

**Scott Powell**  
Chief Executive Officer  
Consumer Banking

July 18, 2008

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

Re: Regulation DD; Docket No. R-1315

Dear Ms. Johnson:

The Board of Governors of the Federal Reserve System (the “Board”) has requested comments to its proposed revisions to Regulation DD and the staff commentary to require disclosures about the opportunity to opt out of overdraft services and certain other account terms and costs associated with overdraft services (the “Regulation DD Proposal”). The Board has also requested, jointly with the Office of Thrift Supervision and the National Credit Union Association, comments to be submitted on its proposed revisions to Regulation AA, which would provide substantive rights for account customers to opt out of overdraft services (Docket No. R-1314) (the “Regulation AA Proposal”; collectively, the “Proposals”). JPMorgan Chase & Co., on behalf of JPMorgan Chase Bank, N.A., and its other subsidiaries, appreciates the opportunity to submit this response.

JPMorgan Chase & Co., (NYSE: JPM) (“Chase”) is a leading global financial services firm with assets of \$1.6 trillion and operations in more than 50 countries. The firm is a leader in investment banking, financial services for consumers, small business and commercial banking, financial transaction processing, asset management, and private equity. Under its JPMorgan and Chase brands, the firm serves millions of consumers in the United States and many of the world’s most prominent corporate, institutional and government clients. Information about the firm is available on the Internet at [www.jpmorganchase.com](http://www.jpmorganchase.com).

Chase plans to comment on both Proposals, and would have preferred to submit a single comment letter addressing all aspects of the Proposals. Since the deadlines for comment letters on the two Proposals are different, we have elected to submit two separate comment letters. Please note that we are concerned about the characterization of long-standing and accepted banking practices as “unfair” under Section 5 of the FTC Act, as well as the unintended consequences of an opt-out program. We will address these issues in our comment letter on the Regulation AA Proposal, which we will submit in several weeks. Please also note that Chase Bank USA, N.A., the consumer credit card bank subsidiary of JPMorgan Chase & Co., will also be commenting on the Regulation AA Proposal as it relates to credit cards.

## **General Comments**

Chase recognizes that overdraft fees can impose an unwanted expense on consumers who have not effectively managed their accounts. That being said, we believe that consumers are in the best position to manage their checking accounts, as only they know their resources and spending needs. To provide consumers with the tools they need to manage their accounts, Chase has initiated customer information programs and provided tools and resources such as free online or telephone alerts, free mobile banking, free 24x7 telephone banking support, free 24x7 online banking, and over 9,000 free Chase ATMs, as well as options for committed overdraft protection, including links to credit card accounts, home equity lines or savings accounts.

We agree that one way to address some of the concerns about overdraft fees is to provide consumers with an opportunity to opt out of overdraft services. The implementation of the opt out in the Regulation DD Proposal, however, requires disclosures that would be complex and confusing for many consumers, and would create significant customer service issues. Even if the proposed opt out disclosure form is revised per our suggestions, the structure of the opt-out is too complex to be easily understood. We are also concerned that the sample form disclosure as proposed might be interpreted by some to create contractual obligations that banks will not be able to fulfill, such as an obligation not to pay any items that would overdraw the consumer's account. Due to the complexity of payment systems, banks cannot insure that items will never be paid into overdraft, even for a customer who has opted out, but they can make sure that an overdraft fee is not charged in that situation.

We also are troubled by the proposal that banks must offer two forms of opt-out of overdraft services; one for debit card and ATM withdrawal only, and one for all types of withdrawals (including checks ACH transactions and other debits). While we understand that some consumers might want to opt out of only ATM and debit card overdrafts (whether because of the additional costs associated with returned checks and ACH debits or for other reasons), we believe that this option will only increase customer confusion. We recommend a single opt-out that covers all withdrawal transactions, and we will discuss this further in our comment letter on the Regulation AA Proposal.

We also believe that the Proposal's requirement that complex and lengthy disclosures be added in the middle of the consumer's account statement is misguided. The account statement is one of the most important tools used by banks and consumers to avoid identity theft, unauthorized transactions and errors on consumer accounts. One of the best ways to detect unauthorized transactions is for consumers to promptly review their account statement each month and to immediately report any suspicious or unauthorized transactions to the bank. When consumers do this, banks can quickly uncover and stop identity theft and fraud schemes, which both protects consumers and contributes to the safety and soundness of banks. To this end, we have worked diligently to design our account statements to be clear, simple and understandable. We respectfully suggest that the value of lengthy opt-out and total fees disclosures in "close proximity" to the itemized list of the fees charged is greatly outweighed by the damage that will be done to the readability and clarity of account statements.

## **Effective Date of Final Regulations**

The Regulation DD Proposal would require banks to make significant changes to payments processing systems, develop a system to capture consumers' opt-out choices, train bank personnel, redesign bank statements and educate consumers. In order to give banks sufficient time to make and test the necessary changes, we recommend that the effective date of the final regulation should be at least eighteen months from the date on which the final regulations are issued.

## **Effect of Opt Out of Overdraft Services**

The Regulation DD Proposal is inconsistent with the concepts set forth in the Regulation AA Proposal, including the definition of "overdraft services". The Regulation AA Proposal defines "overdraft service" as "a service under which a bank charges a fee for paying a transaction (including a check or other item) that overdraws an account." There are two elements to the definition: (1) the bank pays a transaction that overdraws an account, and (2) the bank charges a fee. It is critical that the definition contain both elements. In implementing opt-out requests, banks will not be able to program their systems to insure that an item that would cause an overdraft will never be paid. Banks will certainly attempt to reduce the volume of items that are paid into overdraft by returning more items unpaid and not authorizing debit transactions that would overdraw an account, but banks cannot insure that no items will be paid into overdraft. Instead, in order to comply with the opt-out requirement, banks will program their systems so that a fee is not charged when an item is paid and the account becomes overdrawn. The language of the Regulation DD Proposal and the proposed Sample Form B-10, however, assumes that no items will be paid if they would overdraw the account. The payment system is too complex to insure this result.

Payment transactions are processed through a number of different networks and clearinghouses and are subject to different laws, regulations and contractual arrangements. Transactions are processed via checks, automated clearinghouse ("ACH") transactions, debit card transactions (PIN and signature-based), wire transfers, online transfers and ATM withdrawals. Check processing is governed by Federal regulations, as well as Articles 3 and 4 of the Uniform Commercial Code, as codified into state law (the "UCC"). Debit card transactions are subject to contractual agreements such as the debit card network rules (including the VISA, MasterCard, NYCE and Star operating rules), as well as Federal Reserve Regulation E. ACH transactions are subject to the NACHA rules and Regulation E. Participants in this complex, multi-faceted payment system include banks, payment networks, merchants, merchant processors, ACH originators, ATM operators and consumers. Some transactions are processed intra-day and are immediately debited to the consumer's account. Other transactions are not presented to the consumer's bank until batch processing that night, and still others are not sent to the bank until several days after the transaction was initially authorized. Banks do not unilaterally control the methods and timing of payments processing.

Even after a consumer opts out of overdraft services, some transactions will be paid on the consumer's account that will cause the account to be overdrawn. The Proposals must permit banks to create these overdrafts, even if the consumer has opted out, as long as the bank does not charge a fee in violation of the Proposals. Overdrafts may also be created under other circumstances, such as when an account is debited because previously deposited checks were returned as NSF by the paying bank. Many consumers who opt out of overdraft services will undoubtedly believe, however, that they had opted out of the creation of all overdrafts. Hence, the required disclosures should be carefully drafted to minimize this confusion and risk and to avoid creating contractual obligations that banks cannot satisfy.

### **Initial Opt-Out Disclosure (Proposed Sample Form B-10)**

We have four main concerns with proposed Sample Form B-10 in the Regulation DD Proposal.

First, as discussed above, the sample form states that consumers have a right to opt out of the payment of all overdrafts, rather than a right to opt out of overdraft services. This is not accurate and is misleading.

Second, the sample form is not clear that, although a bank may choose to offer overdraft services, it still has no obligation to pay any item that will overdraw a consumer's account, whether or not the consumer elects to opt out. This should be made clear to avoid consumer confusion.

Third, the sample form does not inform consumers of the exceptions created under the Regulation AA Proposal that would permit a bank to charge an overdraft fee, even if the consumer has opted out. This should be made clear to avoid consumer confusion.

Fourth, the sample form does not reference the possible adverse consequences to the consumer of opting out, including the potential for the consumer to incur additional checks and ACH debits returned unpaid, merchant returned item fees, loss of merchant purchasing privileges or adverse information reported about the consumer to credit reporting agencies. We believe that this information is required in order to present a balanced view of the pros and cons of opting out. We believe that the sample form should include language describing these consequences, and we have added such language to our suggested revisions to the sample form.<sup>1</sup>

To address these issues and to further clarify the consequences of opting out, we have proposed a revised Sample Form B-10, which is set forth on Exhibit A attached to this letter.

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<sup>1</sup> We note that the proposed Commentary Section 230.10 – 3 would permit a bank to “briefly describe the consequences of the customer’s election”, but banks will be hesitant to describe the consequences in sufficient detail to inform the customer due to the requirement that the disclosure be brief and be “substantially similar” to the model form.

## **Subsequent Opt-Out Disclosures**

As discussed above, we strongly urge the Board to eliminate the requirement that banks deliver yet another opt-out disclosure on the account statement or in a separate notice each time the consumer incurs an overdraft fee. This requirement imposes additional costs on banks by increasing the amount of paper and postage necessary to provide account statements to customers, and reflects in our view an incorrect judgment that overdraft fees should be treated differently than other types of account fees.

If, however, the Board retains the requirement for a subsequent opt-out disclosure during each month in which an overdraft fee is assessed, we believe that Sample Form B-10 should not be used for these subsequent disclosures, since its length and complexity make it counterproductive when added to an account statement. We have proposed a short version of the account statement disclosure, which is set forth in Exhibit B to this letter. This short form disclosure includes instructions on how the consumer may obtain additional information about the opt-out and its effect.

### *Location on Account Statement*

As discussed above, Section 230.10(c)(2)(i) of the Regulation DD Proposal requires that the opt-out disclosure must be “in close proximity” to the disclosure of total overdraft fees required under 230.11(a). Section 230.11(a), in turn, requires the total fee disclosure to be “in close proximity” to the line item of overdraft fees required by existing Section 230.6(a)(3). The two sections together require the bank to display a lengthy opt-out disclosure and an aggregate fee disclosure next to the line items of fees charged. Some account statements are presented in chronological order and others are sorted by type of transaction (e.g. deposits, checks presented, electronic transactions, fees). In either case, the introduction of these lengthy disclosures in the middle of the account statement will make account statements unwieldy and unnecessarily complicated, drawing attention from other significant purposes for which such statements serve. We suggest that these requirements be deleted.

### *Trigger for Subsequent Opt-Out Disclosure*

Section 230.10(c)(2)(i) of the Proposal states that, if an opt-out disclosure is delivered in a periodic account statement, it must be included “on each periodic statement reflecting any fee(s) or charges(s) for paying an overdraft”. This language should be changed to read, “on each periodic statement reflecting any overdraft fee(s) or charges(s) for which the consumer could have opted out and has not done so”. As explained earlier in this letter, even if a consumer opts out, there are exceptions under which the bank will be permitted to pay an item into overdraft and to charge a fee for doing so, and these instances should not trigger an opt-out disclosure. In addition, banks should not be required to deliver the opt-out disclosure each month to a consumer who has already opted out. Many banks have the ability to print a message on the account statement for a subset of customers, and banks should be able to use that functionality to

provide clearer statements and reduce costs. We believe there is no value in requiring a bank to deliver an opt-out disclosure to a customer each month if the customer has already opted out of overdraft services.

### **Mail-In Form**

The Board requests comments about whether banks should be required to supply consumers with a form containing a check-off box that consumers may mail to the bank in order to opt out. We oppose any requirement that banks supply consumers with a form, because it would exponentially increase the cost of providing the opt-out disclosure to consumers and processing the responses. There are already several opt-out requirements in operation under Federal Reserve Regulation P and the Fair Credit Reporting Act, and these laws and regulations do not require banks to supply a mail-in form to consumers. Consumers are quite experienced with opting out via telephone or electronic means or by writing a letter. There is no reason to require banks to provide an expensive mail-in form for the overdraft services opt-out. Such a form would not be feasible in an account statement, and would make it highly impractical for a bank to deliver the initial opt-out disclosure together with the other disclosures required at account opening, none of which require a mail-in form. In addition, consumers are opening more accounts electronically and receiving electronic disclosures, a development that promotes competition within the banking industry, as well as customer convenience. A mail-in form would hinder these industry developments. Accordingly, Section 230.10 – 2 of the Proposed Commentary should be revised to clarify that a bank need not provide consumers with a mail-in form.

### **Total Fees Disclosure**

The Regulation DD Proposal requires each account statement to include a new disclosure of the total overdraft or NSF fees incurred during the statement period and for the calendar year to date. We do not believe it is necessary to disclose the total overdraft or NSF fees on account statements separately from other fees incurred in a given period. In so doing, the suggestion is made to the consumer that overdraft fees are somehow more important or warrant closer scrutiny than any other charge incurred by the consumer in a given period. We believe an overdraft fee or NSF fee should be disclosed in the same manner as all other fees are disclosed to consumers.

If, however, the Board retains this disclosure requirement, we suggest that the disclosure should include a choice for banks to report the total fees charged during the last statement period and during the last twelve statement cycles or a total for the calendar year to date. Deposit account statements generally do not cycle on the first day of the month, and banks do not generally calculate aggregate amounts based on a calendar year. It would be much more useful for consumers and easier for many banks to disclose total fees charged during the last twelve statement cycles.

We also ask that the Board clarify that a bank need not provide the box or table if the bank has not charged an overdraft or NSF fee to the consumer during the last twelve statement cycles (or YTD if the bank reports on a YTD basis). We do not believe it necessary to include a special disclosure of charges for \$0. We believe this was the Board's intent, and we ask for such clarification.

### **Advertising Rules for Overdraft Services (230.11)**

We believe that the best way for consumers to avoid overdraft fees is to understand how the fees work, to keep track of their available balance and not to initiate transactions that would overdraw the account. Consumer education is crucial to this effort. We are concerned that the advertising rules in Section 230.11(b) will have a chilling effect on banks' efforts to educate consumers about overdraft services. The Regulation AA Proposal defines "overdraft service" as "a service under which a bank charges a fee for paying a transaction (including a check or other item) that overdraws an account." This term was not previously defined. With this new definition, Section 230.11(b)(2)(xi) takes on a new meaning. It would require extensive new disclosures on any material produced by a bank that states that the bank charges a fee for overdrafts. We suggest that the exception in Section 230.11(b)(2)(xi) should be broadened in order to encourage banks to produce consumer education materials about overdrafts and overdraft fees without triggering extra disclosure requirements.

JPMorgan Chase & Co. appreciates the opportunity to comment on the Regulation DD Proposal. If you would like to discuss any of our comments in more detail, please contact Andrea J. Beggs at 312-732-5345.

Very truly yours,

A handwritten signature in black ink that reads "Scott Powell". The signature is written in a cursive, flowing style.

Scott E. Powell  
CEO, Consumer Banking

EXHIBIT A  
PROPOSED OPT-OUT NOTICE  
INITIAL DISCLOSURE

**B-10 Overdraft Services Opt-Out Notice Sample Form**

We may provide overdraft services for your account. Overdraft services means that if there is a debit to your account when your account does not have sufficient available funds, we may pay the item and charge an overdraft fee. We have no obligation, however, to pay any item that will overdraw your account.

There are fees associated with our overdraft services:

- We will charge you a fee of \$\_\_ for each \_\_\_\_\_ [list debit types] that we pay that overdraws your account.
- We may charge you this fee even if the account is overdrawn as little as \$\_\_.
- [We may also charge you additional daily fees of \$\_\_ for each day your account remains overdrawn.]
- [We can charge you a maximum of \$\_\_ in fees per day and \$ \_\_ per statement period for overdrawing your account.] [There is no limit to the amount of fees we can charge you for overdrawing your account per day/per statement period.]

You have the right to opt out of overdraft services, subject to certain exceptions. If you opt out of overdraft services, we may still decide to pay debits that would overdraw your account, but we will not charge you overdraft fees. In addition, even if you opt out:

- your account may still become overdrawn and you will still be obligated to repay us the amount of the overdraft;
- under certain circumstances, banking regulations permit us to charge an overdraft fee for debits paid into overdraft; and
- we will still charge you a returned item fee if you write a check or initiate an ACH debit that will overdraw your account, and we do not pay the check or ACH debit because it is drawn against insufficient funds.

If you opt out, we may choose to make different decisions about whether to pay debits that would overdraw your account, which could cause your debit transactions to be declined and checks to be returned unpaid (if you do not have immediately available funds in your account), additional merchant returned item fees, loss of merchant purchasing privileges or adverse credit reports about you.

You also have the right to tell us not to provide overdraft services for ATM withdrawals and debit card purchases, but to continue to provide overdraft services for checks, ACH debits and other types of transactions. Even if you do so, we have no obligation to pay any debit that will overdraw your account.

We also offer less costly overdraft protection services that you may qualify for, including [a dedicated line of credit] [transfers from your credit card account] [transfers from your savings account]. To opt out of our overdraft service for this account, call us at 1-800-XXX-XXXX or write us at [insert address]. Please include your account number. An opt-out election by one accountholder on a joint account will opt out the entire account.

## EXHIBIT B

### SUBSEQUENT DISCLOSURE

We may provide overdraft services for your account. This means that if there is a debit to your account when your account does not have sufficient available funds, we may pay the debit and charge an overdraft fee. With certain limited exceptions, you have the right to opt out of overdraft services. For further information or to opt out of our overdraft services, please see [internet address], call us at 1-800-XXX-XXXX or write us at [insert address].