule would significantly curtail many routine credit-granting practices that are valued by both issuers and consumers alike, such as the opportunity to apply for a new account at the point of sale.

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

Additionally, there are also privacy concerns surrounding applications for credit at the retail point of sale. Retail associates will frequently be faced with the uncomfortable and embarrassing task of notifying a non-working spouse that she has been denied for credit, that she must have her husband co-sign on the account, or that the application cannot be approved without further review, as there was no evidence that she had the independent ability to repay the credit obligation, without considering the income of her spouse.

Thus, the inability to extend credit to an important consumer base would have a significant adverse impact on credit availability for non-working spouses. The Board itself notes in the supplemental information accompanying the Proposed Rule that it "acknowledges that the proposed amendments . . . could prevent a consumer without [independent] income or assets from opening a credit card account despite the fact that the consumer has access to (but not an ownership interest in) the income or assets of a spouse or other household member." We find it hard to believe, however, that the Board fully understands the potential impact that the Rule would have on consumers, especially married women who rely on their husbands' income to obtain credit necessary to maintain their joint household. And, we find it impossible to believe that Congress could possibly have intended to end the protection that non-working women have enjoyed for more than 30 years under the Equal Credit Opportunity Act through a back-door amendment to an entirely separate statute, the Truth in Lending Act. To the contrary, Congress carefully included an "independent ability" requirement in a provision of the CARD Act that applies only to under-age credit applicants, not to non-working spouses applying for household credit.

Accordingly, we ask the Board to refrain from adopting a Proposed Rule that essentially prohibits an issuer from considering household income, and from granting separate credit to a non-working spouse.

Furthermore, the Proposed Rule would carelessly undermine the importance of non-working spouses by undervaluing the unpaid care giving work that millions of women (and other non-working spouses) provide for society as a whole. For example, a non-working spouse cares for family members and supports school systems and other community organizations. Instead of treating a non-working spouse with the respect that she or he deserves, the Proposed Rule would make it increasingly difficult for a non-working spouse to obtain credit by forcing issuers to deny that spouse credit if there is no evidence of the independent ability to make payments on the account. Not surprisingly, a majority of married women have no independent income of their own because they have opted to stay at home to raise children and care for family members. If the non-working spouse were to obtain a divorce, she undoubtedly would have control over a sizable portion of the income of the working ex-spouse, and that income clearly would be used to qualify for credit; but such a result would favor divorce over continuation of the family unit. Accordingly, because the Proposed Rule puts at risk core values of our society, it should not be adopted.

Moreover, the Proposed Rule is inconsistent with the purposes of the ECOA. The ECOA requires creditors to make credit available to all creditworthy consumers without regard to sex, race, age or marital status. In particular, the legislative history of the ECOA makes it clear that one "frequent complaint voiced by women during hearings leading to the passage of the Act . . . was their inability to obtain credit because the credit history of accounts shared with their husbands was maintained and reported only in the husbands' names." The ECOA and its implementing Regulation B are designed to remedy a woman's inability to obtain credit without her husband by requiring that, on the applicant's request, the creditor must consider accounts reported in the name of the applicant's spouse that reflect the applicant's ability to repay the debt. The Proposed Rule would undercut this key purpose of the ECOA and would have a chilling effect on the willingness of those very women to apply for store credit with the likelihood she would be publicly denied credit.

As noted above, Congress could not possibly have intended to subject non-working spouses to such demeaning experiences; nor could Congress have intended to restrict the ability of a non-working spouse to serve as an equal partner in the household. In light of the harmful impact the Proposed Rule would have on non-working spouses and their families, we respectfully request that the Board refrain from adoption of the proposed changes to the ability to pay requirements.

Promotional Rebates and Waivers (Section 226.59(e))

To address concerns that the revocation of a promotional waiver or rebate program based on a violation of the account terms may be inconsistent with the CARD Act, the Board used its exception authority under TILA to propose amendments limiting an issuer's ability to offer a promotional rebate or waiver of a rate or certain fees. The supplemental information accompanying the Proposed Rule indicates that it was the intent of the Board to limit the Rule to "promoted" programs and to exclude from the Rule a waiver or rebate that an issuer offers in order to resolve disputes, address compliance concerns or retain customers.

Notwithstanding the intent to limit the Rule to a "promoted" program, the Proposed Rule would not only restrict an issuer's ability to offer a promoted rebate or a waiver, but also could adversely impact an issuer's ability to offer a rebate or waiver that is not promoted, but is merely the type of accommodation that is routinely granted to customers. Accordingly, the Proposed Rule should be revised to clarify that an issuer is not limited in its ability to offer one-off waivers or rebates as an accommodation to individual consumers. Specifically, we recommend that the Board confirm that a rebate or a fee waiver is not considered "promoted" when the rebate or waiver is provided in connection with a consumer accommodation, to resolve a dispute or maintain a relationship, provided in connection with a hardship or workout program, or provided in connection with another customer service policy of the issuer.

For instance, the Proposed Rule indicates that if an issuer communicates a prospective waiver or rebate to a consumer on the periodic statement or by telephone, for example, the prospective waiver or rebate is considered "promoted." We believe this aspect of the Rule is inconsistent with the Board's intent to carve out a waiver or rebate based on a customer accommodation because a statement notice is the most common method of informing a consumer that a fee or other waiver has been granted. In this regard, the Board should clarify, for example, that a 3-month waiver of monthly membership fees for a consumer in the case of hardship, or as part of an established customer retention or collection policy, is not considered a "promoted" waiver, merely because the issuer has a policy of providing such a waiver under appropriate circumstances and of informing the consumer that the waiver has been grated through a statement message. Similarly, we recommend that the Board clarify that a silent but regular waiver practice in connection with customer retention, collection, dispute resolution or other account servicing policies and procedures would not be covered by the Rule even if the practice is applied on a regular basis.

In addition, the Proposed Rule would subject certain temporary fee reductions, such as a reduction in a monthly membership fee, to the requirement under Section 226.55(b) that a reduction apply for a specified period of six months or longer. We believe that subjecting certain fees to the requirement that reductions be offered for at least six months is inconsistent with the plain language of the CARD Act. The CARD Act refers only to rates and not fees. Accordingly, we recommend that the Board revise the Rule to clarify that the six-month duration does not apply to temporary fee reductions. At a minimum, we recommend that, as a technical matter, the Board clarify in the Commentary to Section 226.55 that any such six-month requirement does not apply to fees that are not subject to the limitations under Section 226.55. For example, in any event, the Board should clarify that there is no six-month duration for fee reductions that are not subject to Section 226.55, such as a reduction in a cash advance fee or a balance transfer fee.

On the other hand, we support the proposed commentary provision that clarifies that cash back and rewards programs continue to be permissible. Such programs are important to consumers and should not be limited by the Rule.

As noted above, the Board must include a clear statement in the text of the regulation or the commentary itself clarifying that there are no notice requirements, and no limitations under Section 226.55, for any waiver or rebate of a rate or fee that occurred prior to the effective date of the final rule. Thus, the final rule should not apply to existing waiver or rebate programs that may not be consistent with the final rule. That is, the issuer would not have to provide a 45-day notice, and the limitations under Section 226.55 would not apply, in the event the consumer is no longer eligible for the waiver of interest because he or she no longer has a deposit account with the issuer, or because the program is terminated in compliance with the Rule.

Rate Reevaluations (Section 226.59)

Section 226.59(a) of Regulation Z provides that if an issuer imposes a rate increase on an account and that increase is subject to a 45-day advance notice pursuant to Section 226.9(c) or Section 226.9(g), the issuer must periodically reevaluate the account under Section 226.59 to determine whether the card holder is eligible for a rate decrease. To address questions concerning the circumstances under which a change to the type of rate, such as a change from a non-variable rate to a variable rate, would trigger the rate reevaluation requirements, the Proposed Rule clarifies that a change to the type of rate is not a rate increase for rate reevaluation purposes if the rate following the change is equal to the rate in effect immediately prior to the change. We support the proposed clarification that if there is no rate increase at the time of the change, the rate reevaluation requirements are not triggered.

However, we do not agree with the proposed requirement that an issuer conduct a rate reevaluation if there subsequently is an increase in the variable rate based on a change in a previously disclosed index. We believe that a requirement to later review a subsequent rate increase that is tied to an index that is out of the issuer's control is inconsistent with the general rate reevaluation requirements in Section 226.59. That is, Section 226.59(a) does not apply to a rate increase for which there is no increase in the actual rate and for which there is no requirement to provide a 45-day notice; this certainly is the case where any subsequent change in a rate is tied to the index. In this regard, existing Commentary Section 226.59(a)(1)-3 explains that the "requirements of § 226.59 do not apply to" increases where "45 days notices is not required," for example, if the rate increase results from the increase in the index by which a properly disclosed variable rate is determined. Moreover, reevaluating a rate increase due solely to a change in a predisclosed index that is beyond the control of the issuer makes no sense from a policy standpoint. The rate reevaluation requirements are intended to cause an issuer to consider whether an issuer-imposed rate increase should be eligible for a rate reduction based on the factors that the issuer typically considers in making such determinations. However, the requirements were not intended to cover rate increases where the change is due to an increase in an index beyond the issuer's control.

In addition, it is unclear how and when (i.e. at the time of the index change or six months from the time of the index change) an issuer would reevaluate a rate increase tied to an index. In this regard, for example, if an issuer evaluates a rate increase from 12 percent to 12.5 percent that results from a change in the index, based on a review of new account factors, an issuer should not be required to consider a rate reduction because the rate increase was not issuer imposed, or in other words, the rate increase was not controlled by the issuer. In addition, it is likely that such an index increase would not only result in a rate increase on existing consumer accounts, but also would result in a rate increase for similar new accounts. Therefore, it would serve no purpose for the issuer to evaluate a rate increase resulting from a change in the index, regardless of whether the issuer based the review on the original factors, or on current factors for new customers, because in either case, the rate increase would result purely and simply from the change in the index that is beyond the issuer's control. In addition, any review that would be conducted using original factors likely would not result in a rate decrease because under the original factors there was no index or margin to compare. Accordingly, we believe that a rate reevaluation, under such circumstances, would have absolutely no consumer benefit, while forcing issuers to track accounts for possible rate reevaluation for no purpose at all. Thus, we recommend that the Proposed Rule be revised to clarify that an issuer is not required to conduct a rate reevaluation for a rate increase tied to an index, provided the only rate increase is due to the change in the index and that index is beyond the issuer's control.

At a minimum, it is essential that the Board clarify that the Proposed Rule would not require under any circumstance an issuer to change the type of rate that applies to the account. That is, if an issuer converted an account from a non-variable rate to a variable rate, there should be no requirement to revert back to a non-variable rate. And, if, notwithstanding the above, the Board decides to implement the Rule and require an issuer to subsequently review a rate change due to a change in the index, the Board should clarify that an issuer is permitted to cease reviewing the change in the index following the first review. Without such a clarification, an issuer could be required to review changes in the index for an indefinite period of time, even though such changes are out of the issuer's control and, therefore, should result in no rate reduction upon reevaluation.

Limitations on Imposition of Penalty Fees (Section 226.52)

The Proposed Rule would require, for purposes of determining the amount of the penalty fee that an issuer can impose under the safe harbor, that the issuer must actually have imposed the initial late fee and not just have the right to impose such a fee. For example, under the proposal, an issuer would have to actually impose the $25 fee for the first violation in order to subsequently impose a $35 fee for the second violation. However, if the issuer waives the $25 fee for the first violation, the Proposed Rule would provide that the issuer can only impose a $25 fee for the second violation, not a $35 fee. The Proposed Rule would do little more than discourage an issuer from ever waiving a penalty fee because if an issuer were to waive the fee for the first violation, the fee for the second violation could not be greater than $25.

Consistent with the rationale for expanding the temporary rate exception to cover temporary fee reductions, the Board staff should encourage, rather than discourage, issuers to waive penalty fees in connection with disputes, collections or for retention purposes. Accordingly, we recommend that the Board revise the Rule to permit an issuer to impose a $35 fee for a second violation, even where the issuer elects to waive the first $25 fee. If the Board fails to do so, it is essential that the Board clarify, at a minimum, that an issuer is not required to adjust penalty fees that have actually been imposed and subsequently waived due to, for instance, dispute resolution or as an accommodation to the consumer. Similarly, we recommend that the Board confirm that a partial fee waiver does not preclude imposition of the higher safe harbor fee for a second violation.

Furthermore, we ask that the Board clarify the application of the safe harbor provision in Section 226.52(b)(2)(ii), which permits an issuer to comply with the penalty fee limitations by imposing no more than one penalty fee during a billing cycle. Specifically, we recommend that the Board confirm that under the safe harbor provision, an issuer is permitted to impose a late payment fee and a returned payment fee when the two violations take place in different cycles. For instance, if an account cycles on the last day of the month, a $50 minimum payment is due on August 25th, and the consumer fails to make the required minimum payment by the due date so a late payment fee is assessed on August 27th, we recommend that the Board confirm that if the payment is subsequently made on August 31st, but the check is returned for insufficient funds on September 4th in the subsequent cycle, an issuer is permitted to impose a returned payment fee in that subsequent cycle.

In addition, the Proposed Rule would provide that if a card issuer does not reflect a past due amount in the required minimum periodic payment reflected on the billing statement that the card issuer may not impose a late payment fee based on the consumer's failure to also pay such past due amount. While issuers typically reflect past due amounts in required minimum periodic payments shown on billing statements, there are instances where it is operationally impossible to do so. For example, an issuer may receive a check after the due date and impose a late fee in one cycle, but that payment may subsequently be returned on the day after the billing cycle end—making it impossible to adjust the required minimum period payment due for the next billing statement. Specifically, an issuer would be unable to reflect the past due amount in the required minimum periodic payment because at the time the billing statement was printed, the issuer believed the payment had been made. Under these unique circumstances, the Board should confirm that an issuer is permitted to impose a late fee in the second cycle even if the required minimum periodic payment shown on the statement does not reflect the past due amount.

Temporary Rate and Fee Reductions (Section 226.55(b) and Section 226.9)

In acknowledging that temporary fee reductions can be beneficial to consumers, the Proposed Rule would amend Section 226.9(c) and Section 226.55(b)(1) to expressly permit an issuer to impose a fee increase after a corresponding temporary fee reduction without providing 45 days' advance notice, and without being subject to rate and fee limitations, so long as certain disclosures are provided, and the fee or charge that will apply after the expiration of the period is no higher than the fee that applied immediately preceding the fee reduction. While we fully support the expansion of the exception for rate reductions to include fee reductions, we recommend that the Rule exclude temporary penalty fee waivers from all notice requirements, including the disclosure requirements for promotional fee reductions. Temporary penalty fee reductions should be distinguished from other fee reductions, such as a waiver of membership fees for 24 months, because penalty fee reductions are typically provided in connection with a hardship or workout program, rather than as part of a marketing program solicitation or offer.

In addition, the Proposed Rule would require a new disclosure to be included in application and account-opening disclosures for employee accounts relating to the potential loss of an employee preferred rate. Specifically, an issuer would be required to disclose additional information beneath the tabular disclosures relating to the potential loss of the preferred rate due to the end of the consumer's employment. We believe these additional disclosures, coupled with the advance notice requirements and the application of limitations in Section 226.55 to employee accounts, likely would result in the complete elimination of such beneficial employee rate programs, because it would require issuers to print and provide special initial disclosure forms for employees who are given preferred employee rates, while at the same time imposing notice requirements and rate limitations at the time employment ends. Thus, we recommend that if the Board adopts the proposed additional disclosures for employee preferred rates, the temporary rate exception should be expanded to permit issuers to increase rates, or fees where appropriate, to the standards disclosed without being subject to 45-day advance notice and the limitations in Section 226.55.

Closed Accounts (Section 226.55(b)(3)(iii))

The Proposed Rule would prohibit an issuer from increasing a rate, fee or charge that is subject to the limitations in Section 226.55 to a closed account or to an account that the "card issuer does not permit the consumer to use…for new transactions." If the Board determines to adopt the Proposed Rule for closed accounts—that is, accounts where the ability to make transactions has been suspended—the provision should be limited to permanent suspensions and the Board should specifically exclude temporary suspensions. In this regard, it is essential that accounts that are temporarily suspended be excluded from the prohibition on increasing rates or fees on closed accounts; for example, the Rule should be revised to clarify that accounts temporarily suspended due to exceeding the credit limit, potential fraud, etc. are not subject to the prohibition against rate or fee increases.

In addition, the Board should exclude from the prohibition on increasing rates or fees on closed accounts those accounts where there is a transfer of ownership (i.e., a portfolio sale) and the new account owner merely converts the purchased accounts to the new account owner's credit card platform. In the context of portfolio conversions or other transfers of ownership, the Rule should clarify, for example, that an issuer may change the method for calculating the variable rate, such as the index read date, without regard to the right to reject or the limitations in Section 226.55. In addition, the Board should clarify that an issuer may change the method for calculating balances (i.e., from an average daily balance method to a daily balance method) on the account, even though such a change may impact interest charges for existing balances.

Check Disclosures (Section 226.9(b))

The Rule would require an issuer to include variable rate disclosures with the disclosures required to be provided with checks that access a credit card account. The variable rate disclosures are detailed and complex. In addition, since consumers already would have received variable rate disclosures at account opening or as part of a promotion, such detailed disclosures would provide little value to consumers. Accordingly, we recommend that the Rule limit the requirement to provide variable rate disclosures on checks to situations where there is a promotional rate or fee that is higher than the existing rate on the account, or where the return rate or fee is higher.

Conforming Payments (Section 226.10(b))

The Rule would treat all payment methods that are made available to a consumer as "promoted" and, therefore, as conforming payments. We believe this approach is overly broad and does not adequately distinguish between payment methods that are "promoted" and payment methods that are merely "permitted." In this regard, we recommend that the Board clarify that by merely informing the consumer about a payment method—e.g., including a statement on billing statements that payments can be sent by wire transfer or having an IVR option that allows consumers to make payments over the telephone—an issuer is not promoting a payment option. In addition, we ask that the Board confirm that promoting the ability to make an expedited payment through the use of a live customer service representative does not preclude an issuer's ability to charge an expedited fee.

Account Opening (Section 226.52)

Under proposed Section 226.52(a), the Board states that "an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions." We recommend that the Board clarify that the language in Section 226.52 does not impact what is considered account opening for other sections of the Rule. That is, the Board should confirm that the proposed clarification does not change when the account-opening disclosures must be delivered—before the consumer becomes obligated on the plan or before the first transaction on the plan.

Thank you for allowing WFNNB the opportunity to comment on the Proposed Rule.

Sincerely,

/s/

Daniel Groomes, President
World Financial Network National Bank