June 4, 2009

By Electronic Mail

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 Nos. R-1286 and R-1314

Regulation Comments, Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Re: OTS-2009-0006

Ms. Mary Rupp, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Re: RIN 3133-AD62

To Whom It May Concern:

This comment letter is submitted by the American Financial Services Association ("AFSA")[1] in response to the proposed rule issued by the Board of Governors of the Federal Reserve System ("FRB"), the Office of Thrift Supervision, and the National Credit Union Administration ("Agencies") relating to clarifications of regulations addressing unfair credit card practices ("UDAP Rule") ("UDAP Clarification"). AFSA also submits this comment letter to the FRB in response to the proposed rule issued by the FRB to clarify recent revisions to Regulation Z ("Reg Z Clarification"). Several of the issues we discuss, especially relating to deferred interest programs, are relevant to both the UDAP Clarification and the Reg Z Clarification. We believe our comments will be more cohesive if submitted as a single letter, even though some comments, strictly speaking, relate only to the FRB's Reg Z Clarification. AFSA appreciates the opportunity to share its comments with the Agencies.

Summary

AFSA believes the Agencies have proposed useful and helpful clarifications to the UDAP Rule and Regulation Z. We commend the Agencies for their willingness to provide creditors with additional clarity under the applicable rules. Although we provide a variety of more specific

[1] 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.

comments below, AFSA generally believes that the proposed clarifications should be adopted. AFSA is also very pleased that the Agencies have proposed to permit credit card issuers to offer deferred interest programs to consumers. These programs provide consumers (and merchants) with significant benefits and can be extremely useful in providing consumers with an appealing credit option. As we discuss below, we believe it is critical that the Agencies adopt final rules permitting issuers to continue to offer deferred interest programs to consumers.

Deferred Interest

In General

The Supplementary Information to the UDAP Rule provided an interpretation of the UDAP Rule that would have made it a violation of the rule for a credit card issuer to provide consumers deferred interest programs. The Agencies stated, however, that waived interest programs would still be permitted. This interpretation caused significant concern among AFSA members, and we are very pleased that the Agencies have proposed to revisit the issue in the UDAP Clarification.

Application of § __.24 of UDAP Rule and Interplay with § 226.9(g)

According to the UDAP Clarification, an institution may provide both deferred interest and waived interest programs to consumers, but the Agencies believe that these programs are subject to the protections provided in § __.24 of the UDAP Rule. Specifically, the Agencies state that an issuer could not revoke the deferred interest program on an existing balance unless the consumer is 30 days delinquent on the account.[2] This raises an interesting issue for the FRB, and perhaps the other Agencies as well. If the Agencies deem the revocation of a deferred interest promotion as the equivalent of an increase in APR, which would appear to be the case if § __.24 were to apply to such a revocation, it would also appear that a card issuer would be required to provide a notice of such "increase" under § 226.9(g) if the increase is due to penalty, default, or delinquency.[3] If this is correct, we ask the FRB to provide additional clarification. Specifically, § 226.9(g) requires a card issuer to provide a cardholder with a 45-day notice of the increase in APR. The notice period provides the cardholder the opportunity to find a better credit offer and transfer the balance. We do not believe the 45-day period serves any purpose as it relates to the revocation of a deferred interest promotion, however. In this regard, once the deferred interest program is revoked, the consumer is *immediately* liable for the deferred interest, and the applicable periodic rate may be applied to the outstanding balance, regardless of whether the cardholder transfers the balance at a later date, closes the account, or takes any other action. The FRB should therefore clarify that, if a notice is required under § 226.9(g) in connection with the revocation of a deferred (or waived) interest benefit, such notice need not be provided prior to

[2] Throughout this letter we will reference the UDAP Rule and Regulation Z as currently drafted. We recognize that certain provisions, such as the 30-day delinquency exception in § __.24 of the UDAP Rule, may be amended as a result of the Credit CARD Act.

[3] No notice would be required if the consumer becomes obligated to pay the deferred interest amount due to the expiration of the promotion, as the "increase in APR" is not an "increase" due to a penalty, delinquency, or default but rather due to the expiration of a period of time.

the imposition of the deferred interest and may be provided on the same periodic statement first indicating the liability for the deferred interest.

Treatment of Existing Programs

The Agencies explain in the Supplementary Information to the UDAP Clarification that a deferred interest program established prior to the UDAP Rule's effective date is valid, even if it expires after the effective date, provided that: (1) any periodic statement mailed or delivered on or after July 1, 2010 complies with the disclosure requirements proposed by the FRB in the Reg Z Clarification; and (2) as of July 1, 2010, the card issuer complies with the UDAP Rule. AFSA agrees that card issuers should comply with the applicable requirements under § 226.7 and under the UDAP Rule as they relate to deferred interest programs. The Supplementary Information, however, suggests that violations of these requirements in connection with accounts having deferred interest balances would call the "validity" of the deferred interest program itself into question. This is unlikely to be what the Agencies intended, as there are sufficient enforcement tools available under Regulation Z and the UDAP Rule without the need to invalidate the entire underlying deferred interest program in the event of a violation of Regulation Z or the UDAP Rule. We therefore ask the Agencies to clarify their intent in this regard.

Payment Allocation

The UDAP Rule imposes certain payment allocation requirements on credit card issuers. The UDAP Clarification states that if an issuer provides a deferred interest program to a cardholder, the issuer must allocate amounts paid by the cardholder in excess of the required minimum payment first to the deferred interest balance during the two billing cycles immediately preceding the expiration of the deferred interest program, and any remaining portion of the payment to the other balances consistent with the requirements of the UDAP Rule.

The Agencies have correctly recognized that the strict application of the payment allocation rules in the UDAP Rule could frustrate a consumer's desire to repay a deferred interest balance prior to the expiration of the promotion if the consumer has other balances on the credit card account. We believe the Agencies' proposed requirement to mitigate this problem is a reasonable approach, and we ask that it be retained.

AFSA is concerned, however, that despite the proposed advertising disclosures and periodic statement disclosures pertaining to deferred interest programs, some consumers still may express frustration that they are not able to pay down a deferred interest balance in any meaningful way until the last two months of the promotion. We ask the Agencies, and specifically the FRB, to state affirmatively that card issuers are not expected to attempt to provide additional disclosures relating to a consumer's ability to repay a deferred interest balance during the promotional period. Not only is this the appropriate result, but it would also be difficult to develop additional disclosures that will be meaningful and understood by consumers since the impact of the payment allocation limitations on card issuers will affect each consumer differently depending on the existing account balance, deferred interest balance, subsequent card usage, and payment behavior. AFSA also believes that if a financial institution has the ability to do so, it should certainly be permitted to allocate payments in accordance with a consumer's instructions. Why

prohibit consumers from paying down deferred interest balances if they choose to do so and if a financial institution has the ability to allocate payments in various ways to suit the consumer?

Two-Cycle Billing

We believe the Agencies' clarification in the Commentary regarding the interplay between the two-cycle billing ban and deferred interest programs is appropriate. We ask the Agencies to revise the Commentary, however, to give a more complete picture of how a deferred interest program may operate under the UDAP Clarification and Reg Z Clarification. Specifically, proposed Comment § __.25(a)-3 states that the prohibition on two-cycle billing does not prohibit an institution from charging accrued interest under a deferred interest program if the balance is not paid in full prior to the specified date. The Agencies are aware, however, that there may be other circumstances in which a bank may charge accrued interest in addition to the expiration of the promotion (*e.g.*, consistent with § __.24). AFSA asks the Agencies to revise this comment to note simply that the two-cycle billing prohibition does not prohibit an institution from charging accrued interest under a deferred interest program. If the issuer charges interest in a manner that is not permitted under applicable law, including other provisions of the UDAP Rule, the issuer could, of course, be subject to appropriate enforcement under those provisions.

Periodic Statement Disclosures

The Reg Z Clarification provides several periodic statement disclosure requirements pertaining to deferred and waived interest programs. We believe the proposed requirements are appropriate.

Advertising Disclosures

It appears that a key component in the Agencies' decision to permit issuers to continue to offer deferred interest programs is the FRB's intent to impose certain disclosure requirements under § 226.16 in connection with deferred interest program advertisements. AFSA does not necessarily oppose the FRB's proposed advertising disclosures, but we are concerned that some of the disclosures will be relatively voluminous relative to the space in which they may be provided (*e.g.*, a splash sticker on a shelf below the item that can be purchased using the deferred interest program). For example, we question whether it is necessary to disclose issues relating to the consequences of an account default on a deferred interest plan in advertisements, especially since the default event (*i.e.*, 60-day delinquency) will be relatively uncommon as a result of the Credit CARD Act. We also question whether the "if paid in full" disclosure is necessary—at least in equal prominence—on an envelope, banner, or pop-up advertisement since the actual marketing message inside the envelope will contain this disclosure.

Disclosure of Deferred Interest in a Table

The Reg Z Clarification notes that an issuer offering a deferred or waived interest program may not disclose in the Schumer box a 0% APR as the rate applicable to deferred or waived interest transactions if there are any circumstances under which the consumer will be

obligated for interest on such transactions for the waived or deferred interest period.[4] It appears, therefore, that there are no specific disclosure requirements in § 226.5a or § 226.6 pertaining to deferred interest programs. We believe this is appropriate given the advertising disclosures and periodic statement disclosures that must be provided (assuming the adoption of the Reg Z Clarification). Indeed, to provide such disclosures in a Schumer box would be nearly impossible as part of an in-store display or similar circumstance where the deferred interest offers may be numerous, depending on the purchase transaction, and may vary by the day. To the extent the FRB believes that additional or supplemental disclosures relating to the deferred interest program are necessary under § 226.6, we ask that an issuer be permitted to provide those disclosures on a document separate from the account-opening table if the disclosures are provided in connection with an instant account, such as at the point of sale. This flexibility would be consistent with the proposed flexibility regarding APRs in a risk-based pricing environment, and it would appear to be an appropriate balancing of consumer disclosure and protecting the viability of these beneficial programs.

Definition of Consumer Credit Card Account

The UDAP Clarification describes how the Agencies would consider the status of a credit card account balance if it is transferred to an account issued by the same institution or its affiliate. Specifically, if a balance is transferred from a consumer credit card account issued by a bank to another credit account issued by the same bank or its affiliate, the account continues to be the same consumer credit card account for purposes of the UDAP Rule with respect to that balance (unless the balance is transferred to an open-end HELOC or similar program). We urge the Agencies to reconsider this interpretation, as it will unnecessarily limit consumer choice and make it more difficult for banks to offer beneficial products to their own consumers.

We believe that if a consumer would like to transfer a balance from one account issued by a bank to another account issued by the same bank, the consumer should be permitted to do so without artificial hurdles created for the bank by the UDAP Clarification. For example, assume the consumer has two cards issued by the same bank. The consumer may not be permitted to consolidate the accounts if the issuer is not capable of (or willing to) create a protected balance as a result of the balance transfer (*e.g.*, cardholder wants to move a lower APR balance to a card with a slightly higher APR because the difference in APR is small, but the higher APR card has no annual fee, better rewards, and/or wider acceptance). Yet, if the cardholder wanted to engage in the exact same transaction involving two issuers, the issuer providing the balance transfer would not need to create a protected balance. This latter example is the appropriate interpretation, and it should be valid regardless of who the card issuer is.

AFSA assumes the Agencies are concerned that a card issuer may convince a cardholder to transfer a balance to a new account in order to increase an APR on the transferred balance that the issuer could not otherwise do. We concede that this could happen. However, unless the cardholder otherwise finds value in the balance transfer, it is not clear why the cardholder would authorize such a transaction. In other words, the Agencies have provided significant protections under the UDAP Rule, and the FRB under Regulation Z, that the consumer would receive

[4] We assume this is also the FRB's position with respect to the disclosure of the applicable APR(s) in the account-opening table under § 226.6.

significant and effective disclosures about both accounts, and would be in a position to determine whether a balance transfer from one account to another—regardless of any increase in APR—makes sense for the consumer. Stated differently, it is not clear why the protections are sufficient if the consumer is transferring a balance from one institution to another, but not when balances are transferred within a corporate family.

It is also important for the Agencies to recognize practical limitations to their proposed interpretation. For example, if a consumer uses a convenience check or similar access device issued by one institution to pay a credit card balance on an account issued by a bank affiliate, the institution providing the access check or other device may not have the ability to deny payment on the check and/or treat the balance relating to the transaction different than any other balance on the account.

We note that UDAP Clarification will necessarily restrict choices for consumers who are seeking more beneficial credit arrangements. Not only may an issuer not be able to transfer a balance to a different account because of the hurdles the Agencies propose, but an issuer may not be able to transfer a credit card account balance at all to a closed-end debt consolidation product because such a product may not easily accommodate balances involving different APRs.

Finally, AFSA has a significant number of finance companies as members. These finance companies are not subject to the UDAP Rule. The UDAP Clarification implies, however, that a finance company affiliate of a bank could not offer a credit account without treating as a protected balance a transferred balance from a credit card issued by the bank affiliate. We do not believe the UDAP Rule would apply to finance companies in these (or any other) circumstances, but we ask the Agencies to clarify their interpretation to the extent they believe otherwise.

7-Day Rule

The UDAP Rule provides that an increased APR may not apply to "existing balances" in certain circumstances, and such balances are those accruing up to the seventh day after the 45-day notice was provided. The UDAP Rule indicated that the seventh day was a relatively "hard" cut-off, meaning that the card issuer could take a snapshot of the posted balance as of that day and apply the increased APR to any transaction settling after the snapshot has been taken. The UDAP Clarification, however, would require a card issuer to note the actual date of a transaction and allocate the transaction to the correct APR "bucket" depending on whether or not it occurred after the 7th day.

AFSA believes the proposed clarification is unnecessary, and that the original interpretation of the UDAP Rule was correct. This provided card issuers with relatively clear guidance that could be implemented without any unnecessary systems changes. To the extent that a transaction occurred during the 7-day window, but settled after it, consumers would generally not suffer significant harm, certainly not rising to the level of an unfair practice. Indeed, as a result of the Credit CARD Act, consumers will have a 14-day timeframe to adjust their behavior, making it less likely that there will be transactions that authorize prior to the deadline, but settle after it.

If the Agencies decide to adopt the proposed interpretation, we ask the Agencies to provide an "outer band" of certainty for card issuers. AFSA does not believe that a card issuer should be required to monitor every transaction on an account for which there is a protected balance to determine whether the transaction occurred prior to the 7-day cut-off or after. To give an extreme example, if an issuer increases an APR on an account on January 1, 2011the issuer should not be expected to monitor transaction dates in July 2011 (or 2012? or 2015?) on the off chance that a merchant or acquirer is late in submitting the transaction for settlement. We think it would be more appropriate to allow the card issuer to finalize the protected balance 30 days, or even 60 days, after the 45-day notice is given just so there is a finite number of transactions that must be monitored. The likelihood that a consumer's transaction will come in after 30 or 60 days after the notice is provided is extremely small, but the costs associated with continued monitoring may not be.

Servicemembers Civil Relief Act

The UDAP Clarification provides the requirement that would apply if a cardholder receives a decreased APR pursuant to the Servicemembers Civil Relief Act ("SCRA"). In particular, an issuer may increase an APR that was decreased pursuant to the SCRA once the protections of the SCRA no longer apply, provided that the increased APR does not exceed the APR that applied prior to the military service. AFSA generally agrees with the Agencies' intent to allow card issuers to adjust APRs based on the removal of the SCRA's protections. We note, however, that the Agencies should clarify that an issuer is permitted to increase an APR to the APR that would have otherwise applied on the account if the SCRA's protections had not been invoked, even if the new APR is higher than the APR that applied at the time the SCRA was invoked. For example, if a cardholder invokes the SCRA when a promotional APR is in effect, the card issuer should be able to increase the APR to the level that would have applied at the time the SCRA was no longer applicable, such as the "go to" APR if the promotion has expired.

Two-Cycle Billing

The UDAP Rule provides limited exceptions to the prohibition on using balances from previous billing cycles to calculate interest. One such exception is an adjustment "to finance charges as a result of the return of a payment for insufficient funds." We agree that if a payment is returned, the card issuer should be able to adjust finance charges. It is not clear to us, however, why a payment returned for any reason other than insufficient funds would apparently not qualify for the exception. As a policy matter, it does not appear to be important why a payment was returned, only that it was returned. As a practical matter, it is not clear that card issuers have the capability of determining with certainty the reason for the returned payment, much less why they should be expected to develop such capability. We therefore respectfully request the Agencies to grant card issuers an exception from the requirements of § __.25 for any returned payment, regardless of the reason.

Point of Sale Disclosures

The Reg Z Clarification provides card issuers with the opportunity to provide risk-based pricing for accounts that are opened at the point of sale. The original application of the revised

Regulation Z would have made this very difficult, if not practically impossible, by requiring a card issuer to print the specific APR in the account-opening table provided to the consumer at the point of sale. The logistics associated with such a requirement would have made it virtually impossible to do, unnecessarily distorting the pricing offers card issuers could provide in a point-of-sale context. AFSA therefore strongly commends the FRB for allowing card issuers the flexibility to provide the APR for the account in a disclosure separate from the account-opening table if the APR will vary due to risk-based pricing.

Although the FRB has addressed the disclosure of certain APRs at the point of sale, it is still not entirely clear whether or how the FRB expects an issuer to disclose a promotional rate as part of the Schumer box or the account-opening table when the account is opened at point of sale. We believe that such a disclosure is unnecessary, as the promotion would generally otherwise be known to the consumer (*e.g.*, through an in-store display) and in all cases would be beneficial to the consumer. To impose a disclosure requirement for these promotional rates would make it more difficult for issuers to offer them, *especially at point of sale*, making it less likely that consumers would be able to take advantage of the promotional rate benefits.

If the FRB intends for promotional rates to be disclosed under Regulation Z, AFSA requests the FRB to provide similar flexibility regardless of the reason why the APR may vary. One likely reason an APR may vary for reasons other than risk-based pricing on an account opened at a point of sale is if the consumer is using the account to engage in a specified behavior (*e.g.*, making a specific purchase with a promotional APR associated with that specific purchase). We believe that card issuers should be permitted to provide these APR disclosures outside of the account-opening table, and that such APR disclosures are not necessary in a Schumer box. Rather, for the same reasons consumers can receive risk-based APRs in a clear and conspicuous disclosure provided outside the table, we believe consumers should be able to receive other APR disclosures outside the table if the APR may vary. We strongly urge the Agencies to grant this flexibility.

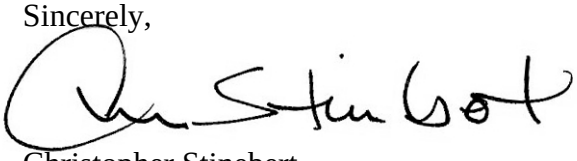
Applicability of § 226.9(c) and § 226.9(g)

It is possible that a card issuer could determine whether to engage in a change in terms, triggering a notice under § 226.9(c), based on a cardholder's delinquency or other default. For example, a card issuer could decide to change account terms by increasing the APR on a cardholder who has made three consecutive late payments. If the issuer engages in such a change in terms (*i.e.*, the account agreement does not otherwise give the issuer the right to increase the APR for three consecutive late payments), the issuer would obviously need to provide notice under § 226.9(c). We do not think the issuer would be required to give notice under § 226.9(g), even though the changed terms could, in fact, be due to delinquencies. Not only does the plain language of Regulation Z suggest that a notice under § 226.9(g) is not required, but there would be no consumer benefit to providing a notice in such a circumstance. AFSA asks the FRB to confirm this interpretation of Regulation Z.

Conclusion

Although we have several specific comments, AFSA believes the UDAP Clarification and Reg Z Clarification are generally appropriate and should be adopted. Again, AFSA appreciates the opportunity to provide its comments. Please do not hesitate to contact me if we can be of further assistance.

Sincerely,



Christopher Stinebert
President and CEO
American Financial Services Association