American Financial Services Association

September 21, 2009

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

Re: Interim Final Rule for the Credit Card Accountability Responsibility and Disclosure Act of 2009 Docket No. R–1364

Dear Ms. Johnson,

This comment letter is submitted by the American Financial Services Association ("AFSA")[1] in response to Interim Final Rule ("Rule") published on July 22, 2009 by the Board of Governors of the Federal Reserve System ("FRB") in the *Federal Register*. Although the Rule is already effective, AFSA appreciates the opportunity to provide its comments on the Rule with the hope that the FRB will make appropriate revisions and clarifications to the Rule as quickly as possible. Below are several comments that AFSA hopes the FRB will consider.

Section 226.9(c)(2) – Change in Terms Rules Affecting Credit Card Accounts that are not Home-Secured

AFSA commends the FRB for the Rule's clarity in defining what constitutes a "significant change" for purposes of Section 226.9(c)(2). However, AFSA believes that the Section 226.9(c) notice requirements should not apply if a "significant change" (as defined in Section 226.9(c)(2)(ii)) is being made to account terms, but the change is favorable to the consumer. Specifically, it does not appear necessary for an issuer to provide a 9(c) Notice, and it appears especially unnecessary to provide an opt-out opportunity, if the change in the Notice Term is beneficial to the cardholder. We believe the FRB should provide an exception to the 9(c) Notice requirements in these circumstances, just as there is an exception if the change in term is a reduction in any component of the finance charge (*i.e.*, a change in the finance charge that is beneficial to the consumer).

In addition, for the reasons presented below, AFSA respectfully suggests that the FRB revise the exceptions from the 45-day advance written notice requirement for the expiration of a rate applicable for a specified period of time ("promotional rates") and the completion or breach of a workout or temporary hardship arrangement ("hardship arrangements"), and add an exception pursuant to the Servicemembers Civil Relief Act ("SCRA").

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit. AFSA member companies offer or are assigned many types of credit products, including credit cards, retail credit, automobile retail installment contracts, and mortgage loans.

Section 226.5 and Section 226.7- 21-Day Rules

The Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act") created two "21-day rules" regarding late payments and grace periods. With respect to late payments, the Truth in Lending Act ("TILA"), as amended by the CARD Act, now provides that a creditor may not treat a payment on an open end consumer credit plan as late for any purpose unless the creditor has adopted reasonable procedures designed to ensure that each periodic statement is mailed or delivered to the consumer not later than 21 days before the payment due date. TILA's grace period rule indicates that a grace period may not expire unless the periodic statement was mailed or delivered 21 days prior to the grace period's expiration.

The Rule implements these provisions by requiring creditors to adopt reasonable procedures designed to ensure that periodic statements are mailed at least 21 days prior to the payment due date and the date on which any grace period expires. AFSA believes this is the proper way to implement these requirements, and supports the FRB's approach. We also support the provision in the Commentary indicating that a due date, for purposes of the 21-day rules, does not include informal courtesy periods, or similar types of periods that may be required by state or other laws. AFSA asks the FRB to retain this provision in the Commentary.

Section 226.9(c)(2)(v)(B) – Promotional Rates

The CARD Act requires that a card issuer provide the Promotional Disclosures prior to the commencement of the promotional period if such issuer intends to increase the APR on the promotional balance upon the promotion's expiration. The Act does *not* state, however, how the Promotional Disclosures must be provided. We believe that the flexibility provided by Congress is critical, and should be reflected in the Rule. Absent such flexibility, AFSA is concerned that consumers will not have access to a variety of beneficial promotional programs which Congress intended to preserve.

The current requirement that the Promotional Disclosures be provided in writing prior to the commencement of the promotion is very difficult for card issuers to meet. The process of accepting a payment card at the point of sale does not lend itself to providing a disclosure before the commencement of the promotion that is customized to the specific cardholder (*i.e.*, with the cardholder's actual APR). A card swipe does not necessarily give the merchant access to the issuer's cardholder data, so the merchant does not have a reasonable mechanism to obtain the cardholder's APR for purposes of printing the disclosure. Furthermore, a retailer's systems may not be capable of providing a written disclosure at the point of sale prior to the commencement of the promotion.[2]

We believe many of these issues could be addressed if the FRB implemented the Promotional Disclosures requirement in a more flexible manner, as permitted by TILA. First, the statute does not require that the information in the Promotional Disclosures (*i.e.*, the "go to" APR (or, for

[2] The transaction could occur at a "self checkout" lane, for example. The FRB has not provided any guidance as to whether the receipt provided in the self-checkout lane would be deemed to be provided prior to the commencement of the promotion. We discuss in more detail below our thoughts on when the promotion "commences" for purposes of the Rule.

deferred interest promotions, the rate at which interest is accruing during the promotional period) and duration of the promotion) be provided in a single disclosure or at a single point in time. Nor does TILA require that the information in the Promotional Disclosures be provided at the point of sale itself. Finally, TILA does not require the Promotional Disclosures to be given in writing. Therefore, according to the plain language of the statute, a card issuer could provide the "go to" APR in an account opening disclosure, on a periodic statement, or in any other disclosure that is provided to the consumer prior to the commencement of the promotion. This would be consistent with the general disclosure regime established by Congress under TILA as there has never been a requirement to disclose an APR at the point of sale in connection with a specific purchase transaction.[3] There is nothing in the legislative history to suggest that Congress intended to deviate from the longstanding approach to TILA disclosures. Furthermore, the card issuer could disclose the length of the promotion in advertising disclosures or other communications to the consumer. The FRB has allowed card issuers to provide information analogous to the duration of the promotion other than in writing to the consumer, such as under § 226.16 of Regulation Z (effective July 1, 2010). If the card issuer provided the Promotional Disclosures using the flexibility described, this would appear to serve consumers well while complying with the plain congressional intent. We ask the FRB to permit this approach.

If the FRB believes that the Promotional Disclosures must be provided at the same time and in writing, we ask that the card issuer be permitted to disclose the APR in a narrative form, or to provide an "up to" disclosure (*e.g.*, "the APR that will apply at the expiration of your promotion will be [the APR that applies to purchase transactions at that time] [or] [up to 26.99%]") on the receipt or a similar document provided to the consumer at the point of sale. Depending on how the merchant handles the point of sale purchase process, however, the receipt may be provided after the consumer has signed for the credit card transaction (*e.g.*, if the merchant prints a receipt only after the consumer has signed an electronic signature pad). We believe this complies with the requirement to provide the Promotional Disclosures prior to the commencement of the promotional period. Strictly speaking, a credit promotion cannot commence until the credit is extended by the card issuer to the consumer (*i.e.*, the transaction posts to the consumer's account). Therefore, point-of-sale activities should be considered to be prior to the commencement of the promotional period, regardless of whether they occur before or after the consumer is obligated for the purchase. Not only is the interpretation consistent with the statute, but AFSA does not believe that the choreography of paperwork and the Promotional Disclosures during a 10-second span at the point of sale should be micromanaged by the Rule.

Of course, if the Rule were to require that the Promotional Disclosures be provided before the consumer signs for his or her purchase, the ability of a merchant/issuer to preprint the disclosures with a narrative APR or an "up to" APR disclosure under the Rule becomes even more critical. In many circumstances, the Promotional Disclosures will need to be preprinted in a manner that allows retail store clerks to provide a single document, perhaps with several different promotional disclosures, to consumers who may take advantage of the relevant promotions. This approach would alleviate many—but not all—of the difficulties associated with providing the Promotional Disclosures at point of sale. For example, if the Promotional Disclosures must be

[3] We can think of no legitimate reason, nor is there any in the legislative history of the Act, to suggest that consumers who make purchases on promotional plans need more robust disclosures *at the point of sale* than consumers who make similar purchases on less favorable credit terms.

provided prior to the consumer signing for the purchase, it is not clear how a retailer will provide the Promotional Disclosures at an unmanned point of sale, such as a self-service checkout line.

In addition to the issues that the Promotional Disclosures Rule raises for in-store transactions, this Rule presents other issues as well. AFSA believes that it would be helpful if the Rule were revised or clarified as follows:

i. *Promotion corrections.* AFSA members report that, on occasion, they may adjust a cardholder's account and give the consumer promotional terms after a purchase has been made. This could occur, for example, if the consumer (correctly or incorrectly) believes he or she should have received the terms of a promotion. As drafted, the Rule would require the issuer to provide the Promotional Disclosures in writing before the commencement of the newly provided promotional period. Issuers should be permitted to make corrections to promotions on accounts (e.g., changing a six-month promotion to a 12-month promotion), or place promotions on accounts that were inadvertently omitted, in response to specific consumer requests (including telephone requests), as long as the issuer sends a follow up letter or billing statement confirming the promotional terms.

ii. *Telephone Purchases.* Many consumers take advantage of promotional offers in connection with purchases made via the telephone. AFSA is concerned that the Rule's requirement that the Promotional Disclosures be provided in writing could result in promotions not being offered to consumers making telephone purchases. Alternatively, consumers may be provided with an unnecessary choice: take advantage of a promotion or receive the product in a more timely way. For example, if the writing requirement means that a merchant cannot ship a product until after it (or the issuer) has mailed a written disclosure, a consumer may forego the promotion simply to receive the product more quickly. This could be relatively common, especially in connection with last minute gift purchases. Consumers should not be forced to make these kinds of choices, nor would they appreciate having to make them.

Assuming that the Rule generally requires the Promotional Disclosures to be provided in writing, AFSA believes it would be more appropriate to allow the merchant to provide the Promotional Disclosures to the consumer orally at the time of a telephone or similar purchase and allow the merchant or issuer to provide the Promotional Disclosures in writing within a reasonable period of time after the transaction (*e.g.*, on the next periodic statement). AFSA believes this will allow the consumer to receive the information in a manner consistent with the overall transaction, but not unnecessarily delay the consumer's receipt of the merchandise. There is precedence for oral disclosures. For example, there is a Gramm-Leach-Bliley provision allowing the issuer's privacy notice to be delivered after the transaction (e.g., in the case of phone transactions) where providing it when the relationship is established "would substantially delay the customer's transaction." 12 C.F.R. § 216.4(e)(2)(ii)(A).

iii. *Internet Purchases.* Similarly, many consumers seek to take advantage of promotional offers in connection with purchases made via the internet. Because the Rule requires that the Promotional Disclosures be given in writing, an issuer must obtain the

consumer's consent pursuant to the requirements of the E-SIGN Act to provide the Promotional Disclosures electronically. We do not believe such a result is necessary to ensure that the consumer receives the information required in the Promotional Disclosures in connection with an Internet purchase. For example, the FRB reasoned in its 2007 electronic disclosure rulemaking that "when shopping for credit or viewing credit advertising online, consumers would not be harmed if the E-Sign consent procedures do not apply" and that "[a]pplying the consumer consent provisions of the E-Sign Act to [advertising and solicitation] disclosures could impose substantial burdens on electronic commerce." 72 *Fed. Reg.* 63462, 63464 (November 9, 2007).

If the Rule requires the Promotional Disclosures to be provided in writing, AFSA believes that the FRB should exempt the Promotional Disclosures from the E-SIGN requirements for the same reasons the FRB provided in its prior electronic disclosure rulemaking. Provided that the required information is disclosed online, consumers are not harmed if they are not provided the Promotional Disclosures pursuant to E-SIGN requirements. To the extent the consumer relies on the promotional information when making the purchase, the consumer has obviously received such information regardless of an E-SIGN consent process. Furthermore, an E-SIGN consent requirement in this circumstance would impose substantial burdens on electronic commerce. It is not commercially reasonable to expect merchants who otherwise would have no need to provide E-SIGN disclosures and obtain E-SIGN consents to develop a mechanism on their web pages to do so simply to provide their consumers promotional financing terms that are more favorable than would otherwise be available. Such a requirement would also force at least some merchants to completely revise their Internet checkout process, as some merchants generally do not know which payment method the consumer intends to use—and therefore whether the consumer will receive promotional financing in connection with the purchase—until the consumer completes the purchase.

iv. Opportunity to Catch Up. If, notwithstanding an issuer's good-faith efforts to comply with the Rule for promotional purchases made beginning as of August 20, 2009, subsequent rulemaking and clarifications demonstrate that an issuer may have failed to technically comply with the Rule for such promotions, such issuer should have the opportunity to send a "catch up" letter to consumers that includes any required disclosures.

v. Safe Harbor. To the extent that Rule requires the Promotional Disclosures to be provided at the time of the promotional purchase, AFSA asks that the FRB consider providing some tolerance for having "reasonable procedures" in place to ensure the provision of timely and accurate promotional disclosures, similar to the standard for statement mailing, because issuers cannot be certain, for any given consumer, that the required disclosures were provided at the point of sale.

Section 226.9(c)(2)(v)(D) –Hardship Arrangements

The Rule provides an exception to the 9(c) Notice requirement if an issuer increases an APR due to the completion of a workout arrangement. Specifically, if the issuer provides a written

disclosure of the "terms of the arrangement (including any increases due to such completion)" prior to the commencement of the workout, the issuer may increase the APR at the completion of the workout without providing a 9(c) Notice. We ask the FRB to modify or clarify this requirement based on the fact that most issuers provide for a consumer to enroll in a hardship arrangement by telephone and make a first payment under the arrangement immediately. An enrollment letter is then promptly sent out confirming the details of the arrangement. We do not believe that an issuer should delay the commencement of a workout arrangement—an arrangement designed to benefit consumers in need of immediate assistance—because the issuer must first provide the consumer with a written disclosure. Rather, we believe that the issuer should be permitted to make the necessary disclosures concisely over the telephone and provide any written disclosures within a reasonable time thereafter (*e.g.*, with the next periodic statement).

Therefore, AFSA respectfully suggests that the exception for hardship arrangements be revised to apply upon oral notice to the consumer in instances where written notice has been or will be provided within the first few days of the arrangement. (The permissible number of days could be specified in a future rulemaking.) This would allow issuers to speak to consumers, apply the reduced rate to provide the needed assistance, and then send a confirmation letter with the required disclosures, including the rate that will apply in the event of the consumer's completion of the arrangement or failure to comply with the terms of the arrangement.

Moreover, although the FRB provided a transition rule with respect to the application of the 9(c) Notice requirements to existing promotion programs, neither the Rule nor the Supplementary Information explicitly provided a similar transition rule for workout programs. Without such a transition rule, some may believe that a card issuer must provide a 9(c) Notice to cardholders at the completion of a workout before the issuer can increase the APR due to the completion of the workout. We do not believe this is what the FRB intended, and we ask the FRB to clarify the application of a transition rule to workout arrangements existing prior to August 20, 2009.

Section 226.9(c)(2)(v) – "SCRA" Exception

AFSA notes that the Rule does not provide an explicit exception to the 9(c) Notice requirement in the event that an issuer increases an APR due to the removal of the protections under the Servicemembers Civil Relief Act ("SCRA"). In other words, absent clarification, some may believe that an issuer must provide a 9(c) Notice and opportunity to opt out to a cardholder in the event that the issuer increases the APR due to the removal of the SCRA's protections from the account. We do not believe that the Rule should result in the consumer having the ability to make the benefits of the SCRA permanent, especially since the SCRA itself does not make such benefits permanent. We ask the FRB to clarify that an increase in APR due to the expiration of the SCRA's protections is a workout for purposes of the Rule, or to provide an explicit exception to the 9(c) Notice requirement for the SCRA. It is critical, however, that the FRB provide a clear transition rule for SCRA accommodations provided prior to the FRB's clarification/revision of the Rule.

Section 226.9(g)(2) –Increase in Rates due to Delinquency or Default or as a Penalty

AFSA respectfully requests that in its next rulemaking on the CARD Act, the FRB clearly allow for anticipatory notice of penalty rate increases, in situations where an Issuer requires multiple late payments before a penalty rate is imposed. An earlier notice (e.g., after the first late payment) that the consumer is in jeopardy of triggering the penalty rate would give the consumer time to bring payments current and avoid application of the increased rate to any balances – a more desirable result for the consumer and one that is consistent with the consumer protection intent of the CARD Act.

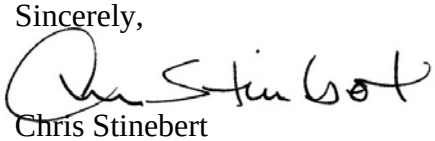
This could be accomplished by removing the requirement that all triggering events must have occurred before an issuer may send a penalty rate notice. Although not required by the CARD Act, the Rule incorporates the CARD Act's requirement for a 45-day notice of an increase to the penalty rate with the FRB's requirement (in its final rules effective July 1, 2009) that the notice not be sent until all triggering events have occurred. Consequently, issuers that currently have penalty rate triggers other than a single late payment may need to consider establishing earlier triggers. To illustrate, if an agreement provides for a penalty rate to apply if the consumer makes two consecutive late payments, an account would have to be at least 30 days past due before the issuer could send the penalty rate notice and 75 days past due before the penalty rate would apply (30 days plus the 45-day notice period), which effectively translates into 90 days past due if the issuer increases rates on the first day of a cycle. AFSA does not believe that Congress intended such a result.

Conclusion

Again, AFSA appreciates the opportunity to provide its comments on the Rule.

Please do not hesitate to contact me at 202-296-5544 if we can provide further assistance on this or other rulemakings to implement the Act.

Sincerely,



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