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Re: OVERDRAFT SERVICES SUBPART:  
Regulation AA; Proposed Rule on Unfair or Deceptive Acts or Practices  
Federal Reserve System [Regulation AA; Docket No. R-1314]  
Department of the Treasury; Office of Thrift Supervision [Docket ID, OTS-2008  
0004; RIN 1550-AC17]; National Credit Union Administration [RIN 3133-AD47]

Dear Sirs and Madams:

This letter is submitted on behalf of Wells Fargo & Company and its affiliates, including Wells Fargo Bank, N.A., Wells Fargo Financial National Bank, and Wells Fargo Financial Bank (collectively, "Wells Fargo") in response to the joint proposed rule regarding Unfair or Deceptive Acts or Practices, published in the Federal Register on May 19, 2008 at 73 FR 28903 (the "Proposed Rule"). This letter will address the Overdraft Services Rule set forth in Subpart D of the Proposed Rule. Comments regarding the Consumer Credit Card Account Practices rule (Subpart C of the Proposed Rule) are being submitted concurrently in a separate letter by Wells Fargo.

Wells Fargo appreciates the opportunity to comment and respectfully requests that the members of the Board of Governors of the Federal Reserve System ("Board"), the Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA") (collectively, the "Agencies") consider the suggestions set forth herein.

Wells Fargo is the largest financial institution headquartered in the western United States. Wells Fargo is a diversified financial services company providing banking, insurance, investments, mortgage and consumer finance through almost 6000 banking offices, the internet, and other distribution channels across North America, and internationally. Wells Fargo has \$595 billion in assets and 160,900 employees. Wells Fargo is one of the United States' top-40 largest private employers. Wells Fargo ranked fifth in assets and fourth in market value of its stock among its peers as of March 31, 2008. Wells Fargo Bank, National Association, the principal banking subsidiary of Wells Fargo, is the only bank in the United States to receive the highest possible credit rating, "AAA," according to Standard & Poor's Rating Service.

We are a national leader in the deposit market (#1, #2 or #3 in deposit market share among banks in 17 Western states), USA's # 4 in deposits and USA's # 2 largest debit card issuer. We have one of our industry's largest network of stores, 5,982, and 6,900 ATMs.

Our vision and values include a commitment to consider the customer in everything we do, and to "do what's right for the customer." We take a leadership role in promoting financial literacy. For example, with the help of students and teachers, we've designed a new curriculum (in English and Spanish) for online financial literacy called "Hands on Banking." We support innovation to provide customer choice and offer a variety of account products and features.

The Agencies are proposing a requirement that institutions allow consumers to opt-out of "Overdraft Services." The proposal would extend beyond marketed "bounce protection" programs to any discretionary payment of customer transactions into overdraft. As we have indicated in our Regulation DD response, we would support a proposal that is limited to "bounce protection" programs and focused on misleading promotions or practices. We also support the proposal with respect to disclosure of available balances that do not include overdraft amounts. However, we believe that extending the proposal

to include non-marketed discretionary overdrafts is not supported under the FTC Act standards or by any previous regulatory concerns.

The current deposit processing system, including the payment of some transactions into overdraft, benefits consumers. In addition, allowing consumers to opt-out of discretionary overdrafts will have significant unintended consequences, including increased costs to both consumers and merchants. This proposal also seriously undermines a fundamental premise that the consumer – not the bank – is in the best position to know what checks they have written or what debit transactions they have authorized that affect their account balance. The vast majority of our customers successfully manage their account balances to avoid overdraft fees. In fact, in the past year, 84% of our customers did not incur an overdraft fee; and in the past month, 93% of our customers successfully managed their deposit accounts to avoid overdraft fees.

Our current practices are designed to help consumers manage their accounts and address the major concerns raised by the Agencies with respect to Overdraft Services:

- We provide clear disclosures of overdraft fees in the account agreement when the account is established.
- We offer options to link a savings account, credit card or line of credit for overdraft protection.
- We notify the consumer promptly after an overdraft occurs so that the consumer can make a deposit or transfer funds to avoid further overdrafts.
- We provide tools through multiple channels (ATM, phone, online) so that consumers can determine available balances<sup>1</sup> and check the status of pending transactions known to the bank.
- We offer a balance alert that can be sent to a customer's cell phone or email when a low-balance threshold has been reached. Mobile banking allows customers to check their current available balance<sup>1</sup> via their cell phone prior to conducting a transaction.
- We provide alerts at our ATMs to notify the consumer if they are making a withdrawal that will be in excess of their available balances.<sup>1</sup> This allows the consumer to cancel the transaction before it goes into overdraft.
- We post deposits to our customers' accounts before debits. This allows a customer to proceed with their transaction at a point-of-sale or an ATM and then make a subsequent deposit or transfer that same day to avoid overdraft fees.
- We generally provide next day availability for most check deposits so that, in most cases, customers have quicker availability than is required under Regulation CC. In fact, about 98% of deposits are currently not subject to a hold.

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<sup>1</sup> We inform customers that "available balance" reflects the latest balance based on transactions recorded to the customer's account on that day, including deposited funds, paid checks, withdrawals and POS purchases. Some transactions activity, however, are not immediately recorded and are not reflected in the available balance.

- We provide account balance information that includes only funds currently available for withdrawal (and does not include overdraft protection or overdraft limit amounts).
- With respect to the Agencies' concerns with respect to debit card holds, we currently have in place procedures to help avoid "excess holds." We identify categories of merchants that typically submit authorizations that exceed the final settlement amount and we limit the holds duration to avoid the excess hold situation.
- Due to timing gaps in the debit card payment system between authorization and settlement, and the inability to match with absolute certainty a pending transaction to a settled transaction, we currently provide an overdraft fee exception as a customer service. Specifically, we do not charge an overdraft fee on a transaction received for *settlement*, if the item could have been paid if we were not holding funds for a *pending* debit card transaction.

While we applaud the Agencies' goal of providing consumers choice, we have serious concerns with the approach taken by the Agencies in the Proposed Rule (and the corollary changes in Regulation DD). We believe that ultimately the proposals will have unintended consequences that will not be beneficial to consumers or the financial institution industry.

## I. Executive Overview

This letter will begin with general comments about the Overdraft Services proposal: (A) concerns with the proposed consumer opt-out rights, particularly, partial opt-out, and fee exceptions to opt-out; (B) discussion of unintended consequences; (C) summary of UDAP concerns; and (D) Wells Fargo's recommendations. Following the general comments, this letter will discuss in more detail our risk management and operational concerns and UDAP analysis. In our UDAP analysis, we will discuss why it is improper to classify the acts and practices in the Proposed Rule as "unfair" or "deceptive" when they do not meet the standards set forth in the Federal Trade Commission's three prong test for making such a designation. We will conclude with our specific comments in response to the Agencies' requests for comment regarding Subpart D – Overdraft Services Rule.

## II. General Comments

### A. Consumer Opt-Out Rights and Debit Holds

**We oppose the Agencies' proposal for a consumer opt-out right for "overdraft services" as defined by the Agencies.** The definition of "overdraft services" goes beyond marketed "bounce protection" programs and covers even discretionary overdraft programs that are not promoted to the public. The use of the term "overdraft services" is a misnomer since it implies that the bank always has a choice about whether to cover overdrafts, when in fact many overdraft situations occur during the normal course of

transaction processing and may be out of the control of the bank, such as those created by posting previously authorized (“must-pay”) debit card transactions.

**Consumers may misinterpret what it means to opt out of overdraft services.** The opt-out proposal would require an institution that has never promoted overdraft services to notify consumers that it now “provide[s] overdraft services” and that the consumers may opt out of these services. This opportunity to opt out of a discretionary overdraft service is likely to be misunderstood by consumers. Regardless of how the opt-out notice is phrased, we believe that many (perhaps most) consumers who choose not to opt out of the overdraft service are likely to believe that they have some assurance that their payments will be covered, even though they are made without sufficient funds. Such a belief would be wrong, of course, since the institution has never committed to pay overdrafts and retains the discretion to return items for insufficient funds. As a result, we believe that, but for the fact that these notices will be required by law, consumers could accuse institutions providing these notices of engaging in deceptive practices.

**Consumers are also likely to be confused as to what is subject to opt-out.** They may not understand that they are still subject to fees that will occur because items will be returned instead of paid into overdraft. Consumers will not understand that they may actually incur more fees than if the item was paid into overdraft because returned items that are not paid may be re-presented multiple times, resulting in multiple returned item fees. The sample notice provided in the Regulation DD proposal is heavily slanted towards encouraging opt-out and does not include sufficient information about the disadvantages of opt-out. The sample notice also does not include a description of the exceptions identified in the Proposed Rule that could result in overdraft fees. Consumers will not understand that overdrafts may still occur even if they opt out, and overdraft fees may still be charged for the permitted exceptions.

1. **The proposal for a “partial opt-out” associated with ATM and POS transactions is particularly problematic and presents significant risk management, operational and communications challenges.** Requiring a partial opt-out right implies (and a consumer may be confused into believing) that the bank is then obligated to pay checks and other transactions into overdraft when no such obligation exists. Consumers cannot effectively say “do not pay my debit card transaction, but pay my checks” because they have no rights under the law to write bad checks and compel the bank to pay them. In fact, given gaps in various payments systems, the Proposed Rule will result in increased risk exposure and potential safety and soundness concerns so that institutions may have little choice but to treat partial opt-out as full opt-out. As a result, the number of checks and other transactions returned unpaid will increase substantially.
2. **Fee exceptions to opt-out are not comprehensive and will lead to customer confusion.** The Agencies acknowledge that there are circumstances where an institution may not be able to avoid paying a debit card transaction that overdraws an account. The Proposed Rule describes two exceptions: (1) where there were sufficient funds at the time of authorization but the debit card transaction amount

presented at settlement by a merchant exceeds the pre-authorized amount; and (2) where the debit card transaction is presented as a paper-based item and the bank had not previously authorized the transaction.

The fee exceptions offered in the proposal are impractical and fail to adequately address the bank's exposure to loss in the event that transactions authorized against sufficient funds are then settled against insufficient funds. Specifically, the fee exceptions in the proposal fail to recognize the impracticality of systematically revisiting fees days after original assessment based on differences between hold amount and settlement amount. There is also no clear fee exception offered in cases where a customer has made a deposit that is subsequently returned unpaid and charged back against insufficient funds; or for late settling debit card transactions which come in for settlement after the 3 day hold has dropped.

Outlining specific exceptions in the Proposed Rule is problematic because it is nearly impossible to specify and predict all the potential scenarios that should be considered as exceptions, and to reflect processing changes and enhancements that may occur in the future. Moreover, when a bank imposes an overdraft fee under one of the specified exceptions, a customer who has opted-out is likely to be confused.

## **B. Severe Unintended Consequences**

**The opt-out proposal will have severe unintended consequences that are detrimental to consumers.** Opt-out for all overdraft services (not just bounce protection programs) means that there may be a significant shift from overdrafts to more returned items. Financial institutions will return and decline more checks, automated payments and debit card transactions, including important payments such as those for mortgages, utilities, insurance and credit cards.

1. **Consumers may be subject to more fees – not fewer.** Consumers who opt-out may simply replace an overdraft fee with a returned item fee. The costs to the consumer of bouncing a check or other item will almost always exceed the costs of allowing an overdraft. Rather than having a single fee associated with the payment of a transaction into overdraft, a transaction could be returned NSF and result in multiple fees. There is no limit on the number of times a check may be re-presented; and ACH items can be re-initiated up to two additional times after the original item is returned for insufficient funds. Consequently, a single transaction for which there are insufficient funds can result in multiple returned item fees. In addition to returned item fees on their deposit account, consumers may also incur separate merchant fees for returned items and late fees, interest charges and penalties from creditors. Failure to make the payments may result in a negative credit rating for the consumers and other adverse consequences, such as termination of services or lapse of insurance coverage for insurance payments. The Agencies acknowledged the fee consequences of returned checks or ACH items, but failed to acknowledge that debit cards are also used for recurring bill

payments and that fees and other negative consequences can also result if debit card transactions are denied.

2. **Customer confusion** - Notification of opt-out rights for discretionary overdraft programs will confuse customers and potentially mislead them into thinking: a) that they are no longer responsible for managing their accounts and maintaining sufficient balances to cover all outstanding transactions; b) that opting out will insulate them from all fees related to insufficient funds; and c) that a decision *not* to opt-out implies a commitment on the part of the institution to cover all their overdrafts.
3. **Adverse impacts on efforts to bank the "unbanked"** - This proposal may adversely affect the availability of deposit accounts to low to moderate income and high-risk consumers and add to the ranks of the "unbanked." Wells Fargo, for example, offers a risk-controlled account designed to return some high-risk customers to mainstream banking. While we do not knowingly authorize transactions in excess of available funds in these accounts (*i.e.*, transactions are authorized when "good funds" are available in the account), gaps in the payment system (timing and amount) may result in some debit card transactions posting into overdraft. If the bank is no longer able to assess fees to offset higher losses in these accounts, the bank may need to reconsider access of debit cards on these accounts, or even the availability of deposit accounts to high-risk customers.
4. **Merchant willingness to accept checks** - This proposal may reduce merchants' willingness to accept checks from customers due to a higher likelihood of returned checks. A merchant cannot have insight into a consumer's opt-out preference, and therefore may choose to accept only debit cards for payment (since these transactions, once authorized, can not be returned unpaid). This may disproportionately impact the elderly who are more inclined to use non-electronic payment methods.
5. **More Holds on Deposits** - It is likely that deposit holds will increase on accounts of both opt-out and non-opt-out customers. Today, Wells Fargo places a hold on less than 2% of deposits. Since more checks are likely to be returned unpaid (rather than paid into overdraft), the bank is more likely to place holds on checks deposited from accounts that have a history of frequent returns. This will affect all customers - not just those that elect to opt-out. For example, the individual depositing these items will not only be subject to a hold, but may also incur returned deposited item fees if the deposited check is returned unpaid from the maker's bank.
6. **Use/availability of debit cards, checks, and cash** - The proposed regulations will likely change the current dynamics of the payments system. Debit cards will become less attractive to offer to high-risk customers, checks will become a less acceptable form of payment to merchants and other payees, and some consumers will face the need to carry more cash, introducing new theft and safety concerns.

7. **Higher costs to consumers** – The increased likelihood of returned check/ACH transactions (including multiple resubmissions) and returned deposits will result in potentially higher costs to both opt-out and non-opt-out customers. The payment system is complex. Merchants have come to rely on the fact that the vast majority of the checks they receive are paid when submitted to banks. The cost of returned checks, and subsequent merchant loss, are likely to be distributed to all consumers in the form of higher prices for goods and services.

### C. UDAP Concerns

1. **The FTC Act does not support a broad definition of “overdraft services” for UDAP purposes.** The definition of “overdraft services” is overly broad. It goes beyond marketed “bounce protection” programs to include even discretionary overdraft programs that are not promoted to the public. The opt-out proposal is flawed in concluding that traditional, discretionary overdraft services (i.e., those not promoted to the public) and the failure to provide opt-out with respect to such services are an unfair practice under FTC Act standards:
- (1) Overdraft fees for these services are not injuries when properly disclosed<sup>2</sup>;
  - (2) Overdraft fees for these services are reasonably avoidable;<sup>3</sup> and
  - (3) Overdraft services provide countervailing benefits to consumers that outweigh the costs in fees.<sup>4</sup>
2. **The policy concerns expressed by the Board, OCC, FDIC, NCUA and OTS do not support a broad definition of “overdraft services” for UDAP purposes.** In the Joint Guidance on Overdraft Protection Programs (by the Board, the OCC, the FDIC and NCUA)<sup>5</sup> and the OTS Guidance on Overdraft Protection Programs,<sup>6</sup> the five agencies identified certain misleading marketing practices with respect to “some overdraft protection programs” that were of concern, such as:

<sup>2</sup> See “Testimony of John C. Dugan Comptroller of the Currency Before the Committee on Financial Services of the U.S. House of Representatives” (June 13, 2007) (Practices that rise to the level of “unfairness” under the FTC Act standards require a combination of “both an inordinate degree of risk or harm . . . and deficiencies in the information provided . . .” so that fees or interest rates that are adequately disclosed are not likely to be treated as unfair under existing FTC Act precedents.)

<sup>3</sup> See, e.g., Saunders v. Michigan Ave. Nat. Bank, 662 N.E.2d 602 (Ill. Ct. App. 1996) which held that the bank’s practices of charging an overdraft fee was not “unfair” under the Illinois Consumer Fraud Act. The court applied the FTC Act analysis and determined that there was no lack of meaningful choice regarding overdrafts. The court noted that the plaintiff had control over whether she would be assessed an overdraft fee and was also free to select another bank. The court concluded that the bank provided the plaintiff “with all of the information necessary to make a meaningful choice in selecting banks.”

<sup>4</sup> Overdraft services allow consumers to avoid returned item fees, late fees or penalties, negative credit ratings and other adverse consequences when payments are not made. Payment of debit card or ATM transactions into overdraft allows consumers to avoid the embarrassment of having a transaction declined at the point-of-sale; or avoid the inconvenience of not being able to withdraw funds at any ATM. Additionally, debit cards are increasingly used for recurring bill payments, and payment of these transactions into overdraft provide similar benefits to payment of checks or ACH (e.g., avoidance of late fees or termination of service).

<sup>5</sup> 70 Fed. Reg. 9127 (Feb. 24, 2005)

<sup>6</sup> 70 Fed. Reg. 8428 (Feb. 18, 2005)

- The marketing and disclosure of overdraft protection programs that promote overdraft services in a manner that leads consumers to believe that the program is a line of credit.
- The use of marketing programs that appear to encourage consumers to overdraw their accounts.
- The failure of financial institutions to disclose that the promoted program may include overdrafts by means other than checks.
- The disclosure of account balances information that include overdraft protection amounts rather than the amount actually available for withdrawal.<sup>7</sup>

These concerns are all with respect to programs with misleading promotions or practices, particularly those that encourage consumers to overdraw their accounts and increase risk for the institution.<sup>8</sup> These concerns do not apply to traditional, discretionary overdraft services that are not marketed to consumers and are provided as an accommodation by responsible financial institutions with appropriate disclosures. The five agencies indicated that historically non-promoted accommodations have not raised significant supervisory concerns.<sup>9</sup>

3. **Public policy should not encourage institutions to promote overdraft services and encourage consumers to overdraw their accounts.** The Agencies had previously expressed concerns about institutions that promote discretionary overdraft programs and encourage the use of overdrafts. The required opt out notice will create an awareness of, and thereby promote, discretionary overdraft services and implicitly encourage consumers to freely avail themselves of these services. Requiring all institutions to notify consumers that they provide overdraft services from which consumers may opt out effectively mandates that all institutions participate to some degree in promoting overdraft services (*i.e.*, bounce protection programs). Even those institutions that have made a conscious decision to refrain from offering bounce protection programs will be forced to participate at some level in a program about which the Agencies have expressed serious concerns.

#### **D. Summary of Wells Fargo Recommendations**

1. For the reasons explained above, Wells Fargo believes that the Agencies are required to limit any exercise of their UDAP authority under Regulation AA, and the corollary disclosure requirements in the Regulation DD proposal, to only those acts and practices that have been the subject of previous regulatory concern and for which there is a legal basis under the FTC Act, such as “bounce protection” programs that actively promote overdraft services.

<sup>7</sup> 70 Fed. Reg. 9129 and 70 Fed. Reg. 8429-30

<sup>8</sup> The Board identified and discussed similar concerns in the Supplementary Information accompanying its amendments to Regulation DD effective July 1, 2006 (70 Fed. Reg. 29582-29583 (May 24, 2005)), but these concerns do not apply to traditional discretionary overdraft services which are not marketed to consumers.

<sup>9</sup> 70 Fed. Reg. 9128, 70 Fed. Reg. 8429

2. To the extent that the Agencies still feel that programs other than “bounce protection” programs need to be addressed (e.g., to formally encourage institutions to adopt some of the recommendations previously identified as “best practices”), they must address them under other authorities (e.g., Regulation DD or Regulation E); and before proceeding any further, we strongly encourage the Agencies to evaluate fully the magnitude of the untenable operational problems and risk-management concerns as well as the unintended consequences this proposal presents to consumers and payment systems.
3. If the Agencies proceed with the proposal, we recommend that the Agencies work within the framework of such other authorities, and engage in further discussions with the financial community to consider the following:
  - A full analysis should be done to determine whether, given severe operational challenges and potential adverse consumer impact, an opt-out requirement should be adopted at all.
  - If an opt-out requirement is to be adopted, provide that any opt-out choice may apply to all transactions.
  - Rather than specifying permitted exceptions that could result in overdraft fees, communicate that if a customer opts-out of “overdraft services” the bank will not in “good faith” authorize a debit or ATM transaction into overdraft (*i.e.*, a transaction will be authorized only if sufficient funds appear to be available at that time). If however, a customer fails to track their transactions and the sum of their debits exceeds their available balance – or a returned deposited item reverses funds that a customer believed were available – overdraft fees may be assessed to encourage proper account management.
  - If the concern is with banks authorizing debit card transactions into overdraft, consider requiring that the bank utilize memo-holds to account for customer activity between batch processing (subject to permitted exceptions). The Agencies could also consider the prohibition of overdraft fees on a processing day when funds that are held due to *pending* debit card transactions cause overdrafts on other transactions received for *settlement*.
  - Consider requiring merchants (under Regulation E) to notify their customers if they are submitting an authorization that may differ from the settlement amount. For example, a hotel seeking an authorization at check-in should notify the customer that with this authorization their bank may hold \$x against their account. This appropriately places the communication of “excess holds” on the originator, not the bank.
  - Customers who elect to opt out present unique risk-management challenges that could result in critical safety and soundness concerns for financial institutions, unless an institution can implement the appropriate risk management policies for such customers. Assuming that the Proposed Rule is adopted, financial institutions must be allowed to retain the right to manage the customers’ accounts and adjust features in a manner that balances the banking needs of the consumer with sound banking practices.

- Regulation may be premature. Financial institutions are actively working to improve the customer's experience and minimize adverse impacts caused by gaps in the payment systems (e.g., difference between authorization and settlement). For example, Visa is partnering with financial institutions and fuel companies that provide Automated Fuel Dispensers to have their payment processing systems updated to send a message back to banks at the end of transaction, so that the bank has knowledge of the final transaction amount within a few hours (where today settlement may take up to three days). This will significantly reduce under/over holds. In addition, many banks are investing significant resources into the development of new account management tools. By forcing a "one-size fits all" opt-out requirement on the industry, the Agencies will stifle more creative and practical solutions that better meet consumer needs.

### **III. Discussion of Risk-Management and Operational Concerns.**

The following provides a more detailed discussion of the risk management and operational challenges associated with this proposal.

#### **A. Partial Opt-Out Requirement.**

In the proposal, the Agencies distinguish between two categories of transactions: (1) ATM withdrawals and Point-of-Sale debit card transactions; and (2) "all others," which includes checks, ACH, etc. The proposal requires that institutions provide consumers with the option of opting out only of overdrafts at ATMs and for POS debit card transactions.

A partial opt-out requirement cannot be enforced and institutions cannot be compelled to provide overdraft services for checks and ACH. Since the overdraft services are discretionary to begin with, there is no legal basis to require an institution to provide overdraft services for specified payment categories. As will be outlined below, a requirement to provide overdraft services for payment of "other transactions" also results in safety and soundness concerns for the bank.

Partial opt-out for ATM and POS debit card transactions present significant risk-management and operational challenges.

#### **Background:**

Currently, we calculate "overdraft limits" for each customer and apply the limits to all categories of transactions that may post against insufficient available funds. For ATM or debit card transactions (which, once authorized, are non-returnable for insufficient funds when the merchant ultimately submits the transaction for payment) some banks now include the calculated overdraft limit in addition to the available funds in a deposit account when deciding to "authorize" a transaction. However, even if a debit card

transaction is authorized when sufficient funds appear to be available in the deposit account, overdrafts can result during posting.<sup>10</sup>

- The bank does not have the ability to implement customer-by-customer overdraft rules for declining debit card transactions. Modification of our debit card authorization processes to include an overdraft limit for some customers when authorizing a debit card transaction and NOT include the overdraft limit for other customers would be immensely challenging. The bank could set a calculated overdraft limit to zero so that debit card transactions would not be authorized into overdraft, but that would also prevent other transactions from paying into overdraft, resulting essentially in a “full opt-out.”
- Intent of proposal may be to prevent “authorization” of debit card transactions into overdraft – but posting challenges may result in safety and soundness concerns. Debit card transactions are non-returnable for insufficient funds once they are authorized by the bank. The bank may be reluctant to pay “returnable transactions” (e.g., checks, ACH) into overdraft – even though the customer has not opted-out of payment for check and ACH transactions – given the uncertainty related to final settlement amount of pending authorized debit card transactions.

The following example illustrates the difficulty of implementing a partial opt-out and the safety and soundness issues faced by the bank.

Example: Assume that a customer who has elected a partial opt-out has \$100 in his account. He initiates a \$50 debit card purchase that is authorized/approved by the bank. This transaction is not received for settlement that night, so the bank “holds” the \$50 amount as a pending debit. This hold reduces the available balance in the account by \$50. That same night, a \$75 check is received for payment. Since this customer has requested only a partial opt-out, the bank MAY elect to pay the \$75 check on the customer’s behalf, even though the account only has \$50 available for withdrawal. Assume the bank pays the check. As an accommodation to our customer, and because of the uncertainty surrounding whether the debit card transaction will actually post, Wells Fargo does not treat the check transaction as overdrawing the customer’s account for purposes of imposing an overdraft fee.

On Day 2, when the \$50 debit card transaction is submitted for settlement, the hold is removed; the debit card transaction is posted to the customer’s account resulting in an overdraft of \$25. The debit card transaction is non-returnable; it *must* be paid, even though it overdraws the account. However, under the Proposed Rule, because of the manner in which Wells Fargo handles the

<sup>10</sup> Consider the following example: VISA rules prevent a bank from holding funds in excess of three business days; however, there is no rule that prevents a merchant from taking more than three days to submit the transaction for payment. When the bank receives the transaction for settlement, it must be paid – even into negative available funds. (It is unclear if the Proposed Rule will permit the bank to assess the customer an overdraft fee in this situation since it does not appear to be covered by any of the proposed exceptions.) If other items have already been paid into overdraft, the payment of the debit card transaction may exceed the bank’s calculated overdraft limit (i.e., “break-out” risk).

transaction, the overdraft is matched to the debit card transaction and no overdraft fee may be assessed.

Under these circumstances, the bank is not receiving compensation for the risk it is assuming, nor will the customer have a fee to discourage over-spending. This reflects a very simple example – only a few transactions and low dollar amounts. Obviously the risks are much higher if the check reflects the customer's mortgage or other bills. As a result, the bank may be unwilling to offer "partial opt-out" or it may elect to return rather than pay the check.

The problem described above is not limited to situations in which a bank is dealing with a *known* pending debit card transaction that is the subject of a hold. Under VISA rules, although debit card transactions must be paid (once authorized) so long as they are presented within 30 days of the authorization, a bank may only "hold" funds for 3 days from the date of the authorization. The bank may be unwilling to accept the risk of paying returnable transactions (e.g., a check or ACH transaction) into overdraft, if there is a risk that a previously authorized ("must-pay") debit card transactions that is no longer the subject of a hold could be subsequently presented for payment, creating an overdraft for which the bank cannot receive a fee to compensate for the risk or to discourage over-spending. (In fact, when the transaction is subsequently presented for payment, the bank will not be able to match the transaction for which there is no hold to determine whether it was a late-posting transaction or one that was *never* authorized to determine if an overdraft fee can be charged for a permitted exception under the proposal.)

To continue the above example, assume on Day 2 a second debit transaction that was previously authorized the prior week is now submitted for settlement. If this is a \$75 item, the account is now \$100 overdrawn (\$100 less a \$75 check, less two debit card transactions of \$50 and \$75). This risk is further exacerbated by debit card transactions that settle for an amount higher than authorized (e.g., restaurants and automated fuel dispensers).<sup>11</sup> When these transactions are received for settlement, the cumulative amount may exceed the calculated amount that the bank deems available to pay items for a customer into overdraft. As a result, to avoid the risks from a safety and soundness perspective, the bank may need to be more conservative and choose not to pay returnable items (checks and ACH) into overdraft. It may also feel compelled to take full advantage of the maximum holds permitted under Regulation CC for deposits to transaction accounts. (Under current practices, we believe that most banks provide consumers with next-day availability for their deposits.)

### **B. Exceptions to Opt-Out**

**While the Agencies have noted that gaps in merchant payment systems exist (e.g., settlement amount may be greater than that authorized or some card transactions may not have been previously submitted for authorization), the exceptions are not comprehensive, and cannot be systematically implemented in today's complex processing environment.**

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<sup>11</sup> Even though transactions that settle for amounts greater than authorized is an acknowledged exception under the Proposed Rule and the bank is permitted to charge overdraft fees for these exceptions, this example highlights the difficulty of tracking for such discrepancies (from a risk perspective) during the decisioning process when multiple payments of different types are coming in for payment.

The example discussed in the previous section illustrates that the “assignment” of overdraft fees to specific transactions is an extremely complex process, which does not always reflect what actually triggered the overdraft. It is therefore entirely possible for a transaction that is subject to an “exception” to trigger multiple overdraft fees for non-exempt items. It does not seem that the proposed exceptions have taken this into account.

- **Deposited Items Returned.** If a customer makes a deposit into their account, which is returned from the maker’s financial institution, the bank will charge-back or reverse this amount from the depositor’s account. These funds may have been used to authorize a debit card transaction. When the debit card transaction is later submitted for payment, there may be insufficient funds remaining in the account, but the bank must still pay the debit card transaction even though it creates an overdraft and even if the customer has opted out. It is not clear under the proposal if the bank may assess an overdraft fee on items submitted against negative available funds in such a situation and we request clarification that this be added as an additional exception to consumer opt-out.<sup>12</sup>
- **Debit Card Transactions - Differences Between Authorization and Settlement Amounts.** Certain types of merchants (identified via “merchant category codes”) routinely submit authorizations that will differ from the final settlement amount (e.g., restaurant tip or automated fuel dispensers). The proposal provides, as an exception to consumer opt-out, that an institution may assess a fee for paying a debit card transaction that overdraws an account, if there were sufficient funds at the time of authorization, but the transaction settles for an amount *greater* than the authorization amount. We have several concerns and questions. First, the tracking of variances between authorization and settlement on a specific transaction is not currently available. Second, the Agencies need to be aware of the complexity associated with multiple transactions posting on a given day (this is the norm, not the exception). Under the Proposed Rule, it is unclear if the fee can be assessed **ONLY** on the particular debit card transactions or on the other items that now must be paid into negative available funds.

**Example:** Here is a simple example – that assumes a low-to-high posting order. Assume a customer has \$100 in his account and conducts three debit card transactions: (1) a restaurant transaction (previously authorized for \$10) that settles for \$14, (2) a \$40 transaction and (3) a \$50 transaction. The \$14 transaction will post first – but the \$4 difference between authorization and settlement will now cause the last transaction to be paid into negative available funds. Under the Proposed Rule, may the bank assess a fee on this transaction if the customer has opted-out? We are requesting clarification that the exceptions be expanded to cover not only the first transaction that is subject to the exception, but the resulting overdraft created by the ensuing transactions.

<sup>12</sup> While we are requesting that overdrafts caused by returns of deposited items be considered as an additional exception under the Proposed Rules, the difficulty of implementing the identified exceptions in our complex processing environment is still a significant issue. This is an example of why Wells Fargo may need to consider modification to our fund availability policy if the proposal goes forward as written.

- **Debit Card Transactions - Not Previously Authorized.** The bank does not have a method to “flag” transactions that are received for processing that have not been previously submitted for authorization. While the Agencies have proposed, as an exception to consumer opt-out, that an institution may assess a fee if a debit card transaction overdraws the account under these circumstances, again – it is unlikely that this transaction is the only debit card transaction received for payment. In a multiple transaction scenario similar to the one in the example described above, it is unclear under the Proposed Rule if a fee can be assessed only on THIS item (if it overdraws the account) – or depending on when/how this transaction is sorted for payment – whether fees can be assessed on OTHER transactions that may be paid into overdraft because of payment of the initial item.
- **Payment of Bank Fees.** Bank fees typically post to an account at the start of batch processing. These fees are typically assessed for services provided and may include: monthly account service fees, purchase of cashier’s checks, requests for stop payments, or overdraft/returned item fees from prior-day transactions. If these fees use available balance, subsequent debit card transactions may post into negative available funds and it is unclear under the Proposed Rule if the bank is permitted to assess an overdraft fee for these transactions. (The proposed exceptions do not address this situation.)

Regardless of whether there are available funds at the time of authorization for debit card transactions, gaps in merchant payment systems will result in an increased number of transactions POSTING into negative available funds. The specified fee exceptions are not sufficiently comprehensive to cover all the possible scenarios, so in many situations the bank will no longer be able to assess fees to compensate for bank risk, or to encourage the customer to manage their available funds. To minimize bank risk, the bank will be more inclined to return check and ACH transactions based on “notice of presentment” (pending authorized debit card transactions), effectively resulting in a “full” opt-out.

#### **IV. UDAP Analysis**

The Agencies state that (a) assessment of overdraft fees without an opt-out right and (b) assessment of fees for overdrafts caused by debit card holds in excess of the transaction amount, in each case “appears to be an unfair act or practice” under the standards articulated by the FTC. The acts and practices described above do not meet all three prongs of the FTC’s test for determining whether an act is “unfair” under 15 U.S.C. 45(n); and therefore, it would be improper to label them as such. Moreover, inappropriately declaring these acts or practices as “unfair” may result in serious unintended consequences.

**The Proposed Rule creates significant litigation risk for financial institutions.** Wells Fargo is concerned that the courts may be sympathetic to arguments that a practice that is unfair today was also unfair in the past. Consequently, we are concerned that this proposal may subject institutions to an increased risk of meritless challenges to past

practices, regardless of how the regulators attempt to frame their determination as applying only prospectively. At a minimum, the Agencies should reconfirm and emphasize the statement in the preamble to the Proposed Rule: "These proposals should not be construed as a definitive conclusion by the Agencies that a particular act or practice is unfair or deceptive."<sup>13</sup> Given the lack of prior regulatory or judicial criticism of these practices, Wells Fargo believes it is inappropriate for the Agencies to subject financial institutions to this new UDAP risk for past practices.

The Proposal is not a proper application of the Agencies' UDAP authority.

Under the standards articulated by the FTC, the Agencies may not determine an act to be "unfair" unless: (1) It causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. In addition, public policy may be considered, but may not serve as the primary basis for the determination that an act or practice is unfair. The practices identified in the Overdraft proposal do not meet the requirements for a determination of what is an "unfair" act under the FTC standards.

**1. Substantial injury**

Overdraft charges that are properly disclosed and charged do not constitute an "injury." An overdraft fee is no more of an "injury" than is any other properly disclosed service fee that may be imposed in connection with an account. Financial institutions establish a wide variety of maintenance and activity fees that are required to be disclosed pursuant to §230.4(b)(4) of Regulation DD (e.g., minimum balance fees, monthly service fees, fees for closing an account, fees related to deposits or withdrawals, fees for use of proprietary and nonproprietary ATMs, etc.).

A deposit account is not a cafeteria plan of services and service fees from which a customer is free to select. Wells Fargo is very concerned about the precedent that might be set by characterizing a properly disclosed service fee as an "injury" simply because the customer did not have the right to opt out of that particular service fee in connection with his or her account.

Payment of overdrafts for debit card transactions have similar consumer benefits as for checks and other items. We believe that the Agencies failed to give proper consideration to the fact that debit card transactions are not limited to one-time point-of-sale transactions. Debit cards are also used in connection with a wide variety of recurring bill payments, e.g. payments to utilities or mortgage payments, and insurance payments. Virtually any recurring payment that could be made using a check or automatic debit could also be made using a debit card, if a biller provides that option. Consequently, the very benefits that the Agencies conceded as arising from the payment of overdrafts in connection with check and ACH transactions can also arise in connection with debit card transactions. Like payment of checks and ACH items, payment of overdrafts for debit card transactions may allow the

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<sup>13</sup> 73 Fed. Reg. 28928

consumer to avoid late charges or other penalties for non-payment, as well as other adverse consequences.

Overdraft services provide benefits to consumers. Just as an overdraft fee is not an injury to consumers, neither is an overdraft service an injury. In the analysis of consumer injury in the Preamble, the Agencies concede that the payment of overdrafts may allow consumers to avoid merchant fees for returned check or ACH transactions, but asserted that there were no similar consumer benefits for ATM withdrawals and POS debit card transactions. We respectfully disagree with this assertion. There is a consumer benefit to payment of overdrafts for such transactions since it helps the consumer avoid the embarrassment of having a transaction declined at the point-of-sale; or avoid the inconvenience of not being able to withdraw funds at an ATM. As mentioned in the preceding paragraph, debit card transactions are also used for recurring bill payments; and the payment of such transactions into overdraft also allow consumers to avoid merchant fees for rejected payments.

## **2. Reasonable ability to avoid the injury**

Consumers are in the best position to avoid overdrafts. Consumers can easily avoid overdrafts and overdraft fees since they are in the best position to know what checks they have signed, what transactions they have authorized, and what withdrawals and deposits have been made. They simply need to record the transactions and make the appropriate additions and subtractions to their account balance. For customers who have difficulty keeping track of transactions, there are other options: (1) keeping extra money in the account as a cushion; (2) arranging with the bank to receive alerts notifying them when their balance drops below a certain amount or (3) linking a line of credit, savings account or credit card to their checking account.

Consumers are responsible for knowing available balances. The Agencies expressed concern that a consumer lacks sufficient information and cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available. As described in more detail below, we provide consumers with tools to check their available balances and check the status of pending transactions known to the bank. Consumers have some responsibility to know what the available balances are in their account. In fact, the Expedited Funds Availability Act (the "EFAA") and Regulation CC are intended, in part, to ensure that depositors have the information they need to be able to determine when a deposit to a transaction account will be available for withdrawal. We believe the EFAA and Regulation CC have successfully accomplished this purpose. We inform customers that they are responsible for recording their transactions and caution them that the available balance communicated by the Bank may not reflect all of the customer's outstanding transactions. We believe that institutions complying with Regulation CC provide sufficient information for a consumer to determine with reasonable certainty whether they have sufficient available funds in an account to cover the payments they authorized.

Financial Institutions provide consumers tools to manage their accounts. Not only do consumers have sufficient information to avoid the stated injury, but financial institutions also provide tools to help them determine their available balances and check the status of pending transactions known to the bank. Consumers can do a balance inquiry using various channels (ATM, phone or online) to determine available balances. At Wells Fargo, we provide alerts at our ATMs to notify the customer if they are making a withdrawal that will be in excess of their available balances. This allows the customer to cancel the transaction before it goes into overdraft. Wells Fargo also posts deposits (credits) to our customers' accounts before debits. This posting practice provides the consumer with a powerful tool to avoid overdrafts on debit card transactions that are authorized into overdraft. It allows a customer to proceed with their transaction at a point-of-sale or an ATM and then make a subsequent deposit or transfer that same day to avoid overdraft fees.

Concerns regarding Debit Holds can be addressed through consumer education and disclosure. The Agencies expressed particular concerns that consumers are generally unaware of the practice of debit holds and therefore could not reasonably avoid overdrafts and overdraft fees arising from the practice of debit holds. However, these concerns could be adequately addressed by better merchant disclosures at the point of sale and better consumer education. A compelling case for consumer education is not the same as a compelling case for labeling bank behavior as "unfair." If there is uncertainty about the length or the amount of the holds, the consumers can use tools provided by the banks to determine their available balances and to determine if there is a pending hold on balances. These tools, together with our posting practices (where we post credits to the consumer's account before debits), can help consumers avoid overdrafts on debit card transactions that are authorized into overdraft. The customer can make a same day deposit or transfer to cover the transaction before it overdraws the account.

Uncertainties that may exist in connection with debit holds do not equate to a lack of meaningful choice. Consumers, properly advised of the practice of placing holds in connection with debit card transactions can choose to either proceed with those transactions or refrain from the use of debit cards.

Merchant behavior should not be used to define an 'unfair' practice for financial institutions. To the extent that any uncertainty arises from the fact that a merchant requested authorization for a transaction amount different than the actual amount of the transaction concerns a practice of the merchant, not the financial institution. It is inappropriate to use the behavior of a merchant as a basis for finding that the financial institution has engaged in an "unfair" practice.

Consumers do not lack meaningful choice regarding overdrafts. At least one court has found in connection with a traditional overdraft service that there was not the lack of meaningful choice needed to establish unfairness.<sup>14</sup> In Saunders v. Michigan Ave. Nat. Bank, the court held that the bank's practices of charging an overdraft fee was

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<sup>14</sup> Saunders v. Michigan Ave. Nat. Bank, 662 N.E.2d 602 (Ill. Ct. App. 1996)

not “unfair” under Illinois Consumer Fraud Act. The court applied the FTC Act analysis and determined that there was no lack of meaningful choice regarding overdrafts. The court noted that the plaintiff had control over whether she would be assessed an overdraft fee and was also free to select another bank. The court concluded that the bank provided the plaintiff “with all of the information necessary to make a meaningful choice in selecting banks.”

### **3. Countervailing benefits**

Consumers have significant benefits from overdraft services. There are significant countervailing benefits to having overdraft services for payment of checks, ACH transactions, ATM and debit card transactions (including important payments such as mortgages, credit cards, and bill payments). The overdraft service allows the consumers to avoid returned item fees, multiple fees for re-presented items, and merchant fees on returned items, as well as additional late fees or penalties which may be imposed by a creditor. The customer also avoids other adverse consequences, such as having negative information entered into credit reporting bureau databases and negative check databases, or having services terminated.

Debit Cards provide benefits for consumers who may not have access to credit cards or cash. The Agencies state that if debit card transactions were denied, this would give the consumer the opportunity to provide other forms of payment without incurring any fees. However, some consumers may not have other payment alternatives and may not have access to credit cards or cash. In fact, it is feasible that a merchant will elect not to accept a check from a consumer whose debit card was just declined, perhaps leaving the customer without means to complete the purchase. As we mentioned above, payment of debit cards into overdraft also helps consumers avoid the embarrassment of having transactions declined, and avoid merchant fees for rejected transactions. We provide consumers with tools to determine available balances and check the status of pending transactions known to the bank. These tools, combined with our posting practices (where we post credits to the account before debits) gives customers the ability to avoid overdrafts by making a same day deposit or transfer to cover an debit transaction that may have been authorized into overdraft.

The proposal may adversely affect the availability of debit cards. In the Agencies’ discussion of countervailing benefits, the Agencies assert without basis that the availability of debit cards would not be adversely affected by the proposal. We respectfully disagree. If the proposal for debit card holds is implemented, we believe that availability of debit cards for consumers will be adversely impacted. Transactions that are authorized when funds are available in the deposit account may no longer be available when the transaction is received for settlement due to gaps in the merchant payment system. The fee exceptions noted in the proposed exceptions are not broad enough to protect financial institutions. Institutions may be increasingly reluctant to issue debit cards if they cannot assess overdraft fees to discourage customers from conducting transactions in excess of their available funds.

#### **4. Any Application of UDAP to Overdraft Services Should Be Limited to "Bounce Protection" Programs and Account Balance Disclosures**

For the reasons discussed above, we believe that it is incorrect to conclude that such acts or practices are, at present, "unfair" under the FTC standards. We believe that the lack of support for many of the provisions in the Proposed Rule should be sufficient to cause the Agencies to reconsider the proposal in its entirety. However, if the Agencies are determined to exercise their authority under 15 U.S.C. §57a(f)(1), we believe that the Agencies should limit that exercise to "bounce protection" programs and disclosures of account balances.

For the reasons discussed previously in this letter and in our Regulation DD letter, Wells Fargo believes that the Agencies are required to limit any exercise of their UDAP authority under Regulation AA and Regulation DD to only those acts and practices that have been the subject of previous regulatory concern and for which there is a legal basis under the FTC Act, such as "bounce protection" programs that actively promote overdraft services. The disclosure of account balances that include funds to be used in connection with a discretionary overdraft service arguably is a promotion of such services and can reasonably be addressed in connection with rules focused on "bounce protection" programs. To the extent that the Agencies still feel that programs other than "bounce protection" programs need to be addressed, they should address them under other authorities, such as Regulation DD or Regulation E.

#### **5. Prospective Application of Final Rule**

We also request that, if the Agencies proceed with some version of the Proposed Rule, the Agencies make clear that the rules apply prospectively only. Such language should make it clear that any institution that engaged in any of the acts or practices specified in the Proposed Rule prior to the effective date of the final rule, but otherwise complied with applicable law, will not be deemed to have been engaged in any unfair or deceptive acts or practices. This is especially important if the final rule is applied to traditional overdraft services not promoted to the public.

Even with the addition of such specific language, we are very concerned that institutions will be inundated with meritless claims and forced to expend enormous amounts of resources defending allegations that acts and practices occurring before the effective date of the rule that have never before been the subject of concerns by the Agencies amount to unfair conduct. This concern would be heightened if the Agencies were to make a final determination that traditional overdraft services not promoted to the public constitute an unfair act or practice under 15 U.S.C. §45(n).<sup>15</sup>

Therefore, if the Agencies determine to adopt some form of a UDAP rule, we ask the Agencies to take steps to reduce the risk that institutions will incur expenses

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<sup>15</sup> To date the Agencies have made it clear that no such final determination has yet been made. Rather the Agencies have only stated that the acts or practices specified in the Proposed Rule "appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC." [Emphasis added] See 73 Fed.Reg. 28929 (May 19, 2008).

defending against meritless claims concerning behavior occurring before the effective date of the final rule. 15 U.S.C. §57a(f)(1) gives the Agencies authority to issue a UDAP regulation prospectively without expressly concluding that a practice is unfair under the FTC standards.<sup>16</sup> Therefore, in addition to requesting that the Agencies make it clear that any final rule apply prospectively only, we also respectfully request that the Agencies refrain from reaching a final determination that the current practices identified in the Proposed Rule, and particularly those acts and practices that concern traditional overdraft service not promoted to the public, constitute an unfair act or practice under 15 U.S.C. §45(n) and the standards articulated by the FTC.

## **V. Specific Comments in Response to Agencies' Requests for Comment.**

### **Section \_\_.31 – Definitions**

The definition of “overdraft services” in the Proposed Rule is overly broad and goes beyond marketed “bounce protection” programs to include even discretionary overdraft programs that are not promoted to the public. As discussed in more detail in other parts of this letter, the FTC Act does not support a broad definition of “overdraft services” for UDAP purposes.

The use of the term “overdraft services” is a misnomer since it implies that the bank always has a choice about whether to cover overdrafts, when in fact many overdraft situations occur during the normal course of transaction processing and may be out of the control of the bank, such as those created by posting previously authorized (“must-pay”) debit card transactions.

The definition of “Overdraft Services” excludes a “service that transfers funds from another account of the consumer” to cover an overdraft. We request that this exclusion drop “of the consumer.” The definition of overdraft service should exclude any service that covers overdrafts from any deposit account, even if the account is owned by another person (e.g. a family member).

### **Section \_\_.32 – Unfair acts or practices regarding overdraft services**

#### **Section \_\_.32(a) Consumer Right to Opt Out**

**The Agencies request comment on whether the scope of the consumer’s opt-out right under §\_\_.32(a)(1) should be limited to ATM transactions and debit card transactions at the point-of-sale.**

- We oppose limiting the scope of the consumer’s opt-out right to ATM transactions and debit card transactions at the point of sale. Partial Opt-out for ATM and POS debit card transactions present significant challenges. (See

<sup>16</sup> 15 USC 57a(f)(1) provides that the Agencies “shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices.”

discussion above with respect to our concerns with enforceability of Partial Opt-out, operational concerns and safety and soundness concerns.)

- We also wish to point out that “Point-of-Sale” (POS) debit card transactions are not clearly defined and consumers may be confused about the scope of their opt-out preferences. The focus on “POS debit card transactions” does not take into consideration the fact that consumers increasingly use their debit card transactions for recurring bill payments, such as utility payments, or for online purchases. Not all debit card transactions are submitted for authorization. Accordingly, even if the consumer has opted-out, debit card payments not submitted for authorization may come in through the normal processing channels and still get paid into overdraft. The proposed exceptions do not cover this situation. The second exception in the Proposed Rule is focused only on transactions not previously authorized, presented by paper-based means. We request that the exception not just be limited to paper-based transactions, but to all transactions not previously authorized.

**The Agencies request comment on the potential costs and consumer benefits for implementing a partial opt-out that applies only to ATM transactions and debit card transactions at the point-of-sale.**

We do not believe that partial opt-out is feasible for the bank to implement.

**The Agencies request comment on whether there are other circumstances in which an exception may be appropriate to allow an institution to impose a fee or charge for paying an overdraft even if the consumer has opted out of the institution’s overdraft service, and if so how to narrowly craft such an exception so as not to undermine protections provided by a consumer’s opt-out election.**

As discussed in Section III (B) of this letter, the fee exceptions noted in the proposal are not clear or comprehensive and will be extremely difficult to implement – especially given the multitude of transactions that typically post to a consumer’s accounts. It is unclear under the Proposed Rules if the intent of a fee exception applies only to a specific transaction. We request that the Agencies clarify that a fee exception should apply not just to the specific transaction subject to the exception, but to the overdrafts that may cascade from paying the exempted transaction. (See our example in Section III(B))

If the Agencies proceed as proposed, the following explicit exceptions/clarifications need to be considered:

- The Agencies have proposed an exception for debit card transactions presented “by paper- based means” that were not previously authorized. We request that the exception not be limited to “paper-based” transactions, but apply broadly to all transactions that were not previously authorized.
- If a merchant submits a transaction more than 3 days after it was authorized, the bank can no longer “hold” funds. This item can not be returned for insufficient funds. If the customer does not have sufficient available funds in their account,

overdraft fees can be assessed on this transaction and on other transactions posting that day. The customer benefited from the authorization of the purchase; and retains the responsibility for ensuring that he does not initiate additional transactions in excess of available funds.

- A new exception should be added to deal with situations in which the overdraft is a result of subsequent adjustment to the consumer's account balance due to a deposited check that is subsequently returned to the bank. (Deposited checks that are later returned are mentioned at 73 Fed.Reg. 28956 (May 19, 2008) of the proposal, but the issue should be more generally applied to overdrafts by adding it to the list of exceptions discussed above.)
- Bank fees typically post to an account at the start of batch processing. These fees are typically assessed for services provided and may include: account monthly service fee, purchase of cashier's checks, or requests for stop payments. If these fees use available balance, debit/ATM transactions may post into negative available funds. We request that the Agencies clarify that the bank may assess an overdraft fee for these debit/ATM transactions.

Clarification Requested:

Opt-out Timeframes. The proposal requires that the bank provide the consumer with the right to opt-out and a "reasonable period to exercise that opt-out." We request clarification on what is a "reasonable period" for opt-out before a transaction can be paid in overdraft. We suggest that new customers have a period no more than 30 days in which to communicate their opt-out preference. If the customer has not expressed their preference within that timeframe, the transactions can be paid into overdraft.

The proposal also provides that institutions must comply with a consumer's opt-out request "as soon as reasonably practicable" after the institution receives it. We request that the Agencies allow an institution to determine what is a reasonable period to effectuate a request.

### **Other Overdraft Practices**

#### **Transaction Clearing Practices**

**The Agencies request comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a consumer's account. Under such an approach, institutions could use an alternative clearing order, provided that it discloses this option to the consumer and the consumer affirmatively opts in. The Agencies request comment on how such a rule would impact an institution's ability to process transactions on a real-time basis.**

We oppose this proposal. The commentary to Section 4-303 of the Uniform Commercial Code cites two reasons why the drafters have never established a posting order for the payment of items. First, it is impossible to state a rule that would be fair in all circumstances. Second, since the drawer should have enough money on deposit to cover

all items, the drawer has no basis for urging that one item be paid before another. We also have the following operational concerns:

In today's posting process, the bank must process over 30 million items a day within a tight timeframe in order to accurately reflect current account balances in a timely manner. Regulations dictate that the bank must make pay or return decisions according to specified timelines, which has a significant impact on both customer experience and bank risk. The breadth of payment methods available to consumers (checks, ACH, transfers, debit card, ATM, etc.) has created significant complexity to the posting process. This is magnified by operational issues in the merchant payment systems that result in gaps between authorization and settlement of debit card transactions.

The bank attempts to balance the customer experience and bank risk. In today's environment there is no perfect solution. There are pros and cons associated with both high-to-low and low-to-high processing. For example, under a low-to-high posting process it would be far more likely that a consumer's mortgage payment would be returned unpaid. While not feasible today, in the future we expect banks to move towards real-time posting of transactions – an order that is perhaps most intuitive to consumers. Mandating a particular sort order would inherently impede such innovation.

Additionally, the Agencies requested comment on a proposal that if the bank employs an alternative posting order – the customer must affirmatively opt-in. Implementation of a posting order requires significant programming and system complexity – there is simply no practical way to treat the transactions of a subset of customers differently in connection with the process of posting transactions. Such an opt-in process would also imply that any future modification to posting order would be designed to solely impact fees, rather than represent innovation designed to minimize the payment system gaps between authorization and settlement and the varied methods a customer may use to conduct transactions.

#### **State Exemptions from the Proposed Rule**

**The Agencies request comment on whether states should be permitted to seek exemption from the Proposed Rule if state law affords greater or substantially similar level of protection.** Wells Fargo strongly urges the Agencies not to permit states to seek exemption from the Proposed Rule. Compliance with state law would impose an undue burden on institutions in having to comply with applicable state law and is not necessary to achieve the Agencies' goals. National banks like Wells Fargo, which operate in dozens of states nationwide, are able to offer a high level of efficiency and customer service by adopting and integrating operating systems and procedures designed to comply with a single uniform national standard. Eroding this uniform system by permitting a patchwork assortment of state regulations – many of which would likely be inconsistent with one another – would severely undermine the bank's ability to offer customers the advantages deriving from this integrated system, with its attendant efficiencies.

**Effective Date**

**The Agencies request comment on when any final rules should be effective and whether a one-year time period is appropriate or whether the period should be longer or shorter.**

Wells Fargo asks that the Agencies be mindful of the cumulative effect of the Proposed Rule in conjunction with the Regulation Z proposals from June 2007 and May 2008, the proposed rules for Regulation DD, and various regulations recently issued in accordance with the FACT Act. The Regulation Z proposals from June 2007 *by themselves* already would require substantial system changes for which Wells Fargo requested a two-year implementation period. Based on the extent of the system and procedural changes that will be required and the complexity of the changes, as well as extensive testing requirements, Wells Fargo requests that the effective date be at least two years from the date any final regulation is published in the Federal Register.

If you have any questions or would like to discuss any of the issues raised in this letter, please contact me at (415) 222-5350 or [shirley.n.thompson@wellsfargo.com](mailto:shirley.n.thompson@wellsfargo.com).

Sincerely yours,



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