American Financial Services Association

December 23, 2010

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20511

Re: Docket No. R-1390

Dear Ms. Johnson:

The American Financial Services Association (AFSA) is grateful for the opportunity to comment on the Federal Reserve Board's ("Board") proposed rule amending Regulation Z with respect to home secured credit ("Proposed Rule"). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

AFSA members recognize the need to enhance consumer protection in the residential mortgage loan process. To this end, AFSA members offer the following comments in response to the Board's request for comments on the Proposed Rule:

I. Request for unified home secured credit proposal

The Board has released numerous proposed, interim and final rules to amend Regulation Z with respect to home-secured credit over the past year. On August 16, 2010 alone, the Board issued five rules in various stages of finality, all of which affect mortgage lending. The extensive closed-end and open-end mortgage proposals in August 2009 on which the industry commented last December are still outstanding. Some elements of that proposal are discussed in this home secured credit proposal, but others are not. It is unclear how all of the elements of these two proposals relate to one another and how the Board intends to harmonize all of these pending rules. Including the Proposed Rule, there are currently four outstanding Notices of Proposed Rulemaking that affect mortgage lending.[1] Additionally, the Board has adopted six final or interim final rules affecting mortgage lending in the past eighteen months.[2] The mortgage industry is currently focused on implementing these final

1 Proposal to revise rules for open-end home-secured credit, 74 Fed. Reg. 43427 (Aug. 26, 2009) (comments due December 24, 2009); Proposal to revise rules for closed-end home-secured credit, 74 Fed. Reg. 43231 (Aug. 26, 2009) (comments due December 24, 2009); Proposal to revise escrow accounts for higher-priced mortgages, 75 Fed. Reg. 58505 (Sept. 24, 2010)(comments due October 25, 2010).

2 Rule implementing the Mortgage Disclosure Improvement Act, 74 Fed. Reg. 23289 (May 19, 2009) (effective July 30, 2009); Interim final rule requiring notice upon sale or transfer of mortgage loan, 74 Fed. Reg. 60143 (Nov. 20, 2009) (effective January 19, 2010); Rule regarding loan originator compensation, 75 Fed. Reg. 58509 (Sept. 24, 2010) (effective April 1, 2011);

and interim final rules. This all-consuming task makes it difficult to focus on proposed rules that appear in one or more publications where the relationship among the proposals is not clear. AFSA members request that the Board issue a unified proposal affecting home-secured credit so that the public and the mortgage industry can fully understand all of the issues being considered. Understanding the complete landscape of proposed regulation will enable the public and the industry to provide more effective and helpful comments to the Board.

II. Credit Protection Products

AFSA members have submitted a separate letter addressing the provisions of the Proposed Rule dealing with credit protection products. Please refer to this separate letter for the views of the AFSA members on this important topic.

III. Rescission Rights

AFSA members support the revisions to the Regulation Z rescission rules. The proposal would provide more certainty to creditors and enhance the protection offered to consumers.

However, AFSA members request additional clarification of what constitutes a bona fide financial emergency in the following circumstances.

Relationship Between MDIA and Rescission Waivers: The regulations implementing the Mortgage Disclosure Improvement Act requires creditors to provide certain disclosures seven days prior to closing.[3] If there is a change in these disclosures during this required waiting period, the creditor must redisclose and provide another three-day waiting period prior to consummation.[4] Either of these waiting periods may be waived by a consumer if a bona fide personal emergency exists.[5] The ability of the consumer to waive these waiting periods under 226.9(a)(3) is almost identical to the ability that consumers have to waive the three-day right to rescind that would be clarified under the Proposed Rules. However, the existence of these two similar but distinct waiver periods poses some new concerns.

For example, if a consumer seeks a waiver under the MDIA regulations, may this request also serve as a request for a waiver of the rescission waiting period? If there is a bona fide financial emergency that justifies the waiver of the MDIA waiting period, then the same emergency will justify the waiver of the rescission waiting period. It seems pointless, and very consumer unfriendly, to require consumers to complete two written waiver requests explaining the same bona fide personal financial emergency. AFSA members request that the Board clarify that a consumer may provide a single statement explaining the existence of a bona fide personal financial emergency and which requests a waiver of both the MDIA waiting period and the rescission period.

Interim final rule revising MDIA disclosure requirements, 75 Fed. Reg. 58469 (Sept. 24, 2010) (effective October 25, 2010); Final rules requiring disclosure upon sale or transfer of mortgage, 75 Fed. Reg. 58489 (Sept. 24, 2010) (effective January 1, 2011); Interim final rule regarding real estate appraiser independence, 75 Fed. Reg. 66553 (Oct. 28, 2010) (effective December 27, 2010).

3 12 CFR 229.19(a)(2)(i).

4 12 CFR 229.19(a)(2)(ii).

5 12 CFR 229.19(a)(3).

Waivers Related to End of Life Issues: Creditors often receive waiver requests in connection with funds that will be used in connection with a family member's terminal illness, death or funeral. The funds may be necessary to pay for travel to a relative who is on their deathbed or to pay for funeral arrangements or transportation of the deceased. These situations certainly qualify as an emergency from a timeliness perspective, but there is no imminent safety or financial loss. Can these waivers be granted by creditors? Religious customs can further complicate the analysis as some faiths call for more urgent arrangements than others. The recognition that different religious practices could affect the appearance of an emergency presents a potential fair lending issue for creditors. Must a creditor decline one such request, but grant another if differences in treatment of waiver requests hinge on ability to delay a funeral service? The potential fair lending concerns are further compounded because in each case a consumer will be asking for a waiver in a situation that the consumer believes is a legitimate emergency, and creditors should not be forced to make individualized decisions in rejecting some of these requests and approving others. AFSA members seek additional guidance on how to approach these sensitive situations and ask that the Board specifically authorize waivers related to these end of life issues

Habitability: AFSA members also request guidance on the issue of habitability. Loss of power may not render a home inhabitable for a healthy adult but may render a home inhabitable for someone with an illness that relies on the operation of medical equipment (in-home dialysis for example) or someone with young children. Once again, fair lending issues arise if creditors are forced to make determinations based on individualized needs. AFSA members seek additional guidance on how to approach these situations and ask that the Board specifically authorize waivers whenever a consumer is facing loss of any utility services.

IV. Loan Modifications

AFSA members understand that new TILA disclosures are appropriate in connection with certain loan modifications. AFSA members also support the exemption for workout modifications as these transactions are beneficial to the consumer and do not warrant new disclosures. However, the proposal is overly complex and difficult to apply. For example, the exemptions for workout modifications and decreased interest rates are subject to multiple carve-outs, making it difficult to determine when a modification is actually exempt. Additionally, it is unclear how the exemptions interplay with each other. It appears that if a creditor enters into a workout modification that involves extending the loan term, new disclosures would not be required under 226.20(a)(1)(ii)(B). However, if the workout agreement includes both a reduced interest rate and an extended term would new disclosures be required under 226.20(a)(1)(ii)(C)?

AFSA members request that the Board simplify the triggers for when new TILA disclosures are required in a modification. For example, the Board could require new TILA disclosures if the interest rate is increased or if a risky feature is added to the loan, such as an adjustable rate. This type of rule would be much clearer and would encourage creditors to continue to enter into workouts and other modifications that are beneficial and necessary for consumers.

With respect to the exception for workout modifications, AFSA members request that the Board broaden the exception to include loans that are in reasonably foreseeable or imminent danger of default. Many borrowers contact their lenders about modification before they miss a payment in order to avoid going into default, which can result in late fees or other costs, as well as negative information on their credit report. Lenders have been criticized in other situations for being unable to assist borrowers that have not yet defaulted, but are seeking to avoid an imminent default. By expanding the workout exception to include reasonably foreseeable or imminent default, creditors will be encouraged to continue to modify mortgages at this critical point and to prevent borrowers from going into default in the first place. If creditors must provide new TILA disclosures when a customer is in reasonably foreseeable or imminent danger of default, this will be one more significant hurdle[6] that could prevent some consumers from being helped at this earlier stage.

AFSA members request that the Board adopt a definition for reasonably foreseeable or imminent danger of default so that creditors can apply this exemption with certainty. AFSA members propose that a borrower be deemed in reasonably foreseeable or imminent danger of default if the borrower has missed one payment or claims that he cannot make future payments and has:

1. Documented a financial hardship that has reduced his income or increased expenses, thereby impacting the borrower's ability to pay his mortgage as agreed;
2. Documented that he does not have sufficient net income to pay the current mortgage payment; or
3. Documented an inability to pay the current mortgage payment using cash reserves or other assets.

These are the same factors a lender considers in assessing whether a borrower is in reasonably foreseeable or imminent danger of default under the Home Affordable Modification Program. AFSA members also request clarification on the timing requirements for new disclosures on modifications. Most loan modifications do not follow the typical application process, as a refinance transaction would. Although some borrowers contact lenders and expressly request modifications, many modifications are the result of informal and ongoing discussions with the lender and it would be difficult to pinpoint the date on which an "application" would be considered to be submitted. AFSA members request that the Board adopt a comment that recognizes this reality and allows some flexibility in determining the timing for disclosures in a modification.

AFSA members suggest that the modification disclosures be provided at the time the borrower signs the modification. A requirement to provide disclosures earlier than that time would be exceedingly difficult as the terms and conditions of the modification tend to change often. If these ongoing changes require new pre-closing disclosures, it will be frustrating for borrowers, who will have to wait an additional seven days each time the terms change after the creditor provides disclosures. Further, modification transactions do not fit well in the current TILA timing rules. TILA disclosures were developed for use in shopping for credit and the timing rules were designed to give consumers adequate opportunity to compare terms offered by different creditors. Modifications, on the other hand, involve individualized negotiations with the borrower's current lender in order to save the borrowers home. The timing requirement for providing TILA disclosures in connection with modifications must take into account this unique context in which modifications take place.

V. New Triggers for Higher Priced Mortgages and Mortgages Subject to HOEPA

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[6] Mortgage servicers and the workout deparments of most lenders are not equipped to provide all of the disclsoures required under TILA if a modification is treated as a refinancing.

AFSA members feel that the new triggers for higher priced mortgages are problematic and that the concept of a transaction coverage rate will cause undue confusion. The Board acknowledges that it proposes this change because the proposed all-in APR would result in an inordinately high number of higher-priced mortgages under the existing triggers. Instead of reexamining the prudence of the all-in APR concept, the Board proposes to introduce an entirely new concept into the higher-priced mortgage calculus. The Board asserts that this "simple modification" to the higher-priced mortgage triggers "does not create undue regulatory burden for creditors."[7] In reality, introducing a new metric will always require expensive changes to lenders' systems.

Additionally, the new metric produces several bizarre results. The Board does not require that lenders disclose the transaction coverage rate to consumers and expressly states that the transaction coverage rate is solely for the purpose of determining whether the loan is a higher-priced mortgage.[8] Thus, consumers will not know whether they have a higher-priced mortgage loan because they never receive a disclosure of this calculation.

However, under the August 2009 proposed rule for closed-end mortgages, which is still pending, the Board would require lenders to disclose on a bar graph, how the *APR* (not the *transaction coverage rate*) compares to the average prime offer rate and the higher priced loan threshold as defined in 226.35(a)(1).[9] Thus, the bar graph would disclose to consumers an entirely irrelevant and misleading comparison. Under the current proposal, the APR is not relevant to the determination of whether a loan is higher-priced. Additionally, with the all-in APR, the bar graph would show that consumers' APRs are well over the average prime offer rate and the higher-priced loan triggers. This will certainly raise questions for consumers as to why their APRs are so high, and lenders will be faced with the difficult situation of having to explain why the APR calculation is so inflated and may even have to explain that the higher-priced mortgage trigger is based on a different metric that is not represented in the bar graph. This tension between the two proposals offers additional support for a unified mortgage proposal.

In addition, the Proposed Rules do not address the fact that the all-in APR will bring an increased number of loans into the definition of loans that are subject to the HOEPA requirements. Creditors, including members of AFSA, generally do not make loans that are subject to HOEPA or similar state laws. While the Board proposes to eliminate the effect of the all-in APR on the points and fees test, the Board does not propose to use the "transaction coverage rate" in place of the APR for the HOEPA rate trigger. If this oversight is not corrected (or the all-in APR concept abandoned), more loans will be rejected because they would be covered by HOEPA and less credit will be available to consumers. Even if this oversight is corrected, many state high-cost mortgage laws will continue to refer to the APR as their test under state high-cost mortgage loan laws. The creation of the "transaction coverage rate" will not affect the definitions used in these state laws.

Instead of attempting to remedy the effects of the all-in APR with the introduction of the transaction coverage rate, AFSA members urge the Board to reconsider the all-in APR concept. Including third-party fees in the APR would distort the cost of credit as imposed by

[7] 75 Fed. Reg. 58661.
[8] 75 Fed. Reg. 58661.
[9] 74 Fed. Reg. 43334.

the creditor providing disclosures, and would make it difficult for consumers to compare pricing among creditors. Further, adopting an all-in APR would have a ripple effect in other provisions of Regulation Z and state law that incorporate the APR concept in other contexts. If the Board retains the current APR calculation, there would be no need for the confusing transaction coverage rate and concerns about a further restriction on credit availability would be avoided.

If the Board adopts this provision of the Proposed Rule, AFSA members request that the Board harmonize this revision with the Home Mortgage Disclosure Act.

VI. Right to Refund of Fees

Should the Board proceed with this proposal, AFSA members ask for additional guidance from the Board on the following points.

AFSA members request that the Board clarify that the lender can establish the mechanism by which a consumer can request a refund, i.e. by mail, telephone, fax or internet. AFSA members also request clarification on when refund requests must be submitted. If the lender accepts refund requests by mail, the rule should be that the request is submitted when the consumer receives the request, not when the request is mailed.

AFSA members request that for purposes of this proposal, the Board adopt the general definition of “business day” in 226.2(a)(6) that counts only the days on which the creditor’s offices are open. The proposal would require lenders to refund fees if the consumer requests a refund within three business days. “Business day” under the proposal would include Saturdays. Many lenders are not open for business on Saturdays and it is unclear how the timing requirement would apply if a consumer attempts to request a refund on a day when the lender is not open for business. Does a consumer meet the three business day requirement if she leaves a voicemail or drops off a written request on a Saturday that is the third business day? It would be in the interests of both creditors and consumers if “business day” for this purpose includes only the days on which the creditor’s offices are open.

VII. Reverse Mortgage Disclosures

AFSA members support the Board’s development of disclosures that are tailored to reverse mortgages

AFSA members are particularly supportive of the Board’s decision not to adopt a suitability standard for several reasons. For one, requiring lenders to make a suitability determination would increase uncertainty. Suitability determinations are inherently subjective, and require a value judgment by the lender. It would be difficult for the Board to develop a suitability standard that lenders can follow and be reasonably certain that they are compliant. This unavoidable ambiguity will have two effects. First, it will increase litigation risk because it will not be clear when a lender has complied with the suitability requirement. There will always be some room for doubt and therefore an opportunity for litigation. Second, it will result in limited availability of these credit products. Lenders will not wish to assume the risk of non-compliance and the possibility of litigation attached to a suitability determination and will likely limit their offering of these products, or exit the reverse mortgage market all together.

A suitability standard would also inappropriately transform lenders into financial advisors. In order to ensure compliance with an inherently ambiguous suitability standard, lenders would have to collect and verify extensive financial and personal information. Lenders would require applicants to submit detailed information about current financial obligations as well as future plans and expectations. Lenders may need to make a judgment about the quality of an applicant's income and whether that level of income can be reasonably expected to continue. Lenders would also review the adequacy of an applicant's insurance coverage to ensure that assets supporting the suitability determination are sufficiently protected. In addition, lenders would have to look at an applicant's responsibility for dependents as well as the applicant's age. This process would be timely and costly and would impose a significant burden on lenders. In addition, even after collecting and verifying extensive information, lenders would, at the end of the day, have to make a value judgment as to the suitability of the loan. Lenders are not financial advisors and should not bear the responsibility of determining whether applicants are acting in their own best interests. Not to mention, borrowers may be hesitant to submit to an exhaustive evaluation of their financial situation.

In short, AFSA members agree that a suitability standard is not appropriate in the lender-borrower context and feel that the Board's proposal to enhance disclosures, regulate advertising and require counseling provide sufficient protection to borrowers in the reverse mortgage market.

VIII. Other Proposed Revisions

The Board's proposal clarifies that the practice of charging interest after a payoff through the end of that month is deemed a prepayment penalty. AFSA members request that the Board clarify that to the extent this practice is permitted under state law, it would not be considered a prepayment penalty. Some states, like Tennessee, allow for a precomputed real estate product and permit a lender to charge interest through the end of the month in which the loan is prepaid.

With respect to the Board's proposal that servicers provide consumers with information about the holder or master servicer, AFSA members request that the Board clarify that the definition of business day is the general definition and excludes Saturdays.

AFSA appreciates the opportunity to comment on the Proposed Rule. Please feel free to contact me with any questions at 202-296-5544, ext. 616 or bhimpler@afsamail.org.

Respectfully submitted,

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Executive Vice President
American Financial Services Association