Bank of America

December 23, 2010

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

SENT VIA EMAIL

Re: Docket No. R–1390; Regulation Z; Truth in Lending

Dear Ms. Johnson:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the Board's proposal (Docket R-1390) to revise its Regulation Z, implementing the Truth in Lending Act ("TILA").

Specifically, Bank of America is commenting on the continued references to the previously proposed section 226.4(g), which would require fees for debt cancellation contracts ("DCCs") offered on closed-end credit secured by real estate to be included in the finance charge, even if the consumer voluntarily elects to purchase the contract. Bank of America is one of the only major providers of a debt cancellation program on closed-end credit secured by real estate, and we are therefore very concerned about the continued references to that section. As further explained below, we believe that this requirement would be confusing to customers, is contrary to the intent of TILA and Congressional intent, and would put Bank of America, and DCCs generally, at a significant competitive disadvantage. We also believe that the Board's objective of clarity for consumers around the fees they will pay for these products can be better achieved in a manner that does not lead to those adverse results.

Bank of America is a member of the Debt Cancellation Coalition (the "Coalition"), along with other institutions that either offer or administer debt cancellation or debt suspension products. The Coalition is also submitting a comment letter on behalf of that group of institutions, but we wanted to offer this additional commentary to provide Bank of America's perspective on the proposed section 226.4(g).

Bank of America shares the Board's desire to ensure consumers are made fully aware of the terms of debt cancellation contracts and any other transactions into which they may enter. To that end, we have devoted significant resources to continually develop and enhance communications to provide clarity to our customers about the terms of those transactions, and to communicate those terms in a brief, simple and straightforward manner. We believe that the Board's efforts to enhance disclosures to consumers regarding debt cancellation contracts will be a significant step in the same direction, but we would request that, as part of those efforts, the Board take into account the concerns expressed in this letter and our proposed alternatives.

I. Background

Under current Section 226.4(d)(3) of Regulation Z, fees for voluntary DCCs are excluded from the finance charge on closed-end and open-end credit transactions if the creditor discloses to the consumer in writing the fact that the DCC is optional, the fee for the initial term of protection and the term of protection (if less than the term of credit), before the consumer signs or initials an affirmative written request for coverage.

The Board's prior proposal, released for comment by the Board in 2009, contained proposed section 226.4(g). That section would have eliminated the existing exclusion for closed-end credit transactions secured by real estate, even for voluntary DCCs, while continuing to permit creditors to exclude DCC fees from the finance charge for other closed-end and open-end credit transactions as long as certain conditions are met. While section 226.4(g) is not set forth in the current proposal, there are several remaining references to its existence, and therefore we would like to reiterate our concerns about this proposed rule if the Board is still considering it.

We understand that the Board's primary concern is that the inclusion of some fees in, but exclusion of other fees from, the finance charge can be confusing and may not give consumers an accurate picture of the full amount they will be required to pay for the DCC over the term of the loan. For the reasons stated below, we do not believe the proposed revisions are necessary to address consumer confusion. In fact, we believe that the proposed changes may result in more consumer confusion than what exists under the current rules. In addition, as further explained below, we believe that requiring fees for DCCs that are purchased voluntarily is contrary to the intent of TILA and Congressional intent. Accordingly, we urge the Board to withdraw section 226.4(g) and to consider the alternative proposal outlined below.

II. Prior Comments

In a letter dated December 24, 2009, Bank of America expressed several concerns with the proposed section 226.4(g). Rather than taking the Board's time by duplicating all of the same content here, we have provided a summary below of our previously expressed concerns and we ask that the Board refer to our prior letter for further details regarding each comment, located at http://www.federalreserve.gov/SECRS/2010/January/20100112/R-1367/R-1367_011110_28043_480256314396_1.pdf.

a. Voluntary vs. Required

We believe that including fees for voluntary DCCs in the finance charge will create the appearance that the DCC is required to be paid for by the borrower during the entire term of the loan, rather than being an optional selection for the protection period selected by the borrower. This is contrary to the nature of our DCCs and raises compliance issues under other regulatory requirements, including the requirement under the Office of the Comptroller of the Currency ("OCC") regulation that banks disclose that the borrower's purchase of a DCC is optional and that the borrower's decision whether to purchase the DCC does not affect his or her application for credit or the terms of any existing credit agreement that he or she has with the bank. Bank of America also permits customers to cancel its DCCs at any time. By requiring the fee in the finance charge, the critical distinction between a *voluntary* DCC and a *mandatory* one would be ignored. Any rule eliminating the finance charge exclusion for DCCs should be limited to mandatory DCCs or voluntary DCCs that do not permit a borrower to cancel the DCC at any time.

b. Overstated Amount

We believe that including the maximum fees a borrower could pay for the DCC in the finance charge is an inaccurate and overstated representation of the fees that the borrower will actually pay. Bank of America's current DCC offering on closed-end credit secured by real estate, called Borrowers Protection Plan®, is offered for a maximum 10-year term, with the first year offered at no cost to protect a single borrower and at a discounted rate to protect joint borrowers. Many of our borrowers cancel their protection after the no-cost or discounted first year period, and almost all borrowers cancel their protection at some point before the end of the maximum 10-year term, whereas the proposed rule requires the finance charge to reflect what the customer would be required to pay for the full 10-year term of the DCC. As a result, the finance charge will be artificially inflated, quite significantly in some cases, for almost our entire portfolio of DCC customers.

c. Inaccurate Net Cost

Furthermore, including the maximum fees a borrower could possibly pay, without also taking into consideration the maximum benefits a borrower could receive in exchange for those fees, does not present an accurate net cost of the DCC to the borrower. In reality, by including the maximum economic benefit a customer could enjoy under the DCC, the finance charge would actually be lower, not higher. Even if the maximum benefit could not be factored, an amount equal to the average benefit banks could expect to provide should be permitted as part of the calculation.

d. Competitive Disadvantage

We are not aware of any products that are similar to Bank of America's DCC on first mortgage loans, nor are we aware of any significant credit insurance programs being offered in connection with first mortgage loans prior to closing. As a result, requiring the inclusion of DCC fees in the finance charge for closed-end credit secured by real estate will create a competitive disadvantage for Bank of America. The competitive disadvantage will occur when a borrower compares the finance charge of Bank of America's first mortgage loan to the finance charge of a creditor that does not offer a DCC product on first mortgages. The cost of Bank of America's loan will appear higher than the other creditor's loan, thereby making the other creditor's loan more attractive, even though the only reason for the higher finance charge amount is an optional product fee that the customer is not required under the loan to pay and the full amount of which the borrower will never actually pay in most cases. The competitive disadvantage will be particularly pronounced for Bank of America because a large number of purchase mortgage customers currently choose to enroll in the Borrowers Protection Plan because of the no-cost (or discounted) offer for the first year.

e. Competitive Disadvantage to DCCs Generally

Requiring DCC fees to be included in the finance charge for closed-end credit secured by real estate will disadvantage DCCs against other products, solely based on when the product is offered. We are aware of certain "mortgage protection insurance" products that are underwritten by third party insurance carriers. These products usually offer to pay the lender a certain amount to be applied to the borrower's loan if the borrower experiences certain events. Because these products are marketed to customers *after* closing, they would not be subject to the proposed requirement to include fees or premiums within the finance charge, as the products are not "written in connection with the credit transaction." Currently, we do not have the option to offer our first mortgage DCC after loan closing due to investor requirements. As a result, the proposed changes will unfairly tilt the competitive field in favor of one particular type of coverage, thus stifling innovation and consumer choice. The proposed rule would provide regulatory favor to insurance products offered post-closing, which in some cases are offered in a predatory and misleading manner, and which could undo a decade of developments favorable to the consumer by the mortgage protection industry and the OCC.

III. New Comments

In addition to our prior comments, we would like to raise several new concerns to the Board's attention about the proposed section 226.4(g):

a. Contrary to the Intent of TILA

Proposed section 226.4(g) is contrary to the intent of TILA. TILA is intended to help consumers understand, compare and evaluate credit offerings and terms. Yet, requiring the fee to be included in the finance charge will make it appear that the product is required rather than optional. This would be confusing to consumers as further described above. In fact, the Board's own tests show that this requirement will confuse consumers. Those tests found that:

> Only two of the 31 participants were able to explain what the [all-inclusive APR] meant—even after being specifically directed to read the explanation provided on the statement. Only one of the 31 participants indicated that he would ever use this information, and the example that one participant provided was an inappropriate use of the fee-inclusive APR. These findings are consistent with the Board's August 2009 HELOC proposed rules to amend Regulation Z to no longer require that the fee-inclusive APR be provided on periodic statements for HELOCs, which is also consistent with the Regulation Z requirements for credit card accounts.[1]

Based on that test, the Board removed the all-inclusive APR from the proposed disclosures for HELOCs in order to disclose the information in a clearer manner. We urge the Board to follow a similar course of action for closed-end credit secured by real estate.

b. Contrary to the Intent of Congress

We also believe that proposed section 226.4(g) is contrary to Congressional intent. Congress crafted an express exclusion from the finance charge disclosure for voluntary credit insurance premiums, if the creditor meets certain conditions.[2] The Board has long recognized that DCCs, while not identical to credit insurance, should be treated like credit insurance for purposes of this exclusion. The Board took this position because it concluded that Congress intended the exclusion to reach products similar to credit insurance.[3] We see no reason for the Board to deviate from this interpretation. As long as a debt cancellation product is optional, we believe Congress intended that it should continue to be excluded from the finance charge.

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[1] ICF Macro report, July 2010, pages ii-iii.
[2] 15 U.S.C. 1605(b).
[3] August 2009 Proposal, Docket No. R-1366, p 43242 ("Over time, the Board, by regulation, has [determined] that certain other charges not specifically excluded by the statute are not finance charges. These regulatory exclusions often sought to bring logical consistency to the treatment of fees that are similar to fees the statute excludes or conditionally excludes from the finance charge.")

The Dodd-Frank Wall Street Reform and Consumer Protection Act reinforces Congressional intent to exclude DCC fees from the finance charge. Section 1414 of the Dodd-Frank Act adds a new Section 129C(d)(1) to TILA, which states that "insurance premiums or *debt cancellation or suspension fees* calculated and paid in full on a monthly basis shall not be considered financed by the creditor." (emphasis added) This recently enacted amendment to TILA is a clear expression of Congressional intent that these fees not be included in the finance charge.

In addition, the Dodd-Frank Act makes several amendments to TILA affecting real estate lending disclosures. Any changes in the treatment of debt cancellation fees should be coordinated with those other changes. This would minimize the potential for consumer confusion and help to ensure that all disclosures are harmonized.

c. Fees for the First Year Only

While Bank of America does not support the elimination of the finance charge exclusion for closed-end credit secured by real estate for the reasons explained above, if the Board determines it appropriate to enact section 226.4(g) then we recommend that only the DCC fees a customer could expect to pay during the first year of protection be included in the finance charge. This would help to address the concern regarding the inclusion of an overstated fee amount in the finance charge, as it would impose a more reasonable requirement on the amount of DCC fees to be included. In addition, for lenders offering a DCC at no cost or a discounted rate for the first year, this would allow customers to enroll and determine the value of the DCC based on their unique circumstances during the first year, without imposing a competitive disadvantage on the lender by forcing an inaccurate total fee amount to be included in the finance charge. This would be similar to an adjustable rate mortgage, where only the initial interest rate is required to be included in the finance charge – in the case of a DCC, only the fee amount during the initial year of protection would be required.

IV. Proposed Alternative Requirements

In our prior response dated December 24, 2009, Bank of America provided a detailed summary of its typical sales process for DCCs offered on first mortgages. The purpose of providing the summary was to demonstrate not only how Bank of America's process meets the applicable OCC and existing TILA regulatory requirements, but also how it provides disclosures to borrowers at multiple points to ensure they have an adequate understanding of the DCC, what they will be charged in exchange for the DCC's protection, and that the DCC is optional and can be cancelled at any time. Ensuring that borrowers understand these three points is critical to achieving strong customer retention rates for our DCCs, and we believe our sales process can provide a strong basis for new regulatory requirements that can satisfy the Board's objectives without resulting in the adverse impacts outlined above.

After summarizing our sales process for DCCs offered on first mortgages, our prior response then proposed alternative requirements that lenders would have to satisfy in order to exclude DCC fees from the finance charge for closed-end credit secured by real estate. These requirements could be in addition to the existing disclosures required under TILA and any new TILA disclosure requirements adopted by the Board as part of this regulatory effort. Under our alternative proposal, creditors offering DCCs on closed-end credit secured by real estate would have to do all of the following:

a. Comply with the OCC's debt cancellation regulation

Adopting the requirements of the OCC's debt cancellation regulation would, among other things, require that creditors provide the verbal short-form disclosures and written long-form disclosures to customers, which clearly communicate the fact that the DCC is optional and is not required to obtain the loan, the amount of the fees on a monthly basis and over the maximum term of the DCC, what the consumer's and creditor's rights to cancel are, and a direction to carefully review the contract containing the terms and conditions of the DCC.

b. Send at least one follow-up communication about the DCC after loan closing

With the addition of the requirement to send a follow-up communication to borrowers after loan closing, creditors could ensure that customers understand what they have purchased, and would be doing so after the sometimes complex loan closing process has concluded. The communication would again describe the DCC, encourage customers to review the DCC terms and conditions they received at closing, provide a description of the periodic fees that will be charged to the borrower, and reiterate that the DCC is optional. The communication could also include the type of information presented in Bank of America's "Getting Started" document (further described in our prior letter), which explains in clear, simple, brief and easy to understand terms how the DCC works and how the customer can file a benefit request.

c. Allow a refund of all fees paid if the customer cancels within an initial period of time

In addition, the communication would inform the customer that if they no longer want the DCC they can cancel and receive a refund of any fees paid. We would recommend that the follow-up communication be required within the first 60 days of the loan, and the borrower would then have 30 days from the date of the letter to request cancellation and a full refund of any fees they may have paid (i.e. a maximum of 90 days of DCC fees could be refunded, depending on the date of the letter). If desired, we would also support a requirement that customers be required to make their decision to cancel and receive a refund of fees paid no earlier than 60 days from the loan closing date, meaning that a minimum of 60 days and a maximum of 90 days of DCC fees could be refunded, again depending on the date of the letter.

d. Send a reminder prior to the expiration of any no-cost or discounted rate period

In addition, we would support a requirement that for programs involving a no-cost or discounted introductory period, the creditor send notice to the borrower at least 30 days prior to the end of that period stating what the new fee will be. We would also support a requirement that the creditor provide a refund of any fees paid by a borrower within the first 60 days after the DCC converts from the no-cost period to a fee. This would give customers yet another opportunity to cancel and obtain a full refund once they begin to be billed for the protection. With respect to customers that paid a discounted rate during the initial period, we would support a requirement that the creditor provide a refund of the new, higher fees paid by the borrower within the first 60 days after the DCC converts from the discounted period to the higher rate.

V. Recommendations

We respectfully recommend that the Board withdraw the previously proposed section 226.4(g) because:

(i) section 226.4(g) would be inconsistent with the intent of TILA to inform consumers and the intent of Congress that voluntary DCC fees be excluded from the finance charge;
(ii) requiring DCC fees to be included the finance charge causes the DCC to appear to be a required rather than optional feature of the loan, despite other regulatory disclosures to the contrary;
(iii) including the total DCC fee amount that a customer could possibly pay in the finance charge would overstate the fees that the customer will actually pay and does not reflect the actual net cost/benefit to the customer without also factoring the benefits the customer could receive;
(iv) requiring DCC fees to be included in the finance charge for closed-end credit secured by real estate will put Bank of America at a significant competitive disadvantage due to its position as the only major provider of mortgage DCCs; and
(v) section 226.4(g) would effectively give regulatory favor to insurance products offered post-closing, which in some cases are offered in a predatory and misleading manner, and which could undo a decade of developments favorable to the consumer by the mortgage protection industry and the OCC.

In lieu of proposed section 226.4(g), we would urge the Board to continue to permit DCC fees to be excluded from the finance charge for closed-end credit secured by real estate if the creditor does all of the following:

(i) give the consumer all disclosures currently required under TILA in order to exclude the DCC fee from the finance charge;
(ii) give the consumer any new TILA disclosures adopted by the Board as part of this regulatory effort;
(iii) give the consumer all disclosures required under the OCC's debt cancellation regulation (12 C.F.R. 37);
(iv) send at least one follow-up communication about the DCC within the first 60 days after closing, which at a minimum describes the DCC, reiterates that the DCC is optional, reminds the customer they can cancel at any time, and describes the periodic fees that will be charged to the borrower;
(v) issue a full refund to the consumer if they cancel within 30 days after the follow-up communication (and within 60 days after the end of any no-cost period);
(vi) issue a refund of the new, higher fees paid by the borrower if the customer cancels within 60 days after the end of a discounted rate period; and
(vii) send a reminder notice to the consumer at least 30 days prior to the expiration of any no-cost or discounted rate period.

In the event that the Board does not withdraw proposed section 226.4(g), we request that the Board limit the scope of section 226.4(g) to only mandatory DCCs and any voluntary DCCs that do not offer customers the ability to cancel at any time. In the event that the Board does not so limit the scope of section 226.4(g), we request that the Board clarify section 226.4(g) to only require that the first year of DCC fees be included in the finance charge, rather than the total fees the customer could possibly pay over the maximum term of the DCC.

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Once again, we appreciate the opportunity to comment on the Board's proposal. Please contact the undersigned at (949) 222-7409 if you have any questions.

Sincerely,

Eric B. Chamberlain
Assistant General Counsel
Bank of America, N.A.
3349 Michelson Drive, Suite 200
Irvine, CA 92612
(949) 222-7409