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August 4, 2008

Regulation Comments, Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Attention: OTS-2008-0004

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

Re: Docket No. R-1314

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: RIN 3133-AD47

To Whom It May Concern:

This comment letter is submitted on behalf of GE Money Bank ("GEMB") in response to the Proposed Rule ("Proposal") issued by the Office of Thrift Supervision ("OTS"), the Board of Governors of the Federal Reserve System ("Board"), and the National Credit Union Administration (collectively, "Agencies") regarding unfair or deceptive acts or practices ("UDAP"). GEMB is a federal savings bank located in Utah and part of the larger corporate General Electric family of companies. We appreciate the opportunity to provide our comments to the Agencies.

GEMB has coordinated with several other commenters (*e.g.*, trade associations) regarding their comments on the Proposal. Generally speaking, we support the comments you receive from entities such as the American Bankers Association, American Financial Services Association, and Financial Services Roundtable. Several of the issues addressed in the comment letters are of particular importance to GEMB and merit our own specific comments. These issues are:

1. **Payment Due Date.** The Agencies should clarify the Proposed Rule to simply require issuers to provide consumers a "reasonable time" in which to make payments, and explicitly state that the 21 day safe harbor is not the exclusive way to meet the requirement. In addition, a second safe harbor should be added confirming the reasonableness of card issuer procedures designed to allow cardholders seven days to review a periodic statement and make a timely payment before the due date, given average mailing times.

2. **Application of Delinquency APR to Outstanding Balances.** The Proposal should be amended to allow card issuers to apply delinquency pricing to the preexisting account balance if a cardholder breaches the terms of the account agreement, without waiting an additional 30 days past the payment due date. Section 2 below includes several alternative ways to address this in the final rule.

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3. **Other APR Changes in Terms.** A provision should be added to the Proposal allowing periodic APR repricing of preexisting account balances (such as once every two years), with notice and opt out, to allow for changes in market conditions. To the extent though that older balances remain at a lower rate, the Proposal's payment allocation rules should be amended to allow card issuers to apply payments to older balances before new ones.

4. **Payment Allocation.** The final rule should provide additional flexibility regarding payment allocation methods. Specifically, in addition to the change noted in item 3 above, a first-in first-out method should be included as a permitted method, flexibility should be provided for promotional balances that require monthly payments, and issuers should have the ability to honor specific consumer requests regarding payment allocation.

5. **Litigation Risk.** More generally, the final rule should be adopted with a view towards minimizing potential litigation risk to issuers. We have included some specific suggestions on this in Section 5 below, including the recommendation that the Agencies implement through Regulation Z those provisions that more logically belong in that Regulation.

In General

GEMB supports reasoned revisions to consumer protection regulations and requirements. As the industry evolves, and products evolve, so should the regulations designed to promote the informed use of credit and to protect consumers. Many aspects of the Proposal, however, go beyond this. Instead of modernizing disclosures to satisfy the need for consumers' understanding of the products offered by issuers, the Agencies are proposing to fundamentally redesign the credit card product. The proposed redesign would be through use of a blunt instrument approach, declaring common, accepted, and (in some cases) specifically permitted practices to be either "unfair" or "deceptive". We do not believe this is necessary or appropriate. In fact, we strongly believe that several provisions in the Proposal would be affirmatively harmful to most consumers—increasing the cost of credit for the most responsible and conscientious consumers in order to reduce the cost of credit for those consumers who default on their accounts. We are also concerned that the proposed changes will reduce the availability of credit to some of the customers who need it the most. At least one industry analyst believes that the Proposal would reduce available credit lines on consumer credit card accounts by $2 *trillion*.[1]

1. Payment Due Date

The Proposal includes a requirement for card issuers to provide for a reasonable time for customers to pay their bills. This is sensible and will benefit consumers. We have two issues with the proposed rule. First, the wording of the rule (and in particular Commentary provision (a)(2) implies that the 21 day safe harbor is the only reasonable method. This provision should be changed to break out the sentence about the safe harbor into a new section, and to clarify that many different methods may be considered reasonable.

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[1] *See* Meredith Whitney, et al., "Far From Over: We Believe the Credit Crisis Will Extend Well into 2009." Oppenheimer & Co., Inc. May 19, 2008.

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Second, we suggest an additional safe harbor—one that generally (given average mail times and statement production times) allows the customer at least seven days after receipt to review and pay the bill. The Agencies state that the proposed 21-day rule is necessary because it may take up to seven days for the mail to be delivered (each direction) and that a cardholder should have at least seven days to review and pay a billing statement. We agree that seven days for the customer to review and pay the bill appears to be a reasonable time, but we disagree that the 21-day rule is necessary to accomplish this result. For instance, mailing time is irrelevant for customers who receive and/or pay their bills online. Additionally, mailing time is unlikely to take seven days each way. Mailing time can be determined based on USPS records or issuer testing, and an issuer may use reasonable procedures to set payment due dates based on average mailing time to the customer's location. All of this should be taken into account if reasonableness is to be determined from the customer's perspective.

Additionally, given the relationship between the existing 14-day rule and the proposed "reasonable time to pay" rule, this issue should be addressed in Regulation Z rather than in a different body of law. Specifically, § 226.5(b)(2)(ii) of Regulation Z sets forth the requirement to mail or deliver the periodic statement at least 14 days prior to the date by which the consumer must make a payment to avoid a finance or other charge. An amendment to this provision of Regulation Z would be more efficient and clear than attempting to govern payment deadlines in a variety of different regulations.

2. Application of Delinquency APR to Outstanding Balances

Underlying Policy

Under the Proposal, the Agencies would prohibit most APR repricing from applying to outstanding balances unless the change falls within a stated exception. One critically important exception is the one for accounts being repriced to a delinquency rate.

We understand the industry controversy that has arisen over the last several years about "universal default"—where a customer's pricing may be changed based on external factors such as default on another account, drop in credit score, etc. In our view, the issues underlying the debate over universal default boil down to customer knowledge (whether the customer had the information necessary to know that the account was at risk of repricing) and avoidability (whether the customer could actually do anything to avoid the repricing).

The Proposal goes much farther than that. In essence, it would prohibit a card issuer, except in very narrow circumstances, from applying an increased APR resulting from a default on the very account on which the delinquency rate is being imposed (an "on us" default) to an outstanding balance, even where the "on us" trigger was disclosed well in advance of the default and was part of the cardholder's account agreement. We cannot understand what is unfair about that. The customer is made aware of the default pricing triggers under current (and soon to be modified) disclosures, each bill sets forth the applicable due date, and the default is completely avoidable if the customer simply complies with the terms of the governing credit agreement by paying on time.

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GEMB strongly urges the Agencies to expand the exception to APR repricing to allow a delinquency rate to be imposed on outstanding balances of an account in the case of an "on us" default—especially a late payment default.

Delinquency Triggers

Alternatively, if the Agencies are determined to adopt specific triggers before allowing repricing of outstanding balances to a delinquency rate, we propose triggers that more appropriately balance the customer's behavior against the issuer's risk. The proposed 30-days past the due date trigger is just too long. Based on our experience, by the time a customer misses the due date by 30 days, the likelihood of that customer's balance charging off in the next 12 months jumps to 40-50% (60-70% when measured on the basis of receivables instead of accounts). By that time, account repricing simply is not effective in mitigating the lender's risk.

We propose safe harbors for two alternative triggers instead of the 30 days past the due date trigger currently embodied in the Proposal:

- First, the delinquency rate could apply to preexisting balances if the cardholder fails to pay by the applicable payment due date twice in any rolling 12-month period. We believe that adopting an additional permitted trigger allowing repricing of preexisting balances if a customer misses two payments within a 12 month period is customer friendly. The customer would receive notice when the first payment is missed and can completely avoid application of the delinquency rate by paying on time in the future. We looked at several representative portfolios and found that the customer population affected by a delinquency rate could be significantly reduced if a two-times late trigger is adopted as opposed to a one-time late trigger.

- Second, the delinquency rate could apply to preexisting balances if the cardholder fails to pay before the end of the billing cycle in which the payment was due (typically five to ten days after the applicable due date). We found that a customer who misses the payment due date and still does not pay by the end of the billing cycle (5-10 days) is *three* times as likely to charge off within the subsequent 12 month period than a customer who pays by the end of the billing cycle.

Adopting the Proposal as currently drafted is fundamentally unfair to cardholders who handle their accounts responsibly. Because the Proposal would limit the ability to adjust the APR on existing balances for a subset of cardholders who default, it would force card issuers to hedge against future-credit risks by increasing the cost of credit to *all* cardholders at the outset. This harm to the majority of consumers to shield some consumers from the consequences of their own actions simply is not justified. This is especially true in a UDAP context, where there is a clear countervailing consumer benefit to allowing card issuers to offer lower prices to responsible cardholders. We urge the Agencies to adopt "on us" account default as a blanket exception to the rule against repricing existing balances, or at a minimum, to adopt the triggers we have proposed.

Notice/Logistics

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We understand the Agencies' concerns regarding consumer notice in connection with an account repricing. We have no objection to requiring the mailing of customer notice one billing cycle before existing balances on an account would be repriced to a delinquency rate, as long as the effective date relates back to the day after default. This would allow a reasonable period of time for the cardholder to explore any other options he or she may have, such as transferring the balance to another lender, or paying off the account. We believe 45 days is too long, and because it does not correspond to a billing cycle date, would cause more confusion than benefit. As noted above, we also believe a delayed effective date for delinquency repricing is not needed when delinquency pricing terms are disclosed up front and the trigger is within the customer's control (such as missing a payment).

Additionally, to the extent the Agencies do restrict the circumstances in which a card issuer may reprice an existing balance in connection with an account default, and instead require prospective-only rate changes, we ask the Agencies to allow creditors to allocate payments to the oldest balances first (as we discuss below).

We also believe that any restrictions on account repricing (and attendant safe harbors) should be delineated by the Board in Regulation Z. We believe the Board has authority to adopt such revisions, and for the reasons described above, GEMB believes this would be the more appropriate approach.

3. <u>Application of Increased APR Resulting from Change in Terms</u>

In addition to prohibiting a card issuer from repricing a credit card balance for most account defaults, the Proposal would also prohibit such repricing in connection with a change in terms ("CIT"). Assuming the Agencies adopt this element of the Proposal, we believe there should be exceptions for repricing outstanding balances in some instances.

(a) Transitioning/Recalibration. We ask the Agencies to give card issuers the express ability to engage in at least one CIT prior to the effective date of the final rule so they may recalibrate the pricing associated with their accounts. For example, a card issuer may need to convert an account with a nonvariable rate APR to a variable rate APR so the issuer can protect against interest rate risk on existing card balances. It could also be that an issuer needs to reprice an account (including the existing balance) to take into account that the issuer will lose that flexibility to reprice in the future. In short, our existing pricing assumes that we will be able to reprice existing balances based on market or risk factors. If that assumption is no longer valid, it would seem only fair, as well as important from a safety and soundness perspective, to allow issuers this opportunity for a CIT. Absent the express acknowledgement of the Agencies that issuers can engage in at least one CIT after the final rule is published, issuers may have no choice but to risk additional (and unfounded) state law liability if they engage in behaviors prohibited in the final rule after it is published but before it becomes effective.

(b) Periodic Ability to Change Terms. GEMB also asks the Agencies to permit a card issuer to engage in an APR repricing CIT no more than once every two years (subject to an appropriate notice period), and to allow the consumer to opt out of the CIT (and close the account) or to retain the account with the new APR applicable to the existing balance. We believe that this is an approach that would be inherently fair to the consumer, while still granting limited flexibility to the card issuer. In this regard, the consumer would recognize at the outset that the pricing on the account may change no more frequently than every two years, and that at such time the consumer would have ample opportunity to determine whether he

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or she would like to continue with the account. We believe this is a more desirable alternative than forcing issuers to choose between operating accounts that are unprofitable as the economic environment changes, or closing those accounts. The latter would not seem to offer consumers much choice at all. We suggest every two years as opposed to upon expiration of the plastic card in favor of a standard approach, and in recognition that different cards may have different expiration date regimes. For instance, many private label cards do not have fixed expiration dates at all.

Interaction with Payment Allocation Provision

As noted above, the Proposal's limit on applying changes in terms to preexisting balances will create a dual balance situation on an account that has undergone a change in terms. If this happens, a creditor should be allowed to apply payments so as to pay off the older balance (at the lower rate) first.

4. Payment Allocation, Promotional Balances, and Deferred Interest Balances

The Proposal would require a card issuer to allocate a cardholder's monthly payment in excess of the monthly minimum payment required in a manner that is "no less beneficial" than three methods provided by the Agencies. In addition, payment may not be allocated to a promotional balance or deferred balance if higher rate balances exist on the account. The Agencies would provide one exception with respect to allocating payments to deferred interest balances and allow a card issuer to allocate the entire payment to a deferred interest balance "during the two billing cycles immediately preceding the expiration of the period during which interest is deferred."

We believe that three additional exceptions are warranted to the payment allocation proposal:

(a) First In, First Out. First, we believe a card issuer should be permitted to allocate a cardholder's payment using a "first-in, first-out" method. We do not believe this option should be mandated, but rather that it should be added to the list of "no less beneficial" methods against which the issuer's allocation is measured. This is an inherently fair approach, and one that we believe easily could be explained to consumers. At the very least, "first-in, first-out" should be an option for issuers who have increased an APR on an account but were prohibited from repricing the existing balance, as noted above, but we also believe it is fair to consumers when applied to all account balances.

(b) Minimum Payment Promotions. Second, we believe the Agencies should make an exception for promotions that by their terms require minimum payments each month. For instance, one common type of promotion in the marketplace offers no interest as long as the required minimum payment is made on the promotional balance each month and that balance is paid in full by the end of the promotional period. Often cardholders pay an amount over the minimum throughout the promotional period as a way of ensuring that they are able to pay the balance in full by the time the promotion expires. If issuers are prohibited from allocating these payments to fully pay the promotional balance, the cardholder may incur interest charges on the account that could have been avoided had a different payment allocation methodology been permitted. Making this type of promotion unworkable would do away with the benefits customers currently enjoy.

(c) Accommodating Cardholder Requests. Third, GEMB asks the Agencies to recognize explicitly that a card issuer is permitted to allocate payments in a manner specifically requested by the cardholder if the issuer has procedures to accommodate cardholder requests. Customers periodically call to

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request that we allocate payments in certain ways, e.g., to their promotional balance prior to any non-promotional balance. Customers who call us to request this are clearly aware that such payments are not required on the promotional balance, but they want to ensure that it is fully paid to avoid being charged the deferred interest. We would like to have the flexibility to accommodate cardholder requests, as we do now.

5. Mitigating Litigation Risk.

In addition to the consumer harm that will result if the Proposal is adopted, we believe the Agencies may inadvertently subject credit card issuers to unnecessary potential liability under state law if the Proposal is adopted in its current form. In particular, the current Proposal can be read to suggest that the Agencies are declaring practices used by hundreds (if not thousands) of credit card issuers to be *per se* unfair or deceptive, GEMB fears that enterprising plaintiffs attorneys may attempt to exploit these new findings by bringing suit under state law against card issuers for such practices used in the past even though they have been well established and well accepted for many years.

To mitigate these litigation risks, we ask the Agencies to avoid declaring practices that are widespread, currently condoned by the Agencies, and in some cases specifically approved under applicable regulations or by the Agencies as suddenly "unfair" or "deceptive." We believe it is *critical* that the Agencies:

- Implement as many aspects of the Proposal as possible as part of Regulation Z,
- Reformulate the proposed rules to require reasonable practices and articulate specific acceptable practices as safe harbors, as is the case with the Payment Due Date portion of the Proposal,
- Make clear that prior practices were neither deceptive nor unfair given the circumstances at the time, and
- State explicitly that any attempt by others to use the final rule as evidence that prior practices were unfair for purposes of state law would frustrate the Agencies' strong intention that the final rule apply only prospectively.

Scope of the Proposal

As part of its Advance Notice of Proposed Rulemaking on the UDAP issue, the OTS asked whether any UDAP regulation should cover more than the savings association, such as "related entities." As part of a diversified corporate entity, GEMB appreciates that the OTS has limited the scope of the Proposal to savings associations and subsidiaries owned in whole or in part by a savings association. We believe that this is the appropriate scope for the Proposal, and we urge the OTS to retain this scope in any final rule.

Conclusion

We appreciate the opportunity to comment on this far-reaching proposal. We would be pleased to discuss our comments if it would be helpful to you.

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Sincerely,

Brent Wallace
President

Member FDIC