



R. MICHAEL MENZIES SR.
Chairman

JAMES D. MACPHEE
Chairman-Elect

SALVATORE MARRANCA
Vice Chairman

LARRY W. WINUM
Treasurer

WAYNE A. COTTLE
Secretary

CYNTHIA L. BLANKENSHIP
Immediate Past Chairman

CAMDEN R. FINE
President and CEO

March 30, 2009

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

Submitted via email

Re: Electronic Fund Transfers, Docket No. R-1343

Dear Ms. Johnson:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on a proposed rule by the Board of Governors of the Federal Reserve System (“the Federal Reserve”) amending Regulation E, which implements the Electronic Fund Transfers Act. This proposed rule would prohibit financial institutions from assessing an overdraft fee for automated teller machine (ATM) withdrawals and one-time debit card transactions at the point of sale (POS) that overdraw consumer accounts without the consumer’s consent. Additionally this proposed rule would prohibit institutions from assessing an overdraft fee when the account is overdrawn because of a debit card transaction hold exceeding the actual transaction amount.

Background

On May 19, 2008, the Federal Reserve, Office of Thrift Supervision, and National Credit Union Association (collectively, the Agencies) issued proposed

¹ The Independent Community Bankers of America represents nearly 5,000 community financial institutions of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community financial institutions compete in an ever-changing marketplace.

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing over 300,000 Americans, ICBA members hold \$1 trillion in assets, \$800 billion in deposits, and \$700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA’s website at www.icba.org.

amendments to Regulation AA (Unfair or Deceptive Acts or Practices referred hereafter as “UDAP”) to prohibit institutions from engaging in certain acts or practices in connection with consumer credit card accounts and overdraft services for deposit accounts.

The proposed amendments only affected overdraft services where the decision to pay a transaction that would otherwise overdraw the customer’s account is automated and based on pre-determined criteria. The amendments did not apply to overdraft lines of credit, where the overdraft is covered by a draw on a separate line of credit, or overdraft balance transfers, where the overdraft is covered by a transfer from another account. As proposed, the UDAP rule would have prohibited fees for covering overdrafts unless the consumer is given a clear and conspicuous notice about the program and a reasonable opportunity to opt out.

Concurrent with the proposal of the Regulation AA amendments, the Federal Reserve separately issued a proposal under Regulation DD (Truth in Savings), which set forth proposed form, content, and timing requirements for providing the overdraft protection opt-out notice. The Regulation DD proposal also set forth proposed revisions that would require all institutions to provide in periodic statements aggregate totals for overdraft and returned item fees for the statement period and the year-to-date. Currently, only institutions that promote the payment of overdrafts are subject to this requirement. The Regulation DD proposal also addressed balance disclosures provided to consumers through automated systems, such as ATMs and online banking services.

These provisions were adopted in final form under Regulation DD. However, the agencies are not taking action on the Regulation AA and Regulation DD proposals regarding consumers’ right to opt out of overdraft services. Instead, in response to comments received, on December 18, 2008, the Federal Reserve issued proposed amendments to Regulation E (Electronic Fund Transfers) intended to: 1) provide consumers a choice regarding payment of overdrafts for ATM withdrawals and one-time debit card transactions; and 2) prohibit financial institutions, in most cases, from assessing an overdraft fee when the overdraft is a result of a debit card hold placed on a consumer’s account if the amount is greater than the actual transaction amount.

The proposed rule includes two alternative approaches - opt out or opt in - for providing consumers a choice regarding payment of ATM withdrawals and one-time debit card transactions that overdraw their account. The proposed rule also includes model forms that may be used to satisfy disclosure requirements and facilitate compliance.

Overview of ICBA Comments

Community banks traditionally have deep ties to their customers and the communities they serve. Historically, community banks paid overdrafts on

accounts as a courtesy and determined whether to clear an overdraft on an *ad hoc* basis. Recently, financial institutions have taken advantage of new technologies and have automated the process. Typically, these automated overdraft programs allow consumers who meet specific parameters to overdraw an account up to pre-set limits. Moreover, financial institutions stress that automation reduces costs and ensures consistent customer treatment.

While consumer advocates complain these programs may be a trap for the unwary, overdraft services are in reality a great convenience to bank customers, and even the Federal Reserve's own consumer testing showed that consumers value having overdraft services, particularly to cover important transactions and bills. Most consumers appreciate the service, as it helps them avoid the inconvenience of merchant fees for returned checks and enables them to purchase goods and services at POS locations without the fear of declined transactions.

Below, please find a summary of our comments.

Governing Regulation

- ICBA commends the Agencies for not proceeding with their proposed amendments governing overdraft services using authority granted under the FTC Act regarding unfair or deceptive acts or practices.
- ICBA urges the Federal Reserve to carefully consider the impact of the recently finalized rules covering overdraft services before considering the implementation of additional regulatory requirements that are superfluous and more costly for community financial institutions, yet provide no additional benefit for consumers.

Consumer Choice Regarding Partial Receipt of Overdraft Services

- ICBA strongly opposes an approach which allows consumers the ability to exercise choice regarding the extension of overdraft services for ATM withdrawals and one-time debit card transactions only as such an approach is not operationally feasible to implement and imposes unwarranted customer inconvenience and confusion.
- If the Federal Reserve deems it appropriate to proceed with an opt-out approach for overdraft services, the ICBA strongly urges applying the approach to all transactions – checks, debit card, ACH, online banking, telephone-initiated and other types of debit transactions. The application of an opt-out provision should be at the account level, not the transaction level.
- ICBA appreciates the Federal Reserve's efforts to afford financial institutions the ability to assess overdrafts in certain situations, particularly those where transactions are not processed in real time.
- ICBA urges the Federal Reserve to allow at least 24 months to implement the final rule.

Opt-Out Approach

- ICBA strongly urges the Federal Reserve to afford financial institutions the flexibility to select one or more methods (mail, telephone, electronic means, or in-person) for consumers to opt out of overdraft services. This flexibility allows financial institutions to tailor opt-out methods to their operational capabilities and markets.
- ICBA recommends a 15-day safe harbor for providing consumers ample time to opt out of receiving overdraft services.
- ICBA opposes any requirement for financial institutions to provide a toll-free telephone number for consumers to opt out of receiving overdraft services on ATM and one-time debit card transactions.
- ICBA supports the ability for financial institutions to implement the customer's choice to opt out of overdraft services at either the account or the product level by offering two different accounts (one with overdraft services and one without overdraft services).
- ICBA strongly urges the Federal Reserve to provide financial institutions with the flexibility to include opt-out notices either annually or on the periodic statement when overdraft services are triggered by any transaction.
- ICBA opposes a requirement to segregate the opt-out notice from other account disclosures, because providing a separate notice will not ensure that the notice will be seen by the consumer.
- ICBA does agree with the Federal Reserve's model form language and finds the language inclusive of community banks' operating practices.
- ICBA urges the Board to provide a 10-business day safe harbor for the "as soon as reasonably practicable" standard.
- ICBA urges the Federal Reserve to allow financial institutions to restrict the ability of a customer to opt back in to receiving overdraft services.
- ICBA recommends the Federal Reserve afford financial institutions the flexibility to offer a number of methods that consumers can use to revoke their prior opt-out election. This flexibility includes revoking the opt-out orally or in writing, whether by telephone or in-person and electronically, and in writing.

Opt-in Approach

- ICBA strongly opposes the opt-in requirement. The final rule should allow financial institutions to offer customers the choice to opt out of the

overdraft services rather than require that consumers affirmatively opt in to receiving the service.

- If the Federal Reserve imposes such a requirement, we strongly support providing financial institutions with flexibility as to how the opt-in notice can be provided.
- As previously noted, ICBA opposes requiring community financial institutions to obtain a toll-free telephone number is an unnecessary expense for many community banks with local customer bases.
- ICBA opposes the requirement to provide consumers written confirmation of their choice as it contributes no benefit to the consumer who already knows and understands what they choose on the account, and represents an unnecessary expense for financial institutions.
- ICBA strongly opposes the requirement for financial institutions not to condition the payment of any overdrafts for checks, ACH transactions, or other types of transactions on the consumer affirmatively consenting to the institution's payment of overdrafts for ATM withdrawals and one-time debit card transactions.
- ICBA believes that community banks should have the flexibility to implement the opt-in approach at either the account or product level by offering two accounts (one with overdraft services and one without overdraft services) if the Federal Reserve deems it appropriate despite ICBA opposition to implement an opt-in approach.
- Should the Federal Reserve adopt the opt-in approach, application should be limited to accounts opened after any compliance deadline and should not be applied to current account holders.
- If an opt-in approach is implemented, we strongly urge the Federal Reserve to provide financial institutions with flexibility in the notice, timing and format requirements.
- If the Federal Reserve plans to conduct additional consumer testing or consider a revised model form for an opt-in requirement, ICBA strongly urges that a revised proposed rule be published before any amendments are finalized.

Debit Holds

- ICBA generally agrees that consumers should not incur overdraft fees if the overdraft is caused by a hold that exceeds the actual transaction amount, however, it would be operationally challenging, if not impossible, to ascertain in an automated processing environment the correlation between the hold amount, actual transaction amount and any overdraft. This technological capability does not exist today.

- ICBA appreciates the Federal Reserve's willingness to establish a safe-harbor permitting financial institutions to assess an overdraft fee if the overdraft is related to a debit hold, however, two hours is too short. ICBA recommends an end of business day as a reasonable period of time for removing holds.
- ICBA strongly urges the Federal Reserve to require merchants (or their acquirers or processors) to promptly submit transactions covered by this rule for settlement within the timeframe of the Federal Reserve's safe harbor.

Governing Regulation

As previously noted, the Agencies originally proposed regulations governing overdraft services using authority under the Federal Trade Commission (FTC) Act, Section 5(a).

In 2005, financial services agencies issued joint guidance on overdraft protection programs and the Federal Reserve issued new rules under the Truth in Savings Act's Regulation DD shortly afterward. In addition, the Federal Reserve published final amendments to Regulation DD in December 2008 that will extend to all financial institutions the requirement to disclose on periodic statements the aggregate dollar amounts charged for overdraft and returned item fees for the statement period and the year-to-date, and also require financial institutions that provide account balance information through an automated system (including, but not limited to, an ATM, Internet web site, or telephone response system) to provide a balance that does not include additional funds that may be made available to cover overdrafts.

ICBA Comments: ICBA commends the Agencies for not proceeding with their proposed amendments governing overdraft services using authority granted under the FTC Act regarding unfair or deceptive acts or practices. ICBA's comment letter to the Agencies dated August 4, 2008, strongly urged not using FTC Act authority to address overdraft services given the potential for negative unintended consequences. For example, defining an act or practice as unfair or deceptive in a UDAP rule means the practice is always unfair or deceptive. Unlike other rules which can be limited to prospective application, defining an act or practice as unfair or deceptive cannot be limited to future application. Consequently, the Agencies' identification of an act or practice as unfair or deceptive in a UDAP rule would become the benchmark for court proceedings. It would be irrelevant that the activity or transaction in question was considered acceptable when it occurred.

In addition, financial institutions have incurred significant expenses to update procedures and processes to comply with the changes required by the joint guidance and the Regulation DD amendments. Moving forward, ICBA urges the Federal Reserve to carefully consider the impact of these recent rules

covering overdraft services before considering the implementation of additional regulatory requirements that are superfluous and more costly for community financial institutions, yet provide no additional benefit for consumers.

Consumer Choice Regarding Partial Receipt of Overdraft Services

The proposed rule defines “overdraft service” as “a service under which a financial institution assesses a fee or charge on a consumer’s account held by the institution for paying a transaction (including a check or other items) when the consumer has insufficient or unavailable funds in the account.” The term does not include lines of credit subject to Regulation Z (Truth in Lending), or “a service that transfers funds from another account held individually or jointly by a consumer.”

While individual programs vary, there are certain common characteristics associated with automated overdraft services, commonly referred to as overdraft protection programs:

- Consumers are covered once they satisfy the bank’s pre-set criteria;
- Financial institutions tend to periodically review individual accounts to ensure the privilege is not abused;
- Consumers are informed that coverage of an overdraft is not automatic but at the bank’s discretion;
- The service extends to all debit transactions – checks, ATM withdrawals, ACH transactions, debit card transactions, pre-authorized automatic debits, telephone-initiated funds transfers and online banking transactions; and
- A flat fee is charged each time an overdraft is paid, and a daily fee may apply each day the overdraft is outstanding.

Not all community banks offer overdraft services. Community banks that choose to offer the service do so as a convenience for their customers. These financial institutions also report that consumers appreciate the service. Many also offer customers the opportunity to opt out from the service, although they report few customers do opt out.

For most community financial institutions, automated overdraft services provide a means to reduce the cost of manually reviewing individual items, while ensuring that all consumers are treated consistently with respect to overdraft payment decisions. When the bank pays overdrawn transactions, consumers receive significant benefits because they avoid additional returned check fees from payees and other adverse consequences, such as the furnishing of negative information to a consumer reporting agency or a substantial late payment fee.

Under the proposal, if the institution allows a consumer’s account to overdraw due to ATM withdrawals or one-time debit card transactions, it would

generally be prohibited from assessing an overdraft fee or charge except as permitted under the exceptions discussed below. The rule would not, however, limit the institution's ability to debit the consumer's account for the amount of the overdraft, if the institution is permitted to do so under applicable law.

A one-time debit card transaction includes a transaction at "the point of sale (at a merchant or in a store), in an online transaction, or in a telephone transaction."

ICBA Comments: ICBA strongly opposes an approach which allows consumers the ability to opt out or not opt in to overdraft services for ATM withdrawals and one-time debit card transactions as such an approach is not operationally feasible to implement and imposes unwarranted customer inconvenience and confusion.

Consumers are increasingly using debit cards instead of paper checks and cash for a myriad of payments including POS transactions, single and recurring bill payments, and online purchases. Although systems – merchant processing systems, card networks, and bank processing systems – have the capability to provide descriptive transaction information, these systems do not possess the capability to distinguish one-time debit card transactions from other recurring debit card transactions. For example, systems are unable to distinguish between debit card transactions for the purchase of a cell phone at the local Verizon store from a debit card transaction paying a recurring Verizon monthly phone bill.

Requiring financial institutions to offer consumers the ability to partially receive overdraft services is completely unworkable. In fact, this requirement may be sufficiently burdensome and operationally challenging that many financial institutions will abandon overdraft services entirely and simply return or reject any transaction that would overdraw an account and charge an almost identical insufficient funds fee. Without overdraft services in place, consumers will have to contend with additional problems such as merchant fees, a negative entry on a credit report or check verification system, and merchants requiring cash only. Consumers will also endure the embarrassment suffered when a transaction is rejected and a tainted reputation for making payments, which can be especially harmful in today's troubled economic environment.

Moreover, a partial approach creates an environment ripe for consumer confusion regarding which transactions are subject to overdraft services. Imagine the financial institution's customer service representative attempting to explain to the consumer that the opt-out provision would apply to most debit card transactions except in those instances where the debit card is used for recurring bill payments.

If the Federal Reserve deems it appropriate to proceed with an opt-out approach for overdraft services, the ICBA strongly urges applying the approach

to all transactions – checks, debit card, ACH, online banking, telephone-initiated and other types of debit transactions. The application of an opt-out provision should be at the account level, not the transaction level.

Given the implementation challenges, ICBA urges the Federal Reserve to allow at least 24 months for implementation of the final rule. Financial institutions will need sufficient time to work with core processors and software vendors to modify and test their systems. Financial institutions will also need time to train employees and educate customers. Card networks need time to incorporate these changes in their network rules and systems. Additionally, merchants and merchant processors will have similar implementation responsibilities.

Exceptions

In the proposal rule, the Federal Reserve grants two exceptions where a financial institution may assess overdraft fees even if the consumer has opted out or has not opted in to receiving overdraft services.

1. The financial institution has reasonable belief that sufficient funds were available at the time it authorized the transaction. Examples of this include transactions where balances are not updated real-time, a previously deposited item is later returned, the settlement amount exceeds authorized amount (e.g. gas station transactions), and the transaction was force paid. This exception does not include instances where a merchant does not submit a transaction for authorization.
2. The debit card transaction is presented to the financial institution by paper and was not previously authorized. This exception would apply to transactions where the merchant takes a card imprint and later submits a sales slip to an acquirer.

ICBA Comments: ICBA appreciates the Federal Reserve's efforts to afford financial institutions the ability to pay an item and assess an overdraft fee in certain situations, particularly those where transactions are not processed in real time.

Opt-out Approach

Scope of Opt-Out

The Federal Reserve proposes to limit the scope of the opt-out requirement to ATM withdrawals and one-time debit card transactions. To minimize the cost impact on financial institutions, the Federal Reserve anticipates allowing substantial lead time for institutions to implement the necessary programming changes. The Federal Reserve requests comments on whether the proposed opt-out requirement should also apply to recurring debit card transactions and on an appropriate implementation period for the proposed rule.

This proposed approach would require financial institutions to provide consumers with notice of the right to opt out of the institution's overdraft service for ATM withdrawals and one-time debit card transactions. The notice would generally be provided at account opening or any time before fees or charges are assessed. The proposed opt out would not apply to other types of debit transactions, including checks and preauthorized electronic funds transfers (EFTs).

ICBA Comments: As previously stated, the ICBA strongly urges applying the opt-out approach to all transactions – checks, debit card, ACH, online banking, telephone-initiated and other types of debit transactions. The application of an opt-out provision should be at the account level, not the transaction level.

Reasonable Opportunity to Opt Out and Reasonable Methods

Under the proposed rule, the consumer must have a reasonable opportunity to opt out of an institution's overdraft service for ATM withdrawals and one-time debit card transactions once the consumer receives an opt-out notice. The Federal Reserve provides several examples as a safe harbor to illustrate what constitutes a reasonable opportunity to opt out, including reasonable methods for doing so.

- *By mail.* The financial institution provides a form for the consumer to fill out and mail. The consumer is given 30 days to opt out from the date the consumer is provided the initial opt-out notice before an overdraft fee or charge can be assessed to the consumer's account.
- *By telephone.* The financial institution provides a toll-free telephone number that consumers may call to opt out. The consumer is given 30 days from the date the consumer is provided the initial opt-out notice to opt out before an overdraft fee or charge is assessed to the consumer's account.
- *By electronic means.* The financial institution provides an electronic means to opt out, such as a form that can be accessed and processed at an Internet web site, provided that the financial institution directs the consumer to the specific web site address where the form is located, rather than solely referring to the institution's home page. The consumer is given 30 days from the date the consumer is provided the initial opt-out notice before an overdraft fee or charge is assessed to the consumer's account.
- *At the time of account opening.* The financial institution provides the opt-out notice prior to or at account opening, and requires the consumer to decide whether to opt out of the institution's payment of ATM withdrawals and one-time debit card transactions pursuant to the financial institution's overdraft service as a necessary step to opening the account.

The Federal Reserve also requests comments on whether it should require institutions to provide a toll-free telephone number to ensure that consumers can easily opt out.

ICBA Comments: ICBA strongly urges the Federal Reserve to afford financial institutions the flexibility to select one or more methods (mail, telephone, electronic means, or in-person) for consumers to opt out of overdraft services. This flexibility allows financial institutions to tailor opt-out methods to their operational capabilities and markets.

ICBA recommends a 15-day safe harbor for providing consumers ample time to opt out of receiving overdraft services. Most consumers appreciate the flexibility and convenience this service allows and a 30-day safe harbor would be too long for consumers who would like access to this protection early on with their account. Financial institutions could always provide a lengthier time period if they so desire.

ICBA opposes any requirement for financial institutions to provide a toll-free telephone number for consumers to opt out of receiving overdraft services on ATM and one-time debit card transactions. For many community banks, a toll-free telephone number is unnecessary because most of their customers are located within the local calling area. Requiring a toll-free telephone number would add unnecessary expense and provide no consumer benefit.

Conditioning the Opt-Out

Under the proposed rule, a financial institution shall not condition a consumer's right to opt out of the payment of overdrafts on ATM withdrawals and one-time debit card transactions on the consumer also opting out of the institution's overdraft service with respect to checks, ACH transactions or other types of transactions such as electronic fund transfers (EFTs). To prevent circumvention of the opt-out right, the proposed rule also would prohibit a financial institution from declining to pay checks, ACH transactions, or other types of transactions that overdraw the consumer's account because the consumer has opted out of the institution's overdraft service for ATM withdrawals and one-time debit card transactions.

The proposed rule would also require an institution to apply the same criteria for deciding whether to pay overdrafts on checks, ACH transactions, or other types of transactions regardless of the consumer's opt-out choice with respect to ATM and one-time debit card overdrafts.

The Federal Reserve is also proposing a modified version of the proposed rule that would expressly permit institutions to condition the consumer's ability to opt out of an institution's overdraft service for ATM withdrawals and one-time debit card transactions on the consumer also opting out of the institution's overdraft service for checks and other transaction types. Under this alternative approach, an institution could also decline checks, ACH transactions, and other

types of transactions because the consumer has opted out of the service for ATM withdrawals and one-time debit card transactions.

ICBA Comments: ICBA believes that the Federal Reserve's alternative or modified approach is the equivalent of an opt-out approach at the account level, therefore, we strongly support such an approach for the reasons previously mentioned.

Implementation of Opt-Out

Under the proposed rule, financial institutions may choose to implement a consumer's decision to opt out at the account level and decline to pay overdrafts for ATM withdrawals and one-time debit card transactions for those consumers that have opted out; or to implement the consumer's choice at the product level and offer two different accounts.

ICBA Comments: ICBA supports the ability for financial institutions to implement the customer's choice to opt out of overdraft services at either the account or the product level by offering two different accounts (one with overdraft services and one without overdraft services).

Notice, Timing and Model Forms

The proposed rule requires financial institutions to provide an opt-out notice before the institution assesses a fee or charge for paying an ATM withdrawal or one-time debit card transaction pursuant to the institution's overdraft service for accounts opened after the effective date of the final rule. Additionally, financial institutions must provide the consumer reasonable opportunity to exercise the opt-out right after receiving the notice before such fees or charges may be assessed to the consumer's account.

The Board requests comments on whether the rule should permit financial institutions to include the opt-out notice on periodic statements in any cycle in which the consumer is assessed an overdraft fee or charge, even if that fee or charge is not incurred in connection with an ATM withdrawal or a one-time debit card transaction.

Two different notices are set forth in the proposed rule. The detailed notice, provided prior to the assessment of any fees or charges, contains information about the institution's overdraft service and the consumer's opt-out right. The shorter notice (potentially located on the periodic statement), provided after the assessment of an overdraft fee, generally informs the consumer of the right to opt out and instructs the consumer to contact the financial institution for more information.

ICBA Comments: ICBA strongly urges the Federal Reserve to provide financial institutions with the flexibility to include opt-out notices either annually or on the periodic statement when overdraft services are triggered by any transaction. Financial institutions have different operating systems and costs

considerations, and a “one size fits all” approach for complying with this requirement is not practical.

In addition, ICBA opposes a requirement to segregate the opt-out notice from other account disclosures, because providing a separate notice will not ensure that the notice will be seen by the consumer. In fact, it could just as easily go unnoticed. ICBA does, however, agree with the Federal Reserve’s model form language and finds the language inclusive of community bank’s operating practices.

Continuing Right and Duration of Opt-Out

Under the proposed rule, financial institutions must comply with a consumer’s opt-out request as soon as reasonably practicable after the financial institution receives it. The Federal Reserve requests comments regarding the need for additional guidance on the “as soon as reasonably practicable” standard. Also, the proposed rule states that once a consumer opts out, the opt-out election remains in effect until revoked by the consumer in writing or electronically.

ICBA Comments: ICBA urges the Board to provide a safe harbor for the “as soon as reasonably practicable” standard. We recommend ten business days, which should be sufficient time to ensure that financial institutions’ systems are updated to prevent payment of overdrafts. ICBA urges the Federal Reserve to allow financial institutions to restrict the ability of a customer to opt back in to receiving overdraft services. It would not be fair to financial institutions to allow customers to constantly change their mind and opt in one day and opt out the next and then back in on day three. Once a customer has opted out, financial institutions should be able to restrict the ability to opt back in at their discretion.

Furthermore, ICBA recommends the Federal Reserve afford financial institutions the flexibility to offer a number of methods that consumers can use to revoke their prior opt-out election. This flexibility includes revoking the opt-out orally or in writing, whether by telephone or in-person and electronically.

Opt-In Approach

Scope of Opt-In

Under this alternative approach proposed by the Federal Reserve financial institutions provide consumers with notice of the right to opt in, or affirmatively consent, to the institution’s overdraft service for ATM withdrawals and one-time debit card transactions. The notice must be provided, and the consumer’s affirmative consent obtained, before fees or charges are assessed. No additional notice is required once the consumer has opted in to the overdraft service.

ICBA Comments: ICBA strongly opposes the opt-in alternative because it is not a consumer-friendly alternative. The final rule should allow financial institutions to offer customers the choice to opt out of the overdraft services

rather than require that consumers affirmatively opt in to receiving the service. Customers do not normally assume at account opening that they will be in a situation of needing overdraft services due to insufficient funds and may be less likely to opt in to receiving the service when it could protect them in the future. When unintentional accounting mistakes occur, most consumers expect and appreciate overdraft services to cover them. But, they may not realize how helpful the service can be until they have an experience where it is greatly needed.

If there is a rare instance where a customer is unsatisfied that their overdraft was paid, then a more effective customer service approach is to accommodate that customer, for example, by waiving the fee for the occasional overdraft and allowing them to then opt out. It is common practice for banks to waive the fee for occasional or first time overdrafts in order to maintain good customer relations, and this common practice makes the opt-in alternative unnecessary for consumers.

Furthermore, requiring financial institutions to provide consumers with an opt-in option to receive overdraft services may put the institution in the position of promoting overdraft services, which the Federal Reserve has expressed concern with in the past.

Operational Considerations

This alternative proposed by the Federal Reserve requires financial institutions to provide a reasonable opportunity for the consumer to affirmatively consent to the institution's overdraft service for ATM withdrawals and one-time debit card transactions. Financial institutions may not obtain a consumer's affirmative consent in writing by including preprinted language about the overdraft service in an account disclosure provided with a signature card or contract that the consumer must sign to open the account and that acknowledges the consumer's acceptance of the account terms. The proposal includes a list of acceptable written alternatives and allows financial institutions to provide online forms and a toll-free telephone number for customers who wish to opt in to the service.

ICBA Comments: While ICBA strongly disagrees with an opt-in requirement for consumers to receive overdraft services, if the Federal Reserve imposes such a requirement, we strongly support providing financial institutions with flexibility as to how the opt-in notice can be provided. Furthermore, as noted previously in our letter, requiring community financial institutions to obtain a toll-free telephone number is an unnecessary expense for many community banks with local customer bases.

Written Confirmation

Under the opt-in alternative, financial institutions must provide consumers with written confirmation documenting the consumer's choice to help ensure the consumer intended to opt in to receiving the service.

ICBA Comments: ICBA opposes the requirement to provide consumers written confirmation of their choice as it contributes no benefit to the consumer who already knows and understands what they choose on the account, and represents an unnecessary expense for financial institutions.

Conditioning the Opt In

The opt-in approach provides that a financial institution shall not condition the payment of any overdrafts for checks, ACH transactions, or other types of transactions on the consumer affirmatively consenting to the institution's payment of overdrafts for ATM withdrawals and one-time debit card transactions.

ICBA Comments: ICBA strongly opposes the requirement for financial institutions not to condition the payment of any overdrafts for checks, ACH transactions, or other types of transactions on the consumer affirmatively consenting to the institution's payment of overdrafts for ATM withdrawals and one-time debit card transactions. As stated previously in our letter, we strongly support the ability for financial institutions to decline all overdraft services, including check and ACH transactions, regardless of a consumer's decision to have or opt in to receiving the services on ATM withdrawals and one-time debit card transactions.

Implementation of Opt-In

Under the proposed rule financial institutions may choose to implement a consumer's decision to opt in at the account level and decline to pay overdrafts for ATM withdrawals and one-time debit card transactions for those consumers that have opted in; or to implement the consumer's choice at the product level and offer two different accounts.

ICBA Comments: ICBA prefers implementation of the opt-in approach at either the account or product level if the Federal Reserve deems it appropriate despite ICBA opposition to implement an opt-in approach. ICBA strongly supports the ability for financial institutions to implement the consumer's choice to opt out of overdraft services at either the account or product level.

Notice, Timing and Model Forms

In contrast to the opt-out approach, the opt-in approach would not require institutions to provide a notice after a consumer is assessed an overdraft fee or charge. Thus, existing consumers may be unaware of their right to determine whether to enroll in their institution's overdraft service for ATM withdrawals and one-time debit card transactions, absent receiving an "initial" opt-in notice. The proposed rule sets forth content requirements for the notice that must be provided to the consumer before the consumer may affirmatively consent to the institution's overdraft service and requires that the opt-in notice be in a form substantially similar to the opt-out model form.

Under this approach, financial institutions would have the option of implementing the opt-in requirement for existing accounts either by providing a notice to all existing accounts on or with the first periodic statement sent on or after the effective date of the final rule. Alternatively, an institution could provide an opt-in notice to existing accounts after the first assessment of an overdraft fee or charge for an ATM withdrawal or one-time debit card transaction on or after the effective date of the final rule. In either case, if a consumer has not affirmatively consented to the service within 60 days after the institution sends the opt-in notice, the institution will have to cease assessing any fees or charges on the consumer's account for paying such overdrafts, except if permitted by the exceptions.

ICBA Comments: While ICBA opposes any requirement that consumers be required to opt in to receiving overdraft services on ATM withdrawals and one-time debit card transactions, should the Federal Reserve adopt the opt-in approach, application should be limited to accounts opened after any compliance deadline and should not be applied to current account holders who are likely accustomed to having the service on their account. Additionally, a new opt-in requirement would create considerable confusion for these account holders.

If these provisions are implemented, we strongly urge the Federal Reserve to provide financial institutions with flexibility in the notice, timing and format requirements. Furthermore, if the Federal Reserve plans to conduct additional consumer testing or consider a revised model form for an opt-in requirement, ICBA strongly urges that a revised proposed rule be published before any amendments are finalized.

Debit Holds

Background

A debit hold occurs when a consumer uses a debit card for a transaction but the final amount is unknown when the transaction is initially authorized. Typically, the hold remains in place until the transaction settles.

In the May 19, 2008 proposed rule under Regulation AA, the Agencies proposed that financial institutions be prohibited from charging a fee for an overdraft where the overdraft is caused solely by a debit hold on the deposit account. In response to comments received, on December 18, 2008, the Agencies did not issue rules under Regulation AA addressing overdraft fees resulting from debit holds. Instead, the Federal Reserve issued proposed rule amendments to Regulation E.

General Rule

These proposed Regulation E provisions would, in most cases, prohibit financial institutions from assessing an overdraft fee or charge if the overdraft was a result of a debit card hold placed on a consumer's account if the amount of the hold exceeds the actual transaction amount. The proposed rule would not

apply to transactions in which the amount of the hold equals or is less than the actual amount of the transaction. Additionally, the proposed rule would not apply if the actual amount of the transaction would also have caused the overdraft to occur.

The debit hold provision impacts debit card transactions in which the actual transaction amount generally can be determined by the merchant or other payees within a short period of time after the financial institution authorizes the transaction (e.g. pay-at-the-pump fuel purchases, restaurant bills). The proposed rule does not apply, however, to debit holds in other retail environments where the actual transaction amount generally cannot be determined for a reasonable period of time (more than two hours) after the merchant has submitted a transaction for authorization (e.g. hotel charges, car rentals).

ICBA Comments: ICBA generally agrees that consumers should not incur overdraft fees if the overdraft is caused by a hold that exceeds the actual transaction amount, however, it would be operationally challenging within the proposed safe harbor of two hours. The Federal Reserve should grant the industry flexibility to ensure that all stakeholders—financial institutions, merchants, processors, and software providers can effectively implement the changes.

Safe Harbor

The proposed rule provides a safe harbor that allows financial institutions to assess a fee or charge for paying an overdraft that is caused solely by a debit hold in certain cases. Specifically, it permits an institution to assess an overdraft fee or charge to the consumer's account in connection with a debit hold if the institution has adopted procedures and practices designed to remove the hold within a reasonable period of time. The proposed rule defines the timeframe as two hours.

ICBA Comments: ICBA appreciates the Federal Reserve's willingness to establish a safe harbor permitting financial institutions to assess an overdraft fee if the overdraft is related to a debit hold, however, two hours is too short. While the merchants, processors, and the banking industry are making progress in terms of faster release of holds, it is too soon to establish a two-hour standard. ICBA recommends an end of business day as a reasonable period of time for removing holds.

Other Approaches

The proposal does not require merchants to disclose debit holds as a substitute for a substantive rule. However, the Federal Reserve requests comments on whether the final rule should require merchants (or their acquirers or processors) to submit such transactions for settlement within the two hour safe harbor period.

ICBA Comments: ICBA strongly urges the Federal Reserve to require merchants (or their acquirers or processors) to promptly submit transactions covered by this rule for settlement within whatever timeframe the Federal Reserve adopts in the final rule. It is the merchant, not the financial institution that places the hold and benefits from the hold. Holding merchants to tighter timeframes will significantly reduce the overall amount of overdraft fees that are assessed as a result of debit holds.

Conclusion

Community banks offering overdraft services do so understanding the importance of open disclosure to their customers. Community bank customers greatly value overdraft services. This value is even documented by the Federal Reserve's own consumer testing. ICBA urges the Federal Reserve to remain mindful that any rule that limits the access of ATM, POS services or overdraft services will be counterproductive and harmful to consumers. We urge the Federal Reserve to carefully consider the impact of recent rules governing overdraft services before additional new regulatory and compliance burdens. Nevertheless, if the Federal Reserve decides to further regulate overdraft services, ICBA strongly urges the Federal Reserve to adopt an opt-out approach for all transactions – checks, debit card, ACH, online banking, telephone-initiated and other types of debit transactions – and not adopt a piecemeal approach that depends on the type of transaction. Additionally, financial institutions should have the flexibility to implement this approach at the account level or product level by offering accounts with or without overdraft services.

Finally, we strongly urge the Federal Reserve to publish a revised proposed rule for public comment after the comments received on this current proposed rule have been considered and additional consumer testing has been conducted. This is especially crucial given the extensive information the Federal Reserve has requested with this proposed rule and the fact that while options are presented for public comment, it is unclear what approach the Federal Reserve is proposing. Also, the public should be able to review any possible amendments if additional consumer testing will be conducted. An additional proposed rule will allow both financial institutions and consumers to comment on more specific provisions.

Again, ICBA appreciates the opportunity to comment on this proposed rule. If you have any questions or would like additional information, please contact the undersigned by telephone at (202)659-8111 or by email at cary.whaley@icba.org.

Sincerely,

/s/

Cary Whaley

Director, Payments & Technology Policy