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Via E-mail: regs.comments@federalreserve.gov

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

Re: Regulation AA; Docket No. R-1314
Regulation DD; Docket No. R-1315

Dear Ms. Johnson:

This letter is submitted to the Board of Governors of the Federal Reserve System (the "Board") on behalf of Compass Bank, an Alabama banking corporation ("Compass"), in response to the Board's request for comment on the proposed regulations under Regulation AA, which implements the Federal Trade Commission Act ("FTC Act") and Regulation DD, which implements the Truth in Savings Act ("TISA"), as well as the staff commentary to Regulation DD. The proposed amendments to Regulation AA and Regulation DD are referred to jointly herein as the "Proposed Rules".

Compass is a Sunbelt-based, regional commercial financial institution owned by Compass Bancshares, Inc., a bank holding company that is wholly owned by BBVA (NYSE: BBV) (MAD: BBVA). Compass has approximately $60 billion in assets and, through its operating companies, maintains more than 580 branches in Alabama, Arizona, Colorado, Florida, New Mexico, and Texas. Compass is among the top 25 largest banks in the U.S. based on deposit market share.

Comments in this letter relating to Regulation AA specifically address overdraft services and the treatment of debit holds; Compass is submitting, under separate cover, a comment letter addressing the proposed amendments to Regulation AA specifically relating to credit practices and Regulation Z.

Compass appreciates the Board's time and effort in preparing the Proposed Rules and hopes that these comments will be helpful to the Board in its effort to promulgate reasonable and workable standards to inform consumers about overdraft services and allow consumers to effectively compare the terms of deposit accounts.

I. REGULATION AA

A. General Comments

The Board, the Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA") (the Board, OTS and NCUA are collectively referred to herein as the "Agencies") propose changes to Regulation AA to regulate certain overdraft services and practices. The proposal identifies certain acts and practices that may be unfair or deceptive and prohibits institutions from engaging in those acts or practices. Historically, consumer credit transactions and overdraft services have been regulated through disclosure requirements. The proposed regulation of overdraft services and practices under Regulation AA is a significant change from the current regulatory treatment of such practices and services.

Recently, Board Governor Kroszner pointed out to the members of the Financial Services Committee of the U.S. House of Representatives that:

> Crafting effective rules under the "unfair or deceptive" standard presents significant challenges. Whether a practice is unfair or deceptive depends heavily on the particular facts and circumstances. To be effective, rules must have broad enough coverage to encompass a wide variety of circumstances so they are not easily circumvented. At the same time, rules with broad prohibitions could limit consumers' financing options in legitimate cases that do not meet the required legal standard. [1]

Governor Kroszner acknowledged that in promulgating a legal standard for "unfair and deceptive" practices under the FTC Act the Board must be mindful of unintended consequences. A practice that may be unfair with respect to certain consumers, or under certain conditions, may be entirely appropriate for another consumer. This has led the Board to focus on addressing potentially unfair or deceptive practices primarily by using its supervisory powers on a case-by-case basis rather than through rulemaking under the FTC Act. Governor Kroszner further recognized the Board's view that the "enforcement of the FTC Act on a case-by-case basis, reinforced by agency guidance that establishes standards and recommended practices, is a more effective way to address these concerns."[2] It is unclear why the Board would suddenly reverse this long-standing policy and propose regulations that are not appropriate for all or a majority of cases and circumstances and, as shown below, could lead to a multitude of unintended

[1] Testimony of Federal Reserve Board Governor Kroszner before the House Committee on Financial Services, June 13, 2007.
[2] Id.

consequences. We urge the Board to reconsider its position and to carefully consider the significant consequences the proposal would have on both consumers and institutions.

B. Overdraft Services

The Agencies are proposing two provisions prohibiting unfair acts and practices related to overdraft services in connection with consumer deposit accounts. The first provision provides that it is an unfair act or practice for a financial institution to assess a fee or charge on a consumer's account for paying an overdraft unless the consumer has been provided with a reasonable opportunity to opt-out of the institution's payment of overdrafts and the consumer has not opted out. The second proposal would prohibit certain acts or practices associated with assessing overdraft fees if the overdraft is caused solely by a debit hold placed on the funds in the account that exceeds the actual purchase amount, unless the purchase amount would have caused the overdraft.

1. Opt-Out/Partial Opt-Out

The consumer's right to opt-out of an institution's overdraft service would apply to all methods of payment, including check, ACH and other electronic methods of payment, such as ATM withdrawals and point-of-sale ("POS") debit card transactions. Institutions would also be required to provide consumers with a partial opt-out option, specifically the option of opting out of overdrafts only at ATMs and for POS debit card transactions. The Agencies' stated intent of the partial opt-out is to allow consumers the ability to determine for themselves whether they prefer that their institution deny the payment of all overdrafts or that overdrafts be paid for check and ACH transactions in order to avoid potential merchant fees.

Although it is impossible for an institution, in all instances, to prevent the payment of items into overdraft, an institution's systems generally will allow consumers the ability to opt-out of an overdraft program at the account level. This would help prevent many, but not all, payments into overdraft. Most systems will not, however, allow the inclusion/exclusion of an overdraft program at the product level. For example, Compass' current systems will not allow a consumer to opt-out of an overdraft program with respect to certain types of transactions, such as ATM or POS transactions. Compass anticipates that the costs and time needed to reprogram our current systems would be material and would not be justifiable from the standpoint of any tenuous benefit to the few consumers we believe would choose to "opt out."

The Agencies acknowledge that institutions may not have systems capable of paying overdrafts for some but not all channels, but state that the benefits of providing choice to the consumer outweighs programming costs. We respectfully disagree with this contention. The programming cost will be significant and even with reprogramming, it is virtually impossible to prohibit the payment of all overdrafts by ATM or POS transactions. For example, a consumer may have a checking account with an available balance of $100 and complete a POS transaction for $100. The same day of the POS transaction, three checks post to the account. The available balance at the time of the POS transaction does not reflect the current day's postings. Assume that checks post prior to the POS transaction and the POS causes an overdraft in the account. At the time the POS transaction was authorized, however, it appeared there was a sufficient available balance to cover the transaction. A similar situation could occur if a deposit item was returned, but at the time of the transaction authorization, the return was not reflected in the available account balance. Under the current operating rules, once a POS transaction has been authorized, the institution cannot return the POS transaction as an overdraft. Therefore, the institution has no option but to pay the item.

In addition to concerns relating to high systems costs (which will ultimately be passed on to consumers) and the questionable effectiveness of a partial opt-out, a partial opt-out may prove highly confusing to consumers. For example, it could be unclear to consumers which debit transactions would be classified as POS transactions for purposes of the opt-out. Consumers may not know whether an opt-out for POS transaction would apply only to PIN-based debit card transactions or whether the opt-out would apply to other debit card transactions, such as online purchases, bill payments, over-the-phone transactions, or instances where the debit card is used for a signature-based transaction. It will be extremely difficult, if not impossible, to educate consumers about the types of transactions subject to partial opt-out.

In addition to educating consumers about the transactions covered by an opt-out, how an institution's system determines available balances for purposes of authorizing transactions will be made much more complex and difficult for consumers to understand. For example, there are instances where, according to the institution's system, an ATM transaction or POS transaction would cause an overdraft; however, the consumer knows that he/she just made a deposit and that there are sufficient funds in the account for the transaction. By way of example, Compass ATM systems will notify a customer if a requested withdrawal transaction could create an overdraft in the account. In the month of June, 76% of the customers that were notified of the potential of overdrawing the account and incurring a fee chose to continue with the transaction. Of those that chose to continue with the transaction, only 35% actually incurred a fee. This highlights the fact that the consumer is in the best position to determine his/her balance and to determine whether there are funds in the account to cover a transaction. If a consumer opts-out of the payment of overdrafts, there could be instances where transactions are not authorized although there are sufficient funds in the account to cover the transaction, which would create problems for both the consumer and the institution. It is important to remember that institutions are responsible for paying items properly drawn against customer accounts.

The Agencies have acknowledged that it is infeasible, if not impossible, for an institution to determine a consumer's "real-time" account balance at any given time. We agree and reiterate that even with additional programming it is impossible to guarantee that the items will not be paid into overdraft. It is the consumer that is in the best position to determine his/her account balance. Only the consumer knows what items he/she may have outstanding. While we appreciate the intent of the proposal to ensure that consumers understand overdraft services and have the choice to avoid the associated costs if the service does not meet their needs, regulation cannot take the place of consumer responsibility. Proper and adequate disclosures concerning the costs and operation of overdrafts ensure that consumers have the information they need to understand the mechanics and consequences of utilizing an overdraft service. Ultimately, only the consumer can avoid the costs associated with an overdraft service through careful and responsible account management.

Exceptions to the Opt-Out/Partial Opt-out

The Agencies acknowledge that in certain circumstances it may be appropriate to allow institutions to assess a fee or charge for paying an overdraft even where the consumer has elected to opt-out. The proposal would permit an institution to charge an overdraft fee in situations where an overdraft occurs as a result of a debit card transaction and the purchase amount presented for settlement by a merchant exceeds the amount that was originally requested for pre-authorization and in situations where a merchant, without first obtaining authorization from a card issuer, presents a debit card transaction for payment by paper-based means and the amount of that transaction creates an overdraft. Because it is impossible for an institution to decline to pay the item beforehand, we are in agreement that both of these situations should not be subject to a consumer's opt-out decision. We urge the Agencies to consider additional situations, such as those highlighted below, where overdrafts could occur through no fault of the institution and consider these situations as additional exceptions.

As stated above, it is infeasible, if not impossible, for an institution to determine a consumer's "real-time" account balance at any given time. It is imperative to allow an exception for instances where, based on the available balance information known to the institution at the time a transaction is authorized or at the time an item is presented for payment, the transaction would not cause an overdraft. This exception would address situations, for example, where the available balance does not reflect the current day's postings, when the ATM network is off-line or when a deposit is returned. It would also cover instances where at the time an authorization is obtained for a debit card transaction, adequate funds are in the account, but then the hold "ages off" the account, other items are presented, and by the time the authorized transaction is presented for settlement, the funds are no longer available. Unfortunately, if there are not additional exceptions that address such instances, the proposal could have the unintended side-effect of causing institutions to impose stricter underwriting standards for the approval of debit cards or discouraging institutions from issuing debit cards.

2. Debit Holds

Under the proposal, an institution must not assess a fee or charge on the consumer's account in connection with an overdraft service if an overdraft is caused solely by a hold placed on funds in the consumer's account that exceeds the actual purchase or transaction amount. Without implementing a manual "look-back" process, the proposal is impossible to implement. Under the proposal, an institution would be required to wait for the actual purchase amount to be presented for settlement before determining whether the purchase or transaction created an overdraft.

Debit card transaction holds are generated by merchants through the card processing systems, and institutions have no control over the debit holds generated by merchants. Merchants request authorizations for transactions through the processing networks, and if the merchant receives approval for a transaction, payment is generally guaranteed. Institutions cannot return an authorized POS transaction for insufficient funds. The debit hold notifies an institution of an impending transaction and the institution posts the debit hold on the consumer's account to help ensure the funds are available when the transaction is presented for settlement.

Debit holds are typically used by merchants in situations where the transaction amount is not certain at the time of authorization. For example, gasoline purchases (pay-at-the-pump), restaurant purchases, and hotel charges are transactions where debit holds are typically used. The financial institution has no control over the accuracy of the hold amount; this is solely in the control of the merchant. As stated above, if an institution authorizes a transaction, the institution is required to make payment when the transaction is presented for settlement; therefore, debit holds are used to prevent the risk of loss from being placed on the institution.

As support for the proposal, the Agencies note that the card issuing institution is not required to send payment for an authorized transaction until the transaction is presented for settlement by the merchant and is posted to the consumer's account. By authorizing a transaction, the institution has essentially guaranteed payment of the authorized amount. Although the funds may not actually be transferred from the consumer's account on the day of the authorization, until the transaction is presented and settled, the funds are, for all practical purposes, unavailable to pay other debits on the account.

As stated above, debit holds are necessary to prevent the risk of loss from being placed on an institution. If institutions are no longer able to assess an overdraft service fee in these situations, institutions will likely decline any subsequent authorizations or transactions on the account if such payments could cause the account to be overdrawn when the merchant presents the actual amount for payment. This result will lead to even more customer confusion and cause even more customer dissatisfaction. Again, the Agencies' proposal also could have the unintended effect of causing institutions to impose stricter underwriting standards for the approval of debit cards or discouraging institutions from issuing debit cards.

The Agencies are concerned that consumers unfamiliar with debit hold practices may inadvertently incur considerable overdraft fees on the assumption that the available funds in their accounts will only be reduced by actual transaction amounts. We contend that consumers will be equally, if not more, confused when an institution fails to authorize a subsequent transaction due to the presence of a debit hold. While we understand that consumers can easily be confused by the use of debit holds, we suggest that this confusion could be dealt with by providing consumers with adequate information and explanation of how debit holds operate and why overdrafts caused by debit holds may result in the assessment of overdraft service fees. Additionally, because it is the merchant that is solely responsible for the debit hold, we recommend that any regulation on the use of debit holds and any disclosure requirements regarding debit holds be made applicable to the types of merchants who initiate the debit holds.

II. REGULATION DD

The Board proposes to amend Regulation DD and its staff commentary to require institutions to provide additional disclosures about account terms and costs associated with overdrafts. The proposal: (i) sets forth content and timing requirements for overdraft service opt-out notices required under the Regulation AA proposal; (ii) expands requirements for disclosing overdraft fees on periodic statements to apply to all institutions and not solely to institutions that promote the payment of overdrafts; and (iii) addresses balance disclosures provided in response to balance inquiries from consumers.

A. Opt-Out Notices

Under the proposal, in providing an overdraft service opt-out notice, the notice must address: (i) categories of transactions for which a fee for paying an overdraft is charged; (ii) the amount of fees assessed for the payment of overdrafts; (iii) the potential impact of the fee in relation to the overdraft amount; (iv) limits on the fees charged; (v) methods for opting-out; and (vi) the availability of potentially less costly alternatives. The opt-out notice must be in a format "substantially similar" to a sample form the Board included in the proposal. The staff commentary would permit additional information to be included in the notice, such as the consequences of the consumer's election to opt-out.

The goal of the proposal is to provide the consumer with information that would allow the consumer to decide whether the benefit of an overdraft service compensates for the cost of the overdraft fees that could be assessed against his/her account. While we agree that the information set forth in the proposal would be necessary for a consumer to weigh the costs and benefits of an overdraft service, there is much more information that a consumer would need to make an informed decision with regard to an opt-out. For example, systems limitations commonly will prevent the institution from being able to determine "real-time" available balances. If a consumer makes a deposit, that amount may not show up on the system as part of the available balance until the next business day. If a consumer has opted-out of overdraft services, certain ATM or POS transaction could be denied because the deposit is not yet reflected as part of the available balance.

Additionally, it is important that any exceptions adopted under Regulation AA be required as part of the opt-out notice. Consumers should be made aware that in certain instances it will be impossible for an institution to prevent the payment of items into overdraft, and in these instances, the institution will be allowed to charge the applicable overdraft fee. If a partial opt-out requirement is adopted under Regulation AA, the consumer will need more detailed information on the types of POS debit card transactions that would qualify for the opt-out. We would also suggest that information concerning whether a consumer may revoke an opt-out, and if so, the method for revocation and time required to process a revocation should be highlighted. While we appreciate the Board providing a sample form, the form seems fairly simplistic to fully educate and explain such a complicated process to consumers. We urge the Board to provide a model form that provides the information necessary to allow consumers to make an informed decision regarding an opt-out, including the consequence of that decision. Additionally, institutions should be given significant flexibility to include any information specifically related to their systems that they believe is pertinent to fully inform consumers of the implications and consequences of opting-out.

The Board specifically requested comment on the method of opting-out; for example, should a "check-the-box" form be provided to consumers or should consumers be allowed to opt-out electronically. We consider it important to allow institutions to implement reasonable opt-out methods that work best for the institution. For example, some institutions may be able to program systems so that the opt-out can be handled through electronic means using a toll-free number, while others may prefer that opt-out forms be mailed to the institution. Each institution will need to implement rules and procedures for handling the opt-out process. For example, on joint accounts when one account holder opt-outs, will the other accountholder be allowed to revoke the opt-out or will the accountholder that placed the opt-out be required to revoke it? These types of situations, if not addressed in the regulations, will be handled differently by each institution and could affect the method by which they wish to receive opt-outs. We contend that a reasonableness standard, along with some examples of what constitutes reasonable methods, are necessary.

Under the proposal, in providing an overdraft service opt-out, the institution must provide the written notice of opt-out rights: (i) before assessing any overdraft fee; and (ii) subsequently during or for each statement period in which a fee is imposed. The subsequent notice is intended to ensure that consumers are given notice of their right to opt out at a time that may be most relevant to the consumer. The initial notice may be given at the time of account opening, either as part of the deposit account agreement or as a stand-alone document. The subsequent notice may be provided on each periodic statement reflecting the assessment of any overdraft fee or it may be provided in a separate notice promptly after the institution pays an overdraft. If notice is provided in a periodic statement, it must be provided in close proximity to the aggregate fee disclosure required as part of the proposal.

Under the proposal, the content of the subsequent notice is the same as the initial notice. As stated above, the initial notice could likely end up being lengthy if it clearly describes the opt-out process and educates consumers as to the implications of opting-out. To require such a lengthy notice during each statement period in which a fee is imposed could be overwhelming and lead to a consumer simply ignoring the information. Additionally, if the notice is on a periodic statement it must be in close proximity to the fee disclosures. This could result in lengthy statements and other important account information being ignored or buried in the mass of information contained in the statement.

Many institutions' systems will not allow placement of opt-out language only on statements where an overdraft fee is assessed. Compass' current systems would require that the opt-out notice be placed on all consumer statements or none. If the opt-out notice were routinely placed on all statements, the notice would quickly become disregarded. Costly programming would be needed to allow systems to include notices on only statements where an overdraft fee is assessed, and again, those costs –in our opinion- unnecessarily have a negative impact on consumers.

To avoid additional programming, the opt-out could be provided on overdraft notices sent to consumers notifying the consumer of an overdraft occurrence. These notices are currently sent on a small, two-fold postcard in order to attract the consumer's attention and to help ensure that the notice is not mistaken for marketing. However, a lengthy opt-out notice would not fit on typical overdraft notices. Therefore, notices in a longer format may result in the consumer's failure to pay proper attention to the notice..

We would suggest that a much shorter subsequent notice, or none at all, would be appropriate. The notice could inform consumers briefly of the right to opt-out and then direct the consumer to a web address, phone number or local branch to obtain the more detailed information. This could more easily be added to current overdraft notices. Additionally, if placed on a statement, the shorter notice would help alleviate the concern of other important account information contained on the statement being overlooked or ignored by a consumer. A shorter opt-out notice, provided clearly and conspicuously, will tend to draw more attention from the consumer than a lengthy, more cumbersome notice.

B. Periodic Statement Disclosures

Regulation DD currently requires institutions that promote the payment of overdrafts to provide consumers information about the aggregate costs of the overdraft service for the statement period and the calendar year-to-date. The proposal expands this provision to require all financial institutions, regardless of whether they promote the payment of overdrafts, to disclose aggregate cost information, including: (i) the total dollar amount for all fees or charges imposed on the account for paying checks or other items when there are insufficient funds and the account becomes overdrawn; and (ii) the total dollar amount for all fees imposed on the account for returning items unpaid.

Institutions that do not promote the payment of overdrafts and do not advertise any type of overdraft service generally do not provide aggregate cost information on periodic statements. However, each fee charged in connection with a returned item or paying an item into overdraft is specifically itemized in the statement. Additionally, most institutions provide consumers with a separate overdraft notice each time an item is paid into overdraft or an item is returned unpaid. This notice includes pertinent information, including fees assessed with the overdraft occurrence.

Requiring all institutions to disclose aggregate totals for overdraft fees and returned-item fees would be costly and require significant time and programming changes, with little real benefit. To comply with the proposed disclosure requirements, it would be necessary to make significant changes to data collection and reporting systems. Compass' systems do not currently aggregate fee data across different statement cycles, which would be necessary to disclose year-to-date totals.

In addition to the significant costs and time involved, requiring all institutions to disclose aggregate totals for overdraft fees and returned-item fees would provide little additional benefit to consumers. Consumers are currently provided with ample information and disclosures about the costs associated with overdrawing their accounts. Currently our consumers receive a schedule of fees at account-opening, notice of fees imposed upon each overdraft, and an itemization of fees on periodic statements. The itemization of fees on periodic statements provides sufficient information for consumers to determine an aggregate total for fees imposed during the statement cycle and calendar year to date. Additionally, Compass provides consumers with a separate notice after each overdraft. The separate notice is more likely to draw the attention of the consumer and is an effective and timely means of alerting consumers about the cost of overdrafts. Therefore, we urge the Board to reconsider its proposal to make the periodic statement disclosures applicable to all institutions.

III. TRANSACTION CLEARING PRACTICES

Although not addressed in the Proposed Rules, the Agencies request comment on certain transaction clearing practices, specifically, the impact of requiring institutions to pay items received on the same day, in order from smaller dollar items to larger dollar items, for purposes of assessing overdraft fees on a consumer's account. Under such an approach, an institution could use an alternative posting order, provided that it discloses the alternative to the consumer and the consumer affirmatively opts-in. The Agencies request comment on how such a rule would impact an institution's ability to process transactions on a real-time basis. The Agencies express concern about the impact of transaction clearing practices on the amount of overdraft fees that may be incurred by the consumer.

A regulation that requires institutions to pay smaller dollar items before larger dollar items could be harmful to the consumer. It is consistently pointed out that the larger dollar items tend to be the items that most consumers would want paid first, such as mortgage payments, car payments and other bill payments. Allowing consumers to affirmatively consent to a specific type of account posting order is an unworkable option. Current systems do not allow for differing posting orders for different accounts. Cost of such a system would be prohibitive. Additionally, having accounts that post in differing orders would be very complicated from a training and compliance standpoint.

Generally, an institution's processing and posting order is a strategic business decision driven by a complex array of considerations, including, but not limited to, the management of risk and customer service considerations. Most institutions base their processing order on a detailed analysis and risk assessment, taking into consideration such things as account types, customer types and transactions types. For example, some institutions, whose customers tend to be frequent debit card users, may pay authorized POS transactions before all other items. Other institutions, whose customers tend to be infrequent users of debit cards, may process checks prior to other transactions. Dictating an institution's processing order will eliminate the ability of the institution to effectively manage certain risks through its processing and posting order.

Requiring all institutions to pay items received on the same day, in order from smaller dollar items to larger dollar items, will greatly affect an institutions ability to process transactions on a real-time basis. This would require institutions to wait until all items are received for a day and then process in dollar order. The goal of most institutions is to move toward processing in real-time to be able to give consumers the most up-to-date information regarding their account. Any regulation mandating a posting order of items received on the same day could render real-time processing a virtual impossibility.

Disclosures regarding the potential impact of posting orders provide consumers with the information they need to limit any impact posting orders may have on overdraft fees. Again, it is the consumer that is in the best position to prevent overdraft fees through responsible account management.

IV. CONCLUSION

We thank the Agencies for considering our comments to the Proposed Rules and appreciate the Agencies' challenge in promulgating reasonable and workable standards to inform consumers about overdraft services and allow consumers to effectively compare the terms of deposit accounts. We urge the Agencies to reconsider regulating overdraft services and practices under Regulations AA, but instead to follow long-standing policy to enforce the FTC Act on a case-by-case basis. Additionally, we appeal to the Agencies to consider the multitude of unintended consequences of the Proposed Rules.

If you have any questions concerning this letter or if you would like us to provide any additional information, please do not hesitate to contact me.

Sincerely yours,

Wendi M. Brown

Wendi M. Brown
Corporate Counsel
Compass Bank