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18 July 2008

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20 and C Streets, NW
Washington, D.C. 20051

Re: Docket Number R-1315
Proposed changes to Regulation DD
Truth in Savings Act
73 *Federal Register* 28739, 19 May 2008

The American Bankers Association ("ABA") is pleased to submit its comments to the Federal Reserve Board's ("Board") proposed amendment to Regulation DD, which implements the Truth in Savings Act. The Board is proposing to amend Regulation DD and the Staff Commentary to the regulation to provide information about costs associated with overdrafts. Specifically, the proposal:

- Sets forth content, format, and timing requirements for notice informing customers of the right to "opt-out" of "overdraft services," as proposed in the Board's separate proposal to amend Regulation AA which implements the Unfair and Deceptive Acts and Practices provision of Section 18(f) of the Federal Trade Commission. (73 *Fed. Reg.* 28904 (May 19, 2008).

- Expands the requirement for banks to provide separate totals of overdraft fees and nonsufficient fund fees by period and year to date to all banks and provides additional formatting requirements;

- Adds to the list of communications that do not trigger additional disclosures requirements the notice of opt-out; and

- Requires banks generally to disclose only the amount of funds available for the consumers' immediate use of withdrawal without incurring an overdraft.

The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ over 2 million men and women.

The proposed changes to Regulation DD are closely linked to those of the Board's proposed changes to Regulation AA. ABA will also be submitting comments to the Regulation AA proposal, which may impact the Regulation DD proposal.

Overall, our comments to the Regulation DD proposal focus on the content of the opt-out notice and the importance of it providing complete information. For example, customers should understand the types of transactions that may cause an overdraft and which transactions will *not* be paid if they opt out. In addition, they should be aware of potential charges when items are returned unpaid, including fees imposed by the payment recipient. While customers should be aware of alternatives to avoid overdraft fees, the regulatory notice should not assume certain alternatives are "superior" or less costly.

230.10 Opt-out disclosure requirements for overdraft service.
(a) General rule
(b) Format and content

Under a separate proposal to amend Regulation AA, the Board is proposing to provide bank customers with a right to opt-out of a bank's "overdraft service" before assessing a fee for the service. This section sets forth the content and timing requirements. In addition, the Board is proposing a model opt-out form institutions may use.

We agree with the Board that the requirement to provide the opt-out notice at account opening must balance the need to provide important information, but in a manner that does not "overemphasize the importance of the disclosure to the consumer in comparison to other information about the account that the consumer is given at the time." For most consumers, the overdraft opt-out notice is not the most important information to review and consider when opening a checking account. Accordingly, the Board should be judicious about formatting and content requirements.

Under the proposal, the notice must include:

(1) ***Overdraft policy.*** The categories of transactions for which a fee for paying an overdraft may be imposed;

(2) ***Fees imposed.*** The dollar amount of any fees or charges imposed for paying checks or other items when there are insufficient or unavailable funds and the account becomes overdrawn;

(3) ***Potential impact of fee in relation to overdraft amount***. A statement that a fee may be charged for overdrafts as low as $1, or the lowest dollar amount for which the institution may charge an overdraft fee;

(4) ***Limits on fees charged.*** The maximum amount of overdraft fees or charges that may be assessed per day and per statement period, or, if applicable, that there is no limit to the fees that can be imposed;

(5) ***Disclosure of opt-out right.*** An explanation of the consumer's right to opt-out of the institution's payment of overdrafts, including the method(s) by which the consumer may exercise that right; and

(6) ***Alternative payment options***. As applicable, a statement that the institution offers other alternatives for the payment of overdrafts. In addition, if the institution offers a line of credit subject to the Board's Regulation Z (12 CFR part 226) for the payment of overdrafts, the institution must also state that fact. An institution may, but is not required to, list additional alternatives for the payment of overdrafts.

The proposed model form illustrates how the information might be disclosed. Given that the model presents a safe harbor and that to avoid potential violations, most banks will likely use it, its content and format are critical. While we believe that the notice should be as simple and brief as possible, it is important for it to be complete and informative without overwhelming or confusing customers.

Use of term "overdraft services." The model form refers to "overdraft services." We strongly recommend that the Board not use the term "overdraft services" as we believe that many customers will not fully understand its meaning and indeed may be misled. Our concern is that many customers will erroneously assume that the term refers to an overdraft line of credit, which is a very different product, with different functions and fees.

In effect, the Board is regulating what is a traditional bank practice familiar to customers that has simply evolved as checking accounts have. Banks originally paid only check overdrafts when those were the only means of payment. As other channels developed, such as the automated clearinghouse ("ACH"), customers quickly learned that transactions made through those new channels may be paid when there are insufficient funds as part of that traditional practice. The term "overdraft services" suggests that the product is separate from this traditional practice.

The Board should test consumers on their understanding of the meaning of "overdraft services." One option for a label might be "payment of overdrafts."

Clarification that payment of overdrafts is discretionary. We suggest that the model language better communicate the discretionary nature of overdraft policies. The banking agencies in their Joint Guidance on Overdraft Protection Programs include in their list of best practices, "Clearly explain discretionary nature of program." We suggest that after "we may pay your overdraft" the Board add, "at our discretion" so that customers are more likely to understand the discretionary nature of the policy if they overlook "may" pay.

Categories of transactions covered. The proposal requires that the notice include "the categories of transactions for which a fee for paying an overdraft may be imposed." The model form reflects this requirement with the list, "ATM withdrawals, debit card purchases, checks, and in-person transactions." We suggest that the model form provide more clarity and completeness about the types of transactions covered so that customers understand what transactions may be paid when there are insufficient funds and the impact of opting out. For example, the proposed model lists "debit card purchases" but excludes debit card bill payments. More and more customers are using their debit cards for both recurring and single payments, particularly for bill payment. For example, customers pay utility and phone bills, insurance, taxes, rent, using their debit card number, whether for recurring payments or single payments. Customers should understand that pre-authorized recurring transactions and electronic transactions, including those made through ACH and debit cards, are included.

It is not sufficient that this list only be presented in the list of items banks *will* pay. Banks should be able to make clear that if the customer opts out, such transactions *will not be paid* if there are insufficient funds, especially as many customers will expect and want these important transactions paid, and there may be significant consequences if they are not. Indeed, according to our recent survey by Ipsos-Reid conducted between July 11th and 13th 2008, of the 20 percent who paid an overdraft fee in the last year, 85 percent said that they were glad the payment was covered. Accordingly, to avoid any deception when explaining the consequences of opting out, banks should be permitted to explain specifically what transactions will not be paid if the customer opts out so that customers may make an informed choice.

Disclosure of opt-out right. The proposal requires that the notice contain an explanation of the consumers' right to opt-out and the methods by which the consumer may exercise that right. The opt-out notice should make clear that even if the customer opts out, there may be occasions when transactions that cause overdrafts will nevertheless be paid and an overdraft fee imposed to avoid any false expectations. Indeed, the Board's Regulation AA proposal recognizes two such circumstances. In fact, there are other occasions. For example, banks may not be able to avoid overdrafts caused by deposits returned after payments have been made based on those deposits and debit card transactions that were not preauthorized. To ensure that customers understand that an opt-out cannot guarantee there will be no overdrafts, the notice should permit a general caution that in some limited circumstances, it may not be possible for the bank to stop authorized transactions (including debit card transactions) from overdrawing an account.

Consequences of opting out. The proposed Commentary to the regulation provides that banks may "briefly describe the consequences of the consumers' election to opt-out of the institution's payment of overdrafts." The proposed Commentary continues, "For example, the institution may state that if a consumer opts out, the consumer's payment may be denied, or returned unpaid, and that the consumer may incur returned items fees from both the institution as well as the payee." The proposed model form only states perfunctorily, "If you do [opt out] you may have to pay a fee if you make transactions that are returned unpaid."

We strongly believe that banks should be able to inform their customers completely and accurately of the consequences of opting out, so as not to cause misunderstanding and confusion. As mentioned, our recent 2008 survey found that 85 percent of those who had an overdraft fee in the past year were glad the payment was covered. The proposed model language and proposed regulation's limits on how banks may explain the consequences of returned items are grossly inadequate and biased.

It is also important that customers understand that not only will they incur a fee from the bank in these circumstances, but they are likely to incur a fee or other charges from the person they are paying. This fact is not clear from the model language, which banks are most likely to use to avoid potential violations for varying from the script of that model. Yet, in many cases, customers will indeed incur a hefty penalty, from the merchant, government, or mortgage lender, for example. The model should specifically state, "If you do [opt out], you will have to pay a bank fee if you make transactions that are returned because there is not enough money in your account when they are processed. In addition, you may have to pay a fee or penalty to the person or entity you had intended to pay."

It is also important to understand, if applicable, that customers may incur a bank fee from a debit card transaction that is returned. There are occasions when a debit card transaction will be presented without prior approval – for example, the merchant makes a choice not to request authorization for certain transactions. The bank typically has the option to return such transactions if there are insufficient funds in the account, though it may have to pay a network fee to do so. The bank may choose to pass that fee on to the customer.

As mentioned earlier, customers should be aware that opting out means that certain transactions, such as debit card bill payments, will not be paid. The disclosures should convey this.

Finally, banks should be able to state that “you will pay a fee” as opposed to “may” pay a fee. Otherwise, the disclosure may create an expectation that perhaps the customer may avoid the fee, when in reality, it is very likely to be imposed.

Partial opt-out. The Regulation AA proposal includes an option for customers to not have “ATM withdrawals and debit card purchases” not paid, but continue to have other overdraft transactions paid. As discussed above, debit card transactions are not limited to ATM and “purchase” transactions, but may be used for bill payment and other transactions. If this partial option is retained in Regulation AA, the disclosure should be clearer in explaining all the types of debit card transactions that will not be paid so as not to mislead customers.

Alternative payment options. The proposed regulation requires the notice to include, as applicable, a statement that the institution offers other alternatives for the payment of overdrafts. If the bank offers overdraft lines of credit, it must disclose this option. The model states, “We also offer less costly overdraft payment services that you may qualify for. . .”

We strongly recommend that the notice about alternatives be a general notice and that the regulation and model language not highlight particular alternatives or suggest that other alternatives are superior.

The proposed regulation and model language are making judgments about overdraft alternatives and their relative costs and assume that cost is the only relevant factor in making a choice. For example, some bank customers have indicated that they do not want a line of credit. Some customers do not want the temptation of a line of credit that might lead to a large outstanding balance, which will take them months to repay and on which they must pay periodic interest. They prefer not to have the line of credit available in order to provide discipline that limits their spending to their available funds. This encourages them to manage their account, even if it may involve the occasional overdraft fee. Others do not want an alternative that requires them to take an affirmative action, such as making a payment.

For many, especially those who do not want the temptation of running up a credit balance, other alternatives are preferable to a line of credit. Alternatives include arranging a link to a savings account or credit card account, arranging a telephonic or electronic alert from the bank when the balances falls below a set threshold, or using a prepaid card for small dollar transactions.

In addition, the proposed regulation assumes that a line of credit or other option is necessarily "less costly" than an overdraft fee. This, in fact, may not be true, depending on the terms of the line of credit and how the customer uses the line of credit. For example, if a bank charges $25 for overdrafts and for an overdraft line of credit charges $5 a month and $10 per transfer, a customer who incurs one overdraft in a year would pay $70 for the line of credit, but only $25 in overdraft fees.

We believe the Board should provide a less biased, more neutral statement and not assume that certain alternatives are superior, because the best choice will vary widely depending on customers and their habits.

It is sufficient and more effective if the notice simply alerts customers that there are alternatives and offers a source to learn more about the alternatives. Banks could either list alternatives on the form or provide options on a toll-free number, website, or a separate document provided upon request.

(c) Timing

Under the proposal, the opt-out notice must initially be provided before the overdraft service is provided and overdraft fees are imposed on the consumer's account. In addition, banks would have to provide a notice on each periodic statement reflecting the assessment of any overdraft. In the alternative, banks could provide the opt-out disclosure on a separate notice sent following payment of an overdraft. Such a notice would need only be sent once per statement period, regardless of the number of overdrafts in that period.

We support the Board's determination that the initial opt-out notice would only be required for accounts opened after the effective date of the final rule and not for existing accounts. The cost of mailing notices to every checking account customer is staggering especially given that the notice will not be relevant to the vast majority of customers, as most customers do not overdraw their accounts on more than an occasional basis. The compliance and environmental cost of a special disclosure simply does not justify the benefit.

Under the proposal, the opt-out notice content is the same for both the initial notice and subsequent notices. However, the Board "is cognizant of the compliance burden" and "recognizes that consumers may not require all of the information . . . in the notices following an individual overdraft." The Board requests comment on whether customers should receive the same information regardless of when the notice is provided.

We strongly recommend that the subsequent notice be abbreviated. A shorter, simple notice is more likely to be read, will provide sufficient information to be useful, and will reduce compliance burdens and costs. We recommend that the subsequent notice only have to contain a general notice advising consumers of their opt-out right and noting that alternatives may be available along with contact information where additional specifics, including information contained in the initial disclosure, may be provided. This approach will ensure that customers receive useful, complete, and up-to-date information, but minimize the costs related to updating, creating, and delivering the notices. It will also help to avoid the need for different requirements, depending on whether the notice is provided on a periodic statement or special notice, which complicates and makes more expensive compliance efforts.

Requiring a lengthy disclosure on an overdraft notice will increase paper, printing, and delivery costs of providing the overdraft notice. Overdraft notices today typically use a short, envelope size paper. The proposed full notice, however, would require more paper, and therefore more postage. Similarly, for periodic statements, a lengthy disclosure will unnecessarily increase the amount of paper and postage.

As the Board notes, certain information, such as the amount of the fee, is unnecessary on a periodic statement, as it will appear elsewhere. The Board further notes that it is not necessary to remind customers that they may incur a fee for overdrafts. We believe that a notice that explains the right to opt-out and a statement that there may be alternatives for the payment of overdraft the information is sufficient.

231.11 Additional disclosure requirements for overdraft services.
(a)(1) Disclosure of total fees on periodic statements: General

Under the proposal, the requirement to disclose on periodic statements the total of nonsufficient funds and overdraft fees is expanded to apply not only to those banks that "promote" their "overdraft programs," but to all institutions. In addition, it is requiring that the aggregate fee totals be "in close proximity" to the fees that must be disclosed pursuant to the regulation and in a table format as illustrated in the proposed model.

We caution the Board not to make the disclosure so prominent that consumers overlook other information that may be more important to them, especially as some banks may include the table when there are no fees. The table may be a distraction to the high percentage of customers for whom the fees are not relevant. In addition, we note that when the Board first adopted the disclosure requirement for banks that "promote" their overdraft policies, many banks decided not to promote overdraft policies in order to avoid this requirement. We can expect that more banks may choose to promote policies if the disclosure is required of regardless of whether the policy is promoted or not.

(c) Disclosure of account balances

The Board is proposing additional restrictions on account balances that may be disclosed in response to a consumer inquiry. Specifically, the proposal requires that banks must provide a balance that "solely includes funds that are available for the consumer's immediate use or withdrawal and may not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the consumer's account." Banks may provide a second balance that includes any amount that may cover overdrafts.

The Commentary and Supplementary Information provide some flexibility in determining the appropriate balance. For example, the proposed Commentary provides that the balance "may but need not, include funds that are deposited in the consumer's account such as from a check, that are not yet made available for withdrawal. . ." The Supplementary Information indicates that this comment is "intended to make clear that institutions are not expected to reconfigure their internal systems to provide "real-time" balance disclosures.

While we agree with the concept, we have some concerns about compliance. Specifically, we are concerned about potential interpretations of "solely includes funds that are available for the consumer's immediate use or withdrawal." First, it is not clear the purpose of the language. The purpose of the provision is to prohibit banks from including in this balance the "discretionary" amount that might be available for overdraft purposes. The proposed language, "may not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the account" accomplishes this objective.

Second, while generally the balance provided through the automated system will only reflect funds that are available for the consumer's immediate use or withdrawal, it is conceivable that, due to operational glitches or lags in updates, there may be instances when this might not be true. Determining "available" balance is notoriously complex. For example, there may occasions when the information provided on the automated system is different from funds that may technically be "available for the consumer's immediate use or withdrawal." In addition, there are occasional instances when the balance is updated for one system, but not yet for another. For example, a balance provided through one channel might reflect a recent debit that is not yet reflected through another channel, in which case bank may be in violation of the regulation.

We also emphasize that any communication to customers about "available" balance not suggest that because funds from checks are "available," the check could not be returned nor the customer not responsible for the amount of any returned check. Banks have been routinely criticized by the press and government agencies for not warning customers when they advise them that funds are "available" that the check may be returned. The problem arises when customers accept counterfeit checks from strangers and, upon the instructions of the stranger, withdraw the funds when they become available and wire the money to the stranger (through a nonbank money transmitter). When the check is returned unpaid, the customer is responsible for any loss. Banks have been endeavoring to educate customers that the phrase "available" funds does not mean that the check cannot be returned and the amount debited from the customer's account. The regulation should not thwart those efforts by suggesting to customers that funds are available absolutely. Modifiers like available for "immediate use" may convey to some customers that there is a level of assurance about the account balance and any items pending collection that is greater than is meant when just describing them as simply "available."

Because the proposed language "solely includes funds that are available for the consumer's immediate use or withdrawal" is superfluous and to avoid ambiguity and potential inadvertent violations, we recommend its deletion.

The proposed Commentary also includes in the list of "balance inquiry channels" subject to this provision ATMs that are not owned or operated by the institution. We strongly recommend that the final Commentary exclude ATMs not owned or operated by the institution. Simply put, banks are not in a position to control what ATMs owned by other entities provide. The result may be to discourage banks from providing the information in these situations. Accordingly, the requirement should be deleted in the final regulation.

Conclusion. ABA appreciates the opportunity to comment on this important matter. We stress the importance of ensuring that customers understand the types of transactions that may cause an overdraft and which transactions will not be paid if they opt out. In addition, customers should be aware of the consequences of having payments returned or rejected, including the imposition of fees by the payment recipient. Finally, the opt-out notice should not presume that certain alternatives to avoid overdraft fees are superior or less costly.

Sincerely,

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