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**WACHOVIA**

August 6, 2004

Jennifer L. Johnson  
Secretary, Board of Governors of the  
Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, D.C. 20551

Electronic Address: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)

**Re: Docket No. R-1197 – Proposal to Amend Regulation DD**

Dear Ms. Johnson:

This letter is submitted on behalf of Wachovia Corporation and its subsidiary companies, including Wachovia Bank, National Association; and Wachovia Bank of Delaware, National Association; (hereinafter collectively referred to as “Wachovia”). Wachovia has reviewed the proposed amendments to Regulation DD (“Proposal”) and we support the efforts of the Board of Governors of the Federal Reserve System (“Board”) to provide “uniformity and accuracy of information” to consumers who may overdraw their transaction accounts. However, Wachovia has serious concerns about certain aspects of the proposed amendments and appreciates the opportunity to bring these concerns to the Board’s attention.

In its letter of January 27, 2003 to the Board concerning proposed amendments to the Official Staff Commentary of Regulation Z,<sup>1</sup> Wachovia represented that it did not offer an overdraft protection program (“bounce protection”) of the type described in the Board’s proposal. Wachovia has not changed its position on this issue, and it does not market a so-called “bounce protection” program to its customers. However, Wachovia is concerned about the lack of definition in this Proposal of “overdraft protection programs.” The Board’s discussion refers to the process whereby financial institutions market and pay overdrafts as a “program,” or “bounced-check protection service.” The description of the “program” to which the Proposal appears to be directed is similar in many ways to the “ad hoc” or “courtesy” payment procedures that have been used by

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<sup>1</sup> Docket No. R-1136, proposed November 26, 2002.

financial institutions for many years. Indeed, the detailed description of the *programs*<sup>2</sup> is so similar to many aspects of the ad hoc/courtesy payment *process* as to raise concerns that it will be extremely difficult for financial institutions, their customers, examiners, and attorneys to distinguish the *program* to which the Proposal appears to be directed from the traditional *process*.

For many years, most financial institutions have employed some form of discretionary process for determining whether an item is paid causing an overdraft or is returned for insufficient funds (“NSF”). Many financial institutions, including Wachovia, have developed, either internally or with the assistance of an outside vendor, automated, risk-based analytics to determine when an item should be paid. Numerous factors such as average deposit balances, length of time on deposit, and number of overdrafts in a defined period, assist financial institutions in determining whether items should be paid creating an overdraft and in managing the risk of cumulative outstandings from the payment of overdrafts. Within this risk-based process, there may be a daily and/or aggregate limit of overdrafts permitted for each account, but these are subject to change on almost a daily basis, depending upon how the consumer manages the account. Wachovia does not disclose, guarantee, or market the operation of this *process* to customers in any way. Wachovia’s risk-controlled process helps customers avoid the embarrassment, inconvenience and additional merchant costs associated with returned checks. At Wachovia, fees associated with items returned unpaid and items paid overdrawn are the same; there is no incremental charge for overdrawn items. This *process* is dissimilar to traditional credit lines governed by the Truth in Lending Act and Regulation Z. The latter credit lines are created by contract between the financial institution and the customer, and the credit limits are disclosed to the customer.

In its discussion, the Board attempts to distinguish automated overdraft *programs* from traditional overdraft *processes* by stating that the programs are accompanied by “marketing plans that appear to promote the generation of fee income by stating the dollar amount that consumers would be allow to overdraw and by encouraging consumers to overdraw their accounts and use the service as a line of credit.”<sup>3</sup> If indeed it is the marketing of these *programs* that distinguish them from traditional ad-hoc *processes*, Wachovia believes that the Board should amend the definitions of Regulation DD to create a “bright line” distinction between *programs* and the traditional *process* whereby items for which there are insufficient funds on deposit are paid or returned. A failure of the Board to define the differences between these services may expose financial institutions to legal and compliance risks and leaves the ultimate interpretation of Regulation DD to individual examiners and the court system.

Notwithstanding the fact that Wachovia believes that its overdraft/NSF *process* is not of the type of *program* addressed in the Proposal, Wachovia would like to offer its comments on other points of the proposed amendment to Regulation DD.

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<sup>2</sup> For the sake of clarity in this letter, Wachovia will use the word *program* when describing the overdraft protection programs called “bounced-check protection programs” and *process* when describing the ad hoc process whereby Wachovia, at its sole discretion, pays or returns items for which there are insufficient funds on deposit.

<sup>3</sup> 69 FR 31760, June 7, 2004.

## **§ 230.2 Definitions**

Wachovia supports the Board's concerns that advertising must be accurate and representative of the product being promoted. However, the addition of the word "terms" to the definition of advertisement is vague and potentially expands the coverage of Regulation DD to a broad range of communications between a customer and a financial institution about a deposit account in question. Indeed, the language of the Official Staff Interpretations ("Commentary") suggests that any communication that might further expand on or explain terms of existing deposit accounts may be deemed advertising.<sup>4</sup> One might even presume that a change of terms notice delivered under 12 CFR 230.5 may be considered advertising under this new definition.

Wachovia urges the Board to reconsider this proposed change to the definitions of Regulation DD. If the Board is concerned about advertising bounced-check programs of the type described in the Proposal, the Board has the authority to define and regulate these programs. We urge the Board to apply changes only to those practices that the Board feels are inappropriate or misunderstood by consumers.

## **§ 230.4 Account Disclosures**

Wachovia has no objection to the additional language in the Commentary. Wachovia's account disclosures provide that overdraft fees may apply to overdrafts created by the presentment of a check or an electronic transaction. However, the disclosure of these fees may require that financial institutions send changes of terms to customers under 12 CFR 230.5(a). Wachovia urges the Board to specify that such documents are not considered to be marketing material, and that the Board provide adequate time for financial institutions to comply.

## **§ 230.6 Periodic Statement Disclosures**

12 CFR 230.6 requires that financial institutions disclose account-related fees on the periodic statement that the customer receives, usually on a monthly basis. Financial institutions disclose overdraft and non-sufficient funds ("NSF") fees in different ways. Some financial institutions list fees on a per item basis, as the item is deducted from the account balance, adjusting the balance on the account as the fee is deducted. Other financial institutions aggregate the fees and subtract the total of all fees charged during the period on the last day of the period. Still others aggregate fees but offer a short narrative of the items included in the aggregate. In each of these scenarios, the customer receives information concerning the amount of the fees and the impact of the fees on the customer's account balance.

The Board believes that "disclosure of year-to-date totals would better inform consumers about the cumulative effect of using an overdraft service on a regular basis."<sup>5</sup> Notwithstanding issues related to the differences between the bounced-check *program*

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<sup>4</sup> 12 CFR 230.2(b) -2.

<sup>5</sup> 67 FR 31763, June 7, 2004.

and the ad-hoc payment of items overdrawn, Wachovia believes that the large majority of customers do not overdraw their accounts deliberately. Absent the existence of a formal line of credit, fully disclosed under Regulation Z, the payment of overdrafts under any *program* or *process* is discretionary with the financial institution. Wachovia believes that most customers do not present checks or perform electronic transactions on the mere chance that the items may be paid overdrawn. Customers who do deliberately overdraw their accounts are aware of the fees associated with the creation of an overdraft.

Believing that the consumer is fully informed on the periodic statement of the debits from his/her account, including overdraft and NSF fees, Wachovia does not support any changes to Regulation DD in this regard at this time. Traditionally, periodic account statement systems are not programmed to move data forward from month to month. In addition, many periodic statement systems do not provide for separate categories of cumulative fees on a monthly basis. Wachovia believes that the customer is sufficiently informed by seeing the per-item fees on a periodic basis and that cumulative totals are unnecessary. The substantial cost of reprogramming and redesigning periodic statements to provide periodic and year-to-date totals would not be warranted.

In addition, the Board has asked financial institutions to consider whether the requirement that fees be disclosed on an year-to-date basis should be limited only to those financial institutions that market overdraft protection and “thereby encourage the routine use of the service.”<sup>6</sup> If the Board proceeds at all with this Proposal, it should be limited to those clearly defined overdraft protection *programs*. However, Wachovia believes that the costs to the financial industry to provide aggregated fees far outweigh the benefit to the consumer to see monthly and year-to-date totals. Wachovia reiterates its discussion above concerning the need for the Board to distinguish clearly overdraft protection *programs* from an ad-hoc *process*. Wachovia urges the Board to withdraw the proposed amendment requiring year-to-date totals until the Board more clearly distinguishes the *program* from the *process*.

### **§230.8 Advertising**

Wachovia believes that overdraft charges generated as an ad-hoc discretionary *process* should not disqualify an account as “free” or “no cost” and should be explicitly excluded under § 230.8(a)(2). However, Wachovia has no objection to the additional disclosures required under § 230.8(f), provided that the Board is able to make a clear distinction between an automated overdraft *program* and an automated ad-hoc discretionary *process* for the payment of overdrafts. Wachovia does not encourage, through marketing or otherwise, customers to overdraw their accounts, and we consider an overdraft fee to be a processing charge that occurs only when a customer creates an overdraft.

Wachovia objects to any requirement that might cause Wachovia to disclose overdraft or NSF fees in marketing communications or to be prohibited from advertising its transaction accounts as “free” merely because the consumer must pay a fee for overdraft or NSF transactions.

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<sup>6</sup> 67 FR 31763.

## **Relationship to Credit Transactions**

Wachovia maintains that the payment of overdrafts through its ad-hoc risk-based *process* does not constitute a type of “credit” that would require disclosures required by the Truth in Lending Act and Regulation Z.<sup>7</sup> In its letter of January 23, 2003 to the Board of Governors of the Federal Reserve System concerning “bounce protection programs,” Wachovia stated that it is our belief that “the fees associated with (Wachovia’s ad-hoc overdraft payment *process*) . . . are not finance charges under Regulation Z.” Wachovia maintains that overdraft or NSF fees are not part of “credit” facilities and thus, are not subject to disclosure requirements under Regulation Z. Wachovia urges the Board to maintain its position on this issue.

## **Conclusion**

Wachovia believes that the *process* currently applied by Wachovia to evaluate and pay or return items is administered in a way that protects our customers and Wachovia. We do not believe that the additional disclosures described in the Proposal should apply to the risk-based, automated *process* used by Wachovia in determining whether to pay overdrawn or return items for non-sufficient funds. However, Wachovia is concerned that the Proposal does not make a clear distinction between this *process* and the practice that the Board describes in the Proposal. We urge the Board to make substantive changes in the Proposal so that the amendments are clearly applicable to the minority of financial institutions that employ the types of *programs* that the Board describes.

Wachovia appreciates the opportunity to respond to the request for information and hopes that the Board finds them helpful. For additional clarification of the points included in this letter, please contact me at 704-715-2489.

Yours truly,

Michael A. Watkins

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<sup>7</sup> 12 CFR 212.2(a)(18).