

May 26, 2009

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

Docket No. R-1353

Via E-mail: regs.comments@federalreserve.gov

Dear Ms. Johnson,

The Consumer Bankers Association (CBA)¹ and the American Bankers Association (ABA)² are pleased to comment on the proposal (the Proposal) by the Federal Reserve Board (Board) to amend Regulation Z, to implement Title X of the Higher Education Opportunity Act (HEOA). The provisions of Title X amend the disclosure and timing requirements for creditors making private education loans, sometimes called “private student loans,” defined in HEOA as loans made expressly for postsecondary education expenses, but excluding open-end credit, real estate secured loans, and loans made, insure, or guaranteed by the federal government under Title IV of the Higher Education Act of 1965.

Private education loans bridge the gap between school or government financial aid on one the hand and realization of a student’s dream of attending the college of his or her choice, on the other. Bankers who make these loans are committed to fair, transparent and flexible education finance solutions for students and families. Implementation of the HEOA reforms through the proposed Regulation Z amendments is welcomed by our

¹ The Consumer Bankers Association is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer financial services, including education loans auto finance, home equity lending, card products, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation’s largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry’s total assets.

² The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members - the majority of which are banks with less than \$125 million in assets -represent over 95 percent of the industry's \$13.3 trillion in assets and employ over 2 million men and women.

members. We believe that with some modifications to the handling of the approval process and associated disclosures the regulation will better reflect how these loans are uniquely tailored to protect young borrowers from undertaking unnecessary debt. In addition, we urge that the regulation conform to the Act's intent of addressing the specialized private education loan product and not erect a compliance pitfall for general multipurpose loans.

We wish to commend the Board and Board staff for the excellent Proposal. Although we have specific comments as set forth below, we are supportive of the thoughtful way in which the Proposal dealt with practical difficulties while carrying out the intent of the legislation to provide consumers of private student loans with the information needed to make good borrowing choices.

We have divided our comments into two groups: major comments and additional comments and concerns.

Major Comments:

I. Approval

A. Conditional Approvals

We appreciate the flexibility the Proposal provides regarding what event is an "approval." However, since approval of private education loans is almost invariably *conditional*, that is, dependent on the future satisfaction of conditions, including school certification, the regulation should make it clear that such conditional approval should be treated as "approval" for purposes of triggering the creditor's obligation to provide the Approval Disclosures. Creditors typically condition their approval on a range of factors, including those that affect underwriting, security, identity, school certification, and—for consolidation loans—confirmation of the loan amounts involved. Among others, these conditions may include:

- School certification of enrollment and financial need
- Income verification
- Proof of citizenship
- Visa and passport information from foreign students
- Validation of underlying loan amounts on consolidation loans
- Validation of co-borrower's identification
- Validation of co-borrower's income
- Compliance with USA Patriot Act requirements
- Compliance with requirements of the Office of Foreign Assets Control (OFAC)

Creditors take steps to verify this information in order to comply with relevant regulations, prevent overborrowing and adhere to safe and sound banking practices. If creditors were unable to condition their approvals on verification of these factors, they

would be unable to make loans. It is frequently the case, due to the financial inexperience of the consumer applicant, that private education loan conditions are not satisfied, resulting in the need to decline or modify the loan.

If the conditions are satisfied, the creditor reaches a “final” approval, but to treat the latter event as the approval for purposes of triggering the creditor’s obligation to provide the Approval Disclosure would be problematic. Final approval, when all conditions are satisfied, may not occur until a time close to the beginning of the school enrollment—possibly not until late August in a typical school calendar – because schools often wait until students are enrolled to finalize their financial aid. The Approval Disclosure triggers a 30-day period to accept the loan terms, which would be too long in many cases to accommodate the time for disbursement to the borrower and school. The purpose of the 30-day window is to permit the consumer to shop for alternatives, and we believe that it is important to encourage shopping for loan terms. It would make little sense –and would have no real value to the consumer--to provide a shopping opportunity so late in the process.

We therefore recommend that conditional approval should be treated as “approval” for purposes of triggering the creditor’s obligation to provide the Approval Disclosures.

B. Changes in terms

If the conditional approval is the “approval” event for purposes of the Approval Disclosure, as we strongly recommend, it would also be necessary for the Board to clarify that changes made following the Approval Disclosure but pursuant to the articulated conditions are permissible, and would form an acceptable basis for declining the loan and/or making a counteroffer to the consumer. For the most part, the failure of a standard underwriting condition, such as an inability to verify an applicant’s income, would result in the withdrawal (or decline) of a loan; or in some cases, such as a discrepancy between the stated income on the application and the validated income, it would result in a counteroffer for a different loan amount or different terms. The counteroffer would require an additional 30-day period, as would an approval of a new application. The decline would generate an adverse action communication under Regulation B.

C. Specific Exception for Changes Based on Information from the School

We particularly call your attention to changes based on information from the school, provided in the form of an original or revised school certification, or through other communications from the school (e.g. letters, phone calls, online account entries, etc.). For the reasons provided below, the final rule should explicitly permit changes resulting from information provided by the school (e.g. loan amount, disbursement date, year in school, and adjustments to such items and other changes) without triggering new Approval Disclosures.

One common condition for many private education loans is the school certification of the loan amount. It is quite common for the applicant to request an amount that is more than the school later certifies. Schools may also submit revised certifications after an initial certification (or separately communicate with creditors outside the formal certification process³) due to changes in a student's financial situation or the awarding of additional financial aid. If the amount is less than the amount previously requested or certified, the creditor must reduce the loan amount and change other terms that are related to the loan amount, or else it would be unable to make the loan. These changes are important both to prevent the student from excessive and unnecessary borrowing and for safe and sound banking. Yet it is a common occurrence that the amount being requested is found to exceed the certified amount, and the school certification occurs so late in the process, that it would be an impossible burden on students and creditors unless (a) creditors may condition the terms of their approvals on the school certification; (b) creditors may change the loan amount and terms accordingly based on final certification; and (c) the changes do not trigger a new Approval Disclosure, the requirement to obtain a new acceptance from the consumer, and an additional 30-day shopping period.

No new 30-day period is called for because, as stated above, school certification may not occur until late in the loan process—close to the enrollment date-- making another 30-day shopping period both useless and problematic. The consumer will have received a conditional approval that was explicitly contingent upon school certification, so there should be no surprise if the final loan amount is different. The Final Disclosure provides the final loan amount, and *the consumer is given an additional 3 business days in which to cancel*. Finally, it should be noted that establishing the correct school certified loan amount is *beneficial*, as it ensures that the borrower receives the appropriate amount of aid and borrows no more than the appropriate amount validated by the school.

School certification is a unique factor, unlike any other contingency that may arise. The school is independent of both the borrower and the creditor, but it holds the ability to determine the precise amount that the creditor can and should be lending. By certifying the loan amount, the school ensures that students do not borrow more than absolutely necessary. This serves an important public policy goal, and it is critical that the regulation does not interfere. If creditors were required to restart the 30-day clock if the certified loan amount differs from the amount previously approved, it could be a disincentive for schools to make modifications in their funding, or to make changes that result in the appropriate amount of aid.

We respectfully request the Board to state in the final rule that a change to the loan offer based on information from the school (e.g. loan amount, disbursement date, year in school, and adjustments to such items and other changes) after the Approval Disclosures have been provided does not (i) require the creditor to provide revised Approval Disclosures, (ii) result in a new 30-day acceptance period, and (iii) require

³ Schools frequently communicate with creditors outside of the formal certification process to indicate changes to loan amounts, disbursement dates, enrollment status, and other relevant information through a variety of means including phone calls, emails, letters, and by directly accessing the creditor's online account service.

the applicant to accept the revised loan offer. Changes based on school information ensure proper borrowing amounts tailored to need and consumers are protected by final disclosures and the associated right to cancel.

D. Model Form

In light of our previous recommendation that a “conditional approval” function as an approval for purposes of the regulatory timing requirement, we further recommend that the Board modify forms H-19 and H-22 to call them “Private Education Loan Conditional Approval” and amend the text to reflect the conditional nature of the approval.

Therefore, the regulation or commentary should clarify that the Approval Disclosure model forms may contain any institution-specific conditions without affecting the safe harbor protection, so long as they are included in a manner that does not affect the substance, clarity or meaningful sequence of the forms and clauses. We also recommend that the following language be included on the form as examples of model conditional language that would be acceptable on the Approval Disclosure form:

Our approval of your application is subject to:

- (1) our verification of the information provided on or in connection with your application and that there have been no material changes prior to disbursement of your loan;*
- (2) information provided by your school, if applicable, and any changes to such information; and*
- (3) such other conditions or requirements that arise under applicable law.*

The current language in the “Next Steps and Terms of Acceptance” section indicating that the loan offer cannot change should be revised accordingly. The regulation should clarify that disclosures regarding conditions relevant to the approval may be made separately or together with the segregated disclosures.

II. Private Education Loan – Definition

The Proposal’s definition of a “private education loan” includes a loan that is “extended expressly, *in whole or in part*, for postsecondary educational expenses to a consumer” (emphasis added). Thus, as proposed, the new disclosures and all other rules applicable to private education loans would apply to an entire loan, any part of which has been identified as intended for postsecondary educational expenses. The Board has requested comment on whether these “multi-purpose loans” should be exempted from the requirements of the regulation.

Title X of the HEOA defines “private education loan” as a loan issued “expressly” for qualified higher education expenses. It does not include—and we do not believe it was intended to include—multipurpose loans. We believe the broader definition in the

Proposal will result in unintended and undesirable results. We request that the phrase, “in whole or in part” be removed from the regulatory definition, that multi-purpose loans be excluded from the coverage of all the new requirements for private education loans, and that the definition cover only those loans marketed for use in paying higher education expenses.

As proposed, general purpose closed end loans that are not secured by real property or a dwelling could become “private education loans” inadvertently. If an applicant indicates that a portion of the loan is going to be used for postsecondary education, the entire loan could be captured by the definition, and creditors would be subject to the full breadth of regulation unique to the private education loan, requiring them to do things that they do not have the capability of doing. Although the Board appears to have recognized some of the potential problem, by exempting multi-purpose loans from the Application or Solicitation Disclosure requirement, in Section 226.37(d)(iii), our concern extends equally to all the other requirements of the Proposal.

This Proposal would create compliance problems for both large and small financial institutions. Large lenders typically do not have integrated processing and operational systems for all loan products the bank offers. The system that processes multi-purpose consumer loans will not have the operational infrastructure to support the detailed disclosure requirements, and it would be unduly burdensome to require that such infrastructure be built. In addition, extensive training of branch representatives would be required for the recognition and processing of such loans because the requirement creates the operational necessity of scrutinizing each application for an indication that it will be used for education expenses, and then forwarding such applications for specialized processing. Small institutions, especially, would be vulnerable to inadvertent violations. Small institutions rarely have special student loan programs, but often make personal loans that may happen to be used in part for educational purposes – of which the bank may or may not be aware. These banks would not likely have in place procedures to comply with the student loan disclosure requirements as they do not make “student loans,” but now would be liable because a standard personal loan was used for educational purposes.

Including multi-purpose general installment loans also creates a significant burden for schools in establishing preferred lender lists for private education loans. The HEOA, and the Secretary of Education’s proposed regulations thereunder, obligates each school to provide detailed information on the private education loan offerings from each lender it recommends. It would be extremely burdensome for schools to gather information about all of the multi-purpose loans used “in part” for higher education expenses from each preferred lender, as that would involve collecting information from numerous and disparate operational units within a bank, which do not ordinarily interact in any respect with schools. A school could rarely be confident it has obtained all necessary information about each multi-use loan available through a “preferred lender” that falls under the definition of “private education loan”, or relevant modifications over time to such multi-use loans. We believe that the overriding focus on “preferred lender lists” under the HEOA informs the meaning of “expressly” and clearly points to loan products

that a school can readily identify and track as education loans and about which it can provide to its students meaningful disclosures.

Therefore, we suggest that the word “expressly” in the HEOA definition was intended to include loans specifically marketed as student or education loans and not general purpose consumer loans. As a result, we request that the Board delete the phrase “in whole or in part” from the definition of “private education loan” and clarify in the Staff Commentary that private education loans include only those that are marketed for use in paying higher education expenses.

III. Self-Certification

The self-certification requirement set forth in HEOA and the Proposal may often duplicate the certifications that are provided to the creditor by the school, in the case of so-called “school-certified loans.” The result would be redundant, unnecessary, and burdensome to all the parties. By a “school-certified loan,” we mean any loan where the creditor requires from the school in written or electronic form, as a condition of making the loan, a certification of the student's enrollment in the institution as well as certification of the student's need for the requested loan amount. *We suggest that the Board adopt one of the two following alternative suggestions for addressing this problem:*

Alternative One: We believe the *best* approach would be for the Board to use the authority granted by Truth in Lending Act (TILA) to eliminate the self-certification requirement for “school certified loans,” as defined above.⁴ We believe that the compliance burden created by requiring self-certification for school certified loans is significant enough to invoke the exception or exemption authority, as the Board has done in several other instances in this Proposal.⁵ Moreover, by securing a school certification the creditor facilitates the important public policy objective of ensuring proper loan amounts, which parallels the focus on preventing over-borrowing in the self-certification process. As such, eliminating the self-certification requirement for “school certified loans” removes an unnecessary burden for schools and consumers while preserving the desired public policy outcome of responsible lending and borrowing.

As part of the above approach, we ask the Board to clarify that for loans that do not involve a school-certification the self-certification form may be presented to the student

⁴ Section 105(a) of TILA provides that the Board’s regulations “may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.” Section 105(f) permits the Board to exempt classes of transactions from TILA coverage where, in the determination of the Board, coverage under all or part of TILA would not provide a meaningful benefit to consumers in the form of useful information or protection.

⁵ See, for example, the Board’s proposed definition of “private educational lender” in section 226.37(b), and the Board’s proposed treatment of telephone applications under section 226.38(a).

by the creditor.⁶ HEOA requires the school to make the self-certification form available to the borrower upon request and states that the creditor may receive the self-certification form from either the student or the school. However, the Proposal does not specify whether the creditor may *also* provide the form for the student to complete and submit. In the case where the student has not obtained the form from the school, the creditor should be able to expedite the application process by providing the form as part of the application for the student to complete.

Alternative Two: If the Board does not choose to eliminate the self-certification requirement for school certified loans, an alternative would be for the Board to permit the school to certify to the creditor that the consumer has completed and signed the self-certification. Schools often certify to lenders electronically, which may make it difficult for the school to convey to the creditor the self-certification form, as signed by the consumer. If the school is certifying to the creditor anyway, it is unnecessary to require the school or the consumer also to physically or electronically convey the self-certification to the creditor. Instead, we suggest that, if the school has obtained the self-certification from the applicant, the school should then be permitted to certify compliance directly to the creditor. The Board could provide model language for the school to use in order to certify that the applicant had signed a self-certification. If the Board elects to adopt Alternative two, we further request that the final rule expressly permit the creditor to present the self-certification form to the student - - on all loans whether or not “school-certified” - - for the reasons stated under Alternative One. Making this explicit will provide important clarification for schools that do not wish to certify that the consumer has self-certified.

Alternative Three: If the Board does not choose to adopt Alternative One or Alternative Two, we respectfully request that the Board expressly permit the creditor to present the self-certification form to the student - - on all loans whether or not “school-certified” - - for the reasons stated under Alternative One.

In summary, we request that the final rule eliminate the borrower self-certification requirement for “school-certified” loans and allow the creditor to provide the self-certification form to consumers with respect to non-school-certified loans. In the alternative, we request that the final rule (i) allow the school to certify to the creditor that the borrower completed and signed the “Borrower Self-Certification” form and (ii) state that the creditor’s collection of such a certification satisfies the creditor’s obligation to collect the signed Borrower Self-Certification form. In any case, we request that the Board clarify that the self-certification form may be presented to the student by the creditor.

⁶ HEOA provides that the form shall be made available to the applicant by the school upon the request of the applicant - but doesn't expressly prohibit others from also providing the form. We believe that the intent of Congress was to ensure the school's cooperation with the education loan process, and was not to create a limitation as to the entities that could provide the form.

IV. Estimates and Redisclosure

Proposed section 226.37(e) states that, if any information required to make the disclosure is unknown to the creditor, the creditor must make the disclosure based on the best information reasonably available, and to state clearly that the disclosure is an estimate.

There are occasions when it is necessary to provide estimated disclosures at Approval, as permitted by Regulation Z, based on the best information reasonably available. The regulation should clarify that, as a general rule, when estimates are used in Approval Disclosures, and new information becomes available that corrects the estimate before the Final Disclosure is provided, that event would not be a prohibited change in terms and would not require a new Approval Disclosure, a new acceptance or a new 30-day period. In particular, we recommend that the Board provide the following two examples, as illustrations only, and not as an exhaustive list:

A. Loan Disbursement Date

Unique to private educational loans is the need for the creditor to estimate the Annual Percentage Rate (APR) based on the loan disbursement date provided by the consumer in the application. The estimate is made necessary because the disbursement date is determined by the school, rather than by the creditor. If a new disclosure and a new 30-day window were triggered by a change in the APR (resulting from a change in the disbursement date by the school) when the actual disbursement date is established, the date would immediately move back an additional 30 days, and the whole process would begin again. In any case, the impact on the APR of these disbursement date changes would be small and would not affect the more prominent interest rate disclosure at all.

B. Consolidation Loan Amounts

In the case of consolidation loans, the creditor may not know the requested loan amount until very late in the application process and therefore would be required to base much of the information in the Approval Disclosures on estimates. Therefore, we recommend that the Board acknowledge that the principal amount and related terms in the Approval Disclosure for consolidation loans may need to be estimates. Again, for the reasons stated above, it should also be made clear that the creditor need not redisclose the Approval Disclosure, triggering an additional 30 day acceptance period, when the creditor gets the final payoff amounts from the lenders of the underlying loans. It would be of no value to the consumer, and would be a potentially time-consuming and wasteful process, if the disclosure must be repeated.

Accordingly, we ask the Board to delete the proposed carve-out language for “Approval Disclosures” in section 226.17(e) to clarify that: (i) creditors do not incur any liability for providing inaccurate “Approval Disclosures”; and (ii) creditors are not required to provide new “Approval Disclosures” if a subsequent event makes them inaccurate before consummation, provided the disclosed term(s) is based on an estimate and is labeled as an estimate in the “Approval Disclosure.”

V. Effective Date

The regulations drafted by the Board are to have an effective date no later than six months after they are issued. However, the HEOA provisions will be effective on the earlier of the date on which the Board's regulations become effective or 18 months after enactment of HEOA. Therefore, the latest possible date the regulation could become effective is February 14, 2010. The Board solicits comment on whether a shorter implementation date is appropriate.

We strongly urge the Board to allow the greatest possible time to permit creditors to begin complying with the regulation. The changes that will be necessary will involve a major operational and technological undertaking, requiring the development of new forms, new procedures, new software, new training developed and instituted, and a host of related concerns addressed. These are not trivial and will take a good deal longer than the Board's Paperwork Reduction Act estimate of 40 hours to complete. At many institutions, 40 hours would not begin even a small part of the work that needs to be accomplished to have the systems ready. If the time necessary to comply cannot be extended, we urge the Board to publish final regulations on or about August 14, 2009, in order to maximize the allowable time for institutions to put the new procedures in place by February 14, 2010.

In regard to loans that are in the pipeline during the transition period, we request that the Board adopt clear transition rules that minimize the cost and burdens, and limit the confusion, of the transition. We propose that the new rules be mandatory for applications received after the effective date and optional for applications that have not been consummated by the effective date. It may be necessary, as creditors begin to shift to new forms and systems and adopt new procedures, for customers with loan applications in process who may have been initiated under the old system to receive an Approval disclosure or a Final disclosure under the new system. If this is not permissible, all creditors would have to maintain parallel systems during the transition period, at great cost.

Additional Comments and Concerns:

226.2(a)(6) -- Definition of Business Day/Timing of Disclosures

Proposed section 226.2(a)(6) contains two definitions of business day for use in different contexts. The Board is proposing employing the "more precise" definition—that is, all calendar days except Sundays and specified legal public holidays—in providing

presumptions of when consumers receive mailed disclosures, and for measuring the period during which consumer have a right to cancel a private education loans.

We recommend creating a new definition that excludes Saturdays from the “business day” definition for the timing of disclosures. Most creditors do not have systems for disbursing funds operational on Saturdays, and the use of the proposed definition—which includes Saturday as a business day --would create a serious problem. Because of the seasonal nature of the education loan business, a large percentage of loans is disbursed in a very short time during the late summer. If the proposed definition is employed, creditors would be in jeopardy of missing the 3-day delivery deadline for the disclosures.

226.37(d) -- Telephone Applications

1. Denied Applications

In lieu of providing disclosures on or with any application or solicitation, the Board is proposing to give the creditor several options in the case of certain telephone applications or solicitations. As proposed, the creditor may, at its option, disclose the information in section 226.38(a) orally, or, “the creditor must provide the disclosure or place them in the mail no later than three business days after the consumer requests the credit.” This is a reasonable approach to the treatment of telephone applications, and—subject to our comment below about who initiates the call— we support the Board’s exercise of its authority to provide these alternatives.

We believe that clarification is needed to address the circumstance in which a telephone application is denied within three business days of the telephone call. In that situation, the application disclosures should not be required. Without such an exception, the consumer would be provided with an application disclosure contemporaneously with an adverse action notice. We believe this would cause nothing but confusion (the consumer will be left wondering whether or not the loan has been denied) and would serve no useful purpose.

Our recommendation should be viewed as analogous to the Board’s proposal (which we support) to permit the creditor to mail the Approval disclosures within three business days of application, rather than providing the unnecessary Application disclosures, if the loan has been approved. As noted in the supplementary information, in such a case “the application disclosure requirements would not provide a meaningful benefit to consumers in the form of useful information or protection.” The same would be true on the flip side, if the loan is promptly denied.

2. Applications initiated by the consumer

As proposed, the exception permitting oral disclosures during telephone applications or solicitations, or mailed within three business days thereafter, applies only to telephone applications “initiated by the creditor.” It is not clear why the Board chose to limit the

scope of this exception, but we would strongly recommend that the limitation be removed.

We believe the majority of telephone applications for private education loans are actually initiated by the *consumer*, not the creditor. Students who are in need of postsecondary educational loans reach out to creditors to obtain financing. Often that is done by phone. There is no reason to treat an application that is taken over the phone differently if the phone call was initiated by the consumer. More importantly, the inability to employ one or both of the enumerated exceptions in section 226.37(d)(1)(ii) would make compliance with the requirements of the regulation virtually impossible in the case of most telephone applications and would be a severe hindrance to both creditors and consumers.

226.38—“As Applicable”

Proposed comment 38-1 states that disclosures required under section 226.38 need to be provided only as applicable, except where it specifically states otherwise. The example provided in the Commentary is that the disclosure of the availability of federal student loans in 38(a) and (b) disclosures is not required for consolidation loans, where the disclosure is inapplicable.

We recommend that the Board provide in this Commentary section a more thorough, *nonexclusive* list of disclosures that do not need to be provided because they would be inapplicable in certain cases.

The Board has stated in the section-by-section analysis under section 226.39(e) that the disclosure regarding the self-certification form in section 226.38(a)(8) need not be provided for consolidation loans nor for loans to students attending covered educational institutions that do not meet the definition of institution of higher education. This should be made explicit in the Commentary.

Further clarification is also needed to address loans where the self-certification disclosure in section 226.38(a)(8) is not necessary and where other disclosures, including those required by sections 226.38(a)(6) and (b)(4), are not required. We recommend that the Board state in the Commentary that these disclosures are inapplicable for the following categories of loans:

- Consolidation Loans
- Loans to cover past due amounts
- Bar study loans
- Residency loans
- Relocation loans

However, as we are unlikely to have thought of every situation that may arise, it is important that the Board state that the list is nonexclusive.

226.38(a)(1) – Interest Rates

1. Rates on Web Sites

The Proposal states that rates disclosed must be the rates that are “actually offered by the creditor.” The Board has sensibly proposed a number of situations in which the rate being provided can be one employed in the not too distant past (e.g., on printed or emailed disclosures). However, the proposed rule for web site disclosures is that the rate must be the one actually offered “when viewed by the public.” We believe that this could create serious compliance problems for creditors.

Although rates can change frequently, the systems cannot make the change so promptly on the web page such that it is concurrent with the actual change in the rate being offered. As a result, there would be many times during transitions between offered rates that the rate “being viewed” on the web is no longer the current rate. The problem is really no different than creditors face with disclosures that are delivered in electronic form or by printed means, and a similar solution would be appropriate (that is, that the rate needs to be one that has been offered within the previous 30 or 60 days). An alternative approach might be to require that it be stated as “good as of” a particular date, with a means of contacting the creditor to determine the current rate.

2. Borrower benefits

We request that the Board clarify that “borrower benefits” (e.g., lower rates provided based on repayment performance) are not the basis on which rates are permitted to be disclosed. Borrower benefits are post-closing incentives that actually come into play only based on subsequent events triggered by consumer performance, which cannot be known by the creditor at the time of disclosure. Given the significant uncertainty about whether such post-closing incentives will apply to a loan, we believe it is inappropriate to include such items as part of rate disclosures.

Moreover, permitting disclosures based on such borrower benefits, even as estimates, could interfere with the ability of consumers to shop for credit. Allowing or requiring borrower benefits to be a basis for calculating interest rates could lead to misleading (artificially low) interest rate disclosures that mask, rather than provide transparency about, the true cost of credit. As a result, consumers could unknowingly choose more expensive loan products, which would in turn unnecessarily increase overall debt burden and contribute to negative repayment performance.

226.38(a)(3)(ii) – Payment deferral options

As proposed, the Application or Solicitation Disclosure must include information related to the options offered by the creditor to the consumer to defer payments during the life of the loan. Creditors typically offer an array of deferment and forbearance options that

apply only during the repayment period. They are *ad hoc*, fact-specific options, which are geared to the individual circumstances of the borrower, and unknowable at the time of the Application or Solicitation Disclosure. Even if they could be itemized, any description of such options would require more space than is available on the proposed model disclosure forms.

For this reason, we recommend that the payment deferral options that are required to be listed in the repayment option disclosures be limited to payment deferral or forbearance options available only while the student is enrolled and exclude any options that are offered by the creditor once the loan enters repayment.

Further, we request that the Board clarify the required details for the Application Disclosure and the Approval Disclosure (in addition to information included in the table in the model form). We recommend that the disclosures be limited to: (a) length of maximum initial in-school deferment period for the loan program, (b) enrollment requirements for maintaining chosen deferment options, and (c) an instruction to consult the credit agreement or promissory note for further details. This will help to prevent a lengthy and complex list of options that would otherwise be provided.

226.39(a) – Co-Branding and Promissory Note

The co-branding prohibition would prohibit the use of the name of a covered educational institution in the marketing of a private education loan in a way that implies that the covered education institution endorses the creditor’s loans. The proposed commentary states that this would include the use of the name of a school on the promissory note. However, nearly all private education loan promissory notes list the name of the student's school. In many cases, the identity of the school is even filled in by the applicant. We believe this does not imply an endorsement and should not trigger the disclosures required by section 226.39(a)(2); but in the absence of a clear statement in the regulation or commentary, creditors will have to provide such a disclosure in nearly every note out of an abundance of caution.

We request that the Board clarify that the mere use of the school name on the promissory note, no more conspicuously than other information displayed on the same page, is not an endorsement and does not require any disclosure about use of the school name.

226.39(c) - Method of Acceptance

Section 226.39(c) states that the creditor may specify the methods of acceptance, and may permit acceptance to be electronic, but may not make electronic acceptance the sole form of acceptance. According to the supplementary information, the reason for this restriction is that “the Board believes that not all consumers have access to electronic forms of communication and that a form of acceptance in addition to electronic communication is appropriate.”

Increasingly, applicants prefer electronic communication with financial institutions, and the applicants applying for private educational loans are in a demographic that is disproportionately inclined that way. We believe there is no reason not to permit them to choose to communicate electronically with the institution –whether to receive disclosures electronically or to notify the institution of the acceptance of loan terms. Consent to electronic communication is typically, if not always, provided in electronic form by the consumer while interacting with the creditor in an online transaction. When a consumer consents to engage in electronic transactions with the creditor, whether electronically or otherwise, the consumer is clearly indicating a preference for, and the capability to undertake, electronic transactions/communications with the creditor, and subsequent acceptance under section 226.39(c) should be permissible as well. In this situation, the Board’s rationale for prohibiting electronic consent as the only means of consent would not be apposite.

As a result, we ask the Board to state in the final rule that where the applicant has consented to electronic transactions with the creditor, it is permissible for the creditor to require electronic acceptance of the loan as the sole method of acceptance, if it so chooses.

226. 39(c) and (d) – Acceptance and cancellation – ability to exercise right

Section 226.37(f) provides that the disclosures may be provided to any consumer who is primarily liable on the obligation. However, section 226.39(c) and (d) do not similarly provide that the right of acceptance and cancellation may be exercised by only the primary obligor. Allowing either the borrower or the cosigner to exercise rights of acceptance and cancellation would unnecessarily complicate and potentially slow the loan process.

We request that the Board clarify its comments to Sections 226.37(f), 226.39(c), and 226.39(d) by specifying that only the primary obligor receiving the required disclosures may exercise the right to accept and the right to cancel set forth in the Approval Disclosure and the Final Disclosure.

226. 39(d) –Delayed disbursement

Proposed section 226.39(d) would provide the consumer with the right to cancel without penalty until midnight of the third business day following receipt of the Final Disclosures. It would also prohibit the creditor from disbursing any funds until the expiration of the three business days.

The prohibition against disbursement of funds until the end of three business days can result in as much as six days elapsing before the student can obtain the funds, since the creditor must wait a reasonable time after expiration of the cancellation period to be

satisfied that the consumer has not canceled. We are concerned that adding so much time to the process could be harmful to students. Because many students turn to private education loans after all other sources of aid have been exhausted, they frequently do not have much time to obtain loan funds before they may be subjected to school-imposed late fees, restrictions on class registration, and inability to obtain transcripts or other records.

Some creditors permit students (or the school on the student's behalf) to return the loan proceeds within a defined period after the disbursement of the loan, without assessing any interest or fees. We therefore request that the regulation permit creditors the flexibility of either delaying disbursement as proposed (and as we have recommended above) or, in the alternative, establishing a policy, to be conspicuously disclosed to the consumer, allowing for the return of the loan proceeds within a defined time without being assessed any interest or fees.

226.39(f) – Application Disclosures to Schools

The Proposal requires that a creditor that has a preferred lender arrangement with a covered educational institution must provide that institution annually, by January 1, the information required under sections 226.38(a)(1),(2), (3), and (5), for each type of private education loan that the lender plans to offer to consumers for students attending the institution for the period beginning July 1 and ending June 30 of the following year.

Disclosures provided by January 1 will not be meaningful to covered educational institutions, because creditors do not typically finalize product offerings for the upcoming academic year until between January and April. Also, creditors sometimes are not aware that a school has placed them on a list of preferred lenders.

We suggest that Board consider allowing creditors to deliver the required disclosures no later than April 1 of each year, or, if later, within 30 days after the creditor is notified that it has been selected as a preferred lender for the covered educational institution.

Appendix H --Models and Samples

1. 2-sided printing

Many creditors may wish to present the disclosures on both sides of a single sheet of paper in order to reduce paper usage and cut paper and mailing costs. We request that the Board provide clarification whether the disclosures may be provided on two sides of a single sheet.

2. Sample Forms

We appreciate the inclusion of sample forms, to provide greater clarity regarding the use of the models. We request that the samples be enhanced to provide examples of the use of

loan origination fees, to demonstrate how the Board intends for these amounts to be disclosed as part of the itemization of the amount financed.

3. Loan level information

The proposed commentary provision for Appendixes G and H includes a description of permissible changes to the forms that may be made without the loss of protection from civil liability. We recommend that the Board include the addition of loan level details to the list of permissible changes, including, but not limited to, date printed, loan identifier, loan type/program, disbursement information and loan acceptance methods (e.g., email, mail, telephone). This information, which is useful to the consumer, should be permissible on the form without the loss of the safe harbor protection, provided that it is included in a manner that does not affect the substance, clarity or meaningful sequence of the forms and clauses.

Thank you for the opportunity to share our views on the Proposal. If you have any questions or wish to discuss these recommendations and comments, please do not hesitate to contact us.

Sincerely,

Steven Zeisel
Vice President & Senior Counsel
Consumer Bankers Association

Nessa Feddis
Vice President & Senior Counsel
American Bankers Association