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September 21, 2009

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By Electronic Delivery

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1364

Re: Rules on 90-Day CARD Act Requirements

Dear Ms. Johnson:

This comment letter is submitted by Morrison & Foerster LLP in response to the interim final rule ("Interim Final Rule" or "Rule") issued by the Federal Reserve Board ("FRB") to implement provisions of the "Credit Card Accountability Responsibility and Disclosure Act of 2009" ("CARD Act" or "Act"). We appreciate the opportunity to comment on this important matter.

The Interim Final Rule makes significant changes in the requirements for credit card accounts. While some of these changes build on provisions previously adopted by the FRB in its amendments to Regulation AA and Regulation Z, many of the changes raise entirely new issues that have not received the benefit of public comment. As a result, the Interim Final Rule became effective without an adequate vetting of the operational and technical issues raised by the Rule. In many cases, the Rule has dramatically affected the delivery, pricing and availability of credit card features, promotions and services. Some issuers have curtailed or ceased the offering of promotions and workout programs, or have delayed program changes, due to the inability to comply with the Rule or because of the lack of clarity in the Rule. Accordingly, we urge the FRB to promptly clarify outstanding issues concerning the Interim Final Rule. Below is a discussion of some of the principal issues in need of clarification.

Consumer Rejection of Increase in Rate or Other Significant Change in Terms

The Interim Final Rule requires an issuer to provide the consumer with the right to reject the change before the effective date of the change in each 45-day advance notice. The Interim Final Rule does not provide such a right to reject: (1) when the minimum periodic payment is increased; (2) where the consumer's minimum periodic payment has not been received within 60

days after the payment due date; or (3) for transactions engaged in by the consumer that occur more than 14 days after the 45-day advance notice is provided.

We recommend that the FRB revise the Rule to make three important clarifications to the right to reject a change. First, the FRB should clarify that issuers are not required to provide a second 45-day advance notice once a consumer becomes 60 days delinquent. Requiring issuers to send a second 45-day advance notice after the consumer becomes 60 days late would significantly extend the 60-day delinquency exception by deferring rate increases due to 60-day delinquencies for at least 105 days after the original payment date. Specifically, section 226.9(h) and comment 226.9(h)(3)(i)-1.ii should be revised to clarify that a dual purpose notice can be sent giving both the 45-day advance notice of a rate increase or significant change in terms and notice that if the consumer becomes 60 days late prior to the effective date of the change, the change will become effective regardless of whether the consumer thereafter attempts to reject the change. This approach is consistent with the dual notice approach contained in the FRB's earlier proposed amendments to Regulation Z stating that a second notice is not required in connection with applying an increased rate to the outstanding balance if a consumer becomes 30 days (now 60 days per the CARD Act) delinquent before the effective date of the change.

In this regard, we also request that the FRB clarify that the timing requirements set forth in section 226.9(g)(2) of the Interim Final Rule—requiring notice to be provided after the occurrence of a triggering event—are not intended to preclude an issuer from sending a dual notice alerting the consumer to the fact that the consumer will lose the right to reject if he or she becomes 60 days delinquent. Thus, for example, we recommend that the FRB make clear that when a consumer triggers delinquency pricing, an issuer is permitted to send out a 45-day notice informing the consumer that his or her rate will increase for new transactions, and that if the consumer becomes 60 days delinquent, the rate increase will apply to existing transactions as well.

Third, the FRB should clarify that issuers are not required to provide consumers the right to reject changes that have been agreed upon. For instance, the Rule allows an issuer to send a notice to a consumer who has agreed to a change anytime before the effective date of that change, rather than 45 days in advance of the change. When this occurs, the issuer should not be required to provide the consumer with the right to opt out of a change that the consumer has already agreed to. Consumers will only be confused by the notice of the ability to reject the agreed-to-change and the lack of any meaningful time to exercise such right. Similarly, the FRB should clarify that the right to reject need not be provided if the change will only apply prospectively. For example, if a new charge will only apply to future transactions, rather than to outstanding balances, an issuer should not be required provide the consumer with the right to reject, since the consumer has no right to reject the application of the new rate to transactions that occur 14 days after providing notice and the consumer can accomplish the same effect by not engaging in such transactions.

In addition, the FRB should revise the disclosure requirements to explain the exception to the right to reject for transactions that occur more than 14 days after provision of the 45-day

advance notice. In this regard, the Office of the Comptroller of the Currency ("OCC") recently issued a bulletin stating that "under the rules, the new rates or terms can be applied to any transaction that occurs more than 14 days after the notice is provided." In addition, the OCC directed national banks to include an additional disclosure that "NOTE: Even if you reject this change in terms, the new terms will be applied to any transactions on your account that occur on or after [INSERT DATE]."

However, we believe that the additional disclosure required by the OCC will be difficult to implement at best. Specifically, the additional disclosure would require national banks to disclose two dates in change-in-terms notices—one, the date on which the changes will generally take effect and, two, the date on which the new rate can apply to new transactions occurring after 14 days after the notice. A requirement to disclose two dates would create significant operational problems, and would make the 45-day advance notice required under sections 226.9(c) and 9(g) confusing, and thereby less useful, to consumers.

Establishment of Workouts and Hardship Programs

The Interim Final Rule provides an exception to the 45-day advance notice requirement if the change involves an increase due to the conclusion or termination of a workout or temporary hardship arrangement, provided that: (1) the rate does not exceed the rate on the account prior to the commencement of the arrangement; and (2) the creditor has provided the consumer with a disclosure of the workout or temporary hardship arrangement in writing prior to the start of the arrangement. The FRB should modify the Rule so that it promotes, rather than hinders, the establishment of beneficial workout and hardship programs needed by consumers.

Prior to the Interim Final Rule, most, if not all, issuers have provided consumers the opportunity to take advantage of workout or hardship arrangements orally, usually by telephone. It is only after the program commences that written confirmation of the arrangement is sent to the consumer, usually on or with the next periodic statement. Under the Interim Final Rule, however, issuers may have to delay commencement of such workout or hardship arrangements until disclosures can be provided. Requiring issuers to delay the implementation of reduced rates or other more beneficial terms until a letter or periodic statement can be sent confirming the terms of the arrangement will preclude issuers from providing consumers needed assistance, especially in connection with a natural disaster such as Hurricane Katrina. Accordingly, we recommend that the FRB provide issuers with the flexibility to provide oral disclosures for such an arrangement, followed by written disclosures shortly thereafter. Allowing oral disclosures would permit an issuer to immediately apply a reduced rate or terms at the time of a telephone conversation, rather than delaying assistance until written disclosures can be provided.

Transition Guidance for Workouts and for "Up to" Promotions

While it is clear that the disclosure requirements for the workout exception will apply to workout arrangements commenced on or after August 20, the Interim Final Rule does not clearly address what an issuer must do with respect to its current workout arrangements; that is, arrangements commenced prior to August 20 which will result in a rate increase after August 20

when the arrangement is concluded. We believe that it would be inappropriate to require an issuer to provide 45 days advance notice and a right to reject the rate increase in the context of existing workout or hardship arrangements where the issuer had reduced the consumer's rate to assist the consumer in working out his or her payment obligations on an account or otherwise cope with a hardship situation prior to August 20, 2009. Instead, we believe that the new notice requirement should apply only to workout and hardship arrangements entered into on or after August 20, 2009.

At the very least, we urge the FRB to make clear that, similar to the approach provided in the Interim Final Rule for promotional arrangements, issuers can rely on oral conversations with consumers at the commencement of pre-August 20 workout and hardship arrangements, since historically most such arrangements have been established orally. Even if some form of written disclosure is required in connection with workout and hardship arrangements commencing on or after August 20, an issuer should come within the exception to the 45-day notice requirement if, prior to August 20, the issuer had orally disclosed to the consumer the lower rate that would apply during the workout arrangement period, as well as the fact that the rate would return to the current rate on the account (or, if applicable, the current rate for purchases on the account). As is the case for pre-existing promotions, the FRB should make it clear that an issuer need not have disclosed the specific "go to" rate expressed as a particular numerical rate; instead, it should be sufficient if the issuer had referred to the rate currently applicable to the account, or a similar reference if the account is subject to a variable rate.

In addition, written transition guidance from the FRB is needed in connection with the disclosure of the "go to" rate for promotional programs. Due to significant technological and operational challenges, many issuers are unable to provide consumers with a specific "go to" rate prior to the start of a promotion. We understand that the FRB staff has provided oral guidance that for a period of time, while issuers develop systems to disclose the specific "go to" rate, issuers are permitted to disclose an "up to" "go to" rate. It is important for this oral guidance to be memorialized in writing and to extend through the end of 2010.

Interest Rate Waivers

The FRB should clarify that issuers can waive, rather than reduce, interest charges or fees, without triggering a 45-day change-in-terms notice. That is, issuers that choose to waive interest posted to an account, or to rebate interest accrued on an account, before they are able to provide the notices required to reduce the interest rate applicable to the account, should be permitted to do so without having to send additional notices or disclosures, since such a waiver or rebate does not involve an increase in the rate applicable to the account. This clarification will facilitate issuer compliance with the disclosure requirements for workout and hardship programs, and at the commencement of certain promotions before written disclosures can be provided. In particular, it would allow issuers to provide reduced rates or terms to consumers immediately while waiving or rebating accrued interest until written workout disclosures can be provided.

Interrelationship of Exceptions

It is important for the FRB to clarify that the exceptions to the 45-day notice requirements are interrelated and that issuers can utilize a combination of applicable exceptions. For instance, the workout exception provides that the issuer must return the rate to the rate that applied prior to the commencement of the arrangement. In this regard, for a workout that is implemented during a promotion, the FRB should clarify that issuers are permitted to return the consumer to the interest rate in effect at the conclusion of a promotion, rather than the promotional rate that was in effect prior to the commencement of the arrangement, if that rate is disclosed as part of the workout arrangement, without triggering the 45-day notice requirements. A similar clarification should be provided for the application of a variable rate.

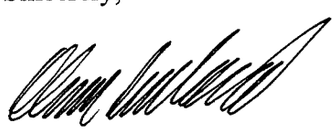
Servicemembers Civil Relief Act

The FRB should specifically provide for an exception to the 45-day advance notice requirement for open-end credit accounts subject to the Servicemembers Civil Relief Act ("SCRA") or comparable state laws. These accounts are subject to a statutorily-mandated temporary hardship arrangement, and thus should not be subject to the 45-day notice requirement or the right to cancel when the SCRA or comparable state limitations no longer apply. Specifically, an issuer who has lowered a consumer's interest rate when the consumer is deployed to active military service within the meaning of the SCRA or similar state law should be permitted to increase the rate at the end of the SCRA or other coverage period without additional disclosures and without triggering the 45-day notice requirement.

We believe that any clarification should be applicable as of August 20, 2009. Such clarification also should provide compliance flexibility between August 20, 2009 and a reasonable period after the FRB provides such clarification to prevent issuers from being held liable for technical violations that may have occurred beginning August 20, 2009 in the absence of clear guidance from the FRB.

If you have any questions regarding these comments, or if we can otherwise be of assistance, please contact me, at (202) 778-1614.

Sincerely,



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