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July 18, 2008

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

Re: Truth-in-Savings, Overdraft Protection Programs, Docket No. R-1315

Dear Ms. Johnson:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on proposed changes intended to help consumers better understand overdraft protection programs. Concurrently, the Federal Reserve has proposed new rules to implement the Federal Trade Commission Act's provisions against unfair or deceptive acts or practices (UDAP). ICBA intends to file our comments specifically addressing the UDAP proposal under separate cover prior to the August 4 deadline.

In connection with the UDAP proposal, the Federal Reserve is proposing new mandatory disclosures for overdraft protection services under the Truth-in-Savings Act (TISA) as implemented by Regulation DD. The UDAP proposal would grant a substantive right that prevents banks from charging a fee for overdraft protection services

¹ The Independent Community Bankers of America represents nearly 5,000 community banks 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 banks compete in an ever-changing marketplace.

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold more than \$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.

unless a consumer is given a clear and conspicuous notice about the program, a reasonable time to opt out from coverage, and chooses not to opt out. The UDAP proposal would grant consumers both a full and partial opt-out option. This proposal outlines the form, content and timing for the notices as well as expanding the information required for periodic statements. This proposal also would prohibit banks from only disclosing a single balance at ATMs, through telephone inquiry systems and over the Internet that includes the amount available for overdraft.

Summary of ICBA Comments

ICBA believes that providing clear and simple disclosures about their accounts is important to help individual consumers responsibly manage their banking relationships. It is equally important to ensure that regulations do not become a barrier to providing consumers with beneficial products and services, including overdraft protection coverage. Community bankers report customers welcome overdraft protection coverage and so rules that discourage or prevent banks from offering this service ultimately work against consumer interests.

Generally, ICBA finds it appropriate to provide consumers with information about overdraft protection services and allow them a reasonable opportunity to opt-out from coverage. ICBA also commends the Federal Reserve for making it clear that these requirements do not apply to alternative mechanisms for covering overdrafts, such as lines of credit or balance transfers. However, ICBA strongly urges the Board to clearly exempt traditional *ad hoc* systems where the decision to cover an overdraft is made manually by a bank staff member; the final rule should be clearly limited to programs that use computer software to clear transactions that otherwise would overdraw an account.

ICBA believes it is disingenuous to suggest community banks failed to communicate information about overdraft protection services when it is the regulatory requirements for account statements that in part caused banks to not provide information. Confusion about what constitutes “promoting” an overdraft protection service and the requirements that are then triggered under the May 2005 rule changes caused the problem. Now, the Federal Reserve proposes eliminating the condition of promotion as the trigger for disclosing this information to ensure all customers understand bank fees associated with overdrawing an account. If adopted, the proposal would require all banks that offer overdraft protection services to provide information on the monthly statement about overdraft fees *and* returned check fees for the cycle and year-to-date. Ironically, it was the 2005 changes that required these disclosures if a bank “promoted” an overdraft protection service that discouraged communication due to banks’ concerns about costs and burdens. To avoid those problems, many community banks elected to carefully avoid any step that might be deemed “promotion.” The same concerns about costs and burdens for making these disclosures on periodic statements still exist and could be enough to cause some community banks to discontinue offering overdraft protection services. While it is impossible to predict how many community banks will elect to discontinue the service, the Federal Reserve must recognize that this disclosure requirement coupled with the additional requirements of the proposed UDAP rule will

likely discourage overdraft protection coverage services at some banks and therefore produce an increase in the number of transactions that are rejected. ICBA strongly urges the Federal Reserve to monitor the changes in offerings of overdraft protection programs that result from these proposed changes to ensure consumers are not adversely affected.

Since there are ramifications to overdrawing accounts, ICBA agrees it is helpful to give community banks the option to explain the consequences to a customer who opts out from an overdraft protection program. However, this should be optional and not mandatory. To help explain the possible consequences to customers, ICBA urges the Federal Reserve to provide model language in either the final rule or supplemental guidance. Because not all community banks offer alternatives, model language should also include an alternative that explains that opting out will mean transactions are likely to be rejected. It is equally important that model language help explain to consumers that a possible ramification from failing to manage an account properly might be account closure.

There has been a great deal of attention in the media to instances where a customer incurred substantial overdraft fees due to a number of small-dollar transactions. ICBA agrees that providing information about the minimum transaction that could incur an overdraft fee is useful. ICBA also does not object to allowing customers to opt out using a check box but believes that the decision to offer a check-box option should be left to the individual community bank since the bank is best positioned to know its products, services and market. ICBA agrees that allowing customers to opt out electronically, no matter how the notice was sent, is logical and practical as long as the bank already offers online banking, e-mail customer service support, or telephone banking services.

Rather than restricting communications with customers, ICBA urges the Federal Reserve to clarify in the final rule that the initial opt-out notice can be provided either at account opening or later. Some banks may elect to provide the information at account opening, but since overdraft protection coverage programs may be added during the life of the account or introduced after an account has been properly managed for a given period of time, clearly stating banks have the option of providing the initial opt-out notice after account opening would reduce possible confusion. The option is implicit in the proposal but clearly stating it would be helpful. For efficiency, ICBA also supports letting community banks use the same notice initially and later when subsequent notices are required, provided the final rule includes the flexibility that gives community banks the option of using the same notice. However, ICBA strongly opposes the proposed mandatory requirement that an opt-out notice be given every time there is an overdraft. Requiring constant notification will be burdensome and costly, will cause information overload for consumers, and likely be counterproductive by causing consumers to disregard the notice.

While ICBA agrees that it is appropriate to bar community banks from disclosing account balances that include funds available through an overdraft protection program, ICBA seriously questions whether many banks will elect to provide two balances, especially since the second balance is likely to cause customer confusion. ICBA does, though, strongly support the Federal Reserve's acknowledgment that the rule is not meant

to mandate “real time” transaction processing. While many community banks are striving towards that goal, it is not yet a reality.

Finally, these changes, along with the changes being contemplated under the two companion proposals, will require sufficient time for transition once the rules are finalized. While some may argue the rules should take effect immediately, at a minimum community banks will need at least 12 months to adapt, especially since the proposed changes will require substantial revisions, including software changes that may be outside the control of community banks. Therefore, ICBA strongly recommends a minimum of 12 months, if not longer, for a transition period once the final rules are published before they become effective. In addition, it is critically important that the effective date for these requirements be identical with those for the UDAP proposal to avoid unnecessary burden and confusion.

Current Community Bank Practices

Many community banks provide services to help customers better manage their finances and avoid the embarrassment and inconvenience of overdrawing their accounts. In addition to the traditional *ad hoc* decision by bank personnel to cover an overdraft, community banks offer overdraft lines of credit, balance transfer programs and, most importantly for this discussion, automated systems that allow customers to overdraw their account up to pre-set limits. When community banks offer more than one type of service that protects customers from bouncing checks, the banks report giving customers a choice about how they would like to cover overdrafts. The option is most likely extended when an account is opened and customers may also be able to elect multiple options and prioritize which program will be used first.

One question that often arises on overdraft protection is how community banks process checks, i.e., in what order particular items are posted. In September 2007, ICBA conducted an informal survey of community banks about overdraft protection and several key elements from that survey are especially worth noting for this discussion. Most community banks that responded report processing credits and deposits before debits. Community banks vary in how checks are processed, with approximately equal numbers processing in ascending dollar order, descending dollar order or randomly.² Those that process the largest checks first report they post in that order primarily as a customer service to ensure the most critical payments, such as mortgages, rent checks, or insurance premiums, are paid first.

Historically, community banks would cover overdrafts on a case-by-case basis based on the customer relationship. Many community banks still use this *ad hoc* case-by-case analysis to determine whether to cover an overdraft. However, community banks are also increasingly taking advantage of technology. Automated technology lets community banks cover overdrafts more efficiently at lower costs, more efficiently and more consistently. Community banks often obtain their automated overdraft protection

² The Uniform Commercial Code allows depository institutions to process checks in any order, an authority frequently affirmed by judicial decisions.

programs from a third-party vendor. Customer eligibility for the service varies, but most community banks require the customer to have demonstrated the ability to properly manage the account over a set period of time, e.g., 30 days to 6 months. The limit to the amount of overdraft that will automatically be covered varies depending on the customer and the type of account but as a standard practice the banks reserve the right to deny payment of any overdraft. Generally, the fee for the service is commensurate with the bank's returned check fee.

In many cases, community banks provide information to ensure customers understand the program and how it operates. However, one problem that has prevented this type of disclosure is concern and confusion about whether disclosure constitutes promoting the service that in turn triggers additional requirements for statements. In fact, bankers have reported instances where examiners have identified information provided by the bank as "promotion" despite what is laid out in the rules and commentary. Unfortunately, this has discouraged transparency and disclosure. When customers are informed about these programs, community banks typically allow them to opt out from coverage. In the interest of safety and soundness and to ensure customers properly manage their accounts, community banks often reserve the right to terminate the service at the bank's discretion if the privilege is abused.

One critical piece from ICBA's September 2007 survey of bankers about their overdraft protection services is that while many reported minimal feedback from customers on the programs, those that did hear from their customers reported being thanked when an inadvertent overdraft is covered. Overall, customer feedback on these services has been positive.

Background

Historically, overdrafts have not been subjected to the disclosures and restrictions under the Federal Reserve's Regulation Z, the rule that implements the Truth-in-Lending Act (TILA). This treatment was designed to facilitate depository institutions' ability to accommodate consumers' transactions on an *ad hoc* basis. In recent years, banks have increasingly automated the process to take advantage of new technologies. From the industry point-of-view, this reduces the costs of overdraft protection and also ensures consistent treatment of customers. On the other hand, consumer advocates argue these programs are a high-cost form of lending that can trap unwary low- and moderate-income consumers, especially the elderly and students. To address these concerns, in 2005 the federal banking agencies issued guidelines³ and the Federal Reserve set out additional requirements under Regulation DD.⁴

It is important to recognize that, as discussed in this proposal, overdraft protection coverage refers to automated systems where an overdraft up to a pre-set level is

³ See, e.g., <http://www.federalreserve.gov/boarddocs/srletters/2005/SR0503a1.pdf>, issued February 18, 2005.

⁴ See the Federal Reserve May 19, 2005 press release announcing the changes, effective July 1, 2006, <http://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050519/default.htm>.

automatically covered. It does not include overdraft lines of credit where a pre-established line of credit is used or balance transfer programs where funds are transferred from another account to cover an overdraft. These distinctions are critical to understanding the proposal and how it will apply to bank operations.

While overdraft protection coverage programs vary from bank to bank, all share certain common characteristics. Generally, overdraft protection coverage is “automatic” for consumers who meet the bank’s pre-determined criteria, although most banks review individual accounts periodically to ensure the benefit is not being abused. Most programs clearly state that paying an overdraft is at the bank’s discretion. Typically, the service extends beyond check overdrafts to transactions at automated teller machines (ATMs), automated clearing house (ACH) debits, debit card transactions at a point-of-sale (POS), pre-authorized debits, telephone-initiated transactions and online banking transactions. Determination to cover the transaction that would otherwise overdraw an account is made through automated systems without human intervention. There is generally a flat fee for the overdraft coverage⁵ and sometimes a daily fee as well. The greatest variation among banks is the extent to which customers are notified about the program.

Because the Federal Reserve is concerned about how well consumers actually understand these programs, several new substantive restrictions are being considered under the separate UDAP proposal. In conjunction with those proposals, these changes to Regulation DD would add new disclosures to provide consumers with appropriate information to help them understand and manage their banking accounts and transactions.

The Proposal

Opt-Out. When the agencies issued their 2005 guidelines, they encouraged banks to offer customers an opportunity to opt out from overdraft protection programs. Separately, under the UDAP proposal, that option would become mandatory. These revisions would provide a model form banks could use to notify customers.

ICBA generally agrees with the requirement that customers be informed and given an opportunity to opt out from overdraft protection. Providing the information is important to enable customers to properly manage their accounts. At the same time, it is important to clearly articulate in the final rule which programs are covered. While we agree that it is appropriate to provide the notice and opt-out for automated programs that determine which overdrafts will be covered, ***ICBA recommends the final rule clearly exempt any processes that involve manual decision-making.*** In other words, if a bank staffer decides whether to cover an overdraft using a traditional *ad hoc* process banks have used for centuries that should be outside the scope of these requirements.

To ensure customers understand how these programs operate, it is important the final model disclosures provide information clearly and succinctly. The proposal recommends that a bank *may* want to include information about what might happen if a

⁵ Generally, the fee for overdraft protection coverage is similar to the fee charged for a returned check.

consumer opts out so that he or she understands the potential consequences.⁶ ***ICBA believes information about the possible consequences from opting out should be an optional disclosure.*** It is important consumers understand the consequences of opting out of overdraft protection, that they are not misinformed about the impact from opting out and that they fully understand what will happen if a transaction is rejected because it would otherwise overdraw the account.

Community banks that have expressed a reluctance or aversion to including such information in their opt-out notices are concerned about potential customer confusion. Therefore, ***ICBA believes this is an opportunity for regulators to develop model language*** that can be used consistently in explaining the possible consequences of opting out to consumers. For example, the models should explain that opting out will mean that the overdraft will not be covered but that a fee for a returned item, which may be the same as the fee charged for overdraft coverage, will still apply. Any model disclosures for opting out should also explain that a rejected transaction may be subject to additional charges from the payee that are outside the control of the bank, may be reflected on credit reports or check verification systems and therefore may cause other inconveniences for the customer. To be certain consumers understand their options, if the bank does offer an overdraft credit option, it should explain that to the customer, too.

It is important that the opt-out requirement be made workable for all concerned. While it is important customers are given the option to opt out, banks should have the option to deny customers the ability to constantly change their minds. In other words, community banks should be able to restrict the ability to opt back after opting out, either by charging a fee or by requiring the customer to wait a given period before being able to opt back in. To be certain customers understand these restrictions, this information should be included in notices.

Opt-Out Notice. Under the proposal, the notice would have to be in writing and would have to include information about how the bank's overdraft protection program operates. Specifically, the notice would have to include information about applicable fees, the conditions under which fees apply, how consumers can avoid fees by opting out, and the availability of less expensive alternatives such as an overdraft line of credit or balance transfer option.

ICBA concurs that the opt-out notice should be written. The written notice serves as evidence and community banks can easily incorporate the notice into their normal account opening procedures or use it when appropriate.

ICBA also agrees that a simple explanation in the notice describing how the program operates is useful. Here is another instance where model disclosures will be particularly useful, especially for community banks which have limited resources. First, as with any model disclosures, adherence to the model language provides a safe harbor for compliance purposes, something the final rules should include and make clear.

⁶ For example, the bank may want to explain that a rent or mortgage payment check might be rejected or that returning a check could result in separate merchant fees, being included on a list of consumers with problem checking accounts in addition to the fee from the bank.

Second, model language helps promote uniformity that makes it easier for consumers to understand.

ICBA agrees that providing information about less costly alternatives to automated overdraft protection programs is helpful. However, it is equally important for consumers to understand that the ability to use an alternative program will depend on eligibility. For instance, if the customer opts to apply for an overdraft line of credit, he or she needs to understand that eligibility will depend on the bank's standard underwriting practices. To use this option, a consumer will have to submit an independent application that will be evaluated like any other credit. Consumers may not want to bother with the application or may not qualify even if the bank does offer the option. Similarly, if the community bank offers a balance transfer program, the customer has to understand he or she has to maintain a sufficient balance in the second account. While that seems obvious, it is an important element that not all consumers may grasp. And, it is important that consumers understand there are fees and charges that also may be associated with any alternative. These are critical to consider since explaining alternatives does not automatically mean all consumers will or will be able to migrate to alternative forms of coverage. Moreover, since consumers who can opt for available alternatives may already have taken advantage of these programs, both for cost savings and convenience, this element of the proposal may not have a significant impact on current consumer behavior.

ICBA recommends that the final rule offer model language that helps banks disclose the availability of alternatives to overdraft protection programs. The language should be simple, easily understood, and adaptable for individual institutions. For instance, the alternative language should include two short paragraphs on overdraft lines of credit and balance transfer programs that banks can choose as appropriate. Model language might state: "Alternative methods of covering overdrafts which may be less expensive are available. If you are interested in such alternatives, please contact a bank customer service representative." That would give the bank the ability to provide the information without including it in each opt-out notice. Trying to cover all the bases and explain all the details associated with possible alternatives in the opt-out notice will quickly make the notice unwieldy and full of the information overload that defeats the purpose of providing the disclosure. Therefore, this disclosure should be short and simple to avoid confusing consumers. The notice about alternatives should fundamentally be an alert that there are options.

Finally, ***ICBA recommends that model language include a paragraph to alert consumers that failure to properly manage an account, including excessive overdrafts, could result in the account being closed.*** Unfortunately, in all the discussions of overdraft protection, including the ability to use alternatives and the fees for accessing any of these services, the responsibility to properly manage an account is often overlooked. Since some element of these proposals would leave community banks with account closure as the only viable safe and sound alternative, consumers should clearly be aware that could be a consequence of their behavior. It would be both useful and beneficial if the Federal Reserve included model language in the final rule that community banks could use to communicate that information to their customers.

Minimum Transactions. As proposed, the notice would have to explain the categories of transactions for which an overdraft fee would apply and explain that an overdraft fee might apply to a transaction as small as \$1.00 (or the lowest amount for which the bank would impose the fee). In addition, the bank would be required to provide information about the maximum costs that might be incurred when overdraft protection is triggered.

ICBA agrees that it is useful to include information about which categories of transactions may be covered by overdraft protection coverage. This ensures customers understand that small transactions, including those at point-of-sale, can trigger an overdraft and the corresponding fee. This is an area some consumers do not seem to fully grasp, so including steps that explain that even small transactions can lead to overdrafts is useful information to provide.

Opting Out. The Federal Reserve is considering whether to allow banks to use an opt-out check off box on the notice as well as whether to let customers respond electronically (as long as the customer has already agreed to electronic delivery of information).

ICBA does not object to the optional use of a check-off box to allow consumer to opt out. This would be simple for customers to use and should be included as an option but not be mandatory. Each bank should be allowed to position its products and services in the best way to serve its own market and the particular customer base the product is designed to serve. For example, some banks may find that it is preferable to require the customer actually sign the form to verify acceptance. Others may find that certain products are less amenable to the check-off box or that a check-off box may be inadvertently checked, leading to customer relations difficulties. Therefore, while ICBA agrees this is a helpful option, it should clearly be an option that can be used at the discretion of the individual institution.

ICBA also recommends that the final rule clearly permit consumers to opt out electronically no matter how the notice was sent. Increasingly, consumers are gravitating towards online banking options and use of the Internet or telephone to conduct banking transactions. It would be useful for the final rule to permit consumers to opt out online even if the notice was sent by another format, such as a paper notice. This will be compatible with current practices and customer expectations. While banks should not be required to offer particular channels such as e-mail customer service, telephone banking or online banking solely to let customers opt out, if the bank already offers these channels, it should be permitted to let customers use them for opting out.

Timing. The opt-out notice must be provided before any fees for overdraft protection may be imposed. Since the protection might not be added at account opening, the proposal would make it clear that the notice must be provided before any fees are assessed.

ICBA recommends that the final rule clearly state that banks have the option of providing the notice and opt-out disclosure either at account opening or during the life

of the account if the service is added to the account after the account was opened. While that is implicit in the currently proposed wording of the regulation, clearly stating that the initial notice may be given *at any time* before the first time a fee for the service is imposed would help, either in the body of the rule or the accompanying commentary.

One requirement under the UDAP proposal is that a customer must be notified of the right to opt out before fees may be imposed and again during any statement cycle when there is an overdraft and a fee is imposed. Banks would have the option of providing a notice separate from the periodic statement and the Federal Reserve is considering whether to let banks use the same notice each time customer notification is necessary. If the bank does send a separate notice, it would not have to include the notice and opt-out again on the periodic statement. If the notice is included on a periodic statement, it would have to be in close proximity to the aggregate fee disclosures for overdrafts and returned checks (see below). The Federal Reserve also is assessing the costs and benefits of requiring a full opt-out notice every time the notice is required.

ICBA opposes requiring delivery of the opt-out notice every time there is an overdraft. If the periodic statement must include fees for the cycle and for year-to-date and that information accomplishes its goal, also requiring a new opt-out notice every time there is an overdraft is overkill and will produce information overload. Rather, the statement that accompanies the statement can be a short and simple reminder that the opt-out right exists. The full notice should not have to be sent constantly. At most, a full opt-out notice sent once each year should be more than sufficient and banks should be given the option of including the overdraft opt-out with any other annual notice. Requiring the notice each time there is an overdraft or each statement cycle there is an overdraft would be costly and burdensome and, unfortunately, if the notice is sent too frequently, more likely completely ignored by consumers.

ICBA believes it is appropriate to include an option in the final rule that lets banks use the same notice for the initial notice as well as for subsequent opt-out notices. Consistency will facilitate compliance for banks and will also ensure that customers can easily and readily identify the notice. Two separate and different types of notices are likely to engender customer confusion. However, it is important that this be optional since it may be necessary to have a different subsequent notice for practical and operational reasons depending on how the bank elects to deliver the notice. As an aside, if the full opt-out notice is triggered whenever there is an overdraft, it will be impractical to use the same notice.

Advertising. In 2005, the Federal Reserve amended the TISA rules so that when a bank “promoted” overdraft protection programs, it was required to provide information on each periodic statement listing overdraft fees and returned check fees for both the statement cycle and aggregated year-to-date. While regulators ordinarily encourage banks to ensure consumers are provided with information, many community banks reported they carefully avoided or ceased communicating with customers about the existence of overdraft protection coverage as a result of this requirement due to the potential costs for making these statement disclosures and the fear of potential criticism by examiners (“regulator risk”). Anecdotal evidence from community bankers suggests

examiners did not clearly understand the requirements such that some examiners deemed *any* information about overdraft protection coverage as promoting the program, regardless of what was in the rule or the commentary. Lack of clarity from the regulators and confusion among examiners did a disservice to community banks and their customers.

This proposal would change the requirement so that *all* banks that offer overdraft protection services, whether they promote the program or not, would have to provide the cycle and year-to-date aggregates on periodic statements. To ensure consumers understand the impact of aggregate fees, the proposal would require the disclosures be provided in close proximity to individual overdraft transaction fees. In addition, based on consumer testing, the information would have to be presented in a tabular format (the proposal includes model templates).

Our recent survey of community banks found many reported making the disclosures. As one banker put it, “the term ‘promoting’ was so broad it would be hard to defend that the bank doesn’t promote the program” while another commented that “it was easier than arguing with the regulator.” However, ICBA is concerned with this requirement since there is a definite cost involved that must be factored into offering the service. These costs have already discouraged some community banks from offering overdraft protection services. Further expansion of the mandate may further discourage community banks, especially smaller community banks, from offering overdraft protection coverage. They may continue clearing overdrafts using the traditional *ad hoc* method, but discouraging the program is a consumer disservice.

Account Balances. Another common consumer complaint has been misunderstanding whether an account has sufficient funds to cover a transaction. The proposal would add a new restriction about how banks provide account balances to consumers at an ATM. If adopted, it would prohibit banks from including in the disclosed balance any funds available to cover an overdraft. This restriction applies to balance inquiries at automated systems such as an ATM but would not apply to in-person discussions, telephone conversations or Internet chats with live personnel.

ICBA agrees with this restriction about including overdraft funds in disclosed account balances. Requiring a bank to disclose the available balance without including additional funds available for overdraft coverage will help avoid customer confusion. ICBA’s survey suggested most community banks do not currently disclose a balance that includes the amount available for overdrafts.⁷ However, ICBA understands that some deposit software programs are structured in a way that compliance with this restriction would make it impossible to offer overdraft protection coverage. Therefore, ICBA urges the Federal Reserve to work with vendors and deposit software companies to ensure that the costs to reconfigure these systems is not excessive or that this restriction does not prevent banks from offering overdraft protection coverage.

⁷ Similar results were found in our earlier survey of a different group of community bankers last September where the majority did not include amounts available for overdraft coverage in their balance disclosures.

While banks would not be permitted to only disclose one balance that includes funds available under overdraft protection coverage programs, banks would have the option of providing a second balance that includes funds available through the overdraft service but only if the bank prominently discloses that the second balance includes available overdraft funds. ***ICBA questions whether permitting disclosure of a second balance would be particularly useful.*** From an operational and cost perspective, making this disclosure may not be entirely feasible. However, since it may provide useful information for consumers, ICBA does support including the option for banks to provide this information. As technologies advance, and as market demands and consumer tastes change, it may become more common to provide this second balance. Including the option in the rule now will obviate the need to revisit and revise the rule in the future to allow the disclosure if consumers demand it.

A separate proposed revision to the commentary would clarify that the bank could include in the disclosed balance any funds deposited that had not cleared under the timeframes set out in Regulation CC, the rule implementing the Expedited Funds Availability Act. ***ICBA finds it helpful to clarify that the disclosed balance can include funds that have deposited but not yet cleared.***

The disclosed balance could also include funds subject to a hold for other reasons, such as a merchant hold on an authorized transaction that has not yet settled. And finally, the commentary would also clarify that the rule is not designed to mandate “real-time” balance disclosures, only that the bank cannot include funds available for overdraft.⁸ ***ICBA believes it helpful to clearly articulate that the rule is not to be construed as mandating “real time” disclosures.*** While community banks are striving to reach that goal and have been making great strides in that direction, operational and technological limitations prevent real time information in all circumstances. Any mandate that required real time disclosures could do a disservice to many smaller businesses, including smaller banks that do not have the wherewithal to provide such information.

Effective Date. The Federal Reserve will ensure that community banks have sufficient time to implement these changes along with the changes under Regulation Z and UDAP. Currently, the Federal Reserve is considering allowing one year after the final rules are published. ***ICBA believes that one year should be sufficient to allow banks to comply with the new requirements.*** However, ICBA strongly encourages the Federal Reserve to consult with third-party service providers and other software vendors to ensure that they will be able to provide the needed updates in time for community banks to implement the changes, remembering that these changes are not the only ones that must be met. And, ***it is critical that the effective date for these changes be identical to the effective date for the parallel changes under the UDAP proposal.*** Anything else will cause unnecessary confusion and needless burden.

⁸ The Federal Reserve believes that adopting this rule will not preclude a separate determination by another agency that it is a deceptive practice under the Federal Trade Commission Act to disclose a single balance that includes funds that a bank may provide to cover an overdraft if the bank does not state that fact.

Conclusion

It is important to recognize the benefits of overdraft protection coverage and not implement regulatory barriers that would undermine these benefits. Overdraft protection coverage offers an efficient and cost-effective way that is consistently applied that allows transactions that would otherwise overdraw a customer's account to clear automatically. Clearing the overdraft helps customers avoid the embarrassment and inconvenience of having a transaction rejected, incurring third-party fees and having the negative information included in credit reports or check verification systems. Restrictions and requirements that make it difficult for banks to continue offering a welcome customer service could have unintended consequences. Barriers to overdraft protection coverage could cause more transactions to be rejected and could cause some consumers to lose access to banking services.

Any final rule should be clearly limited to automated systems that operate without human decision-making for individual transactions. While many banks do offer alternatives to the automated overdraft coverage, that is not universal and not all consumers will qualify or be willing to apply for alternatives.

ICBA agrees that customers should be informed about the programs and be given the opportunity to elect to opt-out. To be certain that information is properly conveyed, ICBA strongly urges the Federal Reserve to develop model disclosures that can be used by all banks, but especially community banks, and that will provide a safe harbor for compliance. However, it is important that consumers are fully informed and understand how their accounts operate so that they can live up to their own responsibilities in managing their accounts.

Thank you for the opportunity to comment. If you need additional information or have any questions, please contact the undersigned by telephone at 202-659-8111 or by e-mail at robert.rowe@icba.org.

Sincerely,

/s/

Robert G. Rowe, III
Senior Regulatory Counsel