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March 30, 2009

Via E-Mail

Ms. Jennifer J. Johnson  
Secretary  
Federal Reserve Board  
20<sup>th</sup> and C Streets, NW  
Washington, DC. 20051

**Re: Docket Number R-01343 Proposed Changes to REG E  
Electronic Transfer Act – 74 Federal Register 28866**

Thank you for the opportunity for Heritage Bank and Trust, Columbia, Tennessee to comment on the Federal Reserve Board's proposed amendments to Reg E, which implements the Electronic Transfer Act, which was published in the January 29, 2009 in the Federal Register. The proposal would limit the ability of a financial institution to assessing an overdraft fee if the overdraft would ha

***RIGHT TO "PARTIALLY" Opt-Out or "partially" Opt-In, versus a Required Opt-In.***

While we support, in principle, the substantive opt-out right established by the proposed amendments to Regulation E (the Proposal), we have serious concerns about requiring consumers to opt in:

- Heritage Bank and Trust discloses its overdraft protection program to our customers and allows them to *opt out (entirely; not partial)* of our programs. A recent FDIC Study suggests that less than 10% of financial institutions offering overdraft protection services on the terms have received consumer complaints about their overdraft programs. *With such a low complaint rate, an affirmative opt-in requirement is unnecessary.*

***Our customers would much rather their check be paid than returned!***

- The Federal Reserve Board commissioned a series of focus groups to study consumer impressions of overdraft services. 8 out of 9 study participants would keep overdraft coverage even if given the opportunity to opt out. The participants valued overdraft coverage as an efficient way to ensure that important transactions would go through. Again, the regulators' own research indicates *very little demand for an opt-in requirement* for overdraft services.
- If adopted, an *opt-in requirement would impose additional administrative burdens* on financial institutions without any countervailing consumer benefit.

2. PARTIAL OPT OUT. The Proposal contains an unnecessary and unworkable partial opt-out provision:

- The partial opt-out would allow consumers to retain overdraft protection services for checks and ACH transactions, while declining protection for other types of transactions, such as "ATM withdrawals" (but not other ATM transactions?) and some but not all "POS debit card transactions". These boundaries of this program will be impossible to convey to consumers. *We believe consumers will conclude that exercising a "partial" opt-out right means they will never be charged an NSF or overdraft fee.*
- The Federal Reserve Study accompanying the Proposal supports our belief. In one study example, half of the participants could not tell the examiners what would happen if they set up a recurring payment for a utility bill, opted out of overdraft coverage and subsequently did not have sufficient funds to cover the payment. Almost half stated that the payment would be covered, even if the consumer had opted out of overdraft coverage. *Any partial opt-out or any opt-in requirement will always be confusing to and misunderstood by consumers. Even if the consumer initially understands how the program operates, it is unlikely that the consumer will retain that understanding for any meaningful period of time.*
- A *partial opt-out* approach would not only be difficult to explain in a manner that consumers would remember, it would be *impossible to implement technologically, at least in the short run.*
- The Proposal *bans financial institutions from varying accounts terms* between accounts that provide partial opt-outs and accounts that do not. This requirement *would invite legal claims and regulatory actions* over whether an account term is varied.

A partial opt-out approach is unworkable. Not only is it confusing and difficult to remember, it adds compliance burdens and substantial technology development costs. It is not right that these costs will be borne disproportionately by small- and mid-sized financial institutions. We believe the Board should implement a regulation that allows financial institutions to offer discretionary overdraft payment services

on a "all-or-nothing" basis and that does not punish them for varying the terms on accounts that do not offer overdraft services.

### 3. **Exceptions to Opt-Out Requirements**

- The Proposal includes exceptions to the general rule that a consumer cannot be charged an overdraft fee if he has opted out of overdraft protection coverage. *If a financial institution reasonably believes that a transaction would not overdraw a consumer's account, but the transaction nevertheless results in an overdraft, the Proposal would permit the institution to charge an overdraft fee.*
- Since many financial institutions cannot track all (or most) transactions in real time, *it is unreasonable and impractical to forbid overdraft fees in situations where the financial institution reasonably believes it must honor a transaction that turns out to be drawn on insufficient funds.*
- We agree with these exceptions but we also believe *it is impossible to track, control and comply with the exceptions with current technology.*

Heritage Bank and Trust supports the Proposal's reasonable-belief exception, but we believe that implementing the necessary technology to comply with the complicated safe harbor rule will be very expensive, especially for small- and mid-sized institutions like ours. The new rule should not take effect for at least two years, so that we can purchase, implement and beta test the appropriate information systems.

### 4. **Debit Holds** The Proposal would prohibit financial institutions from assessing an overdraft fee if the overdraft was caused by a debit hold in excess of the actual transaction amount and the actual transaction amount would not have caused an overdraft.

- The Proposal's debit hold rule *applies only to debit-card transactions in which the merchant can determine the actual transaction amount within a short time period.*
- The Proposal also includes *a two-hour safe harbor that allows the assessment of an overdraft fee for overdrafts caused by debit holds that were placed on the consumer's account within two hours of the transaction that resulted in the overdraft.*

Heritage Bank and Trust supports the concept of a two-hour safe harbor, but we believe that implementing the necessary technology to comply with a complex safe harbor rule will be very expensive. The new rule should not take effect for at least two years, especially so that small- and mid-sized institutions can purchase, implement and beta test appropriate information systems.

Heritage Bank and Trust appreciates the ability to comment on this matter. Overdraft protection benefits most customers and most customers appreciate having it available to them. We hope you will allow the customer to maintain its

opt-out form so that the vast majority of consumers will not be faced with embarrassing and costly returns of payments.

Sincerely,



Mark W. Hines  
President & CEO