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March 22, 2011

The Honorable Ann Pfau
Chief Administrative Judge
Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: Proposal to Expand the Permissible Forms of Bail Payment to Include Credit Cards

Dear Judge Pfau:

We write to urge the Office of Court Administration (“OCA”) to equip courts with the capability to accept credit cards as a form of “cash bail” for all offenses. Alternatively, we ask OCA to endorse the renewal of previously enacted legislation, which expired in August 2010, that allowed for the posting of bail by credit card for all offenses.

Background of New York City Courts’ Acceptance of Credit Cards

Prompted by a request from the Judiciary, the New York State Legislature passed a patchwork of provisions in 2005 that authorized courts to accept credit cards for a variety of court-related payments. At that time, courts had already been authorized to accept credit cards for all criminal fines, crime victim assistance fees and mandatory surcharges. In fact, the Legislature had instituted a series of increasingly expansive pilot projects, over the last 20 years, by which courts could accept certain payments by credit cards. The program was positively received, but the pre-2005 statutes authorizing such payments were not as effective as the Legislature had intended because: (1) as a whole, they were narrowly drafted; and (2) they required specific re-authorization every few years. Although these restrictions were “not the reflection of a deliberate legislative interest in limiting the program,” their effect was to “constrain the efficient collection of revenue.”¹

¹ Memorandum in Support of Legislation, Assembly bill 7561, 2005-06 Reg. Sess. (N.Y. 2005).

Accordingly, the 2005 amendments were introduced to address those issues:

In light of the 20 year success of the Judiciary's credit card program and the significant efficiencies and accelerated revenue collection that the program has made possible, this measure proposes to make permanent the statutory authorization of credit card payment collection in New York's courts, and to expand such authority to all fines, fees, surcharges and other payments that the Judiciary collects.²

The 2005 amendments to the Criminal Procedure Law's bail provision became effective on January 1, 2006, and amended it as follows:

(1) The only authorized forms of bail are the following:

(a) Cash bail.

...

(i) Credit card or similar device [~~where the principle is charged with a violation under the vehicle and traffic law~~]; provided, however, that notwithstanding any other provision of law, any person posting bail by credit card or similar device also may be required to pay a reasonable administrative fee. The amount of such administrative fee and the time and manner of its payment shall be in accordance with the system established pursuant to subdivision four of section 150.30 of this chapter or paragraph [(4)] (j) of subdivision two of section two hundred twelve of the judiciary law, as appropriate.³

The above amendment reads as if it merely broadened courts' authority to accept bail by credit card for all offenses, as opposed to the provision's predecessor, enacted in 1987, which confined credit card payments to violations under the vehicle and traffic law. In fact, however, this legislation was the first to make it actually possible for individuals to pay bail by credit card for any offense, traffic or otherwise. This is because the provision as originally enacted was ambiguous: the only extant definition of the term "violation" excludes traffic infractions as well as crimes.⁴ The 2005 amendments removed that restriction, making credit cards an acceptable form of bail payment for any offense for the first time.

² *Id.*

³ L. 2005, ch. 457, sec. 4, 2005, 2005 N.Y. Laws 457 (amending Crim. Proc. Law § 520.10(1)(i)).

⁴ *See* N.Y. Penal Law § 10.00[3] (McKinney 2008), and Practice Commentary to Crim. Proc Law § 520.10 (McKinney 2010) (noting that the provision was written to clarify the ambiguity of the original provision, and to expand the availability of bail payment by credit card to all offenses).

To provide for the effective implementation of the 2005 amendment, the Legislature also expanded the role of the Chief Administrator of the Courts. Specifically, the measure amended the Judiciary Law by extending the Chief Administrator's authority to accept credit cards as an acceptable form of payment to other areas of the Judiciary's operations, including the bail context.⁵ It also expanded the Chief Judge's authority to "pass along any administrative fee proposed by credit card companies to persons using their credit cards to pay these monies."⁶

Accepting Credit Cards as a Form of Bail Payment in New York City

Despite the success in accepting credit cards for other court-related fines, fees and surcharges, an informal inquiry (by the Criminal Courts Committee) into the City's bail payment procedures has revealed that the 2005 legislation was never implemented by New York City's courts. Several reasons have been cited for this failure. First, although authorized for all payments made by credit card, a "reasonable administrative fee" has never been set, even in instances where credit cards are already being accepted for payments (fines, surcharges, etc.). Court personnel are thus unsure about how, or whether, to set a "reasonable administrative fee" in the bail context.⁷

Another reported concern is the potential for abuse. In accepting credit cards for other court-related payments, the court system has faced, on occasion, situations in which an individual makes a payment with a credit card, but thereafter reports the card as stolen and secures the credit card company's assurance to rescind or cancel payment to the court system. In such instances, court personnel must negotiate the loss with the credit card company, expending court resources.

While these administrative and fiscal concerns are not without merit, both would be addressed and offset by Your Honor simply implementing a "reasonable administrative fee." In addition, because the acceptance of bail by credit card would result in a defendant's more immediate payment and, by extension, a defendant's more immediate release, the New York City Department of Correction would not need to expend as many dollars retaining individuals while they or their families gathered the necessary resources to put up collateral for bail.

There is also a strong policy argument in favor of enabling courts to accept bail by credit card. The current bail system is particularly onerous for indigent defendants, whose only hope for a quick return to their community, their family, and their job, is the bail bondsman. As highlighted in a recent New York Times article, the laws governing bail bondsmen are vague and open to exploitation.⁸ The article points out that bondsmen contracts are often 20 pages or more, and authorize a bondsman to collect a host of fees for seemingly small or obscure reasons: \$250 if the defendant misses a weekly check-in; \$375 an hour for tasks like "bail consulting" and "research."⁹ Perhaps most troubling is the fact that State laws do not require bondsmen to give a

⁶ Memorandum in Support of Legislation, *supra* note 1.

⁷ The Chief Clerk of the Criminal Court of the City of New York, Mr. Justin Barry, was helpful in providing this information. Two members of the Committee met with him on February 22, 2011.

⁸ John Eligon, *For Poor, Bail System Can Be an Obstacle to Freedom*, N.Y. Times, Jan. 10, 2011 at A15.

⁹ *Id.*

reason for revoking a defendant's bond. One of the individuals cited in the article was placed in custody after his bondsman revoked his \$15,000 bond on account of "new police contact," although neither the judge, the prosecutor nor the defense had any record of such contact. In that case, the judge kept the defendant in custody, and set a new bail of \$3,500.¹⁰ While the finance charges that accompany credit cards can be quite high, they will often be lower, and certainly more predictable for defendants, than the fees imposed by bondsmen.

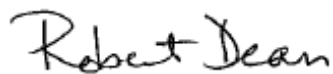
Proposal

The Criminal Courts Committee urges OCA to enable the courts to accept credit cards as a form of bail payment. Notwithstanding the August 2010 expiration of the legislation authorizing bail by credit card, there is authority for OCA to implement such a system: simply, the provision authorizing "cash bail," can be liberally construed to include credit card payments.

Further, the memorandum in support of the original legislation demonstrates that these programs, in general, facilitate the efficient collection of revenue for the Judiciary. And because Judiciary Laws that allow for the collection of a "reasonable administrative fee" are still in effect, any costs associated with instituting the program could easily be offset, and perhaps exceeded, by the funds generated from such a fee.

To the extent that OCA finds authority for such a construction lacking, we request that it urge the Legislature to renew the bail by credit card provision for all offenses.

Very truly yours,



Robert S. Dean, Chair
Criminal Courts Committee

¹⁰ *Id.*