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April 14, 2010

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Proposed Rule – Credit CARD Act Revisions to Reg Z
Docket No. R-1384

Dear Ms. Johnson:

This letter is submitted in response to the Proposed Rule revising Reg Z to implement the provisions of the Credit CARD Act that become effective on August 22, 2010.

Securian Financial Group is a provider of credit insurance programs to the bank and credit union industry, and administers debt cancellation contracts and debt suspension agreements for our clients. We are also a lending and deposit forms provider to our credit union clients, and as such, provide closed-end and open-end consumer and home equity loan forms, credit card forms, and deposit forms to hundreds of credit unions nationwide. It is with this background and knowledge that this letter is submitted. We appreciate the opportunity to provide this information.

We provide the following comments:

LIMITATIONS ON FEES

If we are understanding the proposed rule correctly, it states that a creditor cannot impose a penalty fee that exceeds the "dollar amount associated with that fee", even if the creditor has legitimately determined the amount of that fee under the "cost" formula or the "deterrence" formula. For example: if the creditor has determined that a $30.00 late fee is the amount necessary to cover its costs of delinquencies, and a particular consumer's minimum payment in a given billing cycle is $25.00, the creditor cannot impose the $30.00 late fee. Rather, it must charge only $25.00. We strongly object to this proposal for several reasons.

First, we believe that the Board is taking Congress' use of the word, "proportional" too literally. The term used in the Credit Card Act is "reasonable and proportional". Congress did not define this term and it is, therefore, open to interpretation. The Board chooses to look at each word as a 2-prong test. We disagree. The Card Act does not say that the fees must be (1) reasonable and (2) proportional. It says, "reasonable and proportional" as one phrase. This is often a drafting device in the legal profession and tends to be duplicative for emphasis, rather than intending to impose two separate requirements.

Even if Congress meant to impose a "reasonable" requirement AND a "proportional" requirement, we respectfully disagree with the Board's intepretation of the "proportional" requirement. The Board has somehow determined that Congress must have meant, "proportional to the minimum payment due." We find this doubtful. We believe that it is more likely that Congress was saying that fees should be reasonable and proportional to the consumer's infraction. For example, a $100 late fee should not be imposed when the infraction of paying late only costs the creditor $30.00, or if a $40.00 fee is enough to deter the consumer's offending behavior. Instead, the Board's proposal is so precise as to require a mathematical formula be imposed for each and every consumer for each and every billing cycle, so as to never impose a fee higher than the minimum payment due. However, if this was Congress' intent, it would have stated that specifically. Congress could have very easily stated, quite simply, "late fees and returned payment fees shall in no case be greater than the minimum payment due". It did not do so, and the Board should not impose such a requirement.

Second, we believe that the "cost" and "deterrence" tests are sufficient to satisfy the "reasonable and proportional" requirement. There is no need to go beyond that and tie the fee to the minimum payment. As noted, we believe Congress meant that the fees must bear some sort of relationship to the *infraction* rather than a relationship to the minimum payment due. If the infraction costs the creditor $30.00, then charging a $30.00 fee would be reasonable and proportional to the infraction. However, charging $60.00 when it only costs the creditor $30.00 would not be reasonable and proportional. Likewise, if a $40.00 fee is the minimum required to deter the behavior, then $40.00 is reasonable and proportional to the infraction. Charging $100 simply as a penalty, however, would not be reasonable and proportional. There is no need for the Board to impose an additional requirement beyond the "cost" and "deterrence" tests for the "reasonable and proportional" requirement.

Next, linking the fee to the minimum payment due is unfair to creditors and illogical in its reasoning. The minimum payment due has no correlation between the cost or deterrence of the infraction. Delinquencies cost the creditor just as much when the minimum payment due is $20 as it does when the minimum payment due is $150.00. (Losses may be more when the minimum payment due is higher; however, the Board notes in the rules that the losses associated with the infraction is not a "cost" of the infraction and cannot be factored into the fee.) The Board notes in its proposed Commentary that, if 1 million delinquencies costs a creditor $23 million, then a reasonable fee would be $23.00. The minimum payment due on those 1 million delinquencies, by the Board's own admission, is irrelevant. Therefore the Board should not link the fee to the minimum payment due.

Fourth, limiting the fees to the minimum payment requirement would result in additional losses to the creditor. The proposal states that, even if the infraction costs the creditor $30.00, it cannot impose $30.00 against any consumer with a minimum payment due of less than $30.00. For example, if the minimum payment due is $25.00, the creditor has 2 choices: charge no fee, or charge $25.00. This results in a loss of at least $5.00. This is simply unfair to the creditor, and is by definition an unsafe and unsound business practice. The Board should not require creditors to lose money.

Fifth, imposing the minimum payment due restriction on fees will only encourage creditors to either increase the minimum payment due, or to raise rates for everyone. Neither benefits the consumer. If a consumer is having financial difficulties that is preventing him from making his payments on time, increasing the minimum payment due will only exacerbate the consumer's situation. It will lead to dire straits for the consumer, and create more losses for the creditor. It is completely illogical to impose a rule which causes hardship to both the consumer and the creditor. This cannot possibly be the Board's intent. And while the Board has stated that it thinks raising rates on all consumers is a more transparent way of increasing costs to the consumer than imposing fair and reasonable fees, we find this to be an astonishingly anti-consumer argument, and one that is unnecessarily stringent. As noted above, the "cost" and "deterrence" tests are more than sufficient to reign in exorbinent fees, and does so without providing creditors any additional incentive to increase the minimum payment or rates.

Sixth, imposing the minimum payment due restriction will be overly burdensome to creditors. While some processing systems will be able to cap the fees at the minimum payment due, some systems will not. And such a programming enhancement will cost creditors tens of thousands of dollars. And more likely than not, the programming will not be complete by August 22. For example: even if the Board takes only 30 days to read all the submitted comments and draft and issue the final rules, the rules would become final on May 15 at the earliest. Then, creditors will need time to review and understand the rules, and then coordinate with their data processors. It is not unusual for data processors to take 6 months or more for such changes, especially when they are already taxed with all the additional programming required for the July 1st rules. Even if the data processors begin programming as early as June 15, they may not be done until December. Programmers will have to determine the effect that the August 22 rules have on work already done for the July 1st changes, as well as program and test the new formulas, and creditors will have to train staff. There is simply not enough time prior to August 22 to implement the changes required to add a minimum payment due requirement onto the "cost" or "deterrence" tests.

Seventh, there is no good way of disclosing the fees to the consumers if a minimum payment due requirement is imposed. This is the case both at account opening and on the periodic statement; the Board's proposal will only lead to consumer confusion. Minimum payment requirements are based on outstanding balance. Outstanding balance is dependent upon myriad factors including the particular consumer's credit limit, spending habits, and payment history. The Board states that the fees can be disclosed as "up to $xx.xx" on the account opening disclosures. Filling in that number, however, is next to impossible and becomes virtually meaningless. Not only will it need to be programmed for every individual consumer, but the dollar amount will have no meaning. For example, suppose the creditor has a minimum payment requirement of 3% of the outstanding balance; the consumer has a $10,000 credit limit; and he habitually pays late each month; and the creditor has determined that it costs $30.00 for that type of infraction. Under the "cost" test, the creditor would set its fee at $30.00. But if that fee is also limited by the minimum payment due, then the disclosure would state, "up to" $30.00, rather than simply, "$30.00". However, if the member has only $750.00 outstanding in a billing cycle, his fee could not be more than $22.50 (3% x $750.00) in that billing cycle. If in the next billing cycle his outstanding balance is $500, then his fee could be no more than $15.00. This is untenable for both the consumer and the creditor. The creditor is losing money with each billing cycle, and the consumer has no idea why his fee is changing each month, and what it will be next month. Disclosing the fee as "up to $30.00" is not only accurate (because at times it would be, "up to $22.50" or “up to $15.00”), but misleading. It provides no meaningful disclosure to the consumer because he simply will not know what the actual fee will be in any given billing cycle.

Moreover, we note the same arguments outlined above for the Board’s proposed rule that the minimum payment due restriction would apply even if the creditor uses the safe harbor fee amount. This is absolutely untenable and flies in the face of how a safe harbor usually works. Most creditors will mistakenly assume that, if it uses the safe harbor, it can charge that fee uniformly for all consumers. This will lead to unreasonable regulatory and litigation risk. It also defeats the purpose of using a safe harbor. If creditors have to determine the minimum payment due restrictions and measure those against the safe harbor, there is really no reason to have the safe harbor.

Finally, we note that the minimum payment due restrictions will, by definition, require every single creditor to change its fees. However, with just the cost and/or deterrence tests, and the safe harbor, it could be that many creditors will not have to change their fees (if, e.g., their current fees are below the safe harbor threshold or they have already been basing their fees on cost or deterrence). This would be much less burdensome and chaotic to the industry and consumers alike.

We reiterate all of the above arguments for over-the-limit fees. Basing the fee on the amount the consumer goes over the credit limit bears no relation to the costs associated with the infraction, nor the deterrent effect. It would require yet another calculation to be programmed into the creditors’ systems, and creates even less uniformity than the minimum payment due restrictions. The fee would vary with every transaction, which is untenable.

Based on all of the above, we implore the Board to limit the rules to the “cost” and “deterrence” tests only, and to withdraw the minimum payment requirement restriction. The cost and deterrence tests are more than enough to reign in unscrupulously high fees, and provides for a uniform, easily understood and easily administered fee. For example, if a $30.00 fee is determined under the “cost” test, it will be $30.00 for every consumer every time. It can be uniformly disclosed and administered, and consumers will understand it. Creditors will be able to recoup the costs of delinquencies, and consumers will be better able to adjust their spending and payment behaviors to avoid the fees. Creditors will aviod unreasonable additional costs, and consumers will avoid unnecessary confusion. In sum, imposing the minimum payment restriction does nothing but complicates the rules, and hurts creditors and consumers alike. We respectfully and strongly urge the Board to withdraw this proposal.

Bolding maximums on the account opening disclosures. We respectfully request that the Board withdraw its proposal that the maximum fees be bolded in the account opening disclosures. As noted above, if the minimum payment due restriction proposal is withdrawn, there is no need to state the maximums associated or to disclose the fees as “up to $xx.xx”. Moreover, many creditors have already revised and programmed their disclosure without the bolding in order to comply with the July 1st Reg Z changes. To now go back and reprogram the disclosures will be very costly and, may not be feasible before an August 22nd deadline. This exposes creditors to unreasonable regulatory and litigation risk with minimal safeguards to the consumer. We ask that the bolding requirement be withdrawn.

OTHER COMMENTS

Review of Rates Every Six Months

Time period for reviewing rate increases. We agree that the time period for the 6-month reviews should cease at some point. It is unreasonable for the requirement to go on in perpetuity, and only increases costs for all consumers. We suggest 2 years. This would require review of the consumer's account four times as a result of a one-time rate increase. If, after two years, the consumer's credit standing has improved significantly, he can either ask the creditor to decrease the rate, or he is free to shop around and transfer the balance to a different card issuer who offers a better rate. There are ample safeguards and opportunities at the consumer's disposal if he chooses to exercise it. There is no reason for the creditor to be required to babysit the consumer's credit score indefinitely.

Limitations on Fees

Basing penalty fees on conduct of consumer. We believe that creditors should be allowed to "tier" fees based on, e.g., how often a consumer makes a late payment, e.g., the fee is higher for the 2nd late fee in 12 months. This would be reasonable and proportional to the infraction and would help deter consumers from continuing untoward payment habits.

We do not believe, however, that fees should be imposed on a daily basis, e.g., $5 per day. This is for a few reasons. First, this is not the way such fees are generally imposed by creditors. Also, this could impose up to a $150 late fee and does not correlate with the costs of the delinquency. And if the Board would also impose the cost, deterrence, and/or minimum payment due restrictions, a daily fee would be rendered moot. Additionally, many state laws prohibit such a fee, and it could be considered pyramiding. We find it simply unnecessary to have a daily fee.

Twelve Months as the Appropriate Time Interval for Re-evaluating Fees. We have concerns that 12 months is too short or too frequent of a timeframe. We believe every 2 or 5 years would be more appropriate or whenever the creditor feels circumstances have changed (e.g., the nature of the portfolio has changed because of accounts aquired from a different creditor, or they have begun offering cards in the subprime market, or because the regulatory or legal environment has changed). Imposing the costs of review annually will only serve to pass those costs on to consumers. And we are not convinced that major changes will occur every year. In other words, if a $30 late fee was reasonable in 2010, the chances of it suddenly becoming unreasonable in 2011 are slim at best. And if the rules would require a $1 or $2 dollar change each year, that is untenable. The costs and burden to creditors far outweigh any measurable benefit to the consumer. And we note that consumers have much power when it comes to fees. If they don't like a fee, they simply can pay on time and refrain from bouncing checks and exceeding their credit limits. And they are free to shop around to get lower fees from a different creditor.

We also ask the Board to impose some sort of threshold with regard to changes required as a result of the periodic review. For example, if the cost of the infraction in 2010 cost the creditor $24.00, and in 2011 it costs $23.00, we would ask that the rules allow the fee to remain at $24.00, as the change would be nominal or de minimus. As noted above, the costs to the creditor for making changes to its programming, disclosures, internal documentation and training would far exceed any real benefit to the consumer. And those costs would be inevitably passed on to the consumer anyway. We would suggest either a dollar amount (e.g., $3 or $5.00?) or a percentage (e.g., 5 or 10%). For example, if upon periodic review, the cost does not increase by more than x, the creditor is not required to change its fees.

CONCLUSION

We implore the Board to refrain from adding a "minimum payment due" restriction on top of the "cost" and "deterrence" tests regarding the penalty fees that may be charged. Congress imposed no such restriction in the Credit Card Act, and doing so would cause myriad problems for creditors and consumers alike.

We also ask that the Board take our other comments regarding various other proposals into consideration when issuing the final rules.

Sincerely,

/s/
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