TCF BANK

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Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Docket No. R-1417 & RIN No.7100–AD 75
Regulation Z (Truth in Lending Act) Dodd-Frank Wall Street Reform and Consumer Protection Act: Ability to Repay
76 Federal Register 27390 (May 11, 2011)

Dear Ms. Johnson:

TCF National Bank ("TCF") appreciates the opportunity to comment on the proposed amendments (the "Proposed Rule") by the Federal Reserve Board (the "Board") to Regulation Z, implementing the ability to repay provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act and revising the points and fees definition for High Cost Mortgage Loans. For the ease of drafting, TCF will refer to the rulemaker as the Board throughout this comment, with the understanding that the final rule will be issued by the Consumer Financial Protection Bureau.

TCF is a midwest-based national bank with $18.7 billion in total assets. TCF has 442 branches in Minnesota, Illinois, Michigan, Colorado, Wisconsin, Indiana, Arizona and South Dakota, providing retail and commercial banking services. While a mid-sized bank overall, consumer lending forms less than half of TCF's business. TCF is a portfolio mortgage lender and does not sell its loans, nor does it originate FHA- or VA-guaranteed loans. TCF only originates and services its own loans. TCF does not buy mortgage loans from others, including correspondent lenders.

TCF supports the Board's efforts to level the playing field by requiring that all creditors adhere to prudent underwriting standards and ensure that borrowers have the ability to repay. TCF is concerned that the Proposed Rule may not achieve this important goal while at the same time introducing significant regulatory burdens and risks, particularly for smaller lenders. TCF appreciates the difficulty that the Board is facing in attempting to craft standards that will provide flexibility to ensure that credit is not unduly restricted while still protecting consumers. In considering next steps, TCF urges the Board to engage in outreach to consumer groups and industry, including smaller and mid-size lenders. Due to the significant concerns raised by the Proposed Rule, we suggest that the Board issue another proposal before moving to a final rule.

Widely Accepted Governmental and Non-Governmental Underwriting Standards

The Proposed Rule relies heavily on governmental and secondary market underwriting principals and benchmarks, which does not necessarily achieve the goal of ensuring prudent underwriting, does not level the playing field and poses significant operational and compliance burdens on community banks and portfolio lenders. As a portfolio lender, TCF underwrites its loans to ensure that its borrowers have the ability to repay. If the customer defaults, the risk is TCF's, thus it is in TCF's interest to underwrite with care.

For the centerpiece of the Proposed Rule, ensuring that customers have the ability to repay, the Board did not promulgate any specific standards, but pointed to "widely accepted governmental and non-governmental underwriting standards." TCF acknowledges that the Proposed Rule does not *require* compliance with widely accepted governmental and non-governmental underwriting standards. However, without any other objective benchmark to measure compliance, the Proposed Rule's permissive reference to such standards is likely to be regarded by courts, plaintiff's attorneys, state attorneys general and regulators as a requirement, not an option. Moreover, with the importance of this rule and the serious penalties that could result from a violation, it is critical that creditors have an objective, measurable way to ensure that they are in compliance. Unfortunately, for numerous reasons, "widely accepted governmental and non-governmental underwriting standards," and the specific reference to the Federal Housing Administration ("FHA") guidelines are not workable.

First, such standards are numerous and varied, which not does create a level playing field between creditors. Second, the ambiguity of what it means to be "widely accepted" creates a regulatory requirement that is too vague. Such imprecision may invite litigation and regulatory criticism without necessarily providing protection for consumers. Indeed, it is lax but widely accepted secondary market standards that are largely blamed for the "race to the bottom" that resulted in the housing crisis. Third, this standard, such as it is, is inequitable to smaller creditors and portfolio lenders.

Unlike larger, high volume creditors who routinely sell in the secondary market or originate FHA and VA loans, portfolio lenders do not have ready access to "widely accepted governmental and non-governmental underwriting standards." While it is certainly possible to subscribe to services that will provide the FHA guidelines, the burden of retraining and retooling the entire underwriting staff and program to conform to the detailed FHA standards is a daunting and expensive undertaking for smaller creditors.

Given the difficulty and expense of implementing even one of these standards, smaller portfolio lenders will be at a significant competitive disadvantage to the larger banks that have access to a wide variety of underwriting standards. Moreover, because the FHA standards are the only ones that the Board specifically identified as acceptable, the safest route would be to comply with these standards for all borrowers, even though the FHA standards were developed with a specific borrower and collateral risk profile in mind, a risk profile that is likely to be inapplicable to many applicants. This may hinder creditors' ability to offer loans to credit-worthy applicants, thus restricting consumer access to credit.

TCF is also concerned because it understands that the FHA standards are quite detailed and exacting. While much of underwriting can and should be subject to specific rules, there remains an element of underwriting that is more art than science. The inclusion of FHA or similarly detailed guidelines as the legal standard for compliance with this important regulation exposes creditors to significant litigation and regulatory risk for the slightest deviation from the standards. While there is some risk to FHA creditors already for failure to scrupulously follow the FHA rules, that risk is primarily loss of the FHA guaranty (a risk that TCF as a portfolio lender already takes on with each loan it makes). The transformation of this risk into litigation and regulatory risk is concerning.

Because TCF believes that the reliance on "widely accepted governmental and non-governmental underwriting standards" is unworkable and puts smaller creditors and portfolio lenders at a disadvantage, TCF proposes an alternative. TCF suggests that the Board set certain, objective outside guidelines, such as the highest possible housing DTI, that no creditor may exceed. These guidelines should be broad enough to ensure that credit is available to credit-worthy applicants, with the expectation that the underwriting guidelines set by most creditors will likely be tighter. Within that broad framework, creditors, particularly portfolio lenders, should be free to work out the details (such as what is income or debt) without fear of litigation or regulatory risk. As a portfolio lender, it is not in TCF's interest to put consumers into unaffordable loans, and TCF and other portfolio lenders should have the regulatory flexibility to provide loans to credit-worthy customers without being subject to significant legal and regulatory risk due to either too vague or overly exacting standards.

Loss Mitigation and Other Necessary Exceptions

As a portfolio lender, TCF has a great deal of flexibility in fashioning loss mitigation options for borrowers. Sometimes, due to systems limitations or other issues, it is necessary to complete a refinance rather than a modification for loss mitigation customers. None of these customers would fit within the exception for the refinance of a "non-standard mortgage" in the Proposed Rule as TCF has never offered such non-standard products. TCF believes that, within the scope of safe and sound practices as required by its primary regulator, TCF should have complete flexibility to fashion loss mitigation options to give customers a chance to remain in their homes without application of the ability to repay rules. This is not a situation where TCF is putting either itself or its borrowers into a new risk – the risk already exists and has manifested. It may be that in the end, the borrower will not be able to repay even the loss mitigation refinance, but creditors should be able to try to give borrowers a chance (again, in accordance with prudent safety and soundness considerations) to recover and retain their homes without fear of violating the ability to repay regulations. Thus, TCF requests a complete exemption from the ability to repay rules for loss mitigation refinances.

TCF has a similar concern for balloon products nearing their maturity dates. It may be that a balloon customer would not technically meet the standard underwriting criteria if an amortizing refinance is done near the end of the balloon product. However, creditors should have the flexibility (in accordance with prudent safety and soundness considerations) to try to keep the customer in their home without fear of violating the ability to repay regulations. Thus, TCF proposes that when refinancing a performing balloon product within the six months preceding, or the three months following, a balloon payment due date, that the ability to repay rules be suspended for such customers.

Home Equity Line of Credit Payment for Underwriting

The Board has proposed a new measure of the payment to use when underwriting a simultaneous loan that is a home equity line of credit. The Board proposes that creditors determine the line of credit payment by referring to regulations on how a home equity line of credit payment is disclosed, apparently not realizing that no actual payment is currently disclosed for such products. Thus, this section of the Proposed Rule lacks clarity. Moreover, the Board allows creditors to consider only the draw at origination rather than the full commitment amount, which does not appear to be prudent. Creditors regulated by the federal banking agencies must follow the Interagency Credit Risk Management Guidance for Home Equity Lending issued in May of 2005 ("Interagency Guidance") in underwriting repayment ability for home equity lines of credit. Among other things, the Interagency Guidance includes a requirement to underwrite to the full commitment amount. The creditors subject to this Interagency Guidance must continue to follow it when underwriting simultaneous loans as a matter of safety and soundness. Rather than creating a two-tier system, with non-federally regulated creditors applying the Board's weaker rule and federally-related creditors following the Interagency Guidance, TCF suggests that the Board look to the Interagency Guidance to determine the appropriate home equity line of credit payment for all creditors to use in underwriting simultaneous loans.

Qualified Mortgage

The Board requested comment on the Board's "qualified mortgage" proposal and specifically requested comment on whether creditors are likely to avail themselves of the qualified mortgage protections. As a portfolio lender, TCF will have the flexibility to make its own choice on whether to attempt to bring its loans within the definition of qualified mortgage. As it stands, TCF has two primary concerns about the "qualified mortgage" Proposed Rule: (1) the lack of clarity on the protections offered, and (2) the lack of clarity in the definition itself. TCF urges the Board to adopt the safe harbor alternative in granting protection for qualified mortgages and set clear and objective benchmarks so that creditors can know and prove that they meet the definition. For example, even though the Board has proposed an alternative that allows the creditor to "consider and verify" the consumer's income and assets to come within the definition, there are no standards for this determination. This lack of measurable standards pervades the Proposed Rule, in this instance leaving the status of the loan as a qualified mortgage in doubt. Absent clear, measurable standards to ensure that a transaction is a "qualified mortgage," and clear safeguards once the standard is met, TCF does not anticipate taking advantage of the qualified mortgage exception.

In addition to the vagueness of the definition in general, TCF has specific concerns regarding the "three points" limitation. TCF appreciates the Board's attempt to provide a sliding scale in Alternative 2 for lower balance loans. However, as a smaller creditor that relies in large part on manual processes, TCF believes that Alternative 2 will be difficult to comply with. Therefore, TCF favors the clarity of Alternative 1.

In addition, TCF believes that the proposal regarding the ability to exclude bona fide discount points is unfair to portfolio lenders. By requiring that the calculation must account for the rate of return that the creditor can expect to receive in the secondary market, the Proposed Rule could be read to mean that discount points can only be excluded if the loan will actually be sold on the secondary market. This would have the effect of prohibiting portfolio lenders from excluding discount points, thus making it difficult for portfolio lenders to offer their customers a discount point option while still making qualified mortgages.

Moreover, even if the rule were reworded to make it clear that portfolio lenders may exclude discount points, if the standard remains a secondary market measure, the Proposed Rule is still difficult for portfolio lenders and does not create a level playing field. Since TCF does not have access to secondary market pricing information, TCF would not have a way to measure its compliance. Moreover, even for creditors with access to such information, the calculations could vary based on different secondary market participants and are likely complex. Relying on such a subjective and difficult to determine measure creates an unequal playing field and again creates compliance uncertainty. TCF proposes that the Board publish an acceptable bona fide basis point measure periodically. While the Board could certainly take secondary market pricing into account when determining this measure, if the Board were to make the determination, all creditors would be held to the same easily determinable standard.

Points and Fees Definition

TCF has many concerns regarding the points and fees definition, particularly with the inclusion of originator compensation. We believe that larger creditors and trade groups will be putting in comments detailing the numerous difficulties and concerns with the inclusion of originator compensation -- including the difficulty of determining the compensation at origination, the inclusion of real estate broker compensation in connection with the sale financing of properties owned by the creditor, and the adverse impact on retail vs. wholesale loans. TCF's primary concern is that the Proposed Rule seems to penalize creditors and borrowers if a more experienced originator assists with the loan since the higher compensation of such originators may make it more likely that the loan will trigger high-cost requirements or will take the loan out of qualified mortgage status. By making it more difficult for outstanding originators to be fairly compensated for their experience and abilities, the Proposed Rule may deprive borrowers of the ability to be assisted by the best originators. To the extent that the Board can craft a solution that will allow the best originators to be fairly compensated for their skills without adverse consequences to the points and fees calculation, TCF encourages the Board to do so.

TCF appreciates the opportunity to comment on the Board's proposal. Please contact the undersigned at (952) 745-2725 or by email at hthayer@tcfbank.com with any questions or for additional information.

Very truly yours,

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