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By Facsimile and E-Mail

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551
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Re: Regulation DD; Proposed Rule on Truth in Savings
Federal Reserve System [Regulation DD; Docket No. R-1315]

Dear Sirs and Madams:

This letter is submitted on behalf of Wells Fargo & Company and its affiliates ("Wells Fargo") in response to the proposed rule regarding Truth in Savings, published in the Federal Register on May 19, 2008 at 73 FR 28739 (the "Proposed Rule"). Wells Fargo appreciates the opportunity to comment and respectfully requests that the members of the Board of Governors of the Federal Reserve System ("Board") consider adopting the suggestions set forth herein.

This letter will begin with general comments about the Proposed Rule. Following the general comments, this letter will address specific comments relating to each section.

I. General Comments

The substantive provisions regarding overdraft services and consumer opt-out rights are set forth in the Regulation AA proposal. We are separately providing comments in our Regulation AA/Overdraft Services comment letter expressing our serious concerns with that proposal. However, we would like to re-state some of our concerns here.

A. <u>The FTC Act does not support a broad definition of "overdraft services" for UDAP purposes.</u> The definition of "overdraft services" is overly broad.[1] It goes beyond marketed "bounce protection" programs to include even discretionary overdraft programs that are not promoted to the public. The opt-out proposal is flawed in concluding that traditional, discretionary overdraft services (not promoted to the public) and the failure to provide opt-out with respect to such services are an unfair practice under FTC Act standards:

(1) Overdraft fees for these services are not injuries when properly disclosed[2];
(2) Overdraft fees for these services are reasonably avoidable;[3] and
(3) Overdraft services provide countervailing benefits to consumers that outweigh the costs in fees.[4]

B. <u>The policy "concerns" expressed by the Board, OCC, FDIC, NCUA and OTS do not support a broad definition of "overdraft services" for UDAP purposes.</u> In the Joint Guidance on Overdraft Protection Programs (by the Board, the OCC, the FDIC and NCUA)[5] and the OTS Guidance on Overdraft Protection Programs,[6] the five agencies identified certain misleading marketing practices with respect to "some overdraft protection programs" that were of concern, such as:

- The marketing and disclosure of overdraft protection programs that promote overdraft services in a manner that leads consumers to believe that the program is a line of credit.
- The use of marketing programs that appear to encourage consumers to overdraw their accounts.

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[1] It is important to note that the use of the term "overdraft services" is a misnomer since it implies that the bank always has a choice about whether to cover overdrafts, when in fact many overdraft situations occur during the normal course of transaction processing and may be out of the control of the bank , such as those created by posting previously authorized ("must-pay") debit card transactions,

[2] See "Testimony of John C. Dugan Comptroller of the Currency Before the Committee on Financial Services of the U.S. House of Representatives" (June 13, 2007) (Practices that rise to the level of "unfairness" under the FTC Act standards require a combination of "both an inordinate degree of risk or harm . . . and deficiencies in the information provided . . ." so that fees or interest rates that are adequately disclosed are not likely to be treated as unfair under existing FTC Act precedents.)

[3] See, *e.g.*, <u>Saunders v. Michigan Ave. Nat. Bank</u>, 662 N.E.2d 602 (Ill. Ct. App. 1996) which held that the bank's practices of charging an overdraft fee was not "unfair" under the Illinois Consumer Fraud Act. The court applied the FTC Act analysis and determined that there was no lack of meaningful choice regarding overdrafts. The court noted that the plaintiff had control over whether she would be assessed an overdraft fee and was also free to select another bank. The court concluded that the bank provided the plaintiff "with all of the information necessary to make a meaningful choice in selecting banks."

[4] Overdraft services allow consumers to avoid returned item fees, late fees or penalties, negative credit ratings and other adverse consequences when payments are not made. Payment of debit card or ATM transactions into overdraft allows consumers to avoid the embarrassment of having a transaction declined at the point-of-sale; or avoid the inconvenience of not being able to withdraw funds at any ATM. Additionally, debit cards are increasingly used for recurring bill payments, and payment of these transactions into overdraft provide similar benefits to payment of checks or ACH (e.g., avoidance of late fees or termination of service).

[5] 70 Fed. Reg. 9127 (Feb. 24, 2005)

[6] 70 Fed. Reg. 8428 (Feb. 18, 2005)

- The failure of financial institutions to disclose that the promoted program may include overdrafts by means other than checks.
- The disclosure of account balances information that includes overdraft protection amounts rather than the amount actually available for withdrawal.[7]

It appears that the "concerns" are all with respect to programs with misleading promotions or practices, particularly those that encourage irresponsible consumer financial behavior that potentially increases risk for the institution.[8] These "concerns" do not apply to traditional, discretionary overdraft services that are not marketed to consumers and are provided as an accommodation by responsible financial institutions with appropriate disclosures. The five agencies indicated that historically non-promoted accommodations have not raised significant supervisory concerns.[9]

C. <u>Public policy should not encourage institutions to promote overdraft services and encourage consumers to overdraw their accounts.</u> The Board had previously expressed concerns about institutions that promote discretionary overdraft programs and encourage the use of overdrafts. The required opt out notice will create an awareness of, and thereby promote, discretionary overdraft services and implicitly encourage consumers to freely avail themselves of these services. Requiring all institutions to notify consumers that they provide overdraft services from which consumers may opt out effectively mandates that all institutions participate to some degree in promoting overdraft services (*i.e.,* bounce protection programs). Even those institutions that have made a conscious decision to refrain from offering bounce protection programs will be forced to participate at some level in a program about which the Board has expressed serious concerns.

D. <u>Consumers may misinterpret what it means to opt out of overdraft services.</u> The opt-out proposal would require an institution that has never promoted overdraft services to notify consumers that it now "provide[s] overdraft services" and that the consumers may opt out of these services. This opportunity to opt out of a discretionary overdraft service is likely to be misunderstood by consumers. Regardless of how the opt-out notice is phrased, we believe that many (perhaps most) consumers who choose not to opt out of the overdraft service are likely to believe that they have some assurance that their payments will be covered, even though they are made without sufficient funds. Such a belief would be wrong, of course, since the institution has never committed to pay overdrafts and retains the discretion to return items for insufficient funds. As a result, we believe that the notice requirements of this proposal mandate that institutions participate in acts and practices that could, in a different context, be accused of being deceptive.

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[7] 70 Fed. Reg. 9129 and 70 Fed. Reg. 8429-30

[8] The Board identified and discussed similar concerns in the Supplementary Information accompanying its amendments to Regulation DD effective July 1, 2006 (70 Fed. Reg. 29582-29583 (May 24, 2005)), but these concerns do not apply to traditional discretionary overdraft services which are not marketed to consumers.

[9] 70 Fed. Reg. 9128, 70 Fed. Reg. 8429

Consumers are also likely to be confused as to what is subject to opt-out. They may not understand that they are still subject to fees that may occur because items will be returned instead of paid into overdraft. Consumers may not understand that they may actually incur more fees than if the item was paid into overdraft because returned items that are not paid may be re-presented multiple times, resulting in multiple returned item fees. They may not understand that overdrafts may still occur even if they opt out, and overdraft fees may still be charged for permitted debit card exceptions.[10]

E. The opt-out proposal will have unintended consequences that are detrimental to consumers. Opt-out for all overdraft services (not just bounce protection programs) means that that there may be a significant shift from overdrafts to more returned items. Financial institutions may return and decline more checks, automated payments and debit card transactions, including important payments such as those for mortgages, utilities, insurance and credit cards. Consumers may incur more returned item fees. Furthermore, there is no limit on the number of times a check may be re-presented; and ACH items can be re-initiated up to two additional times after the original item is returned for insufficient funds. Consequently, a single transaction for which there are insufficient funds can result in multiple returned item fees. In addition to returned item fees on their deposit account, consumers may also incur separate merchant fees for returned items and late fees, interest charges and penalties from creditors. Additional fees or penalties may also be imposed by the payee (*e.g.*, merchant or mortgage lender). Failure to make the payments may result in a negative credit rating for the consumers and other adverse consequences, such as termination of services or lapse of insurance coverage for insurance payments.

For the reasons explained above, Wells Fargo believes that the Agencies are required to limit any exercise of their UDAP authority under Regulation AA, and the corollary disclosure requirements in the Regulation DD proposal, to only those acts and practices that have been the focus of prior regulatory concern and for which there is a legal basis under the FTC Act, such as "bounce protection" programs that actively promote overdraft services. To the extent that the Agencies still feel that programs other than bounce protection programs need to be addressed (e.g., to formally encourage institutions to adopt some of the recommendations previously identified as "best practices"), they must address them under other authorities (*e.g.*, Regulation DD or Regulation E); and before proceeding any further, the Agencies need to grasp fully the magnitude of the untenable operational problems and unintended consequences to consumers and payment systems with this proposal.

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[10] In the proposed changes to Regulation AA, the Agencies acknowledge that there are circumstances where an institution may not be able to avoid paying a transaction that overdraws an account. Accordingly, the Agencies have proposed two exceptions (and invited comments on additional exceptions) where an institution may charge overdraft fees even if the consumer has opted out: (1) where the debit card transaction amount presented at settlement by a merchant exceeds the pre-authorized amount; and (2) where the debit card transaction is presented as a paper-based item and the bank had not previously authorized the transaction. (73 Fed. Reg. 28930 (May 19, 2008))

II. Specific Comments

The following comments pertain specifically to the Regulation DD proposal and are not intended to diminish the serious concerns we express with the Regulation AA/Overdraft Services proposal.

A. Opt-Out Disclosure Requirements for Overdraft Services

1. Format and Content

a. Methods for Opt-out

Proposed § 230.10(b)(5) requires institutions to inform a consumer of the right to opt out of the institution's payment of overdrafts, including the method(s) that the consumer may use to exercise the opt-out right. Proposed comment 10(b)-2 provides that such methods may include providing a toll-free telephone number that the consumer may call to opt out or allowing the consumer to mail in the opt-out request.

The Board requests comment as to whether institutions should be required to provide a form with a check-off box that consumers may mail in to opt out. We believe that the Board should not make this a requirement but should allow institutions to decide for themselves if they want to provide a form with a check-off box. We request clarification that institutions would not be required to provide a form with each periodic statement or opt-out notice and that any form would only be provided upon request by the consumer. A form that is mandated with every periodic statement will be of very little use by consumers and would be more than offset by the cost of maintaining and distributing such a form.

The Board also requests comment regarding whether consumers should also be allowed to opt out electronically, provided that the consumer has agreed to the electronic delivery of information. We believe that the proposal should not limit the methods of communication to any specific channel, such as telephone or mail, but should allow an institution to offer other available channels of communication, including online communications, or discussion with a banker in a branch.

b. Sufficiency of Content

The Board requests comment regarding whether the proposed content requirements provide sufficient information for consumers to evaluate effectively whether an institution's overdraft service meets their needs. We believe that the sample notice provided by the Board is misleading and is slanted towards encouraging consumers to opt-out. The notice should be more balanced in its approach, and include sufficient information about the disadvantages of opt-out so that the consumer can make an informed choice.

- **Meaning of "Overdraft Service."** The content of the notice set forth in Sample Form B-10 is not sufficiently clear on the discretionary nature of the "overdraft services." As explained above, this will cause customer confusion and customers may be misled into believing that the institution will cover overdrafts. Unfortunately, as is noted above, we believe that, regardless of how this notice is phrased, consumers who choose not to opt out of the overdraft service are likely to believe that they have some assurance that their payments will be covered, even though they are made without sufficient funds. This customer confusion (particularly if coupled with allegations of banker mischaracterization) inevitably will lead to frivolous claims for damages for failing to pay overdraft items. The problem is that asking a consumer to decide whether to "receive" a purported service that the institution may or may not provide is inherently confusing.

- **Consequences of Opt-Out.** Proposed comment 10(b)-3 permits institutions to briefly describe the consequences of opting out. The notice in Sample Form B-10 contains just the one sentence to explain that if the customer opts-out, "you may have to pay a fee if you make transactions that are returned unpaid." This is not sufficient to help the customer understand the full consequences of opt-out. As explained above, this includes not only one fee, but potentially multiple fees: returned item charges by the bank, multiple charges if the items are re-presented, and merchant charges and penalties or other adverse consequences for non-payment. Unfortunately, regardless of the content of the opt-out notice, the customer is not going to fully understand the consequences of opting out.

- **Partial Opt-Out**. The partial opt-out right is unworkable, and the disclosures are problematic in numerous respects. The statement of the partial opt-out right provides: "You also have the right to tell us not to pay overdrafts for ATM withdrawals and debit card purchases, but to continue to pay overdrafts for other types of transactions."

    - **Description of Partial Opt-Out.** This seems to suggest (incorrectly) that the customer has a right to have an overdraft covered by the institution. The institution cannot, of course, be obligated to cover overdrafts for particular categories of transactions when it was never obligated to cover overdrafts to begin with. A consumer is unlikely to understand that a partial opt-out may result in a de facto full opt-out. The concept of a partial opt-out and the manner in which such a partial opt-out would be communicated to a consumer further emphasizes our view that any effort to communicate to consumers a right to opt out of, or a right to receive, a discretionary overdraft service is inherently confusing. Again, we believe that the notice requirements of this regulation mandate that institutions participate in acts and practices that could, in a different context, be accused of being deceptive.

- **Description of Exceptions.** The Regulation AA proposal contains exceptions that would allow overdraft fees to be assessed for certain debit card transactions (*e.g.*, if the settlement amount exceeds the authorization amount) even if the consumer has opted out. The Board has also requested comment on additional exceptions that should be included. The proposed language in Form B-10 does not take into account the communication of specified exceptions that would allow an overdraft to occur and a fee to be assessed even if the consumer has opted out.

- **"Must Pay" Transactions.** The statement that the customer has the right to tell an institution "not to pay overdrafts for ATM withdrawals and debit card purchases" is inaccurate. This implies a level of control over debit card transactions that institutions do not have. Under debit card network rules, a debit card transaction that has been previously authorized must be paid by the institution when it comes in for settlement, even if it creates an overdraft on the account. Payment of the debit card transaction may then have a cascading effect and result in other transactions posting into overdraft.

- **Limits on Fees.** Proposed Section 230.10(b)(4) requires that institutions disclose the maximum amount of overdraft fees or charges that may be assessed per day and per statement period, or a statement that there are no limits, if applicable. The proposed language in Sample Form B-10 states "We can charge you a maximum of $__ in fees per day and $__ per statement period for overdrawing your account."

  - **Daily OD Limit** - If a customer has insufficient funds, charges may result from a combination of paid and/or returned items on a given day. Typically, the daily limit established by institutions is not specific to overdraft fees, but is a limit for both NSF fees and overdraft fees. By focusing only on the amount incurred for overdrafts, the notice creates the implication that the customer can avoid charges by opting-out. In fact, the customer may simply be substituting an overdraft fee with a returned item (and perhaps incur the same aggregate fee amount per day).

  - **OD Limit for Statement Period** – Typically, there is no statement period limit, unless you multiply the number of processing days in the statement period times the "daily limit." Such a number is not meaningful. We question why this requirement is included and request clarification that an institution is not required to disclose a statement period limit achieved by calculating from a daily limit and multiplying the number of days. Specifying such a limit is not helpful to the customer and is likely to be inflammatory. In reality, the customer would never get close to such a calculated statement limit because the institution will be returning items or closing the account in order to minimize its risk.

- **<u>Alternative Payment Options.</u>** The proposal requires a statement, if applicable, that an institution offers other alternatives for payment of overdrafts. In addition, if the institution offers a line of credit for the payment of overdrafts, the institution "must" also state that fact. The description of the line of credit alternatives needs to make clear that these are subject to credit qualification.

c. <u>Same Content for Opt-Out Notices.</u>
The Board's proposal would require that all opt-out notices contain the same content, regardless of when the notice is provided.

The Board is requesting comment whether the content requirements should differ when the opt-out notice is provided after an overdraft fee has been charged to the consumer's account, or whether the rule should permit institutions to exclude some of the required content in subsequent notices, such as information about alternatives to overdraft service.
The Board requests comment on the burden to institutions and benefits to consumers of providing all of the proposed content in each notice.

We believe that the initial opt-out notice to customers (either at new account opening, or at first overdraft occurrence for existing bank customers) could include the full content required by the Board. After an institution has provided the initial disclosure, however, it is unnecessary to repeat all the same information in subsequent notices so long as the institution discloses the overdraft charges to the consumer in the periodic statement or overdraft notice. A requirement for the same content on subsequent notices would be particularly burdensome if the institutions must provide the notice "on" the statement or overdraft notice, rather than as a separate statement insert. We suggest that subsequent notices can simply remind the consumer of the opt-out right with a brief statement to contact the bank to discuss their options in more detail. This would minimize the amount of space required to communicate the opt-out notice on the periodic statement or overdraft notice, and avoid redundancy.

2. Timing

Proposed § 230.10(c) sets forth timing requirements for providing an opt-out notice. The opt-out notice must be provided: (i) initially before the overdraft service is provided and overdraft fees are imposed on the consumer's account, and (ii) subsequently at least once during any statement period in which the consumer incurs an overdraft fee.

The proposal requires that institutions provide notice of opt-out from overdraft services in a format substantially similar to Sample Form B-10. The notice must either be <u>on</u> each periodic statement containing an overdraft fee or <u>on</u> the notice sent promptly to a customer notifying the customer of the overdraft. If such a notice is going to be required, we request that institutions be allowed to send the notice "with" the periodic statement or "with" the notice of overdraft. If the required notice is sent on the notice an institution provides to its customer regarding the occurrence of an overdraft, the notice is only required to be sent once per statement period. By permitting the required notice to be sent "with" the notice instead of "on" the notice, the Board would be making it easier for institutions to take advantage of the provision that permits the required notice to be sent only once per statement period.

The Board requests comment on the burden to institutions of requiring that the opt-out disclosures appear in close proximity to the fees.
To determine how much of a burden this requirement would create, we need to get a better understanding of what constitutes "close proximity." As noted above, our preference would be to permit the notice to be enclosed with the periodic statement.

Clarification Requested: Clarification is requested regarding what is a "reasonable opportunity to exercise the opt-out right" prior to the assessment of overdraft fees.

We must also be cognizant that a consumer may elect to change their preferences over time, i.e., decide to revoke their opt-out, or "opt-in" at a later date. In order to avoid customer manipulation of the opt-out proposal (e.g., customer elects to "opt-in" prior to drafting a large check or during the early part of the month when bills are due), we suggest that institutions be allowed to determine the effective date associated with an opt-in that works within their operational constraints and customer service preferences.

B. Aggregate Fee Disclosures

The Board is proposing to require all institutions to provide aggregate dollar amount totals of fees for paying overdrafts and for fees for returning items unpaid on periodic statements provided to consumers, pursuant to its authority under Sections 268 and 269 of TISA. As under the current rule, institutions must provide these totals for both the statement period and the calendar year to date. The disclosures must be in close proximity to the other fee disclosures required under Section 230.6(a)(3) and the sample form indicates that they must be in a table or box.

The Board requests comment on the potential benefits to consumers and compliance burden for institutions for the proposed approach.

We do not agree that this requirement should be extended to apply to institutions that do not promote overdraft services. The Board originally exempted institutions that did not promote overdraft protection from the aggregate fee disclosures requirements. It did so because it did not want to impose compliance burdens on institutions that pay overdrafts infrequently. The Board is concerned that the vast majority of institutions have replaced an entirely ad hoc decision-making process for paying overdrafts with an automated process and that this has led to the more frequent payment of overdrafts. We believe that the frequency of overdrafts is better explained by customer behavior. We also believe that customer behavior is influenced by promotional activities that encourage customers to overdraw their accounts. We do not believe that a customer's behavior is explained by whether a person or a computer decides to pay an overdraft. There is no more justification for imposing the aggregate fee disclosures on institutions that do not promote overdraft programs today than there was in 2005.

The Board has concluded that institutions may be reluctant to provide information about their overdraft services out of a concern that providing such information may trigger the aggregate fee disclosures required by 12 CFR §230.10. If this were the case, there should be examples of institutions (other than institutions offering bounce protection) that, following adoption of these rules changed the information they provided to customers about overdrafts. The Board has not cited any examples of any such change in behavior.

The Board states that "a significant number of consumers who use overdraft services on a regular basis do not receive the benefit of the aggregate fee disclosures which might otherwise help them in evaluating their approach to account management and determine whether other types of accounts or services would be more appropriate for their needs." It is not clear, however, whether a benefit is actually received by the consumers who do receive these disclosures. Two points must be made in this regard:

1. The Board indicates that the percentage of accountholders with one or more overdrafts per year is about the same for institutions that promote overdraft services as it is for institutions that do not.[11] Certainly on the basis of this information, there is no reason to conclude that the new information is affecting consumer behavior. Perhaps there is other, more specific, information showing that a significant number of consumers who have received the information required by 12 CFR §230.10 have changed their behavior regarding overdrafts, but such evidence has not been set out in this proposal.

2. The Board indicates that the ability for consumers to compare effectively the terms of accounts is potentially undercut by a rule that distinguishes between institutions that promote overdraft services and those that do not. It is important to keep in mind that the information at issue concerns overdrafts on an existing account. Providing information regarding aggregate fees tied to actual overdrafts can enhance account comparisons only if there are actual accounts to compare (e.g., two accounts at different institutions that incur similar overdraft activity). Clearly, the information that is being proposed to be included on periodic statements will not facilitate the comparison of accounts. The best way to ensure effective account comparisons is by ensuring uniformity of account-related information when a consumer shops for an account. Continuing to restrict the disclosure requirements of 12 CFR §230.10 to institutions that actively promote overdraft services will not impact a consumer's ability to compare accounts.

[11] See 73 Fed. Reg. 28739, 28744 (May 19, 2008).

As noted above, there is no evidence set out in the proposal to indicate that the information currently mandated for institutions offering bounce protection programs has had any effect on consumer behavior. If this is true, then it is difficult to see what, if any, benefit the consumer ostensibly derives from this information that would offset the costs and additional burdens that would be incurred by the industry in complying with this new requirement.

C. Disclosure of Account Balances

The Board proposes that, in response to an account balance inquiry by a consumer through an automated system, an institution provide a balance that includes only funds that are available for immediate use or withdrawal. Wells Fargo supports this proposal. The available balance that Wells Fargo provides to customers via online, telephone (agent and IVRU), ATM (online and receipt) at proprietary and non-proprietary ATMs, or branches includes only funds currently available for withdrawal. It does not include funds from a linked overdraft protection source or calculated overdraft limit.

D. Effective Date

Wells Fargo asks the Board to be mindful of the cumulative effect of the Proposed Rule in conjunction with the proposed rules for Regulation AA and Regulation Z. Based on the extent of the system and procedural changes that will be required and the complexity of the changes, as well as extensive testing requirements, Wells Fargo requests that the effective date be at least two years from the date the regulation is published.

If you have any questions or would like to discuss any of the issues raised in this letter, please contact me at (415) 222-5350 or shirley.n.thompson@wellsfargo.com.

Sincerely yours,

Shirley Ng Thompson

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Managing Counsel

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