July 19, 2004

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

Re: Regulation DD
Docket Number R-1197

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the proposed amendments to Regulation DD. Bank of America is a financial holding company that operates the largest banking network in the United States, with full-service consumer and commercial operations in 29 states and the District of Columbia. Bank of America provides financial products and services to over 33 million households and 2.5 million businesses.

General comments

The summary and Supplementary Information suggest that the genesis for the proposed rule is a concern that bounced-check protection services – services that are marketed to consumers with the suggestion that overdrafts will be automatically paid up to disclosed overdraft "limits" - may encourage customers to mismanage their accounts. While payment of the overdrafts under these programs is discretionary, the services are often marketed as being similar to a line of credit. The Supplementary Information describes the characteristics of these programs in detail. The Supplementary Information also distinguishes these bounced-check protection services from the accommodation that institutions have traditionally granted consumers in paying overdrafts on an ad-hoc basis, either in the branch or through an automated system. An essential difference being that institutions have not promoted or generally disclosed the traditional accommodation.

The proposed rule, however, does not limit itself to bounced-protection services but broadly sweeps other overdraft protection programs within its scope. We believe this is inappropriate and unnecessary. The rule should be limited in scope to address the concerns raised by those non-traditional services that are marketed to consumers with the suggestion that overdrafts will be automatically paid up to a disclosed limit and that may encourage account mismanagement.

Comments on proposed revisions

Section 230.2 Definitions

We recommend clarifying the proposed comment to this section. The last sentence states that disclosures provided at account opening, on statements and on electronic terminal receipts are not advertisements. The sentence could be read to suggest that disclosures provided at other times might be advertisements. We suggest revising the sentence to read: “An institution is not promoting a deposit or service solely by providing disclosures or other information required by federal or other applicable law, including disclosures or information provided at account opening, on a periodic statement, in a change in terms notice, or on an electronic terminal or other receipt.”

We believe that an additional definition is necessary to support the proposed changes to Section 230.8. Section 230.8 uses the term “automated overdraft service” and defines it as an automatic service that is not subject to Regulation Z. We believe that definition is overly broad. The term should be defined in Section 230.2 as an automated overdraft program that is disclosed and marketed to consumers and that is not covered by Regulation Z. Traditional overdraft programs that provide protection by automatically transferring funds from another deposit account of the consumer – such as savings overdraft protection services – should be specifically excluded from coverage. The definition of “automated overdraft service” should be focused on the perceived concern – bounced-check protection services.

Section 230.4 Account Disclosures

Proposed comment 4(b)(4)-5 would require institutions to specify the types of transactions for which an overdraft fee applies. The comment then gives as an example: overdrafts “…created by check, or by ATM withdrawal or other electronic transfer…” This proposal seems to be inconsistent with the general disclosure requirements in both the Regulation DD and the Model Clauses for Account Disclosures in Appendix B to the regulation. Further the requirement to list “the types of transactions” suggests that every possible type of transfer must be listed which is inconsistent with the reference in the example to “other electronic transfer.” We fail to see how a long laundry list of potential transactions for which an overdraft fee may be imposed is more helpful to consumers than a simple statement that an overdraft fee may apply to any transaction that overdraws an account. We believe that a simple general disclosure is easier for consumers to understand.

We have no objection to providing a short list of representative, common categories – such as: checks, debit card transactions, ATM withdrawals, telephone transfers, automatic debits and other electronic transfers. But we believe the proposed comment should be amended to make clear that an institution may apply an overdraft fee to any transaction that overdraws an account by disclosing that fact in general terms, and that the institution does not have to list every type of transaction for which an overdraft fee may apply.

We recommend that the comment include model language that would comply with this new requirement.

Section 230.6 Periodic Statement Disclosures

Institutions may currently itemize each fee on the statement or may group fees of the same type together and report a total for each type on the statement. The proposed rule would require institutions to treat overdraft fees and returned-item fees differently. It would require institutions to aggregate each of these two fees separately and report the total amount of each fee for the statement period and for the year to date. We oppose this change for many reasons.

We are not aware of any evidence that would suggest that our customers are confused about how our traditional overdraft protection services work or about the overdraft and returned-item fees that apply to their account. These traditional overdraft protection services are disclosed. Our overdraft fees are disclosed. Our customers also understand that we will occasionally accommodate them in an ad-hoc basis and pay an item that overdraws their account. These services and accommodations have been offered for decades without any apparent confusion on the part of our customers. They have not encouraged customers to mismanage their accounts. As a result, we see no basis whatsoever for such a dramatic and burdensome change in the periodic statement rules.

The common meanings of "overdraft fees" and "returned-item fees" do not cover all of the related potential fees. Many institutions charge an insufficient funds fee for items that are presented against uncollected funds or against funds that are subject to a hold. If the item is paid, these situations are not normally described as creating an "overdraft." This is why many disclosures refer to the fee as an "insufficient funds fee."

We do not see how reporting these two fees separately provides any substantial benefit to consumers. To a consumer, the relevant information is that they incurred a fee because they did not have sufficient available funds in their account to pay an item. Whether the fee is labeled "overdraft," "returned-item," "insufficient funds item," "unavailable funds item," or some other term would not seem to provide important information to the consumer. If some aggregation is required, we believe that the fees that should be aggregated are those fees incurred because the consumer did not have sufficient available funds in their account to pay the item – regardless of the name attached to the fee. However, if "overdraft items" and "returned-item fees" must be aggregated separately, then the proposed rule should define these terms to avoid confusion about how to characterize a fee incurred because funds in the account were subject to a hold or were uncollected.

This change would require substantial and expensive systems modifications. Our estimate of the expense for the initial systems modifications for paper statements exceeds $1 million. Additional costs which are not reflected in this estimate will also be incurred related to e-statements, customer awareness education, employee training, changes to existing account disclosures and agreements, and policy and procedure changes.

There are also practical difficulties in aggregating these fees in a way that is not confusing to customers. Some institutions, including Bank of America, tier the insufficient funds fees and charge different amounts for insufficient funds items based on the transaction history of the customer. Customers who manage their accounts appropriately and only occasionally overdraw their accounts incur a lower fee per item than those who overdraw their account frequently. If these fees are aggregated and the customer has moved during the statement period from one tier to the next tier, an aggregate dollar amount for these fees will be confusing. These fees are frequently charged in one statement period and then, after the customer reviews their statement and calls to discuss the fee, reversed in the next statement period. If the fee and subsequent reversal are both reported separately on the relevant statement, the customer can easily track the transaction on their statements. These are just two examples of how an aggregation requirement would result in situations that would confuse both our staff and our customers.

Many banks, including Bank of America and Fleet National Bank, currently provide customers with an overdraft and returned-item notice at the time of the event. The notice includes information about each transaction, including fees charged and whether the item was paid or returned. We believe this notice is more informative, consumer friendly, and timely and enables consumers to better understand the costs of overdrawing their account than aggregation of fees on an account statement.

If some change to the periodic statements is considered necessary, the change should narrowly address the perceived concern. If the Board believes that consumers are confused about bounced-check protection services and that this change is necessary to address that confusion, then the requirement to aggregate fees should be limited to accounts with bounced-check protection services. We have seen nothing that would suggest that such a draconian measure is needed or appropriate for traditional overdraft protection services.

We understand this proposal to apply only to fees commonly described as “overdraft fees.” The proposal would not apply to fees incurred under traditional overdraft protection programs – such as fees for transfers from a savings account or line of credit to cover items that would otherwise overdraw an account. We recommend expanding the comment to this section to make that clear.

Section 230.8 Advertising.

The Supplementary Information states that the advertising rules in the regulation are being revised to address bounced-check protection services. We agree that these changes should address only bounced-check protection services. However, the proposed changes also cover other services. The regulation and commentary define their coverage by referring to “an automated overdraft protection service that is not subject to … Regulation Z.” This definition is not sufficient because it appears to cover the traditional accommodation institutions grant their customers, including automated ad-hoc programs, that are not marketed to consumers. It also covers automated programs that provide overdraft protection by transferring funds from another deposit account of the customer. We recommend that this term be defined in a way that clearly limits its coverage to the perceived concern – bounced-check protection services.

The Supplementary Information states that five new examples would be added to the commentary regarding the promotion of overdraft payment services. The first four examples do address bounced-check protection services. However, the fifth example also covers any account related service. The fifth example provides that if an advertisement describes an account as "free" or "no cost" and also mentions any account related service for which there is a fee, then the ad must state that there is a cost for the related service. This is overly broad and a trap for the unwary. We have no objection to applying this requirement to bounced-check protection services; however, we have heard nothing that suggests consumers view this as a general concern or that they are confused by current advertisements for related services and so we see no basis for such a dramatic change.

We also note that the proposed language in the fifth example - " … a cost associated with the service…" – is too broad. There are many services that "cost" the customer something – such as the fee paid to an Internet service provider in order to access an online banking service at the institution. We recommend clarifying that this would only apply when the institution charges a fee for the related service.

We believe the change proposed in the fifth example would have broad and unintended consequences. It would probably require every institution to reprint the majority of their promotional brochures. We oppose this sweeping change. We believe that the current standard prohibiting advertisements that are misleading or that misrepresent the deposit contract adequately address this concern.

Implementation

Implementation of two of the proposed changes would be both time-consuming and very costly. They are the proposed amendment to Section 230.4(b) requiring aggregation of fees on statements and the proposed amendment to Section 230.8 requiring an advertisement to disclose that a cost is associated with an account-related service. If those changes are adopted, we recommend that institutions be given at least one year to implement the changes.

We thank you for your consideration of the foregoing. If you have any questions about the issues raised in this letter, please contact the undersigned.

Sincerely,

Paul DeKoster
Assistant General Counsel
Bank of America, N.A.

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