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

Re: Docket No. R-1286: Proposed Rule on Regulation Z
Open-End (Revolving) Credit

Dear Ms. Johnson:

I am asking that this letter be considered as a comment on the Board of Governors of the Federal Reserve System's (Board) proposed rule on the open-end (revolving) credit provisions of Regulation Z. I understand that the comment period has closed, but Jane Ahrens, Senior Counsel, Division of Consumer and Community Affairs, informed me that the Board could still consider comments on this issue and suggested that I submit late comments.

I am writing concerning the situation under which a bank or other creditor replaces a credit insurance program with a debt cancellation term in a credit card agreement in the manner outlined below. Specifically, on behalf of my client, Aon Integramark, I request that, as part of its comprehensive review of the open-end credit provisions of Regulation Z, the Board revise the Official Staff Commentary (Commentary) to Section 226.9(f) of Regulation Z to clarify that, for purposes of this Section, under a credit card account, a conversion of credit insurance coverage to "debt cancellation coverage," as that term is defined in Section 226.4(d)(3)(ii) of Regulation Z, or "debt suspension coverage," as that term would be defined under the proposed amendment to Section 226.4(b)(10), Comment 1, is treated identically in all respects to a conversion of one credit insurance provider to another. If the Board decides that it cannot change the Commentary alone, I request (i) a change(s) to Section 226.9(f) of Regulation Z to provide that under a credit card account, a conversion of credit insurance coverage to "debt cancellation coverage," defined as stated above, or "debt suspension coverage," proposed to be defined as stated above, is treated identically in all respects to a conversion of one credit insurance provider to another, and (ii) a corresponding change(s) to the Commentary to Section 226.9(f).

This is an important issue because banks and other creditors (banks) that provide credit card accounts to consumers for personal, family or household purposes have been and currently are asking to replace credit insurance coverage with debt cancellation under the terms of their respective credit card agreements. Over the past ten years, virtually all major U.S. bank credit card issuers (*e.g.*, Citibank, Discover Card, Chase Bank, Capital One, American Express, etc.) have replaced an offer of credit insurance to their credit card customers with an offer of debt cancellation or suspension terms in their agreements. Credit insurance and debt cancellation can be important financial planning tools for consumers in these difficult economic times. As banks migrate from credit insurance to debt cancellation, there is uncertainty regarding whether compliance with Section 226.9(f) in the manner outlined below is sufficient to exclude the fees for debt cancellation from the finance charge where the conversion from credit insurance is to debt cancellation rather than another group credit insurance policy through another insurance provider.

Debt cancellation is a superior product from both the bank's and the consumer's perspective. The protections offered under a debt cancellation/suspension agreement are generally more varied than the limited menu of events that insurance law permits to be covered by credit insurance. For example, in addition to the events covered by credit insurance, debt cancellation agreement protections may include hospitalization, divorce, move or other life events, while credit insurance coverages are uniformly limited to life, disability, involuntary unemployment and family leave of absence. Pricing of debt cancellation agreement protection is based on safe and sound financial practices, while credit insurance coverage pricing is based on a statutory *prima facie* rate set by a state insurance department. The uncertainty regarding the legality, under Regulation Z and the federal Truth in Lending Act (TILA) of a conversion, however, makes it difficult for banks to implement the conversion.

We have outlined below the factual and legal context in which this conversion issue arises, the legal basis for permitting conversion in the manner described and the benefit of this approach to the bank and the consumer.

I. Factual Context

The issue concerning the Commentary to Regulation Z Section 226.9(f) arises in regard to existing bank credit card programs with optional credit insurance that when selected is billed monthly to the credit card account. At the time the borrowers select credit insurance, the borrowers receive the credit insurance disclosures required by the TILA and Regulation Z. *See* 12 C.F.R. § 226.4(d). Regulation Z requires that in order for credit insurance premiums to be excluded from the finance charge, the insurance coverage must be voluntary and this fact must be disclosed to the borrower in writing, and the borrower must sign or initial an affirmative request for credit insurance after receiving the required disclosures. Similar provisions exist for voluntary debt cancellation. *Id.* (The proposed rule would amend Regulation Z Section 226.4(d) in certain ways. It would not, however, fundamentally change the point that the treatment of credit insurance and debt cancellation or "debt suspension" (this term would be defined under the proposed amendment to Section 226.4(b)(10), Comment 1) under Section 226.4(d) is similar.) The Section 226.4(d) disclosures cover significant elements of the required Office of the Comptroller of the Currency (OCC) Debt Cancellation Regulation disclosures, most importantly requiring a written affirmative request, that most banks follow when offering debt cancellation. *See* 12 C.F.R. Part 37; Part III.C of this comment letter below.

Since 1998, banks have replaced traditional credit insurance programs with a debt cancellation term in their credit card agreements. The reasons for the shift toward debt cancellation are discussed in Part IV of this letter below. Banks have begun, and are continuing, to shift programs by offering all borrowers opening new credit card accounts only the protection of debt cancellation. Administratively it is more efficient for banks if all accounts include the same term or protection so that the fees and other administrative procedures are uniform. Thus, banks switching to debt cancellation would like to cease offering credit insurance on their existing credit card accounts. Rather than terminating debt "repayment" protection for existing borrowers who previously requested credit insurance, banks would prefer to replace credit insurance with debt cancellation protection on existing credit card accounts in the manner outlined in Part III below.

II. Legal Context

Section 226.4(d)(3)(i)(C) of Regulation Z requires, among other prerequisites for fees paid for debt cancellation to be excluded from the finance charge, that the consumer sign or initial an affirmative written request for coverage after receiving the other disclosures specified in Section 226.4(d)(3)(i)(A), (B). This same prerequisite must be met for premiums paid for credit insurance to be excluded from the finance charge under Section 226.4(d)(1)(iii). (Under the proposed rule, in proposed new Section 226.4(d)(4) and proposed Commentary thereto, if the creditor maintains reasonable procedures to provide the disclosures to the consumer orally and maintains evidence that the consumer, after being provided the disclosures, affirmatively elected to purchase the insurance or coverage, oral disclosures are permitted for telephone sales, provided that the creditor mails the required disclosures within three business days after the telephone purchase.) Under Section 226.9(f), however, this signature or initialing requirement does not apply when there is a change in credit insurance providers under a credit card account, even though a change in the premium rate and/or a substantial decrease in coverage may result. A card issuer's ability to (i) avoid having to obtain a cardholder's affirmative written authorization (the cardholder provided such authorization when he/she originally purchased credit insurance) to continue his or her credit insurance with another insurer and (ii) still be allowed to exclude the related premiums from the finance charge represents the most important benefit of complying with Section 226.9(f) when there is a conversion from one credit insurer to another.

Neither Section 226.9(f) nor the Commentary thereto contains any reference to this Section's applicability to a conversion of credit insurance to debt cancellation, while Section 226.4(d) contains explicit references to debt cancellation. Thus, it is possible to conclude that Section 226.9(f) does not apply to such a conversion, When the debt cancellation provisions were added to Regulation Z, however, the credit insurance provisions were already in place. It is likely that the conversion of credit insurance to debt cancellation issue was not considered when the debt cancellation provisions were added because the shift away from offering credit insurance to offering debt cancellation agreements occurred later, and because banks had not anticipated the logistical problems with and customer confusion resulting from the management of both a credit insurance program that is in run-off and a debt cancellation program on all new business. Given the similarity of treatment of debt cancellation and credit insurance in other sections of Regulation Z and the Commentary, it is reasonable to conclude that Section 226.9(f) should apply to conversion from credit insurance to debt cancellation.

Because of the current uncertainty, a credit card issuer involved in such a conversion runs the risk of violating the TILA and Regulation Z if it (i) attempts to comply with Section 226.9(f) by offering a cardholder the opportunity to opt out of debt cancellation and (ii) then, if the cardholder fails to opt out, excludes the fees for such protection from the finance charge. The violation may occur when, in reliance on Section 226.9(f), such card issuer excludes the debt cancellation fees from the finance charge without complying with Section 226.4(d)(3)(i)(C) by obtaining the cardholder's signed or initialed affirmative written request for such protection. To avoid this risk and eliminate the uncertainty, we are requesting a revision to the Commentary.

III. Proposed Conversion

A. Proposed Approach

Credit insurance and debt cancellation are functionally equivalent from the borrower's perspective. Under both credit insurance and debt cancellation, on the occurrence of certain events the borrower is no longer liable for payments. In the case of credit insurance a third party insurer is liable to pay a benefit to the lender and/or borrower, while in the case of debt cancellation the lender forgives the debt. To borrowers the end result is the same, but with debt cancellation there is no risk that the third party will not honor its liability. Therefore, borrowers actually are better protected by debt cancellation. The replacement by debt cancellation protection will fulfill the borrowers' stated intent to purchase protection against the inability to repay a debt due to the occurrence of an identified event. The new debt cancellation term will offer the same or better protection at the same or a reduced cost to borrowers. Additionally, debt cancellation offers more flexibility in that additional life events can trigger protection not available under credit insurance programs as discussed in Part IV below.

Under the proposed conversion, the banks intend to notify borrowers of the conversion by sending written notice to all borrowers pursuant to applicable law governing the open-end credit agreements and according to the terms of the credit card agreements. The notice would inform the borrowers that credit insurance coverage is being cancelled and will be replaced with a debt cancellation term for the same or a reduced monthly charge. Along with this notice, each "credit insured" borrower would receive a conversion debt cancellation agreement that is tailored to provide the same or improved protection as was being provided under the applicable credit insurance certificate. The notice also would inform borrowers that if they do not want the debt cancellation term added to their credit card agreement, they may call an 800 number or write the bank and request that the cancelled credit insurance not be replaced with a debt cancellation term. Borrowers would have 30 days (or any longer period required by Regulation Z Section

226.9(c) under this rulemaking) to notify the bank of their request not to have the cancelled credit insurance replaced with a debt cancellation term and any charges relating to debt cancellation would be removed from their accounts.

The notice would include as an enclosure the actual debt cancellation conversion agreement. The notice would contain the substantive information required by the OCC regulations, but modified to reflect the fact that borrowers are not applying for credit. *See* 12 C.F.R. Part 37. Thus, borrowers would receive all required disclosures at the time the new debt cancellation term is offered, and would have given affirmative consent to obtaining the same protection at the time the credit card was originally requested.

The bank does not intend to request that borrowers provide an affirmative written request (sign for the protection of debt cancellation) and return the debt cancellation disclosures in order for borrowers to receive continued protection in the form of debt cancellation. Such a request is as a practical matter, and should be considered legally, unnecessary. The customer has previously provided written consent to the purchase of credit insurance coverage that is being replaced by the same or improved protections of the conversion debt cancellation agreement. Additionally, the customer has received multiple credit card statements that include the monthly fee for credit insurance coverage without cancelling the coverage. So, the customer's intent to protect his/her ability to repay his/her credit card debt with the purchase of credit insurance is well-established. Additionally, the bank believes that return rates for such a request would be very low due to human nature and the busy lives of borrowers, not because borrowers do not want continued protection. If borrowers were required to sign and return the disclosure, some borrowers would fail to return the disclosures with the result that these borrowers would be left with no protection. Those borrowers who wanted protection but failed to sign and return disclosures, and yet thought they had protection regardless of the notice of conversion, would find themselves unprotected if an additional signature were required.

We believe that the approach outlined above permits borrowers to continue to receive the same protection that the borrowers originally requested with no interruption in that protection, while at the same time giving any borrowers who do not want the debt cancellation protection simple instructions for communicating that to the bank and having the protection terminated. We also believe that the proposed approach is consistent with existing regulations regarding debt cancellation and credit insurance.

B. Section 226.9(f)

The provision in Regulation Z regarding subsequent disclosures when a credit card account insurance provider changes also supports the proposed plan. *See* 12 C.F.R. § 226.9(f). Regulation Z requires that notice be provided to borrowers of any change in the insurance provider initiated by the card issuer, and requires that the notice inform borrowers that borrowers may discontinue the insurance, but does not require that the lender obtain a second affirmative written request for insurance from borrowers. *Id.* Under the proposed plan, the lender is changing the type of debt repayment (or cancellation) protection from credit insurance provided by a third-party insurance company to a debt cancellation term provided by the lender. In effect, this is the same kind of change in provider addressed in Section 226.9(f). Under the proposed plan, the bank will give borrowers notice of the change from an insurer/provider of credit insurance to a bank provider of a debt cancellation term, and the bank will inform borrowers of their ability to discontinue protection. Thus, the proposed plan is consistent with the requirements of Regulation Z as to a change in a credit insurance provider on a credit card account.

Section 226.9(f) permits credit card issuers to change credit insurance providers (and the existing coverage as well) and exclude the premiums for the new coverage from the finance charge without requiring issuers to obtain each cardholder's signed or initialed affirmative written request for such new coverage. Debt cancellation is functionally equivalent to credit insurance, and is treated identically to credit insurance in other provisions of Regulation Z and the Commentary. Thus, we believe that merely the addition of commentary to the existing Commentary to Section 226.9(f), stating that this Section applies to conversions from credit insurance to debt cancellation in the same manner and to the same extent as it applies to conversions from one credit insurance provider to another is necessary to make this expanded application effective and consistent with the parallel treatment of credit insurance and debt cancellation in other provisions of Regulation Z.

C. OCC Debt Cancellation Regulations

The proposed approach is consistent with the OCC debt cancellation regulations. The OCC debt cancellation regulations do not specifically address a procedure for converting a credit insurance program to a debt cancellation term. These regulations assume that an additional fee will be charged for any new or revised loan term, which is not the case when credit insurance is converted to a debt cancellation term. For example, the OCC regulations require a national bank to obtain a written affirmative election to "purchase" a new debt cancellation/suspension loan term and written acknowledgment of the required disclosures. *See* 12 C.F.R. § 37.7(a). The stated reasons in the explanation issued with the proposed OCC regulation for requiring borrowers' signatures are to prevent packing, to prevent tying the extension of credit to the purchase of debt protection and to assure an informed purchase of protection by borrowers. *See* OCC Final Rule: Debt Cancellation Contracts and Debt Suspension Agreements, 67 Fed. Reg. 58962, 58971 (2002). Those regulatory concerns were satisfied when borrowers originally signed up for credit insurance coverage. The borrowers have previously qualified for the credit and affirmatively elected to protect their debt prior to the replacement of the credit insurance with a debt cancellation term.

If the borrowers originally received the required Regulation Z disclosures and made an affirmative election to purchase credit insurance, a subsequent amendment of the credit card agreement with no increase in the fee and no degradation in existing protection should not require a new written affirmative election when the borrowers receive written notice of the change in compliance with the open-end credit agreement and the opportunity to cancel protection.

The prohibited practices provision in the OCC regulations regarding prohibited contract terms and unilateral modifications supports the proposed plan. The provision provides that a contract term providing for unilateral modification is prohibited unless: (i) the modification is favorable and without additional charge, or (ii) the consumer is notified of the change and provided a reasonable opportunity to cancel before the change goes into effect. *See* 12 C.F.R. § 37.3(c)(1). Although there is no debt cancellation or debt suspension term in the open-end credit agreement in this proposal and thus no unilateral modification provisions, the OCC has specified how a debt cancellation or debt suspension term could be modified, and the proposed plan satisfies both elements that the OCC requires to avoid the unilateral modification prohibition.

D. Contract Law

Contract law also is relevant to the replacement of a credit insurance program with a debt cancellation loan term. Initially borrowers were enrolled in a group credit insurance program offered by the bank when they selected credit insurance in connection with their credit card account. The bank was the group credit insurance policy holder. The bank enrolled borrowers when the borrowers affirmatively elected credit insurance coverage (in writing). Thus, the bank is the entity that contracted with the insurance company. The bank intends to terminate this group policy of credit insurance. As a result, borrowers no longer will be able to be enrolled under the group credit insurance policy. The bank intends to replace the credit insurance protection that borrowers received when enrolled in the group credit insurance policy with a debt cancellation term in the credit card agreement. As discussed above, this is consistent with the borrowers' affirmative written election to obtain protection against an inability to repay a debt. This change will involve an amendment of the credit card agreement.

A contract, by general definition, is an agreement enforceable at law between two (or more) parties. *See, e.g.*, Restatement (Second) of Contracts ("Restatement"), §§ 1, 22. As a fundamental principle of contract law, a contract cannot be changed unilaterally. *Id.* As a general principle, however, a contract may be modified or amended by the express agreement of the parties to it. The Restatement provides that the manifestation of assent may be made wholly or partly by written or spoken words or by other acts *or by failure to act*. *Id.* § 19 (emphasis added).

The above proposed conversion may occur when the original credit card agreement provides that the bank may change any term of the agreement or add a new term at any time and, when required by applicable law, will mail borrowers prior notice of the change. Thus, notice of the replacement of credit insurance with a debt cancellation term will be consistent with the provision in the credit card agreement, and will be consistent with applicable law and general contract law regarding contract formation. The bank intends to provide advance written notice of the amendment to borrowers and afford borrowers 30 days (or any longer period required by Regulation Z Section 226.9(c) under this rulemaking) to notify the bank of their request not to have the cancelled credit insurance replaced with a debt cancellation term. The written notice will clearly state that the failure of the borrower to notify the bank of his/her request not to have the debt cancellation term added will constitute the borrower's agreement to the debt cancellation term. If, after receiving such a notice, a borrower fails to notify the bank of his/her desire not to have debt cancellation added, the credit card agreement will be deemed to have been effectively amended, relying on the failure to respond to the prior written notice as a substitute for the borrower's signature. Moreover, the debt cancellation term states that it will be incorporated into the credit card agreement and may be terminated at any time by written notice to the bank. Consequently, even if borrowers do not exercise their right to notify the bank of their desire not to have debt cancellation added, borrowers may terminate this protection at any time. Thus, the amendment of the credit card agreement in the manner outlined above is consistent with general contract law.

IV. Benefits of Debt Cancellation Over Credit Insurance

Banks increasingly are deciding to make the conversion from credit insurance to debt cancellation. The decision to convert to debt cancellation is based on a number of factors, including the logistical and regulatory simplicity of managing a debt cancellation program vis-à-vis a credit insurance program. There is great difficulty and expense for a bank to comply with state law credit insurance requirements. These requirements vary from state to state (a monumental concern for a credit card issuing bank doing business in multiple states),and include bank employee insurance agent licensing and remaining in compliance with state prima facie premium and certificate changes. Related bank credit insurance compliance expenses and the related risk of non-compliance are viewed negatively within the banking industry. Because a debt cancellation term offered by a national bank or federal savings bank/association ("FSB") (*see* OTS Letter from Carolyn B. Lieberman, Chief Counsel (Jan. 10, 1995); OTS Letter from Carolyn B. Lieberman, Acting Chief Counsel (Sept. 15, 1993)) is not subject to state insurance regulation, and because debt cancellation statutes and regulations and/or other policies are uniform for federally chartered banks and savings associations and nearly uniform for state chartered banks, banks incur far less administrative expense in offering debt cancellation instead of credit insurance. These savings may be passed along to consumers in the form of lower pricing for debt cancellation agreements than for credit insurance. Additionally, as noted above regarding national banks and FSBs, the risk of violating state insurance law is eliminated when debt cancellation is offered by such an institution. Thus, debt cancellation benefits federally-chartered depository institutions from an administrative, economic/efficiency and safety and soundness standpoint.

Moreover, in several ways, debt cancellation is a superior product for consumers as compared to credit insurance. First, debt cancellation offers a benefit to consumers by causing the bank directly and rapidly to negate the debt obligation, in contrast to the more cumbersome involvement of a third party when a credit insurance claim is filed. Second, some exclusions from coverage under credit insurance, such as suicide, ages not within age limitations (*i.e.*, elderly people maintain protection under debt cancellation but not credit insurance) and preexisting disease, are not excluded from protection under debt cancellation. Finally, debt cancellation typically provides protections not offered by credit insurance, such as hospitalization, terminal illness and loss of limb.

By amending the credit card agreement to offer a debt cancellation term rather than credit insurance, the bank will be able to operate more efficiently and will honor the original goals of its borrowers. Borrowers will receive the same requested protection at the same cost, borrowers will be fully notified of the change and borrowers will have the right to request that all protection be terminated.

V. Conclusion

The uncertainty concerning the applicability of Section 226.9(f) to conversions of credit insurance to debt cancellation is preventing the provision of debt cancellation on a conversion basis to consumers. As a result, consumers are being denied the opportunity to obtain debt cancellation with more pro-consumer attributes than the credit insurance that is being discontinued. Consequently, we believe that issuance of a proposed amendment to the Commentary as soon as possible would best address this pressing need for guidance.

We are requesting amendment of the Commentary to clarify that Section 226.9(f) applies to conversions from credit insurance to "debt cancellation coverage," as that term is defined in Section 226.4(d)(3)(ii) of Regulation Z, or "debt suspension coverage," as that term would be defined under the proposed amendment to Section 226.4(b)(10), Comment 1. The need exists now to make this clarification for the benefit of banks and consumers. In addition, as part of the Board's overall examination and revision of the open-end credit provisions of Regulation Z, now is an appropriate time to address the issue. The amendment to the Section 226.9(f) Commentary could occur in the context of a second proposed rule (or a final rule) amending the Regulation Z open-end provisions and Commentary. If the Board decides that it cannot change the Commentary alone, we request a change(s) to Section 226.9(f) of Regulation Z, as well as a corresponding change(s) to the Commentary to this Section, providing that under a credit card account, a conversion of credit insurance coverage to "debt cancellation coverage," as that term is defined in Section 226.4(d)(3)(ii) of Regulation Z, or "debt suspension coverage," as that term would be defined under the proposed amendment to Section 226.4(b)(10), Comment 1, is treated identically in all respects to a conversion of one credit insurance provider to another.

Aon Integramark and I appreciate your consideration of this comment letter as part of the Board's review of the open-end credit provisions of Regulation Z. Please do not hesitate to contact me if you have any questions or would like additional information.

Very truly yours,

Jeffrey I. Langer

Jeffrey I. Langer

cc. Tom Ostenson, Esq.
Elizabeth L. Anstaett, Esq.
Darrell L. Dreher, Esq.