November 5, 1999

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

Re: Docket No. R-1008

Dear Ms. Johnson:

I am writing on behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions, in response to the Federal Reserve Board's (Board) request for comment on proposed revisions to Regulation B.

The Equal Credit Opportunity Act (ECOA) prohibits a creditor from "discriminating against an applicant in any aspect of a credit transaction on the basis of the applicant's race, color, religion, national origin, sex, marital status, age . . . receipt of public assistance benefits, or the good faith exercise of a right under the Consumer Credit Protection Act." (15 U.S.C. § 1691). This statute is implemented by Regulation B, which is promulgated by the Federal Reserve System. As part of the Board's continuing effort to keep its regulations current, the Board is proposing to amend Regulation B by lifting the ban on voluntary collection of such "prohibited criteria" as an applicant's race, color, religion, national origin, sex, marital status and age. In light of the purpose of Regulation B and the potential harm that this proposal could cause, NAFCU urges the Board to omit this provision from the final rule.

The stated purpose of Regulation B is "to promote the availability of credit to all creditworthy applicants **without regard** to race, color, religion, national origin, sex, marital status, or age . . . [and to] prohibit[] creditor practices that discriminate on the basis of any of these factors." (emphasis added) (12 C.F.R. § 202.1). Despite the Board's clearly stated purpose to promote the availability of credit without regard to any of the above described prohibited criteria, the Board's proposal would turn this race-neutral regulation into a race-conscious one. Although NAFCU supports efforts to bring credit to low-income individuals and underserved communities, we do not believe that the Board's proposal will accomplish that end.

In support of their decision to again propose an amendment that would allow for the voluntary collection of prohibited criteria, the Board cites comments (received in response to the advance notice of proposed rulemaking) from such agencies as the Department of Justice and the Department of Housing and Urban Development. Generally, these commenters believed that if the Board were to allow the notation of prohibited criteria, then creditors and government agencies would be better able to "monitor for possible discriminatory practices and might [be able] to better target underserved markets for small business or other lending." [64 Fed. Reg. 44,586 (1999)]. It is never made clear, however, how by simply becoming more conscious of an applicant's race, color or national origin, a creditor will be able to more effectively meet the credit needs of the underserved. If it is to be inferred that, based on this data, a creditor should take steps to ensure that a greater number of applications are approved for minority individuals, the regulation would be likely to be found unconstitutional under the strict scrutiny standard as set forth in *Adarand Constructors, Inc. v. Pena* [515 U.S. 200 (1995)] and *Shaw v. Reno* [509 U.S. 630 (1993)].

Compare the present rulemaking to the Federal Communication Commission's equal employment opportunity regulation (47 C.F.R. 73.2080). The FCC's regulation states, in pertinent part, that licensees (in this instance, radio stations) should review their employment policies in cases "where there is underrepresentation of either minorities and/or women, . . . to assure that [the licensees] do not inadvertently screen out any group and take appropriate action where necessary." This provision is not unlike the thrust of the Board's proposed modification: to review the creditor's policies and practices to assure that they are not inadvertently screening out any particular group. NAFCU believes that the D.C. Circuit's recent examination of this regulation provides a good context for our consideration of the Board's proposal.

The D.C. Circuit in *Lutheran Church-Missouri Synod v. FCC* (141 F.3d 344 D.C. Cir. 1998) noted that:

> [T]he very term 'underrepresentation' necessarily implies that if such a situation exists the station is behaving in a manner that falls short of the desired outcome. The regulations pressure stations to maintain a workforce that mirrors the racial breakdown of their 'metropolitan statistical area' . . . The Commission and DOJ nevertheless insist that the FCC's program should be regarded as if it did no more, or not significantly more, than seek non-discriminatory treatment of women and minorities. (*Id.* at 352).

The court goes on to say:

> [W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race. (*Id.* at 354).

While NAFCU does not mean to suggest that the Board's proposed revision would result in creditors' providing unconstitutionally preferential treatment for minorities in connection with the granting of credit, we would suggest that the proposed revision adds nothing to the existing regulation that would ensure that the decision to grant credit is made on purely race-neutral criteria. It is not that the Board's proposal is unconstitutional on its face, but rather that it creates an opportunity for creditors to utilize illegal standards when determining whether to provide credit.

Echoing the analysis of the court in *Lutheran Church*, NAFCU believes that the underlying purpose of the proposed revision is to identify creditors that are "behaving in a manner that falls short of the desired outcome." The desired outcome here, of course, would be the provision of credit to low-income individuals. The question then becomes, how does a voluntary data collection assist creditors in meeting this desired outcome while remaining consistent with the purpose of the Equal Credit Opportunity Act? This problem is further compounded by the fact that the data collection would be optional and therefore unreliable. It is also extremely likely that applicants themselves will respond negatively to such a data collection – finding questions about race and national origin to be intrusive and even offensive. For these reasons, NAFCU believes that the Board's proposal is inconsistent with the purpose of Regulation B, and would produce data that is of questionable quality and could be construed by applicants to be an invasion of privacy. NAFCU opposes the inclusion of this provision in the final regulation and would urge the Board to remove it prior to finalization of the rule.

NAFCU also opposes the Board's inclusion of Section 202.12(b)(7) requiring that credit unions maintain documents in connection with preapplication marketing. NAFCU believes that this section is overbroad, requiring credit unions to maintain "any correspondence (to and from the selected recipients)." [12 C.F.R. 202.12(b)(7)]. Because of the burdensome nature of this requirement, NAFCU believes that it should not be included in the final version of the rule.

Thank you for this opportunity to share NAFCU's views regarding the contemplated changes to Regulation B. Should you have any questions or require additional information please call me or Suzanne Garwood, NAFCU's Director of Regulatory Affairs, at (703) 522-4770 or (800) 336-4644 ext. 266.

Sincerely,

William J. Donovan
Senior Vice President
Deputy General Counsel