THE FINANCIAL SERVICES ROUNDTABLE

*Financing America's Economy*

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Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Email: regs.comments@federalreserve.gov

**Re: Federal Reserve Board Docket No. R-1393: RIN No. 7100-AD55, Truth in Lending**

Dear Ms. Johnson:

The Financial Services Roundtable[1] ("Roundtable") welcomes this opportunity to comment on the Federal Reserve Board's (the "Board") proposed rulemaking to amend Regulation Z, as part of the Board's ongoing effort to implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"). The industry has worked quickly and efficiently to implement the changes required by law and regulation. The industry has taken affirmative steps to revise their lending policies to better serve their customers' needs. The Roundtable supports the spirit of the proposed regulations to provide greater clarity to the industry but we have concerns with the latest proposal, including the separation of household income from applicants' credit personal income when evaluating a consumer's ability to make the required payments before opening a new credit card account or increasing the credit limit on an existing account. Our concerns are outlined below.

**I. Prohibiting use of household income is a misinterpretation of the CARD Act and should be withdrawn.**

Assessment of household income is permitted under the CARD Act and is necessary under the Equal Credit Opportunity Act. Section 226.51 requires that a card issuer "...consider(s) the ability of the consumer to make the required minimum period payments under the terms of the account..." In most cases this entails considering the income of the consumer.

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $84.7 trillion in managed assets, $948 billion in revenue, and 2.3 million jobs.

Generally, Section 226.51(b) prevents an issuer from opening a new account for a person under 21 years old unless it undertakes particular underwriting steps. The CARD Act uses the term "independent" only in the context of consumers under 21. Therefore, language pertaining to underwriting for consumers under 21 years old (originally college students) differs from the statutory language pertaining to underwriting for the general population.

Legislative history shows that Congress intended there to be a different underwriting standard for people under 21 years of age as compared to the general population. The term "independent" was added to the CARD Act while the bill was pending in the Senate. During Senate debate no statements were made detailing how this provision should be interpreted by the Federal Reserve. This provision was included in an amendment made by Senators Chris Dodd (D-CT) and Richard Shelby (R-AL) to make additional changes to their own manager's amendment. Before the inclusion of the Dodd-Shelby amendment, Senator Robert Menendez (D-NJ) introduced two amendments to the bill that would have included an "ability to pay" provision in the bill.

Senator Menendez introduced Senate Amendment 1115 under which credit card applications would require a cosigner who could repay the debts or "submission by the consumer of financial information, including through an application, indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account." (emphasis added). The goal of Senator Menendez proposal was to require the same standards of "ability to pay" for all consumers as those required under the Act for consumers under the age of 21. Instead of requiring "independent means" for all consumers, the final language in the CARD Act requires "independent means" for underage consumers only. Senator Menendez ultimately voted "yea" for the final bill that contained this language.

The proposed rule argues that the statutory language for the general population requiring showing of "the ability of the consumer to make the required payments" demonstrates Congress's intent to require a showing of an "independent means" of repayment. Following the plain reading of the Act, the Roundtable strongly believes that the legislative history and outcome in the Senate is meaningful and persuasive. Therefore, the Board should not interpret the term "the consumer" to be the same as "independent means" where Congress specifically used these terms in separate provisions.

Accordingly, neither the CARD Act nor Regulation Z requires the imposition of a prohibition against asking for and using household income. In fact, the CARD Act does not require the specific consideration of income at all. This requirement appears only in the proposed rule issued by the Board. Nor is the Roundtable aware of legislative history suggesting that lenders could not consider household income in making the "ability to pay" determination, even if staff is independently concerned that asking for household income might result in consumers providing an inappropriately high level of income on the loan application. The Roundtable requests that the Board balance that concern against the consequences of banning use of the term as described below.

A large number of lenders solicit income from applicants by requesting "household income." The term is intended to be evocative and encourage consumers to offer all the income that they may legally rely upon to repay debt. This way their applications receive the fullest and fairest consideration possible from the lender, and the lender can make an appropriate credit risk decision. Furthermore, there is not a good alternative to asking the question this way in order to obtain all income information.

In community property states (*e.g.* California, Texas), the income from both spouses is the property of each and is certainly appropriate for an individual to include. Asking merely for the income of the applicant would not only be anomalous, it would be misleading. To limit this question to applicants in community property states is confusing for consumers and operationally challenging. In addition to concerns about obtaining accurate income to process applications, many lenders are concerned that a failure to ask for household income might well result in a negative impact to non-working spouses that is at odds with longstanding policy under Regulation B.

In the proposed rule the Board "acknowledges that the proposed amendments…could prevent a consumer without income or assets from opening a credit card account despite the fact that the consumer has access to the income or assets of a spouse or other household member." However, the Board does not discuss the potential impact and consequences that may result from this rationale. The Roundtable believes that this is an issue that the Board should review and consider in greater detail. Thus, the Roundtable recommends that the Board withdraw this part of the proposed rule and conduct agency hearings on this issue.

Available evidence clearly suggests that there are adverse consequences to just using "income" as the only factor in considering whether or not an applicant has the ability to repay. Many applicants, largely women (97% of stay-at-home spouses are women), answer that question with "none." Under the proposed rule, many stay home spouses will likely be denied access to separate credit in their own names – a result fundamentally at odds with the public policy of promoting separate credit for spouses that is a long-standing concern of Regulation B and other law. Permitting the continued use of "household income" would likely avoid this problem.

In short, if the rule as proposed were to go into effect, it would have a negative impact on credit by unnecessarily limiting the availability of credit, resulting in fewer people having access to credit when they need it most (e.g. in emergencies). Without the use of household income, the rule as proposed will have an improper and negative impact on women.

We submit that the prohibition on the use of household income is being put forward to fulfill the technical, not substantive, requirements of a regulation. However, the substantive policy of ensuring credit access to non-working spouses is far more important – and a longstanding concern. Therefore, the Board should continue to allow the use of household income.

**II. Conforming Payments**
The proposed rule outlines the differences between conforming and non-conforming payments. Accordingly, the Board's proposal states that if a creditor promotes a specific payment method, payments made ***via*** that method, prior to the end time set by the promoter, would be a conforming payment. The Roundtable believes the definition of "promoting a payment" is unintentionally expansive. The Roundtable is concerned that such a broad definition will not provide the payment card industry with the appropriate guidance with respect to the differences between conforming and non-conforming payments. Additionally, we strongly urge the Board not to extend the conforming payment requirements and pay-to-pay prohibitions to third parties that are not agents or servicers of the issuer. Furthermore, we do not consider an institution "promoting" a third party if they simply provide a list of third parties to consumers. (§226.10(b)). The Roundtable believes that the Board's interpretation in this instance is very broad, and we request that the Board reconsider this section and develop a narrower approach.

**III. Temporary Fee Waivers**
Under current Regulation Z, an issuer must provide 45 days advance notice prior to a significant change in the account. According to the proposed rule, a waiver or a rebate of interest, fees, or other charges limited by Section 226.55 that is later revoked would be considered an increase in a rate, fee, or charge if it is a waiver or rebate program promoted by an issuer. The proposal also provides examples of when one is or is not "promoting." The Roundtable believes any prospective waiver of a penalty fee (*e.g.* late, over the limit, *etc.*) should not be subject to any disclosure requirement, including the requirement for promotional fee or rate reductions.

Next, prospective waivers of membership fees should not have to meet the requirements for promotional fees because they should not be deemed "promoted" if the waiver is a one-off prospective waiver such as a 3-month waiver of monthly membership fee in case of hardship or a customer retention conversation. These examples should not have to meet disclosure and 6-month minimum duration requirements. For instance, if a customer contacts a financial institution to explain that she will experience financial hardship for 3 months, a card issuer may provide a waiver of the monthly membership fee for the next 3 months. This kind of one-off prospective waiver is consistent with waivers or rebates to resolve disputes, address compliance concerns, or retain customers. Thus, it should not be considered a promotional waiver or rebate that would trigger the notice and 6 month requirements.

**IV. Rate Evaluations**
According to the proposed rule, a "change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate is not a rate increase for purposes of Section 226.59, if the rate in effect immediately prior to the change in type of rate is equal" to or greater than the rate in effect immediately after the change. The Roundtable believes that the rate reevaluations should not be triggered when there is a change to the type of rate (e.g. from non-variable to variable) and, over time, the variable rate diverges from the non-variable rate due to the operation of the index. This would impose a substantial amount of operational complexity, as issuers would need to monitor on an ongoing basis to determine when, if ever, the need to reevaluate arises. The Roundtable respectfully requests that the Board withdraw and reconsider this section.

**V. Floor Rates**
Section 226.9(c)(2)(v)(C) of the proposed rule extends beyond credit cards, to all open-end credit that is not secured by a house, the requirement that a variable rate plan may not have a floor rate in order to be outside the control of the issuer. Thus, a variable rate plan, even for non-credit card based accounts, does not qualify for the exception for variable rates if it has a floor. This proposed expansion to areas unrelated to credit cards goes beyond the Congressional intent and scope of the CARD Act. Therefore, the Roundtable recommends that the Board reconsider and withdraw this portion of the proposed rule.

**VI. Additional Issues that Require Clarification**
Below are additional issues that the Roundtable recommends should be reviewed and considered by the Board:

> a. ***Limitation on fees for Method of Payment.*** (§226.10(e)): Creditors are generally prohibited from imposing a separate fee for allowing consumers to make a payment by any method. The Board proposes adding comment 10(e)-4 to state that such prohibition extends to third parties who "collect, receive, or

process payments on behalf of the creditor." Clarification is needed that the comment is not meant to apply to parties, such as Western Union, MoneyGram, or the United States Postal Service. They are not agents of the issuer since they receive payments on behalf of the consumer and transmit the payments to an issuer at the direction of the consumer.

b. ***Advertising Promotional Rates & Fees***. (§226.16(g)): The proposed rule extends the requirement to promotional fees that an advertisement provide notice to the consumer about the promotional period term, appropriate fees, and, in some instances, make clear that the promotional period rates and fees are "introductory." The Roundtable requests some flexibility in these requirements to permit the ability of issuers to use phrases such as "$40 annual fee waived for the first year" or "no annual fee for a year – of $50 value." The required notice and information is still conveyed but in a more succinct and understandable manner.

c. ***Envelopes excluded from Ad Requirements.*** (§226.16(g)(5)): Currently, the above advertising requirements do not apply to envelopes, banner ads, or pop-up advertisements. We request clarification that this exclusion also extends to email subject lines.

d. ***Limitations on Fees during 1st Year After Account Open (§226.52(a)(1)); and Advance notice exception to limitation on increasing rates, fees, and charges (§226.55(b)(3))***. The Board requests comment on any operational difficulties posed by its proposal to define an account as being open no earlier than the date on which the account may first be used by the consumer to engage in transactions. Defining an account as being open when the account opening disclosures are mailed would provide compliance certainty and ease operational complexity.

e. ***Penalty Rates.*** (comment 5a(b)(1)-5): According to the present rules, an issuer must reduce a rate that was increased based on a delinquency of more than 60 days, if the consumer makes the first required minimum payment on time following the date of the rate increase. Further, an issuer is required to periodically review accounts on which there was a rate increase and, when appropriate, reduce the rate. The proposed rule attempts to clarify that an issuer may not disclose in the Schumer Box any limitations imposed by the above two requirements on the duration of increased rates. However, the clarification would require disclosure if the issuer's practices differ from the above two requirements. The Roundtable believes this kind of disclosure will only confuse consumers and issuers will have no incentive to implement a practice more beneficial to consumers. If an issuer discloses a practice that is more beneficial to consumers – *e.g.*, the issuer will lower the rate based on the first three required minimum payments made on time. Without a point of comparison, consumers will assume the disclosed practice is more detrimental to their interest. The Roundtable recommends that proposed staff comment 5a(b)(1)-5 should not be finalized. The model language in model forms G-10(B) and (C) would continue to disclose to the consumer the standard practice required by Regulation Z.

f. ***Transition rule for disclosure changes***. Sufficient time is requested in order for issuers to analyze the final rule, and then to recall, re-design, and issue revised disclosures. As such, we request that the mandatory compliance date for the changes follow TILA §105(d), which states that for disclosure changes, the final rule must be issued by April in order to have an effective date of October. The effective date would apply to disclosures provided on or after that effective date. However, if issuers are able to comply with the new disclosure requirements earlier, they should be allowed to do so.

**VII. Harmonization and Coordination**
With the issuance of this most recent proposed rule, the industry will have responded to four rulemakings related to the implementation of the CARD Act. As mentioned previously, the Roundtable and the payment card industry have moved aggressively to implement the CARD Act and its accompanying regulations. Moreover, the card industry will take whatever actions are necessary to comply with the current proposal and additional rulemakings. However, in accordance with the Dodd-Frank Act, the newly created Consumer Financial Protection Bureau (CFPB) will share jurisdiction with the Board and other agencies regarding consumer products, including payment cards.

In the coming months before the CFPB's powers become effective in July 2011, the Roundtable believes it will be critical for the Board to coordinate not only with CFPB and other federal agencies with respect to payment card regulation, but also with the industry. An open and robust dialogue would be in the best interest of the payment industry, regulators, and most importantly, consumers. Without a coordinated effort, the payment card industry could face conflicting and redundant rulemakings, which would bring uncertainty to the credit market and negatively impact the availability of credit in the marketplace.

**VIII. Mandatory Compliance Date**
The Roundtable recommends that the Board set a mandatory compliance date that will provide the card industry with enough time to comply with this additional rulemaking.

While the Board has characterized this rulemaking as presenting clarification, many of the components in reality make significant substantive changes to the existing regulation. Too narrow a timeframe will unnecessarily burden the industry and hinder effort to comply with a final rule. When the CARD Act originally was implemented – the industry was given staggered implementation dates and in some cases over year and a half to comply. While 18 months in this case may be too long, implementing a final rule immediately would be too quick. As the Board develops its timeline to implement a potential final rule, the Roundtable urges the Board to provide the payment card industry with sufficient notice and time to implement the provisions that may be in a final rule without negatively affecting an institution's relationship with its customer base. The Roundtable recommends that the Board give the industry one year to make the necessary compliance changes to implement the final rule. By styling this as a delayed mandatory compliance date, issuers would be empowered to implement the changes as quickly as they are able.

The Financial Services Roundtable thanks the Federal Reserve for the opportunity to comment on the latest round of rulemakings for the CARD Act. If you have any questions, please feel free to contact me or Brian Tate at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard Whiting
Executive Director and General Counsel