Bank of America

Legal Department

January 3, 2011

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

Re: Regulation Z Docket No. R-1393
RIN No. 7100-AD55

Dear Ms. Johnson:

Bank of America is one of the world's largest issuers of credit cards, and as a bank is dedicated to providing fairly priced, clearly disclosed, open-end credit to consumers. The past several years have seen significant change in the laws that govern this valued source of credit. We appreciate the efforts of the Board of Governors of the Federal Reserve System ("Board") to provide related regulatory guidance, including this most recent proposed rule.

Key Points:

- We urge the Board to reconsider proposed changes to §226.51 (Ability to Pay), which would expand the regulation beyond the original legislative scope, overriding long-standing regulatory precedent and congressional intent. Many consumers would be hurt, particularly non-working spouses seeking credit in their own names.
- The mechanics of Ability to Pay applicable to credit cards should not apply to charge cards. Rather, ability to pay calculations for charge cards should take into account unique product features, like full repayment of the balance each month.
- The proposed twelve-month fee limitation period should run from account open date.
- The phrase "active" is too broad for purposes of determining whether an account may be subject to an increased fee or charge.
- Flexibility should be provided with respect to certain disclosure and timing requirements, where such changes would have no adverse impact on individual consumers.

§226.51 Ability to Pay

'Establish credit in your own name,' is sound advice frequently given by parents, family law experts, and personal finance pundits. Proposed changes to §226.51 (Ability to Pay) would make it virtually impossible for non-working spouses to establish credit in their own names. Congress did not intend such a result, and there are sound public policy reasons to avoid it. Therefore, the Board's proposal to require that the ability to pay be "independent" for all applicants should be withdrawn.

The Credit CARD Act of 2009 ("Card Act") amended Chapter 3 of the Truth in Lending Act by adding Section 150, Consideration of Ability to Repay, which states that the issuer must consider the ability of the consumer to make the required payments under the terms of such account. There is no requirement that this ability be independent, which is consistent with the existing commentary under Regulation B, whose

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guidance notes, for example, that when faced with reliance on income of another person, "the creditor may require the spouse's signature, *but need not do so*– even if it is the creditor's practice to require the signature when an applicant relies on the future earning of a person other than a spouse." (§202.7(d)(5) Comment 2 emphasis supplied). Regulation B contemplates reliance on household income for an individual applicant, and the Consideration of the Ability to Repay section of the Card Act has no language that indicates an intent to undo this.

The source of the word "independent" is an entirely different section of the Card Act, amending a wholly separate section of the Truth in Lending Act. Section 127(c) of the Truth in Lending Act was amended to provide that applicants under the age of 21 had to submit information "indicating an *independent* means of repaying any obligation." Such a provision would be superfluous if the ability to pay already required an independent means test. We believe that statutory interpretation would conclude that the independent means test applies only to the under 21 applicant, and the proposed expansion of that phrase should be abandoned.

Requiring banks to limit their consideration to an individual's income creates an unfair and harsh consequence because, as a general rule, joint debt is counted fully against the individual. Although the family combines the income to support the family's obligations, the bank cannot seek total household income to consider the ability to meet the total household debt obligations. This is an unwarranted and unnecessary intrusion on what are currently sound underwriting practices, especially in light of the proposed requirement that household income cannot be considered.

The Board addressed some of these arguments, as shown in the discussion in the Supplementary Information that accompanied the proposed rule. However, beyond the issues of regulatory and statutory interpretation, the Board should also consider that the proposed changes may have unintended consequences. A non-working spouse may not want to be liable for the charges of the other spouse, and therefore no want to have to have a joint account. Non-working spouses may want to have access to a line of credit for family expenses, and to build some credit in their own name, for any future contingency. Under the proposed rule, non-working spouses will be declined for a failure to meet an independent ability to pay, because they cannot count the total household income on which they would be relying for repayment of the debt. Ironically, if the non-working spouse were to divorce, he or she would then be able to list any alimony to meet the independent ability to pay test. So under the proposed rule, the non-working spouse is more qualified for credit when divorced and dependent on alimony than when married and maintaining a shared household.

We believe that such as result would be contrary to public policy, and contrary to the purpose of the Federal Reserve Board's own guidance in section 202.10 of Regulation B. This section provides that authorized users who are spouses should be reported to the bureau, because "[b]efore the enactment of the ECOA, many women found it difficult to obtain credit..." The Board recently went to great lengths to protect this provision in the recasting of new FICO scores. Yet there is little value to a non-working spouse's building a credit file that reflects management of household accounts if the non-working spouse still cannot qualify for credit on his or her own because of a perceived lack of independent income.

Bank of America has conducted a preliminary review of the impact of eliminating "total household income" from the application. In reviewing six months of application data, over ten percent of the applications that today pass ability to pay are projected to fail the ability to pay calculation under the proposed rules. Retired applicants and non-working spouses would be impacted at a much higher rate than the general population. When we look at the accounts that were approved but would have failed the proposed ability to pay rule, they have thus far demonstrated lower early delinquency than the portfolio as a whole. Consequently, since our data indicates neither a safety and soundness nor a creditworthiness issue, we are unable to see the compelling reason for making it so difficult for non-working spouses to obtain credit in their own name.

Therefore, when balancing statutory interpretation, public policy, and practicality, the proposed changes to Ability to Pay should be withdrawn, and the current rule left unchanged.

Application of Ability to Pay to Charge Cards

The proposed rule provides that charge cards are subject to the new provisions, including ability to pay. Some charge cards have a disclosed credit limit, but many do not have preset spending limits. Charge cards require payment of the balance in full each month; there is no option to revolve. But it is the rare customer who actually charges the maximum amount permissible each month (whether that permissible amount was disclosed or not). Because charge cards require payment in full each month, it is generally thought that customers are less likely to inadvertently accrue more debt than they can afford to repay, because there is no incremental debt added each month, and there is no interest charged on the account. Because of these clear distinctions between charge cards and credit cards, it is inappropriate to apply the same ability to pay calculation to both products. Therefore, we urge the Board to clarify that, for purposes of ability to pay and its application to charge card, banks are not required to use the maximum amount the customer might be permitted to charge, but may use some other reasonable measure of anticipated use.

If the Board were to require that the credit card calculation be used for charge card accounts, it is very difficult to envision how ability to pay can be satisfied because, it may appear that the lender should use the maximum amount the customer could borrow in any given month in its consideration of ability to pay. For example, for a credit card with a $10,000 line, the ability to pay test might require monthly disposable income of around $300 a month, or expressed annually, $3,600 of disposable income. But a charge card with a similar limit would require $10,000 a month of disposable income, or $120,000 annually. At the other extreme, consumers who easily qualify for a $2,000 credit card under ability to pay may not qualify for even a $300 charge card. Charge cards are different form credit cards, and the Ability to Pay guidance must account for this. Flexibility in the application of ability to pay will encourage the development of more charge cards with preset lines, which our research indicates is something customers are interested in because of their built-in control features.

§226.52 Limitations on Fees; §226.55(b)(3) Advance Notice Exception

In measuring the relevant time period for the first year limitations on fees, the Board proposed that the time period be measured from the first date the customer could use the account. The Board has requested comment on whether issuers will have operational difficulties posed by the amendment defining this one-year period. Our greatest concern with this section is the statement "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." Our system tracks as the open date the date we create the account on our system, which is generally a few days before the card and initial disclosures are mailed to the customer. No customer can engage in a transaction prior to the creation of the account on our system, but generally there will be an indeterminate number of days after that date that most customers will have to wait before they can make a transaction. We do not track, and would not have a reliable way of determining, when exactly a customer can first use an account, and that date may vary depending on how and where the account was opened (for example, was a balance transfer offer included with the application, or was it a point of sale application for credit?).

We think the system's account open date, which is consistently measured, readily available on all systems and exists as a matter of industry practice, serves the purposes of this section and should be the starting date for the twelve month measure.

§226.55 Treatment of Protected Balances

The Commentary to §226.55(c)(1) provides that an increased fee or charge can only apply to an active account. The term "active" account is, in this context, too extreme both in concept and execution and the regulation should be changed to clarify that this limitation applies only to truly closed accounts at the time of the mailing of the notice. In the alternative, there should be specific exemptions for temporary losses of charging privileges, for example, due to fraud.

There are many situations where a customer temporarily loses charging privileges, such as when an account is blocked pending a fraud investigation of a particular charge. This status may only exist for a few hours, or a few days, and should not impact a change in pricing terms. An account might be open when it is mailed the change in terms, and may have subsequently lost active charging privileges when the change is applied to the account. The ability to reject a change in terms, when applicable, is adequate protection to consumers. The test for active charging privileges is overly broad, not always relevant, and difficult to implement. Because of this operational complexity, it should be stricken from the proposed rule.

§226.16 Promotional Fees and Disclosures

The Board has proposed allowing temporary reductions in fees that then return to their former levels without necessitating a change in terms, in the same manner as promotional rates. In so doing, the Board has appropriately provided consumers with the benefits of promotional fees. However, the application of all the promotional rate rules to promotional fees is unnecessarily awkward. Specifically, the §226.16(g)(3) requirement for use of the term "introductory" or "intro" in immediate proximity of the promotional fee does not add value to the customer. In the context of the rate, the phrase serves as a reminder that the rate is introductory, and will change after a period of time. This is understandable because the rate applies in an ongoing manner. If, however, the bank is waiving the fee for balance transfers associated with the credit application, for example, this concept is not going to be clearly communicated if we must say, "0% introductory balance transfer fee for balance transfers associated with this credit application (4% for all other balance transfer requests)." Or if the annual fee is waived for the first year, what is gained by requiring that it be disclosed as an introductory annual fee of $0 for the first year? In the context of transaction fees and annual fees, requiring the use of "introductory" or "promotional" does not add clarity or any particular value, and does handicap efforts to clearly communicate the nature of the fee waiver.

§226.59 Reevaluation of Rate Increases

In earlier discussions of this section, the Board rejected the use of billing cycles and required that the reviews occur no later than every six months. The stated rationale for this position was that a card issuer may have billing cycles that are several months long (see the Supplementary Information to the Final Rule Effective August 22, 2010). We consistently have 12 billing cycles every year. The length of the billing cycles varies slightly based on the number of days in the month, and holiday timing (for example, an account has a billing cycle that ends on January 4th. Six months later, the cycle might end July 5th because of the 4th of July holiday). We are concerned that the review on the end of the sixth billing cycle would appear to come a day late in the above example. Strict adherence to the day of the month will create burdensome programming and monitoring, especially considering that the result of the rate review need not take effect for an additional 45 days (presumably to allow it to align with actual billing cycles). We respectfully request a statement that billing cycles can be used to measure the months required by this section if the issuer has 12 nearly-equal billing cycles every year. We recognize that this was not part of this proposed rule, however we believe that a statement in the Supplementary Information would be a sufficient clarification, given the nature of this issue.

§226.5a(b)(5), §226.6(b)(2)(v) Grace Period
The proposed rule provides that the §226.54 limitations on imposition of finance charges, the single-cycle transitional grace period for accounts moving from pay-in-full to revolving, should not be disclosed as a grace period under §226.5a(b)(5) and §226.6(b)(2)(v). We think this makes sense, however this exception is too narrow. The Board should clarify that the §226.54 limitations on imposition of finance charges does not constitute a "grace period" for *any* disclosures of a grace period required by the regulation. This will provide for a consistent treatment of this limited (and difficult to clearly disclose) circumstance, and would clarify that it need not be disclosed on the periodic statement, the annual fee reminder letter, etc., which we believe is the Board's intent.

§§226.5a(b)(6), 226.6(b)(2)(vi), 226.7(b)(5) Balance Computation Methods
The proposed rule makes provisions for simplified disclosures of the balance computation methods that are identified by name in the regulation. We request that the Board confirm that the balance computation methods named in the regulation can be used for transactions that accrue interest on the transaction date even if the transaction date is prior to the first day of the cycle in which the transaction posts to the account, which may be the case for cash advances. Consumers can thus benefit from a consistent and abbreviated disclosure.

§226.9 Subsequent Disclosure Requirements
The proposed rule inserts a provision that an increase in a fee previously reduced consistent with 50 USC app 527 (the Servicemembers Civil Relief Act, or "SCRA") may be restored without a right to reject. Out of respect for our servicemembers, we often reduce more fees than those specifically articulated in the SCRA. The final rule should clarify that in this instance a lender is permitted to return all fees to their previous levels, once SCRA no longer applies.

In conclusion, we believe the proposed rule clarifies much of the substantive, disclosure, and timing requirements of the regulation. Such clearly articulated standards provide the necessary framework to design credit products to meet consumer needs.

Respectfully submitted,
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