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Southern Christian Leadership Conference

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Reserve System
20th Street and Constitution Avenue,
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Docket No. R-1314
Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2008-0004

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Re: Unfair or Deceptive Acts or Practices; Proposed Rule

Ladies and Gentlemen:

The Southern Christian Leadership Conference (SCLC) appreciates the opportunity to comment on the rule proposed by the Board of Governors of the Federal Reserve System; the Office of Thrift Supervision, U.S. Treasury; and the National Credit Union Administration (collectively, the "Agencies") regarding their review of unfair or deceptive practices under Section 5(a) of the Federal Trade Commission Act.¹ Specifically, the SCLC would like to take this opportunity to respond to the Agencies' request for comments as to "whether the proposal would inappropriately curtail consumers' access to credit."²

About the SCLC

The SCLC was established in 1957, following the Montgomery bus boycott, under the leadership of co-founder Reverend Dr. Martin Luther King, Jr. Throughout the 1960s, the SCLC coordinated civil rights campaigns and voter registration drives throughout the South, most notably in Albany, Georgia, and in Birmingham and Selma, Alabama. The SCLC also played a major role in the March on Washington for Jobs and Freedom where Dr. King delivered his "I Have a Dream" speech on the steps of the Lincoln Memorial. The visibility that the SCLC brought to the civil rights struggle laid the groundwork for passage of the Civil Rights Act of 1964.

¹ "Unfair Acts or Practices Regarding Security Deposits and Fees for the Issuance or Availability of Credit." See 73 Fed. Reg. 28,904 (May 19, 2008).

² See Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28,904, 28,925 (May 19, 2008). This comment also touches on the Agencies' requests for comments regarding "[w]hether disclosure of security deposits and fees enables consumers to understand the impact of those charges on the availability of credit" and "[w]hether alternatives ... are appropriate."

Today, the SCLC is a nationwide organization advocating for equal protection and civil rights of African-Americans under the law. The SCLC continues its commitment to achieve social, economic, and political justice for African-Americans and all American citizens.

The SCLC Opposes Certain Aspects of the Proposed Rule

The SCLC shares the Agencies' concerns for protecting consumers from unfair or deceptive practices and, as described below, we are supportive of certain aspects of the rule regarding credit card billing and account management practices. We are, however, concerned that the proposed rule would have the consequence of limiting access to credit to a large portion of consumers. In particular, we believe that the proposal would have a disproportionate and adverse impact on African-American consumers, who historically have had trouble obtaining access to credit because of their lack of, or weak, credit history.

In particular, we are concerned with the provision of the proposal that would prohibit certain fees in connection with subprime credit card lending.³ As the Agencies summarize:

[I]nstitutions would be prohibited from financing security deposits or fees for the issuance or availability of credit ... if those deposits or fees utilize the majority of the available credit on the account. The proposal would also require security deposits and fees exceeding 25 percent of the credit limit to be spread over the first year, rather than charged as a lump sum during the first billing cycle.⁴

In sum and substance, this provision would prohibit fees that utilize more than 50% of available credit and heavily regulate fees that utilize more than 25% of available credit.

We believe that the proposed rule would limit African-Americans' access to credit and, thus, impede their ability to use public accommodations as well as their ability to improve their credit score. The SCLC, therefore, cautions the Agencies against imposing such onerous regulations as would limit the credit available to certain high-risk consumers, including many African-Americans.

³ Unfair or Deceptive Acts or Practices, Section __.27—Unfair Acts or Practices Regarding Security Deposits and Fees for the Issuance or Availability of Credit, 73 Fed. Reg. 28,904, 28,923-25 (May 19, 2008).

⁴ Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28,904, 28,909-10 (May 19, 2008).

Outlined below are the reasons why the SCLC is concerned with the proposed rule.

Access to Credit is an Issue of Concern to Many African-American Consumers

Equality of access to credit has been and continues to be a major civil rights issue. Because “credit is a key enabler of wealth,”⁵ Congress has expressly acted to prohibit intentional discrimination in equality of access to credit.⁶ Despite Congress’s prohibition on discrimination, African-Americans sometimes face challenges accessing credit due to external factors.

As Fair Isaac, creator of the most common credit rating system, explains, “A credit score is a number that summarizes your credit risk, based on a snapshot of your credit report at a particular point in time. A credit score helps lenders evaluate your credit report and estimate your credit risk.”⁷ Under the Fair Isaac FICO system, “[t]he higher the score, the lower the risk.”⁸ In this way, the credit scoring system separates borrowers deemed better credit risks - often called prime borrowers - from those deemed worse credit risks - often called subprime.⁹

Because they are deemed lower risk borrowers, “[c]onsumers with high or prime credit scores are generally allowed access to a wide variety of banking and credit services.”¹⁰ The necessary flip side of this is that riskier, “[c]redit-challenged consumers generally have limited options and are not typically afforded the same opportunity to access credit and banking products.”¹¹

⁵ The University of Denver Center for African-American Policy, “Financial Empowerment for the Unbanked and Underbanked Consumer: ‘Crossing the Red Line’” 2 (Dec. 2006), *available at* <http://www.blackpolicy.org/resources/CCR3.pdf> [hereinafter “Denver”].

⁶ For example, the Equal Credit Opportunity Act, Title VII of the Consumer Credit Protection Act, provides: “It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction— on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)...” 15 U.S.C. §1691.

⁷ “Understanding Your FICO Score” 3, *available at* http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf.

⁸ “Understanding Your FICO Score” 7, *available at* http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf.

⁹ Subprime is often used to refer specifically to consumers with FICO scores under 620. However, the specific division is not important to this discussion.

¹⁰ Denver, *supra* note 4, at 2.

¹¹ Denver, *supra* note 4, at 2.

Although the credit scoring system is race-neutral, a disproportionate number of the more than 130 million Americans with subprime prime credit scores are African-American.¹² As a 2004 study by the Texas Department of Insurance concluded: “Whites and Asians, as a group, tend to have better credit scores than Blacks... In general, Blacks have an average credit score that is roughly 10% to 35% worse than the credit scores for Whites.”¹³ The Federal Trade Commission has reviewed and generalized these results. As the FTC noted, “African Americans ... are strongly over-represented in the lowest deciles and underrepresented in the highest deciles. For example, 26% of African Americans are in the group with the lowest 10% of credit... scores, while only 3% are in the highest 10% of scores.”¹⁴ Examined differently, “more than one-half of all African Americans have credit scores in the lowest quarter of the overall score distribution...”¹⁵

Despite supposed advances in credit profiling, “[i]n many cases, credit challenged consumers are simply denied access to services on the basis of their credit scores.”¹⁶ And many “banks, credit unions and savings and loan institutions ... avoid low credit score areas, resulting in fewer financial services for the unbanked and underbanked consumers.”¹⁷ The consequence of these facts, coupled with the foregoing, is that African-Americans “represent a significantly higher percentage of the underbanked and unbanked consumer market.”¹⁸

Thus, “in many communities ... fringe, non-mainstream, financial services companies ... provide the only option to access financial services and financial assistance.”¹⁹ Put simply, for subprime borrowers, including disproportionately

¹² Renee McGaw, “Study Says Credit Scores Used Against Minorities,” DENVER BUS. J. (Jan. 9, 2007), *available at* <http://denver.bizjournals.com/denver/stories/2007/01/08/daily17.html>, *citing* Denver, *supra* note 4. Discussions of why this fact holds are not critical to this discussion.

¹³ Texas Department of Insurance, “Use of Credit Information by Insurers in Texas, Report to the 79th Legislature” (Dec. 30, 2004).

¹⁴ “Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance,” A Report to Congress by the Federal Trade Commission 53 (July 2007), *available at* http://www.ftc.gov/os/2007/07/P044804FACTA_Report_Credit-Based_Insurance_Scores.pdf [hereinafter “FTC”].

¹⁵ FTC, *supra* note 12, at 54.

¹⁶ *See* Denver, *supra* note 3; *see also* Renee McGaw, “Study Says Credit Scores Used Against Minorities,” DENVER BUS. J. (Jan. 9, 2007), *available at* <http://denver.bizjournals.com/denver/stories/2007/01/08/daily17.html>.

¹⁷ Denver, *supra* note 4, at 2.

¹⁸ Denver, *supra* note 4, at 3.

¹⁹ Denver, *supra* note 4, at 2.

many African-Americans, the choice to obtain a credit card means accepting higher fees and more restrictions than prime borrowers would. But subprime borrowers still have this choice. The SCLC is concerned that the Agencies' proposed rule would threaten to take away the choice.

The Agencies' Proposal Would Worsen African-Americans' Access to Credit

Unlike previous rules proposed by the Agencies, which have focused on improving disclosures, the Agencies' current proposal would prohibit certain lending activities outright. While the SCLC applauds the various banking agencies for attempting to protect consumers from unsavory lending practices, prohibiting lenders' activities by limiting fees will likely reduce and possibly eliminate credit options for those consumers that the Agencies are presumably trying to help.

Issuers set the higher fees that they charge to subprime borrowers in order to adjust for these borrowers' higher risk of default. If the fees were artificially depressed, keeping all other variables equal, issuers would lose money. While one could hope that capping fees for subprime products would simply result in better credit terms for borrowers, realistically, many issuers would cut back on offerings or simply exit the market.

This hypothetical is precisely what the Agencies propose. As a result of the rule, many affected issuers would stop offering subprime credit. And so subprime borrowers, who are largely African-American, would be left without access to any meaningful credit. This would leave subprime borrowers without a choice to obtain credit. As discussed, these subprime borrowers are disproportionately African-Americans. Thus, the effect of the Agencies' proposal would be to limit African-Americans' access to credit.

Compounding the likely injuries to African-Americans and other consumers as a result of this proposal is the fact that, without access to credit cards, subprime borrowers would find it difficult to improve their credit scores.²⁰ Thus, African-Americans and other consumers would continue to be trapped in the cycle of no credit and unable to improve their credit rating.

Under the FTC Act, the Agencies can only regulate a practice as unfair and deceptive if the "practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and *not*

²⁰ See, e.g., CNN/Money, "5 ways to boost your credit score," at http://money.cnn.com/2005/09/21/pf/debt/credit_scores/index.htm ("Have credit cards - but manage them responsibly. In general, having credit cards and installment loans (and making timely payments) will raise your score. Someone with no credit cards, for example, tends to be higher risk than someone who has managed credit cards responsibly.").

*outweighed by countervailing benefits to consumers or to competition.*²¹ The Agencies acknowledge that “consumer credit card accounts with financed security deposits and fees can provide benefits to consumers ...”²² However, the Agencies conclude without argument or analysis that “it appears that the benefit to consumers from access to available credit is outweighed by the high cost of paying for that credit.”²³

Access to Credit Cards and Civil Rights

In the past twenty-five years, credit cards have become an important facet of consumer life.²⁴ Without credit cards, many African-Americans would be excluded from amenities that most Americans now take for granted, such as access to public accommodation. This would affect the everyday lives of many African-Americans and preclude them from such activities such as business and social travel.

Access to public accommodations has been, and continues to be, a core civil right. But, increasingly, the ability to reserve a hotel/motel room or a rental car requires that one have a valid credit card. The fact that a customer must use a credit card to reserve a hotel/motel room or a rental car does not mean that the customer must use the card to pay for the services. Rather, credit cards have become a means to verify customers’ identities and ensure that customers comply with their reservations.

For example, the large hotel chain Marriott states, “Marriott requires all room reservations to be guaranteed by a valid credit card. Your credit card is not charged at the time of reservation, and is used as a guarantee that a room will be held in advance of your arrival.”²⁵ Other large hotel chains, as Choice Hotels, also require a credit card to make a reservation: “[Y]our credit card is required to guarantee your room.”²⁶

The impact of not being a cardholder is not limited to lodging, but extends also to rental cars. In fact, even more limiting than hotels or motels, many rental car companies require a card even where payment is made in person. For

²¹ 15 U.S.C. §45(n).

²² Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28,904, 28,924 (May 19, 2008).

²³ *Id.*

²⁴ See Jonathan Orszag & Susan Manning, “An Assessment of Regulating Credit Card Fees and Interest Rates” 4 (Oct. 2007) (Study Commissioned by the American Banks Association); Kathleen Johnson, “Recent Developments in the Credit Card Market and Financial Obligations Ratio,” FED. RES. BULL. 473, 475 (Autumn 2005).

²⁵ “FAQ: Reservations - General,” at <http://www.marriott.com/>.

²⁶ “Frequently Asked Questions & Help,” at <http://www.choicehotels.com/>.

example, Thrifty Car Rental provides, “To qualify to rent the THRIFTY vehicle, the renter must present at the time of rental a major credit card or debit card ... in the renter’s own name with available credit.”²⁷ And Dollar Rent A Car explains, “When you arrive at the rental counter, you will need to show a valid driver’s license along with an acceptable credit card.”²⁸

These examples are not random, but relate to the fundamental role of public accommodation in the American civil rights movement. Title II of the Civil Rights Act of 1964 provides, “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.”²⁹ The stated purpose of Title II was “to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in public accommodations ...”³⁰ Underscoring the importance of Title II to the Civil Rights Act, the first Senate draft of the Civil Rights Act³¹ dealt solely with public accommodations, although a later bill³² expanded to match the scope of the House bill.

Upon the passage of the Civil Rights Act, Title II was the first provision to be attacked. In companion cases Heart of Atlanta Motel, Inc. v. United States³³ and Katzenbach v. McClung³⁴ the U.S. Supreme Court resoundingly upheld Title II. Writing in Heart of Atlanta, the Court pointed out the need to remedy the “obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging.”³⁵

Without the ability to reserve a hotel or motel room, today’s credit-less traveler also finds herself “uncertain of finding lodging.”³⁶ She must hope that, when her flight lands, she finds a rental car counter that would not let her make a reservation but will accept cash from her in person; that, when she reaches the hotel where she was unable to make a reservation, there are still rooms available;

²⁷ “General Policies,” at <http://www.thrifty.com/>.

²⁸ “Dollar Car Rental Policies,” at <http://www.dollar.com/>.

²⁹ 42 U.S.C. §2000a.

³⁰ H.R. Doc.No. 124, 88th Cong., 1st Sess., at 14.

³¹ S. 1732.

³² S. 1731.

³³ 379 U.S. 241 (1964).

³⁴ 379 U.S. 294 (1964).

³⁵ 379 U.S. at 253.

³⁶ *Id.*

and that the proprietor will not require a credit card to secure against incidental charges.

The SCLC Supports Certain Aspects of the Proposed Rule, and Additional Credit Card Practices, That Would Preserve or Improve Access to Credit While Protecting Consumers

While the SCLC feels strongly that the fee-setting provisions of the Agencies' proposed rule would have a disproportionate and adverse impact on African Americans and would be generally unfair to all consumers, we support several provisions that seek to protect consumers from unfair or deceptive practices.

In particular, we endorse those provisions of the proposed rule that would prohibit the practices of double-cycle billing, universal default, and that would require a grace period prior to the assessment of late fees and an "opt-out" opportunity for cardholders upon notification of a change-in-terms.

Further, the SCLC believes that credit card issuers should be required to report their customers' account payment history to all three of the major national credit reporting agencies (i.e., Equifax, Experian and TransUnion). Reporting of the origination of an account should be reported to the credit bureaus, however, only after the cardholder has either made a charge on their account or made two executive payments. Such a threshold would protect against a decrease in a consumer's FICO score as a result of the closure of an unused account.

Congress's Recent Experiment Regulating Student Loans Shows the Potential Dangers When Government Sets Fees for Borrowing

Last September, Congress passed the College Cost Reduction and Access Act of 2007 (the "2007 Act") with the intention of making college more affordable to students by mandating interest rate reductions and lowering fees charged by student lenders. The Act cut interest rates that borrowers pay on federally insured student loans and cut yields on private loans.

In January, the largest student lender, Sallie Mae announced that it "expect[ed] that the [2007] Act w[ould] significantly reduce and, combined with higher financing costs, could possibly eliminate the profitability of new FFELP³⁷ loan originations..."³⁸ Thus, "[i]n response to the [2007] Act and market conditions," Sallie Mae announced "plan[s] to be more selective in pursuing origination activity, in both FFELP loans and private education loans."³⁹ And

³⁷ Federal Family Education Loan Program - the largest federal source of financial aid for college.

³⁸ 8-K, January 3, 2008.

³⁹ *Id.*

Sallie Mae predicted “to see many participants exit the student loan industry in response to the Act as well as current market conditions...”⁴⁰

Sallie Mae’s prediction turned out to be prescient. By April, “about 50 providers of federally guaranteed loans, as well as nearly 20 private student-loan firms, ha[d] pulled out of the market.”⁴¹ In total, nearly 100 of the nation’s largest student lenders, almost 30 percent of the total market, have discontinued providing student loans.⁴²

African-American students felt the effects of student loan troubles disproportionately. Students enrolled at institutions with higher graduation rates are more likely to be able to get more low-cost private loans, while students at schools with lower graduation rates are likely to be assessed higher fees and rates.⁴³ And minorities are disproportionately likely to attend schools with low graduation rates.⁴⁴ Thus, many African-Americans faced hardship as they sought to pursue their higher education because of government regulation.

In response, Chairman Bernanke wrote a letter to Senators saying that “Congress ‘may well wish to revisit’ its decision last fall to reduce the federal subsidy to private lenders...”⁴⁵ Congress did. On May 7, the Ensuring Continued Access to Student Loans Act of 2008 (the “2008 Act”)⁴⁶ was signed into law. *The Wall Street Journal* described the relationship between the 2007 Act and the 2008 Act as follows:

Convinced that private lenders were making too much profit on federally insured loans, [Congress] enacted changes last fall that rendered most new student loans unprofitable. As numerous firms

⁴⁰ *Id.*

⁴¹ Kevin Kingsburg, “Citi Unit Curbs Student Loans,” *WALL ST. J.*, at D4 (Apr. 17, 2008).

⁴² David Cho & Maria Glod, “Credit Crisis May Make College Loans More Costly,” *WASH. POST*, at 1A (Mar. 3, 2008).

⁴³ *Id.*

⁴⁴ See “Placing College Graduation Rates in Context How 4-Year College Graduation Rates Vary With Selectivity and the Size of Low-Income Enrollment Postsecondary Education Descriptive Analysis Report” x (“Low-income serving institutions also tended to have larger proportions of minority students”), xi (“Compared with other low-income serving institutions, those identified with high graduation rates ... had ... lower minority enrollments”), available at <http://nces.ed.gov/pubs2007/2007161.pdf>.

⁴⁵ Robert Tomsho & Sarah Lueck, “Senate Clears Bill On Student Lending,” *WALL ST. J.*, at A4 (May 1, 2008).

⁴⁶ H.R. 5715.

abandoned the market amid the credit crunch and just before the peak of college financing season, the anxious pols realized their blunder and are now seeking a bailout of the same lenders they had just finished punishing.⁴⁷

“From start to finish,” it continued, “it is hard to imagine a more thorough example of Congressional blundering while covering its tracks by blaming everyone else and getting the Fed and taxpayers to clean up the mess.”⁴⁸

The SCLC’s position is that our federal banking agencies should not make a similar mistake with regard to subprime credit cards.

Conclusion

Although the SCLC appreciates the Agencies’ attempt to protect consumers from unfair and deceptive credit practices, we believe they need to consider the potential negative consequences to consumers of the proposed rulemaking. The blanket prohibitions that the Agencies have proposed will result in a significant group of Americans, disproportionately African-American, having less access to credit cards, an impaired ability to improve their credit scores and fewer opportunities for upward economic mobility.

Improved disclosures can continue to improve the transparency and fairness of the credit markets.⁴⁹ Moreover, unfair and deceptive practices should still be proscribed. However, broad prohibitions such as those suggested by the proposed rule for credit card fees would have injurious effects and, thus, should not be implemented.

Sincerely,



Dexter M. Wimbish, Esq.
SCLC General Counsel

⁴⁷ “An Education in Bailouts,” WALL ST. J., at A14 (May 5, 2008).

⁴⁸ *Id.*

⁴⁹ Apparently recognizing this fact, the banking agencies have continued to refine their approach to disclosure. At the same time that they announced these proposed rules, the Federal Reserve made proposed amendments to Regulation Z to “ensure that consumers receive a reasonable amount of time to make payment” and “to provide that a creditor that collects or obtains a consumer’s agreement to pay a fee before providing account-opening disclosures must permit that consumer to reject the plan after receiving the disclosures ...” See “Truth in Lending; Proposed Rule,” 73 Fed. Reg. 28,866 (May 19, 2008).