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July 18, 2008

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

Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attn: OTS-2008-0004

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Federal Reserve System 12 CFR Part 227: Docket No. R-1314; 12 CFR Part 230: Docket No. R-1315; 12 CFR Part 226: Docket No. R-1286; Office of Thrift Supervision 12 CFR 535: Docket ID. OTS 2008-0004; National Credit Union Administration 12 CFR Part 706: RIN 3133-AD47

Dear Ms. Johnson, Mr. Bowman and Ms. Rupp:

Bank of America Corporation and its bank affiliates appreciate the opportunity to comment on the proposed rules that the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, the "Agencies") published in the Federal Register on May 19, 2008. The comments below will also address the proposed changes to Regulation AA, Regulation DD, and Regulation Z.

Bank of America is a leader in domestic retail banking – particularly with regard to deposits and credit cards. We serve more than 59 million households through 6,100 retail banking offices, nearly 18,500 ATMs and award-winning online banking services. With 24 million U.S. consumer deposit customers (approximately $525 billion consumer deposits as of June 30, 2008) and 38 million active U.S. card customers (over $150 billion in managed account balances as of June 30, 2008), we lead the industry in both domestic deposits and card balances. The Agencies' proposal, therefore, is of great consequence to Bank of America and its customers.

I. Executive Summary

A. Overview

The proposal would substantially reinvent the business of credit card lending and deposit taking. While in many cases, the effects of the rulemaking would be relatively benign and the market would simply adjust to incorporate prescribed terms, other aspects of the proposal specify the terms and, implicitly, the prices, of credit card and deposit offerings. Areas of the proposal that bar mainstream credit and deposit practices would have substantial effects on the availability and cost of credit for consumers, and the efficiency and cost of the deposit system. This proposal will have a broad impact on the economy both at the retail level and in highly complex securitization markets, slowing growth and limiting access to financing.

Finally, the proposal represents a substantial departure from the letter and the spirit of the Federal Trade Commission Act (the "FTC Act"), which authorizes the Agencies to regulate unfair and deceptive trade practices. In several areas, rather than regulating unfair or deceptive practices, the Agencies are legislating what they believe to be *ideal* practices. More importantly, we believe the practices that the Agencies are mandating are in fact far from ideal from the perspective of consumers, banks, and the financial system as a whole, and the Agencies would be making a serious error in denying consumers the choice of alternate practices.

B. Deposits

The Agencies propose to require a bank to permit customers to opt out of discretionary overdrafts for checking accounts at the opening of an account and then on a regular basis throughout the account relationship. Bank of America supports the concept of customer choice in this area, and already offers customers notice and opt-out for potential overdrafts at our ATMs. We have not extended notice and opt-out to all overdrafts on an account, however. The reason is twofold: first, the current deposit processing system, of which discretionary overdraft is one part, benefits consumers, so there has been limited demand for such an opt-out; second, because opting out of discretionary overdrafts is incompatible with the current payment system, the changes to the system necessary to accommodate the opt-out capability would come with costs to consumers and to the economy as a whole that far outweigh the benefits. We believe the Agencies have failed to weigh, or in some cases even consider, these costs.

The Agencies' proposal focuses only on overdraft fees. We believe it is inappropriate for the Agencies to regulate one term of a deposit relationship without considering the incidental effects on other aspects of that relationship. For example, that relationship, at least at Bank of America, generally offers customers free check processing and account maintenance, free on-line banking, and free usage of our ATMs. If the proposal is adopted, the current pricing structure for all deposit services may no longer be viable, and all customers, not just those who opt-out, may see a change in how they pay for access to the banking system.

Moreover, for those who do opt-out, the Agencies set the price at zero for the unavoidable situations where a bank pays an item that overdraws an account.[1] We believe that price-setting of this sort is inappropriate and wholly unauthorized by the FTC Act. Price-setting, particular price-setting where the price is established at zero, stifles innovation, and the overdraft proposal will have the direct effect of stifling innovation in areas like account management tools.

The Agencies' proposal also undermines the fundamental premise on which the business of deposit taking has been based since its inception: the concept that the customer is responsible for the money that is deposited into and withdrawn from the customer's account. The customer, not the bank, is in the best position to know what checks the customer has written or what debit

[1] Although the inexact standard the Agencies use to establish overdraft fees as "unfair," described in greater detail below, could just as easily be applied to any other, legitimate bank fees.

transactions the customer has authorized that could affect the customer's balance. And it is the customer who has always been responsible for ensuring that good funds are available to support all transactions that the customer initiates. That said, Bank of America recognizes that today's payment systems are more complex than they used to be, and, to that end, Bank of America provides tools and services to its customers to help them manage their account, in the current environment. The Bank notes that the majority of the Bank's customers successfully manage their accounts in a manner that avoids not only overdraft fees, but all banking fees. The Agencies' premise that customers are no longer able to manage their accounts is flawed.

The Agencies' proposal also fails to consider innumerable technological and practical problems that would be created by the proposed opt-out and debit-hold requirements, as well as the unintended effects that would accompany them. For example:

- In the majority of cases when assessing an overdraft fee for a point of sale transaction, good funds are available at the time of authorization but are not when the transaction actually settles. This happens because the customer has authorized other transactions against the account, such as a check or ACH payment, that are processed in the interim. The customer is then charged a fee. Consequently, we do not understand how it is an unfair and deceptive practice to authorize an item when the customer's account shows sufficient funds available and then charge a fee if it turns out the funds were not available. In effect, the proposal requires us to take uncompensated risk. Moreover, the proposal removes any incentive for customers to manage their accounts to ensure that good funds are available to cover all of the transactions they initiate and authorize.

- Conversely, 61% of authorizations approved when good funds are *not* available end up having good funds available when settlement occurs and therefore do not incur a fee. This will happen, for example, in situations where customers know they have deposited funds, but the funds have not yet been made available at the time of the authorization, but are available at the time of settlement. Under the proposal, customers who opt out will have these transactions declined (and be very confused as to why).

- Bank of America currently provides next-day availability on 97.5% of deposits, and places holds on or otherwise delays only 2.5% of deposits. If the UDAP proposal is implemented, we estimate that the number of items on which we place holds could triple. This is because checks written on accounts that have opted out will be more likely to be declined, which in turn, will cause a ripple effect on every account that has received one of the returned checks. The current models used by banks to determine whether to place a hold may need to be revisited. Moreover, because checks written on opt-out accounts can be deposited in any account, all customers, even those who have not opted out, may see a slow-down in their funds availability. This means that Bank of America customers could lose next-day access to $173 Billion annually, and if this effect is extrapolated to the industry, more than $1 Trillion dollars of deposits could be affected. This will result in declined POS transactions and returned checks/ACH for customers who do not opt out, as well as for those who do.

- The proposal finds that customers will suffer no harm if their debit card transaction is declined at point of sale because they will use a credit card instead. In fact, 21% of our deposit customers do not have a credit card (and that percentage will likely increase significantly if the Agencies adopt the proposed credit card rule). If the debit card is declined, neither cash nor check will be a viable alternative for that transaction,[2] leaving the customer without the ability to complete the purchase.

- We estimate that under the proposal, returned checks could increase as much as three-fold and ACH declines will dramatically rise, because customers who opt out will have their checks and ACH transactions that are presented against insufficient funds returned or declined, rather than paid. Assuming 100% opt out, cumulatively, customers will experience incremental returned checks totaling 12.8 million checks representing $4.3 Billion; 11.1 million ACH transactions representing $2.4 Billion will also be returned annually, causing tremendous customer and merchant inconvenience and increasing costs throughout the system. As a result, merchant returned check fees incurred by our customers will increase by $321 Million, or $143 annually per customer who bounces a check. Merchants will also face increased collection costs associated with the bounced checks. To some extent these effects will be mitigated as customers opt back in, but there will be substantial disruptions to the payment system in the interim, as well as a loss of consumer confidence.

- The debit-hold proposal will create a crippling problem for bank processing because the proposed rule will effectively mandate a three day delay between a bank's receipt of a debit authorization request and that bank's ability to determine whether to pay or return all intervening items.

For perspective, it is worth noting that a recent GAO study of overdraft practices at banks failed to identify any of the issues identified by the Agencies as significant problems in the current system.[3] In fact, when the Federal Reserve Board looked at the issue of overdraft fees as recently as two years ago, and issued related guidance and regulations, there was no suggestion these were unfair practices. Yet banks that relied on that guidance will be deemed by the proposal to be acting in a predatory manner.

Solutions

While the Bank believes that the proposal as drafted would impose cost and inconvenience to customers, we believe that modest changes to the proposal could preserve its benefits while substantially reducing its costs.

The proposal should state that for accounts where a customer can and does choose to opt out of overdraft fees, the bank may, in good faith, continue to charge a fee if the customer's account

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[2] Cash would likely not be a viable alternative because most likely the customer will be using the same debit card that was declined to attempt to withdraw cash from the same account through an ATM. Similarly, we believe most merchants will be reluctant to accept a check from a customer who just had a debit transaction declined.

[3] United States Government Accountability Office, Report to Chairwoman, Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services, House of Representatives, Bank Fees, Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Saving Accounts. , GAO 08-281, (January 2008). ("GAO Study").

shows good funds at the time of the authorization but then fails to produce good funds at the time the transaction settles. This clarification would reduce some of the unintended effects on the payment system that are described above. Also, it is a perfectly appropriate assignment of rights and responsibilities. When a customer's behavior is responsible for an overdraft – for example, if a deposit does not clear, or if a check the customer had previously written is presented to the bank the same day the transaction was authorized, and cleared as part of overnight processing – it is perfectly appropriate (and in no way unfair or deceptive) for a bank to charge a fee for incurring the risk of paying overdrawn items.

We intend to supplement this letter by August 4, 2008, with additional clarifications or changes that will help relieve of other issues identified in this letter.

C. Credit Cards

Risk-based Re-pricing

In the context of risk-based re-pricing, the Agencies propose an unsecured credit card account whereby customers can revolve a balance practically indefinitely at the same interest rate so long as they do not pay more than 30 days late. In effect, the Agencies propose that *any other system* for risk-based re-pricing a consumer's credit card debt is *per se* unfair and deceptive, regardless of the other benefits of the account, how it is disclosed, or market developments – and notwithstanding other laws authorizing and regulating such practices.[4] That would be an extraordinary finding, and one without legal or factual foundation.

More importantly, however, the Agencies' regulatory prescription – like most governmental attempts to set market terms – would have substantial adverse unintended consequences, primarily for the very group of people the Agencies are attempting to aid.

Credit cards today are the foremost example of what is known as open-end credit, whereby a lender agrees in advance to allow a customer to borrow up to a pre-determined amount and repay all or a portion of that amount at the customer's choosing each month. The amount revolved and the length of repayment is largely up to the consumer, who also retains the option of transferring the balance, without notice, to a competitor offering lower rates. But this flexibility for the customer means real challenges for issuers who must earn a reasonable risk-based return and operate safely and soundly.

As described in detail below, these benefits for the customer depend in considerable part on the issuer's ability to increase the interest rate on the customer's debt to the extent that the

[4] The proposal would thereby find to be unfair and deceptive the system of risk-based pricing proposed by the Board itself a year ago, as part of its Regulation Z amendments. It would also find to be unfair and deceptive the comprehensive system of notice and choice established by Delaware law, to which Bank of America's card business has adhered in good faith for more than twenty years. (It also calls into question the fairness of a similar notice and opt-out regime that the Agencies are proposing for overdraft fees in this same rulemaking.)

customer's risk of charge-off increases or market or economic conditions change.[5] Before risk-based pricing democratized access to credit, card companies simply charged all cardholders a relatively higher rate at the outset, and declined credit to those who presented more risk. The GAO recently documented the transition to risk-based pricing as part of an exhaustive study, which also noted that this transition, combined with vigorous competition among issuers, lowered rates for vast segments of credit card users.[6] The Agencies' proposal would undo this system.

First, the proposal would invalidate all forms of default re-pricing – that is, a higher interest rate imposed upon the customer's violation of the card agreement – except one: a customer paying 30 days late. Data clearly show that there are other types of default that present substantial risk of charge-off and that therefore should also be permitted. These other types of default – for example, making late payments twice in twelve months – can also be disclosed just as clearly and understood by customers just as readily as the one approved by the Agencies.

Second, the proposal would invalidate all forms of repricing not related to the customer's performance on the card – for example, an amendment to the rate based on a recent deterioration of the individual's credit history, default to other issuers or increases in market interest rates. In other words, credit card companies would not be allowed to amend the terms of a credit card agreement regardless of borrower's risk or market conditions. While the proposal has a surface appeal, it would have substantial adverse effects for consumers and issuers.

Our experience shows that when Bank of America raises interest rates for a given group of customers presenting higher risk, our increased interest income approximately and appropriately offsets the greater losses incurred by that group. In other words, risk-based re-pricing allows us to offset increased losses, and earn a similar rate of return for risky customers as we do for our average customer. Furthermore, when we re-price customers, we find that the re-pricing itself does not cause any significant increase in default – in other words, for two groups of borrowers with a given risk profile or score, those who accept a change in terms to a higher, risk-based rate do not default significantly more than a control group who are kept at a lower rate. Many re-priced customers tend to manage their credit more wisely, making larger monthly payments and paying down their debt faster. Thus, from our perspective, a higher interest rate not only allows us to earn income to compensate for greater risk, it actually reduces the risk we are managing and causes the customer to manage credit more wisely.

The Agencies' proposal appears to assume that losing the ability to re-price will not materially alter issuers' willingness to lend, and that issuers will offset revenue losses simply by charging annual or other across-the-board fees, thereby allowing less risky customers to cross-subsidize more risky customers. Intense competition for those less risky customers makes this outcome unlikely. Rather, interest costs for all customers are likely to rise significantly, and credit availability is likely to decline. Many of these customers who benefit significantly from access

[5] The proposal draws a distinction between repricing of debt already owed (existing balances) and debt incurred in the future. As described below, while that distinction has a surface appeal, the fact is that the risks to the issuer lie predominantly in the existing balance.

[6] GAO-06-929 at 31

to credit are likely to turn to payday loans, refund anticipation loans and other higher-cost, less transparent forms of unsecured credit left untouched by the Agencies' rule. And they will of course lose the security and other benefits of a credit card in the process. We are attempting to quantify the potential loss in credit availability and the increase in credit costs to impacted customers and intend to supplement our submission with this information.

Time for Payment

Another area that highlights our concerns about the credit card rule involves the time for payment. Regulation Z, promulgated by the Fed, provides for at least a 14 day time period between mailing of the statement and the date by which the payment in full must be made in order for the customer to receive a grace period (that is, an interest-free loan from time of charge to time of payment). Today, the minimum grace period due date and the minimum payment due date provided by regulation are the same number of days.

The proposal, however, prescribes a 21-day time period for purposes of late fees and other consequences; it does so by finding any shorter period to constitute an unfair and deceptive act and practice under its Regulation AA. Remarkably, the Board has preserved the 14 day rule under Regulation Z. Therefore, minimum grace period due dates and minimum payment due dates may differ. This proposed rule is a recipe for customer confusion, as it creates two payment due dates – the date by which any payment in full must be made, and, seven days later, the date by which payment must be made to avoid being late. A consumer must determine and arrange to pay the balance in full by Day 14, but would have until Day 21 to determine and arrange to make the minimum payment. If the UDAP argument is based on time to review the statement and arrange payment, one would assume that the time needed to review the statement to determine and arrange to pay the entire bill would need to be longer than the time needed to review the statement and to arrange to make the minimum payment.

The premise of the rule must be that a customer cannot reasonably avoid late fees if given only 14 days in which to pay, but this premise lacks support. The Agencies assume, without any factual foundation, that mail delivery takes seven days each way, leaving seven days for review. Even assuming the mail moved at that pace – and we do not believe it does -- *over 60% of our customers pay on-line or through channels other than the mail.* In addition, statements are available on line for customers, so the review can take place even if the physical bill has not yet arrived. Thus, the animating premise for the proposal is not only factually incorrect but also wholly inoperative in a *majority* of cases.

Solutions

As with the deposits proposal, Bank of America believes that relatively modest changes to the proposal would significantly decrease its adverse and unintended effects, while continuing to serve its intended purposes.

First, with respect to default re-pricing, the Agencies should permit re-pricing based on any default event that can be demonstrated to reflect a material increase in the bank's risk of loss, provided the specific default events that may cause a re-pricing have been clearly disclosed to, and understood by, consumers at the outset of the account relationship and whenever they occur. We propose the final rule include a safe harbor for certain default events that commenters can demonstrate meet that standard. The Agencies should not arbitrarily limit the number of such events to one (30 days late), and implicitly suggest that any other default event -- no matter how justifiable based on risk and no matter how well disclosed and understood -- is *per se* unfair and deceptive. As described below, we believe that one default event that clearly meets this standard is late payment or overlimit twice in twelve months. Such a standard is not only fully justified on grounds of risk but also allows customers to be notified after the first occurrence and told that a recurrence will prompt re-pricing.

Second, the Agencies should allow re-pricing for "off-us" events that reflect a material increase in the bank's risk of loss or cost of funds – such as defaults with other creditors or increases in market interest rates – provided such increases are made on clearly prescribed and disclosed terms, and subject to at least a two-year limitation on the frequency with which such re-pricings can occur. For example, banks clearly should be permitted to reprice customers upon expiration of a card, provided that the card carries some minimum time – for example, two years – and provided the customer is provided notice and the opportunity to repay at the original rate under the original terms. Notice could come at account origination, through a special notice prior to expiration of the card and the time the bank plans to reprice, and on the first statement after re-pricing. Such an arrangement would clearly allow a customer to reasonably avoid a higher rate.

Third, the Agencies should not legislate a time for payment unless and until they can develop a factual record to support the time they choose.

Following is a more detailed description of the likely effects of the proposal on our deposits and credit card businesses.

I. Bank of America's Concerns Regarding the Deposits Proposal

Bank of America shares the goal of the Agencies in ensuring that consumers are provided with tools and information they need to make choices about managing their monies. However, the proposed amendments to Regulation AA and to Regulation DD provide minimal, benefit to a small percentage of customers, while fundamentally disrupting the consumer banking and payments systems in a manner that will impose substantial cost on all consumers, merchants, and financial institutions.

A. Current practices with regard to deposits and debit transactions are beneficial for consumers, and Bank of America provides tools to help customers manage their accounts.

The Bank disputes the underlying suggestion of the proposed regulations that current discretionary overdraft provisions are unfair to consumers. Discretionary overdraft fees are an integral part of an overall deposit relationship that provides numerous benefits to consumers. Our research and day-to-day interactions with customers confirm that consumers are aware of and understand the way the overdraft system works, and also understand they are responsible for managing their own monies. The Bank has provided consumers with appropriate tools to help them effectively manage their accounts. We believe it is inappropriate for the Agencies to regulate only one term of a deposit relationship, particularly without considering the incidental effects of doing so.

1. <u>Consumer deposit accounts and the system that support them are beneficial for customers.</u>

Consumer deposit accounts are foundational financial tools, necessary for consumers to function efficiently and to prosper in today's society. A deposit account is an easy means for consumers to facilitate payments, build savings and capital, and even establish a foundation for credit. Today's deposit accounts, and the related services, are more flexible and secure than cash. Industry competition has spurred innovation, and consumers expect and receive many core features from their checking accounts. At Bank of America, some of these features include:

a. <u>"Free" checking</u>: Bank of America offers a checking account with no monthly maintenance fee. In fact, in an average month, approximately 80% of the Bank's consumer customers pay no monthly maintenance fee.

b. <u>Multiple payment functionality</u>: Today's checking account customers have multiple payment options far beyond traditional checks. Consumers, for example, initiate their own ACH transfers through the Bank's online bill-pay service, and transfer funds between Bank of America accounts at Bank of America ATMs. And, of course, customers with debit cards can pay for items anywhere VISA or MasterCard debit cards are accepted, including online.

c. <u>Readily available transaction and balance information</u>: Customers also have demanded easy access to more information about their account balances. Consumers can get information about transactions that have cleared and balance information online, through the Bank's 18,500 ATMs, over the phone or in one of our 6,100 banking centers.

d. <u>Faster access to their money – fewer and shorter holds on the checks they deposit:</u> Today, the Bank makes available 97.5% of all deposits made by customers at Bank of America banking centers or ATMs no later than the next business day. Many of these deposits are made available to the customer faster than the law requires, and faster than the Bank itself receives good funds.

2. <u>Consumers understand that it is their responsibility to manage their accounts and understand the way discretionary overdrafts work, and view the Bank's decision to pay discretionary overdrafts as beneficial.</u>

At its core, the relationship between a bank and its checking account customer is one in which the customer places money on deposit with the bank and then instructs the bank what to do with that money. Each transaction conducted by the customer is an instruction to the bank to pay money from the account. With the authority to instruct the bank to pay money comes the responsibility to ensure that there are good funds available to pay every transaction that the customer initiates. The customer, not the bank, is in the best position to know what checks the customer has written or what debit transactions the customer has authorized that could effect the customer's balance. And it is the customer who has the responsibility to make deposits in a form and at a time that the deposited funds are available to pay the checks and debit transactions.

As banking law has developed in the world of checks, banks are obligated to pay all "properly payable items,"[7] unless they fall into an explicit exception. See, e.g., UCC Sections 4-401 and 4-402, and Official Comment.[8] When a bank receives an instruction from the customer, such as a request for a withdrawal of cash from an ATM or a check, the bank understands that the customer wants the instruction to be followed if it is possible for the bank to do so. In that context, discretionary overdraft protection is another important feature customers have come to expect of the Bank.

Overdrafts and overdraft fees[9] occur when the consumer spends more money than the consumer has available. The situation can arise from any form of payment request presented against the customer's account, including paper checks, electronic checks, ACH transactions, debit card transactions, or ATM withdrawals. The situation can also arise if the customer deposits an item that bounces.

Our customer research shows that customers understand they are responsible for managing their accounts and can avoid fees if they manage their funds appropriately. The fact that almost 90% of our customers do not overdraw their account in any given month, and that 65% of our customers did not incur an NSF/OD fee last year shows that the vast majority of our customers understand how to manage their accounts in a way to avoid overdraft fees. However, if they make mistakes or fail to manage their accounts appropriately, and overdrafts occur – and this can happen to anyone – customers expect the Bank to cover the overdrafts and to trust them to pay the overdrafts back. They do not want to be embarrassed or suffer the financial consequences of bounced checks or dishonored point-of-sale ("POS") transactions. Customers appreciate the benefit of banks using their discretionary overdraft authority to save the customers from this embarrassment or cost.

Overdrafts may appear to occur during the day. But the Bank's decision about whether or not to impose a fee is not made until the Bank conducts its processing at night. A customer may conduct a transaction with a debit card by entering a PIN. If the customer only has $50 in the account and he or she buys $60 worth of groceries, the $60 transaction will appear to draw the

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[7] In the Official Comment 1 to section 4-401 of the UCC, the UCC Commissioners stated, "An item is properly payable from a customer's account if the customer has authorized the payment and the payment does not violate any agreement that may exist between the bank and the customer. An item drawn for more than the amount of a customer's account may be properly payable."

[8] For checks, section 4-401 provides banks authority to "charge against the account of a customer an item that is properly payable," and section 4-402 establishes the concept of wrongful dishonor if a bank refuses to honor an item that is properly payable.

[9] At Bank of America, the fee structure and the fee amounts were created in conformance with OCC Guidance. In 12 CFR 7.4002, the OCC requires that a national bank consider several things when establishing a fee, including "**the deterrence of misuse by customers of banking services**." (emphasis added). The OCC criteria recognizes that banks' current fee structures deter inappropriate behavior, such as overdrawing one's deposit account. See also, OCC Interpretive letter 997 and OCC Interpretive Letter 916.

balance down to negative $10. If he or she checked an ATM or online banking, the account would show a negative balance. Most, if not all, banks post transactions – that is, actually transfer the money to pay the item – in a batch at night. And fees are imposed after the time that processing occurs.

As part of its batch processing, Bank of America processes credits – that is, deposits – before we process debits – that is, items presented for payment. In our example above, that negative $10 balance can be cured if the customer makes a deposit before cut-off time at a Bank of America ATM or branch. The customer will not receive an overdraft or NSF fee. In fact, at Bank of America, over 61% of the POS debit transactions that place the account into a negative balance on an intraday basis never incur a fee because the customer cures the overdraft before processing. This statistic demonstrates very clearly how well the majority of consumers understand the bank system, and this intraday float is a benefit that customers actively use, and risk losing under the proposal.

Importantly, the Bank clearly discloses the fees associated with overdrafts at account opening, at the time of the occurrence (by mailing a notice to the consumer promptly after the imposition of a fee, and, if the customer has signed up for eAlerts, by an electronic message to a mobile phone or email account) and in monthly statements.

3. <u>The Bank provides the tools that a consumer needs to manage his or her account.</u>

While the consumer must authorize each and every transaction, whether by writing a check, authorizing an auto-debit, or swiping a debit card, the Bank may not become aware of the transaction until long after the consumer has conducted the transaction. This is true even for debit card transactions, which can take three business days to be submitted by the merchant for processing. Because the Bank does not become aware of the details of the transaction until long after the consumer has already received the benefit of the transaction, the consumer, not the Bank, is in the best position to know whether or not the transaction will overdraft his or her account.

Technological developments have given bank customers more options for paying their bills and managing their finances. These choices require more sophisticated means of keeping track of funds, and the Bank has responded by providing the following tools:

a. <u>Overdraft Protection:</u>

The Bank offers two products that help customers pay items that are presented against insufficient funds. With Savings Account Overdraft Protection, we transfer available funds from a linked savings account to cover items presented against insufficient funds in a checking account. While signing up for the service is free, we charge a fee when the customer uses the service, currently $10 each day that transfers occur. With Credit Card Overdraft Protection, we will transfer funds from a linked credit card to cover items presented against insufficient funds in a checking account. Like with Savings Account Overdraft Protection, signing up for the Credit Card service is free, but the customer may incur fees for the transfer under the terms of the credit card agreement.

b. Other Tools:

In addition to the overdraft protection products, Bank of America has a variety of tools it provides to customers to help them keep track of their balances, manage their accounts and avoid overdrafts. These tools, when combined with an active and accurate check register, can help customers avoid overdrawing their account.

(i.) Free online banking – This service allows customers to track when their transactions have posted, so they can see what the bank has processed. For many transactions, the bank will also display the transaction as "pending" until it has been processed.

(ii.) e-Alerts – Online notices are sent to a customer's computer, PDA, or mobile phone to alert him or her that a low-balance threshold has been reached or after an overdraft fee has been imposed.

(iii.) Overdraft notices – We mail notices promptly after the overdraft occurs so customers can transfer funds and avoid additional overdrafts.

(iv.) Telephone banking – Customers can call and check their balances at any time.

(v.) Customer Service. Through Customer Service, we work individually with each customer who contacts us by phone or in person to evaluate his or her situation. In the event of bank error, we make the situation right. We also utilize our call centers to educate consumers about the various tools available to them. For example, if a customer is calling to inquire about an overdraft fee, we may suggest one of our overdraft protection products.

(vi.) Student -- Stuff Happens® card and one waiver of an overdraft fee. We recognize that students may be handling deposit accounts for the first time. We provide each student who opens a CampusEdge Checking account one Stuff Happens® card that the student can present to forgive one fee, and, if they select our student deposit value package, they also receive the right to have one overdraft fee waived.

c. Fee Education:

Tangible evidence of the Bank's commitment to empowering customers is its comprehensive, multi-media Fee Education program. Among its benefits, this program includes an interactive website that provides plainspoken videos to educate and explain account management services available at the Bank and provide detailed information on Bank of America product pricing and fees. The Bank has also recently revised its NSF/OD notices to simplify the language and add messaging about account management options, such as overdraft protection programs and eAlerts.

Of course, one supporting an opt-out of overdrafts might argue that all these benefits of the current system will persuade customers not to opt out, and that there is therefore nothing lost by allowing customers to choose between this system and one where overdrafts will not be allowed. Certainly, that is logical, *if one presumes that* (1) an opt out is technologically feasible; (2) an opt out option will not affect the services available to those who choose *not* to opt out; and (3) the proposed opt out would be understood by consumers. As described in the following section, none of these presumptions is correct.

B. <u>If the Agencies adopt the proposed changes to Regulation AA and Regulation DD, there will be severe unintended effects for consumers.</u>

Customers who opt out of overdrafts may not realize the full scope of benefits they are giving up when they opt out. Moreover, the ramifications of the opt-out proposal will not only be felt by the customers who have opted out, but will be felt by all participants in the depository system. Some of those ramifications are:

1. <u>Unintended effect on other fees for all customers.</u>

The current pricing and fees on bank accounts reflects a balance of risk and reward based on the current practices and permissible fees. Banks cannot functionally prevent all overdrafts, but, if the proposal is implemented, banks will be prohibited from charging a fee to those customers who have opted out; in effect, the banks would be forced to take on uncompensated risk. If this proposal were adopted, the current pricing structure is no longer viable for customers that opt out. Services that are currently free, like free checking and savings accounts, free online banking, free e-alerts, free access to the Bank's ATMs, free Keep the Change®,[10] and even free debit cards, would have to be reviewed to see if it continues to make economic sense for the Bank to continue to provide the services for free. As a result, the pricing structure will likely change for *all* customers.

2. <u>Delay in availability of deposited funds for all customers.</u>

Bank of America currently makes approximately 97.5% of deposited funds available to its customers within one business day of the deposit – meaning that customers have delayed availability to only 2.5% of deposits. The items that are currently delayed by more than one business day are almost exclusively items that the Bank has determined warrant a hold under Regulation CC. As a general rule, the Bank makes funds available much more quickly than required by Regulation CC.

The Bank estimates that, if the Agencies' proposal were adopted, the percentage of deposits that it will not be able to make immediately available could triple to 7.5% of deposits. This translates into delayed availability for Bank of America customers representing $173 billion dollars per

[10] Keep the Change® is Bank o America's free savings program where we round up debt card purchases to the nearest dollar amount and transfer the difference to a linked savings account.

year, which equates roughly to $1 Trillion industry-wide. This delayed availability will, in turn, result in additional declined POS debit transactions and additional returned checks.

Because a returned item increases the likelihood of the customer experiencing an overdraft, and because the proposed rule prohibits a bank from being compensated for the risk associated with an overdraft, banks will make greater efforts to ensure that deposited items have cleared before allowing consumers access to the deposited items. This means that, for customers who opt out, banks will likely hold a higher percentage of deposited items for longer periods of time both as a means of protecting the bank and as a means of protecting the consumer. For example, banks that currently make funds available more quickly than Regulation CC requires may consider utilizing the full delay of availability allowed by law. In addition, since a higher percentage of checks will be bounced, there will be more disruption in the processing of deposits and current models used by banks to determine whether to place a hold may need to be revisited. This means that banks may need to start placing holds on more items. The net result will be that deposits processing will be slower and less efficient than it currently is for all participants in the depository system.

3. <u>The opt-out structure proposed by the Agencies will lead to customer confusion</u>:

Because of the complexity in the depository system, including different forms of transactions (PIN and Signature Debit, ACH, Wire, Paper Checks, Electronic Checks), payment system participants (e.g. Card Associations, Regional Pin/ATM Networks, NACHA, FedWire, transferring banks, merchants), and the different channels for conducting the transactions (branches, ATMs, online banking, phone), it is impossible for a bank to prevent all overdrafts from occurring. For example, if an item that the customer deposited is returned after bank has made the funds available to the customer, the bank will deduct the amount of the returned item from the customer's account; if the customer has made transactions against those available funds, the return of the deposited item can overdraw an account. The result will be confusing for customers who believe that, when they opt out, the bank will be able to prevent all overdrafts.[11] Moreover, the Agencies have appropriately recognized that banks should not be prevented from charging overdraft fees for transactions that the bank could not prevent. Specifically, the Agencies allow an exception for situations in which "the purchase amount presented at settlement by a merchant exceeds the amount that was originally requested for pre-authorization." This situation happens most frequently in pay-at-the-pump gas station situations where the merchant usually submits only a $1 pre-authorization request. However, when a bank imposes a fee under one of the exceptions, the customer who has opted out is likely to be very confused and angry when the bank imposes an overdraft fee.

4. <u>Consumers who opt out will lose the float for same day deposits</u>:

[11] As we address in Appendix A, the notice proposed by the Agencies is not balanced, and will mislead customers in many important respects, including leading consumers to believe that their request to opt-out of overdrafts will prevent all overdrafts and all overdraft fees. We respectfully request that the Agencies rethink the proposed model notice.

Today, Bank of America customers who know their paycheck will be direct-deposited that evening can make purchases with a debit card during the day knowing that Bank of America will credit the paycheck before processing the debit card transactions. If the customer opts out of overdrafts, the bank will be obligated to decline those debit card transactions if the customer doesn't have enough money at the time of the transaction even if the customer would avoid overdraft fees because of the direct deposit that night. In fact, as noted above, 61% of transactions that Bank of America authorizes against insufficient funds at the time of the transaction settle into good funds during processing. Customers who opt out will not be able to use this convenient "float."

5. Consumers who opt out will bounce more checks:

If a bank is not authorized to use its discretion to pay overdrafts, it is more likely that the bank will bounce checks that the customer has written.[12] We interpret the proposal to mean that, when a customer opts out of a bank's overdraft service, the bank is obligated to make all reasonable efforts to decline transaction that will overdraw the customer's account. This means that, for customers who have opted out. Banks will be obligated to return checks that are presented against insufficient funds. The Bank estimates that it could return as many as 1.1 million checks *per month* and return 900,000 ACH transactions *per month* or almost 24 million items per year. Cumulatively, that is over 100 million transactions worth a total of over $11 billion per year. [13] If these numbers are extrapolated to the industry, the macroeconomic effect will be significant.

Moreover, customers will face fees from the merchant to whom they wrote the check, both for bouncing the check and for making a late payment, and the customers may even lose the authority to write checks with those merchants. If a merchant is a creditor, bounced checks could result in late payments which, in turn, could be reported to the customer's credit report. The costs to the consumer of bouncing a check virtually always exceed the costs of allowing an overdraft.

6. Consumers who opt out may not have an alternative means to make a payment:

We are aware that, in this difficult economic time, consumers are using their debit cards to purchase necessities more than ever. Bank of America's own data suggests that if all of Bank of America's customers were to opt out of overdrafts, the Bank would decline 6.8 million POS debit transactions *per month* or over eighty million transactions per year (1.2% of all authorizations).

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[12] While the Agencies have proposed to allow consumers to opt-out of only debit and ATM transactions, Bank of America, like most banks, does not currently have the technology to treat debit and ATM transactions differently from checks or ACH transactions in making the decision about whether to pay or not pay the transaction. Since there is no obligation for banks to pay any item into overdraft, until the banks are able to implement the appropriate systems and safeguards, if a customer has opted out of overdrafts, a bank is likely to apply that decision to all transactions even if the customer has only requested to opt-out of debit and ATM.

[13] It is important to emphasize that 61% of POS debit transactions that are made at a time when there are insufficient funds in the account, and hence, would be declined, ultimately settle into good funds. So these transaction numbers are not an accurate representation of the number of fees that consumers will avoid.

The proposed opt-out structure assumes that consumers have alternative choices to pay for their necessities. But this assumption is not a given, and customers who opt out and who do not have a credit card or some other payment mechanism will have their debit card declined and will have no alternative means of purchasing what they need. Our own data shows that some 21% of our debit card customers do not have a credit card. For these customers, a decline of a debit card transaction very likely means that they will not be able to complete the transaction.[14]

C. Changing the status quo in such a dramatic fashion would have systemic effects.

The effects of this proposal will be felt throughout the economy. The effects will be felt most dramatically within the financial industry, as the proposal will impose significant compliance costs and deprive banks of revenue at a time when banks are facing capital constraints and a constricted credit environment.

1. The macroeconomic effects could be severe, as there will be a reduction in consumer purchase transactions, and merchants will face greater collection costs.

The proposed regulations could have unintended macroeconomic effects. The clear and obvious result of this proposed rule will be that banks will decline a greater number of debit card transactions, bounce a greater number of checks and decrease the speed at which they make deposits available for use. As noted above, if there were 100% opt out, Bank of America estimates that it will decline or return 100 million transactions each year worth over $11 billion. Merchants would lose sales, as some portion of the declined debit POS transactions would be abandoned by the consumers. Merchants who had accepted a check for payment for goods or services would face collection costs if the check bounced. Bounced checks would also have a ripple effect on the merchant's own bank account, as the merchant would face the consequences of returned deposits.

Moreover, if the industry triples the amount of deposits that are not made available within one business day, the effect on the economy in general and the financial system in particular be significant.

The cumulative effect will be that merchants will have fewer sales and increased collection costs, and all participants in the deposit system will have less liquidity.

2. The cost of compliance, the imposition of uncompensated risk and the loss of revenue will put undue pressure on the banking industry.

The cost of compliance with the proposed rules will be enormous. The Agencies' proposal assumes that the discretionary overdraft system that has developed over time is a simple product that a bank can easily add or subtract from an account. The automated processing of

[14] Cash or checks will likely not be viable alternatives because, in most cases, the cash or checks will be drawn from the same account against which the debit transaction was declined under the proposal, and the bank will be obligated to decline the ATM transaction or the check in the same manner as the debit transaction.

discretionary overdraft decisions, however, is integrally tied into the core of payments processing within the depository system.[15]

Bank of America conducted a preliminary sizing of the technology resources that will be required to comply with the requirements of the proposed regulations. More than 60 systems within the Bank's infrastructure will be affected, requiring approximately 100 full time employees to work for two years. These changes to the technology infrastructure will need to be undertaken at the same time the Bank will be complying with credit card provisions of the proposed amendments to Regulation AA and the FDIC's regulation related to Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure and Large-Bank Deposit Insurance Determination Modernization, see Federal Register, Vol. 73, No. 116 (Monday, June 16, 2008) at p. 34017 (Monday, January 14, 2008). Technology costs associated with regulatory compliance will severely hamper the Bank's ability to conduct other systems maintenance and improvements and to implement new product innovation that requires technology resources.

Even with this massive technology effort, we believe that we will not be able to achieve a true no-overdraft account. This means that the Bank will remain in a position of having to allow overdrafts for customers that present risk to the Bank but, because of the proposed rule, the Bank will not be entitled to compensation for this risk.

3. By forcing a "one size fits all" solution – a solution that is currently unachievable – on the industry the Agencies would stifle more creative and practical solutions that better fit consumer needs.

By regulating a single solution, the Agencies have removed much of the incentive or ability for banks to distinguish themselves from the competition – efforts that benefit consumers. The Bank has recently implemented numerous products and tools to help customers manage their money, including online banking and e-Alerts. It has numerous additional projects underway to continue to meet customer demand for better ways to manage their money, including some that address some of the concerns raised by the Agencies. By requiring that the Bank offer an overdraft opt-out on all accounts, the Agencies have removed the Bank's ability to design a rational product that protects the Bank from taking on uncompensated risk, while offering a compelling value proposition to the consumer.

In addition, as noted above, virtually all technology resources will be devoted to aligning systems to comply with the proposed rules so that there will be little extra manpower available to innovate.

[15] The Agencies appear to disparage the automation of the discretionary decisioning of overdrafts in its proposal. However, automated decisioning of discretionary overdrafts is the grease to the engine that allows banks to instantly decision billions of debit card transactions each year in a manner that allows merchants to get paid and consumers to get the convenience of fast and easy payment systems. It allows banks the ability to process millions of paper and electronic checks within the requirements of Regulation J, Regulation CC and the U.C.C. related to the midnight deadline, while at the same time, allowing banks to decision the payments of ACH credit and debit transactions, online bill-payments and wire transfers. Without automated overdraft processes, and the ability to establish a system to rationally consider and allow overdrafts within the scope of this very complicated payment system, banks could not keep up with the volume and variety of payments that they do today.

Ironically, the Agencies' proposal may impede, rather than assist, the development of a rational no-overdraft account.

D. The Agencies provide insufficient support to justify changes of this magnitude.

1. The Agencies failed to meet the statutory standards for declaring a practice as unfair or deceptive.

Bank of America respectfully submits that the Agencies failed to meet the statutory standards for declaring the practices that they address as unfair or deceptive. As the Agencies laid out in the discussion of their statutory authority to issue the proposed regulation, the Agencies must show three things in order to declare that a practice is unfair: (1) substantial consumer injury; (2) injury is not reasonably avoidable; and (3) no benefit that outweighs the injury.

a. Failure to provide an opportunity to opt-out of overdrafts does not cause injury, the fee is reasonably avoidable, and there are countervailing benefits to the consumer that outweigh any monetary harm to the consumer of an overdraft fee.

For the first prong of the test, the Agencies have explained that there is substantial consumer injury "due to the fees assessed in connection with the payment of overdrafts." The Agencies added that some consumers who rely on overdraft services are likely to use it more and therefore pay more fees.[16]

There must be something more to the concept of "injury" to the consumer than merely the fact that the consumers paid a fee.[17] The Agencies have merely asserted that the fee is unfair without making any demonstration about what that unfairness is. In this situation, the fee is clearly disclosed to the consumer and is contractually agreed to when the consumer opens the account. It is difficult to understand how paying an overdraft and charging a fee for the service in this instance can be considered unfair.[18] The Agencies have failed to make a prima facie case that there is "injury" to the consumer beyond the fact that consumers pay money.

[16] The Agencies also noted that average overdraft fees have gone up in recent years, and the Agencies noted some direct benefits of overdrafts associated with checks that are lacking for ACH withdrawals or POS debit transactions.

[17] The OCC, in Advisory Letter 2002-3, noted that "monetary harm, such as when a consumer pays a fee ....**as a result of an unfair practice**, will be deemed to involve substantial injury." (emphasis added).

[18] If one were to apply the Agencies' rationale for this rule in other contexts, for example to late fees for video rental stores, it becomes apparent how weak the rationale is. Customers who rent movies understand that it is their responsibility to return their movie on time. Customers also understand that if they do not return the movie on time, they will be charged a fee. The late fee is an inherent part of the video movie rental business because it allows the movie rental store to manage their business in a way that keeps movies on the shelves for all customers by penalizing customers that keep movies too long. And, movie rental businesses have innovated to other models, like the monthly plans, without regulation through competition and technology. There has been no finding to our knowledge that anyone thinks a video late fee is unfair. The parallel to the banking business is apt. Consumers are aware of and understand that it is their responsibility to manage their accounts. Consumers are aware that if they overdraw their accounts, they will be charged a fee. Overdraft fees are an inherent part of a bank's business as it allows banks to serve all customers, while penalizing customers who don't abide by the rules. And banks are moving to alternative business models through competition and technology, and no regulation is needed.

Under the second prong of the unfair test, the Agencies assert that consumers cannot reasonably avoid overdraft fees if they are not provided with the opportunity to opt-out. The two examples that the Agencies provides to support this proposition are that a consumer cannot reasonably know when a deposit will clear and a consumer cannot reasonably know when a refund from a merchant for a returned item will be credited to his or her account.

This recitation ignores the fact that the consumer can easily avoid overdraft fees by properly managing his or her account. As noted above, over 65% percent of our customers paid no overdraft fees last year. Bank of America customers have adequate tools (e.g. online banking, e-Alerts, phone banking and their own diligence) to keep track of their balances. In fact, *they are better positioned than the Bank to know whether any given transaction will overdraw their account.*

The two examples provided by the Agencies to support the proposition that consumers cannot avoid overdraft fees – holds on deposited checks and credit for returned items – simply do not make sense. If a consumer has a hold placed on a deposited item, the consumer will be told in the hold notice required by Regulation CC when the funds will be available. For all deposits, a consumer can learn whether or not a deposit has been made available through online banking or calling the Bank's Customer Service. It is very reasonable to expect a consumer to not spend funds represented by a deposited item prior to it being made available to them. In fact, two of the purposes for the Expedited Funds Availability Act and Regulation CC were to provide consumers with clarity and certainty about when funds might be made available to them and to balance the consumer's desire for quicker availability against the risks to the bank and to the consumer of the item being returned unpaid.[19]

With a credit for a returned purchase, the time it takes to credit a refund from the merchant to a consumer's account is much more likely to be the responsibility of the merchant than of the Bank. The consumer should have no expectation that he or she can spend the money represented by the returned item until the funds are actually available in the consumer's account. And, as with deposited items, online banking and telephone banking are readily available tools that allow customers to easily learn when the credit has been provided.

Finally, in discussing whether the injury is outweighed by countervailing benefits, the Agencies examined individual transaction scenarios in which a consumer may have preferred to have POS debit transactions declined rather than approved. In this isolated scenario, there are clear countervailing benefits, including the benefit to the customer of being able to complete the transaction that he or she initiated without embarrassment. As we have cited elsewhere in this letter, we believe that 21% of our debit card customers do not carry a credit card, and would not be able to complete a transaction if their debit card was declined. Also, customers receive the benefit of interday float – as described above, 61% of transactions that the Bank authorizes into a

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[19] To the extent that the Agencies are concerned not just with the question of when funds are made available to the consumer, but when a deposited item is actually paid, the Bank is in no better position than the consumer to know that. Because the current processing system does not require affirmation of payment by the payor bank, a depository bank, like the depositor themselves, is left with certainty only coming with the passage of time.

negative balance on an intraday basis – transactions that the Bank would be required to decline under the proposed rule – settle into good funds. Demonstratable evidence of customer-perceived benefits in these practices is provided by the fact that almost half of our customers, when given a notice at our ATMs that consummating the ATM transaction might lead to an overdraft, choose to proceed to the transaction. Clearly, for many, many customers there is a countervailing benefit on a transaction level to the Bank paying items into a negative balance.

But, perhaps more importantly, the Agencies ignored the broader benefits of the current discretionary overdraft system, both in the context of an individual transaction and in the context of bank processing. The countervailing benefits include the speed, efficiency, variety, and broad availability of payment devices and systems that are accessible to consumers today.[20] Moreover, the Agencies have acknowledged that the application of the discretionary overdraft system to checks is overwhelmingly beneficial to the consumer – as the consumer will pay an overdraft fee if the check is paid, but will not have to pay for a returned-item fee from the merchant. The Agencies do not, however, acknowledge in the discussion of the countervailing benefits, that most banks cannot currently distinguish between an opt-out for debit transactions from an opt-out for checks. Thus, the Agencies fail to recognize that the isolated scenario where a consumer may have preferred to have their debit transaction declined must be considered in the context, at least with current processing systems, of also having checks bounced. To deal with the debit transaction in isolation is to ignore the intertwined realities of the current processing system.

In short, the Agencies have ignored the benefits, both at the individual transaction level and at the systemic level, that far outweigh the detriment of a readily avoidable fee to the consumer.

b. <u>Placing a hold on the basis of an authorization request by a merchant is not an unfair practice by the Bank.</u>

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[20] The discretionary overdraft decisioning is deeply imbedded in deposits processing. In this regard, it is very similar to funds-availability processing, and the Agencies may want to consider the following analogy to analyze the proposed rule. One could think of the funds-availability process as a system of which consumers could opt-out. If one thought of funds-availability processing as a service of which one could opt-out, the people who opted-out would be entitled to receive immediate availability for all deposited items; and the people who didn't opt-out would face delayed availability. Like with overdrafts, this would appeal to some customers because they would get a perceived benefit, the benefit of immediate availability. But other customers would understand that the perceived benefit also has costs; for funds-availability, immediate availability can hurt a customer if a deposited-item bounces after the customer has spent the money.

Banks do not consider their funds-availability processing, a highly automated process that is designed to catch suspicious deposited items for hold while releasing non-suspicious deposited items for prompt availability, to be a "service" that a customer could opt-in or opt-out of, and we don't believe the Agencies would view it a such either. Funds-availability processing is a core part of processing checks and other deposited items. It too used to be a highly manual process, with individualized decisions very similar to historical overdraft decisioning. It is an important tool in managing the bank's safety and soundness. But, just because it is highly automated, (in fact, largely because it is highly automated), it is not a "service" of which a customer could "opt-out." The proposal by the Agencies to allow opt-out of overdraft "services" is equivalent to the Agencies allowing consumers to opt-out of funds-availability processing, and demand immediate availability of all deposited items. The allowance of opt-out of either process would be highly disruptive to the deposit processing system, and ultimately harmful to the consumers who opt-out; the Agencies should no more regulate opt-out of discretionary overdraft than it should regulate opt-out of funds-availability.

The Agencies have proposed a prohibition on banks imposing an overdraft fee if an authorization request from the merchant exceeds the actual transaction. The proposal related to debit holds is understandable as it relates to consumers, but it is misplaced in placing the responsibility for the alleged harm on the banks.

Under debit processing rules, it is the merchant that determines the amount of the authorization.[21] The bank has no means of knowing how much the actual amount of the transaction is at the time of the transaction, but is wholly reliant upon the merchant to inform the bank of the amount. Moreover, the bank, when it authorizes a transaction, is obligated to the merchant for the amount of the authorization.

That said, Bank of America currently does not place holds on authorizations that come from classes of merchants that have a history of having a high discrepancy between the amount of the authorization and the amount of the actual transaction. For example, gas stations, hotels and rental car companies are well known to place authorizations that rarely correlate with the actual amount of the transaction. Bank of America does not place holds on authorizations that come from gas stations, hotels or rental car companies.

However, it is rare that a merchant class has 100% accuracy between the authorization amount and the transaction amount. Therefore, the Bank's current approach, while avoiding holds on transactions with merchants who are most likely to have their authorization exceed the transaction amount, is imperfect. The Bank believes that the imperfection is relatively minor, and as such, the Agencies' determination that the practice of holds on debits is unfair does not survive close scrutiny in light of the way that Bank of America processes authorizations.

In assessing whether the injury is avoidable, the Agencies note that consumers are generally not aware of the practice of debit holds, and, even if they were aware, the consumer could not readily determine how long the hold might stay in effect. The Agencies conclude, without explanation or support, that it is unreasonable for a consumer to be expected to verify whether a hold remains in place before each and every subsequent transaction. As indicated above, the party responsible for submitting an authorization is the merchant. Under Regulation E, the Agencies could address the perceived issues with the current system.

Perhaps the most troubling part of the Agencies' justification for the debit hold rule is the analysis of the countervailing benefits. The Agencies acknowledge that the bank is in a difficult spot because it is bound to pay up to the amount of the authorization. The Agencies then note that since the bank only has to pay the amount of the actual transaction, there is no potential loss to the bank from releasing the hold and, hence, no need to charge a fee based on the hold amount.

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[21] In some circumstances, the network processing rules bind the issuing bank to pay amounts over and above the authorization request; in these circumstances the merchant does not necessarily expressly submit the authorization amount, but rather, it is implied by the network rules. For example, pay-at-the-pump authorizations have, until recently, obligated banks to pay up to $75 for the transaction. This $75 amount is not directly set by the merchant, but, rather, by the network rules. In any case, whether the authorization amount is established by the merchant directly or by the network rules, it is not the bank that establishes it.

The Agencies' rationale ignores the risk to banks during the time the authorization is pending, and, as importantly, ignores how fundamentally unworkable the proposal is. A bank, which is obligated to pay the merchant the amount of the authorization if the merchant submits a valid transaction for that amount, protects itself during the intervening time period, which can be three business days,[22] by placing a hold. In that intervening time period, many transactions could be processed, including deposits, checks, other debit card transactions and ACH. Under the Agencies' proposal, the bank would be required to recalculate every transaction on the account that occurred between the time of the authorization and the time of the transaction. The net result is that, if the account appeared to be overdrawn during this three day time period, the bank would have to wait until the time period has completed in order to determine whether it can actually impose the fee.

To say this differently, under this proposed rule, there may be up to a three day delay between the bank's receipt of an authorization request and the bank's ability to determine whether to pay or return all intervening items. This will create confusion and irritation with customers and slow down the processing system in an intolerable way. It is difficult to see, for example, how a bank would be able to meet the midnight deadline for checks if the customer on whose account the checks are drawn has conducted signature debit transactions that are still pending; since the bank cannot know the actual amount of the transaction until the transaction is submitted, it is impossible for the bank to calculate an accurate available balance on which to make a decision about whether to pay the check.[23]

In balancing the countervailing benefits, the Agencies neglected to consider the benefits to the consumer and to the bank of being able to only look at one day's transactions when processing, and not having to recreate three days worth of transactions.

For Bank of America, the Agencies' rule will not present a substantive change in our risk exposure because we have already identified and adjusted our risk practices to allow us to avoid

[22] Under the Visa Rules, a merchant must submit actual transactions within three business days of the transaction, and banks must drop authorization holds within three business days. In most situations, the transaction is processed sooner than the three-day limit.

[23] For example, a customer has $65 in his account on day 1 and makes a purchase where the merchant places a $50 authorization request, but does not submit the transaction to the bank until day 3. On the same day, a check for $25 drawn on the account is presented to the bank and the customer conducts a $20 ATM withdrawal. The bank will need to make a decision about whether to authorize the ATM withdrawal in real time and it will need to make a decision about whether to pay the check before midnight of day 2. If the customer has opted out of overdrafts, the bank has a true dilemma: either the bank can authorize the ATM withdrawal and pay the check on the hope that the signature debit transaction will be $20 or less, or the bank can decline the ATM withdrawal and bounce the check on the assumption that the transaction will be more than $20. If the bank guesses wrong, it will either have denied a transaction and/or bounced a check for which the consumer had funds or it will have paid the ATM withdrawal and the check into overdraft against the customer's wishes. In either situation, if the bank guesses wrong, it will have a dissatisfied customer. The incentive created by the proposal would be to bounce the check and deny the ATM transaction since overdraft fees would not be allowed. If you consider that any one account can have multiple transactions every day, and that the bank has almost 30 million deposit customers, you can see how unworkable this proposal becomes.

holds on authorizations initiated by certain merchant classes. But the Agencies' proposal imposes enormous compliance costs and ultimately forces banks to adopt an unworkable processing system.

2. The Agencies need to gather more information before declaring deposit practices unfair or deceptive.

If there were a substantial problem with the current overdraft fee structure, one would expect substantial reliable research and information about the topic. However, one of the key notations of the recent GAO study was the dearth of reliable information about overdrafts.[24] Despite this finding by the GAO, the Agencies did not conduct their own survey of banks.

The Agencies also failed to consider the core findings of the GAO study that suggested that, while enforcement of current regulations could be improved, there is no demand for make changes in the current depository system as it relates to discretionary overdrafts.[25]

The GAO also noted that the FDIC is in the midst of a more comprehensive study of 500 state-chartered banks, including a review of transaction-level data from 100 of those institutions. The GAO noted that the FDIC is expected to complete its study in 2008. Despite this, the Agencies published the proposed regulation based on very limited research that was conducted primarily through a single community group.

The Agencies did solicit comment from the industry and the public in 2002, and that survey of the industry resulted in the Interagency Guidance on Overdraft Protection and the 2006 amendments to Regulation DD. In the Interagency Guidance, the Agencies appeared to define overdraft protection programs as those programs where the payment of overdrafts is "marketed

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[24] See GAO Study at p. 24: "while we cannot fully assess the quality of results from these two studies, **we note them here to illustrate the lack of definitive research in this area**." (emphasis added).

[25] In that study, the GAO looked at banks' fees, including overdraft fees, and at regulatory response to bank fees. The GAO found that "regulators received relatively few consumer complaints about fees and related disclosures – less than 5 percent of all complaints from 2002 to 2006 – than about other bank products." The GAO also found that some bank fees increased during the five years of the study, including overdraft fees, while other bank fees declined, like monthly maintenance fees. And the GAO concluded that regulators should more actively enforce the existing disclosure rules, particularly the current regulations that require banks to provide copies of their fee schedules and other account disclosures upon request and prior to the opening of an account.

The fact that consumer complaints about fees make up less than 5% of all complaints strongly suggests that fees in general, and overdraft fees in particular (which, by definition must be something less than 5% of consumer complaints), are not a concern for most consumers.

The GAO's indication that overdraft fees have risen, but other bank fees have dropped, is consistent with the message that Bank of America is trying to deliver today. Modern banking and convenience is so intertwined and the market is so competitive that changes in a bank's revenue stream from one source will likely have effects on other aspects of the bank's revenue stream. Regulators must be very cautious when taking actions that overrule the marketplace in steering the revenue streams away from the natural flow dictated by the market.

Finally, while the GAO did call for banking regulators to more actively enforce existing regulations, nothing in the GAO report called for new regulation.

to consumers essentially as short-term credit facilities." Similarly, the focus of the amendments to Regulation DD was on the marketing and promotion of the use of overdrafts in lieu of credit.

While offering consumers the opportunity to opt-out of an overdraft program was one of the best practices recommended in the Interagency Guidance, it was merely one of 17 practices identified as best practices, and there was virtually no discussion of the opt-out best practice in the materials published by the Agencies in relation to either Regulation DD or the Interagency Guidance. There was no suggestion in the Guidance or the Regulation DD amendments that failure to provide an opt-out was, in any way, unfair.

E. If the Agencies do adopt changes to the discretionary overdraft process, the Agencies should make three important clarifications or changes to their approach: (1) regulate through authority other than UDAP; (2) provide sufficient time for the industry to implement any technological changes that will be required to be able to comply; and (3) adopt a good faith authorization standard.

If the Agencies adopt changes in the discretionary overdraft system, then the Bank respectfully recommends that the Agencies make the following clarifications or changes in its approach:

1. If the Agencies implement aspects of the proposed rules, the Agencies should implement those changes through regulations and guidance other than the Unfair and Deceptive Practices Act.

The Agencies should utilize their authorities outside of the FTC Act to implement change in this area. Like the Board's decision to regulate "bounce protection programs" under Regulation DD, other authority is better suited to the type of change that the Agencies are trying to effect. To the extent that a consumer has difficulty in knowing how much a debit authorization is or how quickly a debit transaction may be processed, the Agencies could utilize Regulation E to require merchants to submit transactions to the financial institution within two hours of the authorization request.[26] This type of rule would reduce some of the most dramatic complications for banks trying to comply with the concept of opt-out, and would help banks provide better service and information to customers. Regulation E could also be used to provide guidance to merchants on how to calculate an appropriate authorization amount when the actual transaction amount is unknown, including providing an upper limit on how much a merchant can authorize.

2. If the Agencies implement aspects of the proposed rules, the Agencies should ensure that the mandatory compliance date is far enough in the future to allow banks the time necessary to implement the broad and complex changes that are required by the rules.

[26] This spring, VISA proposed changing its rules related to pay-at-the-pump transactions, such that, effective in October, merchants will be required to submit transactions within 2 hours of authorization (rather than the traditional 3-day rule). This will help tremendously with the pay-at-the-pump situations when merchants start complying with the rule.

As described above, the Bank's preliminary technology review has identified at least sixty different systems within the Bank's infrastructure that would need to be altered in order to comply with this rule. With a cost on the order of $50 million, the changes required would be neither inexpensive nor easy.

Compounding this difficulty is the effect of simultaneously attempting to implement the technology changes required to comply with the FDIC regulations and the proposed credit card regulations. The combined effort of implementing both deposit-system changes and card-system changes at the same time would place an incredible strain on the Bank's resources.

Our preliminary estimate is that, for the deposits-related work alone, the quickest possible implementation of all of the change necessary to come into compliance is two years.

The Bank respectfully requests that the Agencies ensure that the effective date of the final rules be at least two years after the issuance of the final rule.

3. <u>If the Agencies are going to implement aspects of the proposed rules, the Agencies should adopt a good faith authorization standard for when banks are prohibited allowed to charge a fee.</u>

In describing the proposed regulations, the Agencies accurately acknowledge many of the severe operational problems that banks would face in complying with the proposed regulations. The Agencies appropriately included two exceptions that would allow banks to impose overdraft fees on overdrafts initiated by customers who had opted out when the overdrafts were the result of actions that were outside the bank's control – for example, the Agencies recognized that a bank does not have the opportunity to accurately approve or decline a pay-at-the-pump authorization since the common practice of the gas station industry is to submit only a $1 authorization request.

The Agencies also invited comment as to whether the exceptions that they provided were sufficient or whether additional exceptions were needed. Parsing the specific situations and examples of when and where an exception to the opt-out rule is warranted strikes the Bank as a less-than-useful exercise. While there are some additional exceptions that the Bank will advocate for in Appendix A where we respond to the Agencies' specific requests for comment, we will not be able to describe all of the situations where an exception might be warranted. Processing systems are simply too intertwined and complicated to easily anticipate all situations where we believe an exception would be warranted. Moreover, as technology develops, it is likely that specific exceptions may become outdated and obsolete, and the need for new exceptions will likely arise. The Bank believes that establishing a standard based on a principle would better serve the regulators, the industry and consumers than creating a list of exceptions. We believe that a standard based on the principle that a bank may charge an overdraft fee to a customer who has opted out if the bank authorized a transaction on the basis of a good faith belief that funds were available at the time of authorization, but the funds were no longer available at the time the transaction settled.

A good faith authorization standard is fundamentally fair. A good faith authorization standard would achieve the goal of substantially reducing the number of overdraft fees that a customer who has opted out will receive, while still retaining the principle that the customer is responsible for managing his or her account. Moreover, the cost to the industry of compliance with a good faith authorization standard is dramatically less than trying to achieve total compliance.[27] This balance between achieving the majority of benefits to those customers who opt out, while imposing relatively fewer costs on the industry strike the Bank as the more appropriate balance.

III. Bank of America's Concerns Regarding the Credit Card Proposal

Credit cards that are universally accepted, highly portable, and competitively priced are good for consumers and good for the economy. Consumers also have considerable choice today in the credit cards they select and the way they use them. While we share the Agencies' desire to ensure consumers are well informed in making those choices, the proposal invalidates several mainstream credit card practices – sound practices that are inherently fair and consistent with current law and regulation. We are concerned such an approach will limit consumer choice and make less credit available to fewer individuals on less favorable terms, as described in detail below.

As a part of our review of the proposed rules, therefore, we offer alternative approaches resolve the Agencies' fundamental consumer protection concerns, with fewer adverse impacts on the consumer and the economy.

A. <u>Application of Increased Rates to Outstanding Balances</u>

1. <u>A credit card relationship offers consumers unique flexibility and choice.</u>

Every time a consumer uses a credit card, for any reason, he or she receives an open-end, unsecured loan based largely on that consumer's earlier promise to repay. If the customer wishes to charge additional items or is unable to repay the loan immediately, the customer may revolve a balance on the loan up to a pre-determined amount and repay a portion each month. Each month, the consumer has a choice – pay the balance on the statement in full and avoid finance charges on purchases, or elect for that month to pay less than the full balance, and finance the outstanding balance. The amount revolved and the length of repayment is largely up to the consumer. But this flexibility means real challenges for issuers who must earn a reasonable risk-based return and operate safely and soundly.

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[27] For example, any standard more restrictive than a good faith authorization standard would have the net effect of dictating processing order for banks. Notably, both the OCC and the Federal Reserve have explicitly declined to dictate processing order in the past when presented with the opportunity to do so. See OCC Interpretive Letter 997 and 916; see also Joint Guidance on Overdraft Protection Programs. Similarly, the UCC takes no position about the order in which checks and other items should be processed, and, in refusing to take a position, the NCCUSL justified their neutrality "because of the impossibility of stating a rule that would be fair in all cases…" See Official Comment 7 to UCC §4-303. We believe that the Agencies should not do indirectly what they have declined to do directly, and hence, should not implement a rule that would have the ramification of dictating a processing order for banks.

Credit card pricing practices today reflect the different ways consumers choose to use their cards and differences in risk. Before the advent of risk-based pricing, card companies simply charged all cardholders a relatively higher rate at the outset, and declined credit to those who presented more risk. Risk-based pricing has revolutionized the credit card industry. Issuers have developed sophisticated modeling capabilities that combine internal data with credit bureau information to predict future performance and price loans accordingly. The result has been democratized access to credit – allowing lenders to offer affordable, mainstream credit to consumers who previously might have been denied from receiving bank loans or other traditional forms of credit.

2. <u>Risk-based pricing ensures returns are commensurate with risks that change over time.</u>

We use risk-based pricing both to set initial interest rates on new accounts, and to re-price existing accounts, commensurate with the creditworthiness of our customers and changes in market interest rates. At the outset of a card relationship, we obtain a credit bureau report, and consider the consumer's FICO score and general credit history, and, consistent with the terms of the application, price the new account accordingly. While the initial information we obtain is useful, as the years go by, and the customer's financial situation changes, sometimes significantly, the original score tells us less and less about the risks we are actually running when we continue to extend credit to the customer each month. And that risk lies with the existing balances, not just new charges.

To account for changes in risk that become evident over time, we may reprice (through default pricing and pricing by amendment, each of which is described below) a relatively small percentage of our card portfolio. In 2007, for example, over 93% of our customer balances had the same or lower price from the prior year, 3.9% were re-priced as a consequence of default pricing, and 2.6% were re-priced by amendment.

While our risk models cannot pinpoint specific customers who will default, they accurately predict overall charge-off rates for a given population, which allows us to price risk accordingly. For example, a model may predict a 9% charge-off rate for a group of 10,000 accounts; while we do not know which 900 accounts will charge-off in the relevant time period, we know the final number will be very close to 900, and we can price the group of accounts to ensure we earn a return that covers these expected charge-offs.

Risk-based pricing does not materially increase the risk of loss on an account. Test and control data used by the Bank in a recent re-pricing, for example, show the default rate of the re-priced group was only slightly greater than the loss rate of the control group that was not re-priced. So the repricing action does not become a self-fulfilling prophecy; it merely prices for the risk that is identified.[28] Moreover, our data shows many re-priced customers tend to manage their credit

[28] Specifically, when we re-price customers, test and control data show that the repricing itself does not cause any significant increase in loss rates – in other words, for two groups of borrowers with a given risk profile or score, those who accept a change in terms to a higher risk-based rate do not have a loss rate that is significantly higher rate than a control group who receive no notice and are kept at the original lower rate. But both groups have a loss rate that is 50% higher than our average customers – confirming that our models are truly predictive of eventual customer default.

more wisely, making larger monthly payments and paying down their debts faster. Thus, a higher interest rate not only allows us to earn a return that compensates for greater risk, it actually reduces the risk we are managing and causes the customer to manage credit more wisely.

If banks were not able to price open-end, unsecured credit according to risk on an ongoing basis, then each transaction essentially would become a closed-end loan, with a very lengthy amortization schedule. We do not know of a bank that offers a closed-end, unsecured consumer loan with a twenty-year term, and accurately pricing risk over such an extended period would be difficult; if not impossible.

In short, current practices allow us to offer lower interest rates to customers who manage their credit well and relatively higher rates to those who show more risk, and they ensure that returns are commensurate with risks that change over time. With that framework in mind, we turn to the specifics of the proposal, and its effects on risk-based pricing by default and by amendment.

a. Default pricing

Default pricing (an increase in the account APR) by the Bank, can be triggered when a customer is late or overlimit on the account twice in a twelve-month period. Default pricing is disclosed upfront as a part of the Schumer Box and is set out in the credit card agreement and in many marketing materials received before and after the account has been established. The Agencies downplay the significance of these disclosures by suggesting each consumer inaccurately discounts the probability that the default rules will apply to his or her individual accounts. In other words, the proposal assumes consumers read and understand the disclosures regarding default pricing, but believing they will never be late or overlimit, they discount these advance warnings. We firmly agree that consumers read and understand these disclosures – indeed, we take great measures to ensure they are worded simply and prominently displayed. We have no reason to believe consumers disregard this information. But even if they did, the fact consumers are aware of contractual provisions that are both fair, and clearly and conspicuously disclosed, but assume these provisions will never apply to them has never been a basis in law to disregard those contractual provisions – and it should not be so in this instance.

The Agencies' proposal outlaws all possible default criteria save one: being 30 days late. In our experience, heightened risk justifying a re-pricing comes well before a customer goes 30 days late. At 30 days late, the risk of default is so high that risk-based repricing would not produce a sufficient yield to offset that risk. Indeed, a "fair" risk-based interest rate for customers who pay 30 days late – that is, a rate sufficient to earn approximately the same return as our general population – would exceed 40%. Repricing at this point would do neither consumers nor issuers any good.

For these reasons, the Agencies should not arbitrarily limit the number of default events to one (30 days late), and conclude that any other default event – no matter how justifiable based on risk and no matter how well disclosed – is *per se* unfair and deceptive. Rather, the Board should amend Regulation Z to permit repricing based on any default event that is related to the account is adequately disclosed, that reflects *a materially increased risk of default*. The final rule should include as a safe harbor certain events that the Board, based on comments and data it receives, can state with confidence meet that standard.

One such event that clearly indicates a material increase in risk is a customer's failure to pay by the payment due date or going overlimit on the account twice in a twelve-month period. Bank of America data shows a material risk of default for an account with such multiple events. Furthermore, by requiring multiple events of default, one-time miscalculations or other mistakes (cited in the proposal and discussed in the following paragraphs) are not acted upon. We think that is appropriate.

As one basis for limiting the reasons for default repricing, the Agencies express concern that a combination of exceptional circumstances outside the mainstream of card payment processing that might cause a customer to "unknowingly" go overlimit or otherwise default on a credit card account. These include:

i. accrued interest or fees;
ii. the institution's delay in replenishing the credit limit following payment; and
iii. other reasons not anticipated by the borrower, such as illness, that cause consumers to pay late or miss a payment.

Regarding the first point, interest on a credit card for a short time period of one billing cycle is neither hard to calculate nor anticipate. Customers who revolve balances are well-informed as to their APRs and can see the amounts of interest that accrue month to month. They also have multiple options for checking balances periodically throughout the month, including for most issuers, 24-hour customer service on-line and by phone and "e-alerts" – by which consumers can arrange for text messages or e-mails that alert them as they approach their credit limits.

The second point is simply incorrect. Financial institutions apply payments as of the day received, and most, including Bank of America, immediately restore the available line of credit. Even if the credit available is not immediately restored, this generally only affects authorizations of new charges and does not reduce the credit line for purposes of overlimit status.

With regard to the final point, the logical extension of this reasoning would deem *per se* unfair and deceptive any pricing practice that results in costs incurred by the borrower due to any unforeseen circumstance. Under this extraordinary standard, late fees, fees imposed by merchants – as well as numerous other economy-wide penalties for failure to perform -- should be unfair. Moreover, while our Bank sympathizes with, and takes great care to accommodate, customers who experience illness or similar misfortune, such unforeseen life events increase the risk of loss for banks, and banks should be permitted to appropriately price for such risks.

In summary, the Agencies' proposal with regard to default repricing (30 days late) would occur too late to be effective. Default pricing should be triggered by default events that present a material risk of default and that are clearly disclosed to, and understood by, consumers. As described in further detail below in the section titled *Proposed Alternatives*, one such event is a combination of two late or overlimit events over a twelve month period.

b. Pricing by Amendment

If market conditions dictate, or when we see that a customer is exhibiting risky behavior, we may seek to charge the customer a higher interest rate by amending the agreement. The consequences of amendments are avoidable by consumers in many ways. The consumer, for example, may pay the balance off, either by using existing assets or transferring it to a different account. For customers who do not have sufficient assets or alternative credit to pay the entire balance in full in that first month, we allow customers to reject the proposed amendments, and continue to make payments at existing (rather than the proposed new) rates. In other words, if the customer does not wish to pay the higher rate, he or she can simply decline the proposed change in terms and repay the existing balance under the old interest rate; the only thing the customer need do in return is stop making additional charges on the card. In each case, notice and choice are preserved.

Contrary to suggestions in the proposal, customers understand and regularly exercise their options. Bank of America recently tracked customers who had called us about a rate change by amendment. After explaining the terms and reasons for the change, Bank of America offered to process an immediate opt-out. This segment of customers, therefore, had seen the amendment, understood the change, and was given an opportunity to immediately reject the rate increase. Yet a significant percentage – over half – declined to reject the change. These were customers who desired continued access to open-end credit from Bank of America and decided, rationally we believe, that access to that credit going forward was worth paying higher interest rates on debt already owed.

The Agencies' proposal would prohibit re-pricing by amendment of existing debt, even with customer notice and choice.[29] For the group described above, the proposal would make the choice for the consumer, invalidating the option chosen by the majority of customers. The proposal notes that the bar on re-pricing applies only to existing debt, and not future charges. In the great majority of cases, we learn about an increase in a customer's risk *after* the customer has accumulated a large balance and utilized a large part of a credit line, not before. Thus, the risk lies in that existing balance, not future charges. Based on our experience, ***90% of the balances charged off were balances that existed prior to any repricing.*** And as noted above, to disallow repricing in this manner converts the card relationship into a long-term closed-end loan.

While the bank needs to be able to price for changes in risk over time, consumers need some certainty that their rates and terms will remain unchanged for a period of time, so they may reasonably manage their finances, and they should have a means of avoiding any changes. As set forth in more detail below in the section titled *Proposed Alternatives*, Bank of America believes the right balance between these interests is that pricing by amendment be permissible

[29] The proposal summarily dismisses the effectiveness of customer notice and choice in footnote 55, saying, "This choice [to not reject], however, may not enable the consumer to reasonably avoid injury." This is a *non sequitur*. The sole "injury" identified by the Board was an increase in the customer's interest rate. The opportunity to reject gives consumers the direct ability to avoid that increase – provided they are willing to discontinue charging on those particular cards. In other words, consumers have a choice, and regularly exercise that choice in order to avoid increased interest rates; which is the very essence of being reasonably avoidable.

upon expiration of the consumer's card (but no less than every two years) provided there is sufficient notice and a right to opt-out.

3. Eliminating risk-based pricing would have severe unintended consequences.

We have significant concerns regarding the impact of the Agencies' proposal to effectively eliminate all forms of risk-based repricing (including default pricing and pricing by amendment), other than for borrowers who are 30 days late. The following paragraphs enumerate these concerns:

Risk decisions would be less accurate and credit will cost more. – If the ability to re-price according to risk is taken away, one consequence will be less accurate risk decisions and increased cost of credit. In other words, one reason the risk profiles are accurate is that they have far more information to draw on in assessing risk, information that is simply not available at initial underwriting. Experience information such as balance trends and balance compositions, new accounts opened by the customer after the credit card was granted, the frequency, timing, and amount of payments, and the interrelationship between this data is very powerful. If all risk must be priced as of account opening only, and there is no opportunity to adjust that risk assessment in the future, and the information related to that risk assessment is far less predictive and reliable, then many categories of accounts will have to be priced higher at account opening.

There will be less credit available and higher interest rates overall. – As noted above, in 2007 over 93% of our credit card customers had the same rate or lower as compared to the previous year. For the others that were re-priced, the higher-priced balances reflect the economic reality that they had a higher risk. If balances cannot be re-priced to address the risk individually identified for a given customer, then the collective balances of many customers must reflect the risk premium, through some combination of higher prices or lower availability of credit.

If we consider customers with a FICO score of 670 or less, for example, we would find the following: average utilization is much higher than the portfolio average, as is their rate of default. Without the ability to re-price those whose behavior indicates greater risk over time, such borrowers will either be charged significantly higher interest rates, or extended no or significantly less credit, or some combination of both. This would drive some customers to discontinue borrowing, but we assume far more customers will instead turn to payday lenders, rent-to-own, etc. Yet these are not borrowers who fail to manage credit well as a whole. While their default rates are higher, they are still low on an absolute scale; in other words, they are successfully repaying their loans. Depriving them of credit will not benefit them or the economy.

This also is not to say that risk-based pricing affects only the consumers on the margin. With the limited information available at the point of application, a given consumer may appear to be of low risk, and have a corresponding low rate. But as time goes on, the actual risk becomes very apparent based on our experience with that consumer. If we cannot adjust for that risk and re-price that existing balance, the consumer remains at a favorable rate that is simply not warranted. In this way, the proposal may remove disincentives for poor payment behaviors and encourage moral hazards.

Variable rate accounts would become far more prominent, depriving customers of choice. - Many of Bank of America's credit card accounts are not variable rate accounts, because we believe these customers prefer to have non-variable rate accounts. If existing balances cannot be re-priced by amendment to reflect changing market and economic conditions, then interest rate risk is transferred to the bank. We will have to convert most existing non-variable rate accounts to variable rate accounts, including all new account offers. Consumers may prefer to have a non-variable rate product, with the understanding that the Bank may amend the terms in the future. However, consumers will be denied this choice.

Customers would be deprived of choice in general. - Beyond being deprived of the ability to choose a non-variable rate product, consumers are deprived of choice in general. The rules do not allow for customer consent in any circumstances – an unreasonable infringement on freedom to contract. A bank could not, for example, offer a choice of accounts, one with a lower non-variable rate that is subject to change by default pricing or amendment, or a variable rate product that is only subject to repricing if 30 days or more past due.

The Agencies' proposal will conflict with established statutory structures. – The State of Delaware, where Bank of America's card-issuing national bank is located and the laws of which govern the bank's pricing practices, has affirmatively and specifically legislated on the ability of banks to re-price existing balances.[30] The state law expressly provides a mechanism of advance notice and opt-out for amendments that increase the APR on an account. Delaware law permits the consumer to exercise choice: upon receipt of the notice, the consumer may reject the change, and pay the account off under the original terms.[31] The Agencies' proposal, which would disallow pricing by amendment notwithstanding the protections of notice and opt out, effectively declares Delaware banking law unfair and deceptive.

For all the foregoing reasons, the proposal raises significant concerns, most of which could be corrected by modest changes, described in the following paragraphs.

- *Proposed Alternatives*: Modest amendments to the current proposal would protect consumers, while avoiding the hazards discussed above.

    - **Default Pricing: Regulation Z should be amended to allow default pricing only for default events, adequately disclosed, that reflect *a material risk of default.***

For repricing based on risk to be effective, the segment of the population identified must not be so risky: 1) there is no realistic price to reflect the incremental risk, or 2) the incremental cost of

[30] The National Bank Act provides that national banks may export the interest rate determined by the law of the state in which the national bank is located. 12 U.S.C. Section 85; see also, Marquette Nat. Bank v. First of Omaha Service Corp. 439 US 299 (1978).

[31] The amendment structure through notice and opt-out authorized by Delaware law has been upheld by courts. See, e.g., Edelist v. MBNA America Bank, 790 A.2d 1249 (2001) (permitting the amendment of the agreement to implement arbitration through a notice and opt-out regimen).

credit is never actually earned, because the account is destined to be a loss. Efficacious default repricing requires identifying a population with a common, identifiable behavior that reflects enhanced risk, but is early enough in the lifecycle of the account that the identified population can be priced at a level that will actually compensate the bank for the risk associated with these loans.

Applying these principles to the proposal, an account that is already 30 days past due (the only default trigger allowed in the proposal) has a 12 month Gross Loss Rate that exceeds by *six times* the loss rate for the portfolio that does not miss a payment.[32] In contrast, an account that has been late twice in the past twelve months has a 12 month Gross Loss Rate that is 60% higher than the portfolio. The latter event, therefore, is a more viable measure of default: It identifies a group of accounts 1) showing a material risk of loss, relative to the overall population, 2) that may be re-priced with a degree of expectation that the income will actually be earned and will compensate for the enhanced risk.

Bank of America recommends the Board amend Regulation Z to provide that triggering events for a default repricing be limited to default events, adequately disclosed, that reflect *a material risk of default*. The Board could provide safe harbor events; and one such event[33] should be two late payments (defined as a payment not received by the Payment Due Date) or overlimits in a twelve month period.[34] For this event, the Board might require the lender to provide a statement message each month following the occurrence of the first late payment or overlimit, warning the borrower that the second event within a 12 month period could result in default repricing. Such a message would further enhance the customers' awareness of, and opportunity to avoid, the consequences of a second late event.

To implement this recommendation, the Board could modify the existing §226.9(c) and §226.4(c)(2) (and any other conforming changes to Regulation Z the Board considers necessary) to establish the qualifying default trigger.

- **<u>Re-pricing by Amendment</u>: Regulation Z should be amended to allow repricing by amendment for good cause, with good cause defined as a material risk of borrower default or changes in market or economic conditions), and subject to borrower advance notice and a reasonable opportunity to opt-out. To ensure borrowers are not surprised, re-pricing could be limited to expiration of the card (no less than two years).**

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[32] For purposes of this analysis, we treated the Board's proposal of 30 days from the Payment Due Date as an account that is 30 days past due (two payments have been missed). As noted below, the card business generally operates on the basis of payment cycles, which do not necessarily align to 30-day periods or month ends.

[33] We are currently working with an industry coalition to provide data to the Board regarding additional events that meet the test of a material risk of default, and we reserve the opportunity to supplement this letter with those findings.

[34] As noted in our 2007 comment letter to the Board regarding its proposed Regulation Z changes, under these circumstances banks should be able to send the required default notice proposed in the Board's Regulation Z amendments upon the first late payment or overlimit and act upon the occurrence (e.g., default reprice the account) of the second late payment or overlimit within a 12 month period.

The Agencies are proposing notice and opt-out as an element of the overdraft rules in the deposit portion of the proposal. We suggest the Board amend Regulation Z to adopt this as its standards for credit cards. Through its use of Regulation Z authority, the Board can establish a strong notice and opt out requirement that focuses on providing an adequate disclosure of options to customers. We suggest the following mechanics of a notice and opt-out to avoid customer surprise and ensure the notice is clear and conspicuous:

- The amendment increasing the interest rate must not take effect before the month the customer's credit card naturally expires (generally every two years).[35]
- The amendment must accompany the periodic statement.
- If payments exceed the five year amortization rate of an outstanding balances, then no further payment may be applied to that payment, and the remainder of that payment will need to be applied instead to non-outstanding, non-promotional balances.
- That statement cannot contain any other marketing inserts or checks.
- The statement itself must contain either the entire notice or a summary of the notice, and must include opt-out information.
- The effective date of the change must be no sooner that the first day of the billing cycle that starts after the receipt of the statement that includes the notice (about 30 days).[36] Therefore, the notice must precede actual expiration of the card, giving the customer sufficient time to arrange for an alternative credit card.
- The customer must be permitted to opt out by mail, phone, or if a registered online banking customer, online.
- The opt-out period must extend through the billing cycle that ends after the receipt of the statement that first shows the change. The first statement to show the change and the intervening statement would each also carry the opt-out reminder. Therefore, the customer will receive three notices (the statement with the amendment, the statement for the next billing cycle, and the statement showing the increased interest rate).
- If a customer rejects the rate, he or she loses charging privileges, and a subsequent use of the account nullifies the opt-out (often referred to as "debit-ratification").
- Customers who reject an amendment and do not use the account will not be subject to a future amendment changing the price.
- In amending Regulation Z, the Board should clarify that closing off future charging privileges upon an opt-out is not adverse action or discrimination against the exercise of consumer right.

By way of an example, assume an account whose billing cycle aligns with months, and whose expiration date on the credit card is December 2010:

[35] If a card is reissued because, for example, it was lost or stolen, then the original expiration date would continue to apply.

[36] As we indicated in our 2007 comment letter to the Board regarding its Regulation Z proposal, to be effective (and conform to industry practices) card customer notices required by regulation should be aligned with billing cycles. Notice periods that straddle billing cycles (such as 45-day notice periods) are difficult and costly to implement.

- The statement mailed in December (reflecting November's balances) would contain the notice of change in terms. The customer would have a clear notice and the instructions to opt-out would be on the statement as a well as the notice. The customer could call or write in to opt-out.
- The statement mailed in January (reflecting December's balances) would remind the customer of the opt-out; the December balances would still be at the lower rate.
- The statement mailed in February (reflecting January's balances) would show the higher rate, but would be the last notice of the opt-out. At the end of the February billing cycle, (which will follow the payment due date shown on that statement) the opt-out window would close.

Taken together, these proposed modifications to the Agency proposal strike the right balance between the industry's need to price for risk and sufficient consumer protections. Put another way, it is difficult to envision how a bank following the above policies could be deemed to be engaged in an unfair or deceptive practice.

B. Prescriptive payment allocation would lead to customer confusion and inefficient processing.

Payment allocation is a complicated area, because open-end credit card accounts are very fluid. Payments are generally made in response to the receipt of the statement. But the statement represents only the previous billing cycle's activity, and when the corresponding payment is received, there will have been new activity on the account as well.

At Bank of America, payments are currently allocated in one of two ways: Payments are allocated low to high, or, if the customer is paying in full, billed balances before new balances (those that have posted to the account but have not yet appeared on a statement). This approach, used throughout the industry, is relatively easy to administer and explain to customers.

The proposal would change this straightforward approach, creating different processing requirements for different categories of payments. Banks would apply minimum payments in one manner, for example, but payments in excess of the minimum could be applied in accordance with (or no less favorable than) one of three rules: high to low; pro-rata by balance category (presumably determined by APR differentials); or equally among the balances (presumably determined by APR differentials). Moreover, the proposal creates unique rules that segregate – and require different payment allocation methods for – promotional balances and the "outstanding balances" (balances that preceded an interest rate increase on new transactions).

The changes proposed by the Agencies, which are overly-prescriptive and laden with mechanics, would lead to customer confusion and inefficient processing, as well as significant design expense and processing time.

Our proposed alternatives would make slight variations to the Agencies' proposal.

First, there should be no segregation of promotional balances or outstanding balances. This will greatly enhance ease of implementation and be less confusing to customers. Unique rules for "promotional balances" or for "outstanding balances" would reduce promotional rate offers, as described in greater detail below, increase processing time and cost, and increase customer confusion. Furthermore, as we note below in Appendix B, *Comments on Specific Proposed Regulations Related to Credit Cards*, the definition of promotional balances may be very difficult to apply in practice.

Second, the rule should make clear that unless the consumer pays the billed balance in full, all payment allocation determinations are to be made using the balances as of the day the payment was received. In applying both the pro-rata method and the equally-among-the-balances method, the relative balances would be determined on the day the payment is received.

Third, if the consumer pays in full, the payment should be allocated to the billed balance. It is Bank of America's experience that when customers pay in full they intend for that payment to be allocated to the billed amount shown on the statement, not to any new unbilled transactions. Under the Agencies' proposal, because new transactions are included in the pro-rata and equally-among-the-balances calculations, and because of various other payment allocation rules proposed by the Agencies, payment in full would not operate to pay off the billed balance.

Finally, if the Agencies are to construct a payment allocation approach, we think this is best done under Regulation Z. The paragraphs below discuss these issues and our proposed amendments to Regulation Z in greater detail.

The Agencies suggest changes are needed in this area because the consumer has no control over payment allocation and therefore, loses the benefit of low APRs on promotional balances, and suffers other adverse effects outside his or her control. In many cases, the effects of payment allocation are readily avoidable through the consumer's choice of how the account is used and paid-off. For example, customers may (and do) choose for a period of time only to make transactions that qualify for a promotional rate. During this time, the consumer receives the full benefit of the promotional rate, regardless of the payment allocation method used by the bank. Once the promotional period expires (generally lasting no more than 15 months) the customer may choose to use the account for all transaction types. At Bank of America, well over a third of our customers who have a promotional balance have no other balance on their account and thereby maximize the benefit of the low promotional rate notwithstanding any particular payment allocation method.

Because payment allocation is inexorably linked to promotional rate offers, to the extent the Agencies' rule segregates promotional balances from payment allocation, the rule is likely to lead to fewer promotional rate offers, which provide benefits to consumers. Balance transfer offers associated with a promotional rate are excellent tools for consumers to "refinance" a short term debt obligation at an attractive rate. Moreover, because they are used by banks as a primary means of competing for balances, promotional rates serve to keep *all* card interest rates lower. If, as a consequence of overly restrictive payment allocation rules, promotional rates become less common and less attractive, that could lead to an overall increase in interest rates.

The proposal's payment allocation rule will also be incredibly complicated and costly to implement, particularly if financial institutions attempt to apply anything other than a pure high to low allocation method. Consider, for example, the following series of decisions that would apply for each payment we receive, on every account:

- Is any portion of this payment part of the minimum payment?
- How much of the minimum payment may be applied to an outstanding balance?
- For the amount in excess of the minimum payment, what are the pro-rata balances (this cannot be calculated until after the minimum payment has been applied, so the system must apply a portion of the payment, then stop and go back and calculate the now-remaining balances)?
- If there is money still left over, that money may be applied to outstanding balances (yet another independent pro-rata calculation if there are multiple rates); and
- If there is money still left over, that money may be applied to promotional balances (yet another pro-rata calculation if there are multiple rates).

Appendix D provides a sample payment allocation that further demonstrates the complicated nature of the decisions required by the proposal.

If the payment allocation decisions to be made by each bank are complex – as shown in the questions above and Appendix D – one can imagine the difficulty in providing customer disclosures and explanations, and the high level of customer confusion. This is inconsistent with the Agencies' overall goal of enhancing customer benefits and transparency.

As noted above, the Board should move payment allocation rules into Regulation Z, and the proposal should provide options that do not require complex calculations, where a single interpretative error can create significant liability. In Appendix B we have supplemented this response with answers to the proposal's highly detailed and technical questions regarding payment allocation. These questions (and answers) reinforce the importance of creating a clear, simple payment allocation rule under Regulation Z. Bank of America would propose the following elements to such a rule:

First, if the customer pays the previous balance in full, billed balances are paid before new balances. If the payment is less than the previous balance, the creditor may choose one of three methods in a given billing cycle for portions of payment in excess of the minimum payment:

High to Low;
Equally among the balances; or
Pro-Rata by balance types (determined by rates)

Second, no balances are segregated from payment allocation, and all payment calculations are made using the balances as of the day the payment was received. Consequently, payments are applied without recalculations based on any previous application of a part of that payment.

Third, the Board should address the five year amortization period for outstanding balances within Regulation Z. And Regulation Z should also make clear that the payment allocation section does not govern the determination of whether a transaction is still subject to an ongoing Claim or Defense liability.

These slight changes to the proposal, implemented through Regulation Z, would substantially meet the Board's goal without imposing significant processing time and without introducing highly complex payment allocation rules.

C. The fundamentals of credit card grace periods are impacted by changes to payments of promotional amounts

Under the Agencies' proposal, banks may not require payment of any portion of a promotional rate balance or deferred interest rate balance in order to receive a grace period on purchases. Although this provision is linked to the rule governing allocation of payments, it is best considered in isolation, as it operates independent of payment allocation.

The proposed rule affects the fundamentals of the credit card product, so it seems fitting to start the analysis of this issue with a review of the credit card, and how it has developed. The first credit cards were actually charge cards. These cards allowed the consumer to incur credit with designated merchants. The consumer would then receive a bill at the end of the month that was to be paid in full. There was no interest on the account; the full amount was to be paid by the payment due date that appeared on the billing statement. This billing practice was the genesis of the "grace period," by which customers who pay in full and on time effectively receive interest-free credit on their purchases. The grace period distinguishes the credit card from virtually every other form of lending.

This concept of grace period then is as old as the product itself, or rather, quite literally older than the product itself. Grace periods result in an interest-free loan, free money to consumers. If a grace period is offered by a creditor, the question of whether or not to take advantage of it is completely at the consumer's discretion. A creditor should be permitted to make these interest-free loans contingent on payment of the previous billing cycle's balance in full.

The proposal also has a logical flaw: consider what happens if the bank offers a promotion on purchases. Assume a customer has a $500 balance of purchases at a 7% interest rate. If this were not a promotional interest rate, then the customer would either pay the $500 in full and get the grace period (no interest on purchases for approximately thirty days), or would make a partial payment and pay a months interest at a 7% interest rate. But if that same 7% interest rate on purchases was a promotional rate, how much must the customer pay in order to get a grace period on purchases? Applying the Agencies' proposed rule, the answer is $0, not $500. So even if the customer made a minimum payment and revolved the balance, the bank would be obliged to give the customer a grace period on purchases, and charge no interest. If the customer need not pay anything to have a grace period on purchases that are at a promotional rate, then the issuer will be compelled to give a grace period on purchases, and every promotional rate on purchases will effectively be 0%.

We think instead that the consumer has a choice in the above scenario. The choice is whether to take advantage of the 7% promotional rate by paying something between the minimum payment and $500, or to pay the $500 in full and receive a grace period on that balance. That same choice, pay in full or revolve at the promotional rate, exists when the promotional rate is on balance transfers. The consumer who chooses to have both a balance transfer balance and a purchase balance can either take advantage of the balance transfer promotional rate for the duration of the promotional period, or the consumer can pay the balance transfer and purchase balance in full. In the latter case, the consumer will have taken advantage of the promotional rate on balance transfers for one cycle and received a grace period on the purchase balance.

Grace periods are so popular and thus ubiquitous in the credit card business that they have come to be taken for granted. But they do create an interest-free loan, albeit one with a pay-in-full condition. This pay-in-full condition has always existed, and requiring payment in full has never been "unfair." There is no support or logic for determining that it is now.

Further, as drafted, the proposal would create an additional balance disclosure on the periodic statement. Today and under the June 2007 Regulation Z amendment proposal (with additional formatting requirements), creditors are required to disclose the account balance outstanding on the closing date, referred to as the "New Balance Total." The New Balance Total is also the amount the consumer must pay to take advantage of the grace period. If the consumer is only required to pay a portion of the New Balance Total to take advantage of the grace period, presumably that balance would have to be added to the periodic statement. Separate totals for each balance currently at a promotional rate are not required today and are not provided and would be confusing for customers.

- *Proposed Alternative*: Greater disclosure of the payment requirements of promotional rates under Regulation Z could remedy the perceived concerns.

Grace periods constitute an interest-free period, and banks have every right to condition the grace period on payment in full. As such, there should be no mandated change to this fundamental feature, and the grace period should continue to be conditioned on payment in full. However, Regulation Z could be amended to require greater disclosure around this practice. For example, the regulation could require a notice on the first statement in which a promotional rate appears that provides a warning to consumers that purchases cannot be paid in full without also paying all other balances in full, including the promotional balances.

D. Changes to the number of days to pay and creating a 21 day safe harbor reduces transparency and clarity of communication .

This provision intends to allow consumers more time to review the credit card bill and arrange for a payment to avoid late treatment for any purpose other than grace period. The proposal provides that the consumer must have a reasonable period of time between the date the statement is mailed and the payment due date to make a payment, and sets a 21 day safe harbor.

In doing so, the proposal creates a difference between the 21-day payment due date to avoid being "late" and the 14-day payment due date to retain the grace period, which is provided for today in Regulation Z. To avoid inevitable customer confusion, we believe the best approach is to make no added changes, or set the safe harbor commensurate with the 14 day grace period date in Regulation Z. Should the Agencies decide a longer time period is necessary, our data show the 21-day period selected is overly-conservative, particularly in light of current electronic payment mechanisms and faster mail times. We propose as an alternative a minimum 19-day payment due date. Details of the proposal and our alternatives follow.

The dichotomy created by a 21 day payment due date and 14 day grace period due date leads to a highly illogical result. Under this structure, a consumer must determine and arrange to pay the balance in full by Day 14 to preserve the grace period, but has until Day 21 to determine and arrange to make the minimum payment to avoid late treatment. One would assume that the time needed to review the statement to determine and arrange to pay the entire bill would need to be *longer* than the time needed to review the statement and to arrange to make just the minimum payment.

The proposal also reduces transparency and clarity of customer communication, for there are functionally two payment due dates – the date by which the payment must be made to retain the benefits of the grace period (and remain a "pay-in-full" customer), and, seven days later, the date by which payment must be made to avoid being late.

Our data suggest that with mail and payment mechanisms today, the 21 day minimum time period is conservative. The Agencies' analysis turns on mail and review times – the Board uses seven days mail time both ways, and seven days for review. Over 80% of our customers pay *before* the payment due date. Moreover, over 60% of our customers utilize payment channels other than the mail, and therefore are not subject to this need to have an additional seven days for a return post. In addition, statements are available on line for customers with online access, so the review can take place even if the physical bill has not yet arrived.

- *Proposed Alternative:* The Board should choose a shorter time period than the 21 days proposed and should consider Regulation Z as the vehicle for the proposed change.

There is no indication that mail times have gotten longer during the decades that the current Regulation Z standard of 14 days has been in place. Indeed, to the contrary, alternative means of receiving the billing information and for arranging a payment have made it easier and quicker for consumers to do so.

To avoid inevitable customer confusion, we believe the best approach, is to set the safe harbor commensurate with the 14 day grace period date in Regulation Z – or make no change whatsoever. Should the Agencies decide a longer time period is necessary, we propose as an alternative a minimum 19-day payment due date.

Any changes regarding the time between mailing a statement and the payment due date should be made in Regulation Z, which today governs the application of late or overlimit fees if the consumer does not make a timely payment.

E. **The proposed elimination of the two-cycle balance calculation method will have unintended consequences**

Bank of America does not utilize a two-cycle balance calculation method. However, as drafted, the proposal will affect processing for cash advances that have transaction dates that fall in the prior cycle but which post in the current cycle, as well as interest assessment on certain returned payments.

Cash transactions traditionally do not have a grace period; like a classic loan, they accrue interest from the day the loan is taken until the day the loan is paid. In a credit card billing cycle context consider, for example, a check cash advance made on April 30th on an account whose statement is generated on May 2nd, but further assume that the transaction does not post to the account until May 3rd. Many institutions charge interest from the date of the loan, April 30th. This practice would be banned by the proposed rule because it would include interest based on balances from a previous billing cycle. Yet there is nothing inherently "unfair" or even confusing about charging a customer interest from the day the customer takes a cash advance.

Similarly, if a payment made in one cycle is returned after the end of that billing cycle, many institutions adjust the account so that the effects of the earlier "payment" are undone and forgone interest is recaptured when the payment is determined to be invalid. This too would be swept up by the proposal.

Regulation Z should be amended to prohibit the two-cycle balance calculation method, if the Board determines that is a desirable outcome. That preserves the ability to charge interest on cash transactions and the undoing of a returned payment, provides clarity and certainty, and avoids the problematic UDAP determination.

F. <u>Holds and overlimit calculations do not impact the vast majority of the industry.</u>

In the credit card industry, there is a credit line, and that static line is the measure for determining overlimit status. Any holds, or authorizations, do not move the actual credit line nor do they count against the credit line for an overlimit determination. Rather, they are used to determine whether a new charge will be approved; if the charge is approved and the actual balance does not exceed the credit line, there is no overlimit fee, regardless of the number of outstanding authorizations that have not yet generated an actual transaction.

Debit card practices are entirely different, for there is no set credit line. Our comments on the parallel debit card proposal are included in the portion of this letter that addresses those specific concerns.

G. <u>Security Deposits and Fees for the Issuance or Availability of Credit</u>

This provision represents an appropriate exercise of UDAP authority, and stands in stark contrast to the other UDAP portions of the proposal. In this regard, this provision is similar to the Board's HOEPA UDAP findings.

H. <u>Disclosures of firm offers should be made through the FACT Act authorities.</u>

This disclosure should be introduced through Regulation Z, or even more appropriately, through the Fair Credit Reporting Act's Risk-Based Pricing Rules. Bank of America has no concern with adding a sentence to the marketing (though we think it states the obvious and that the information is clear elsewhere in the advertisements), if the Board considers that appropriate. But there should be no finding that the absence of this language is in any way deceptive now, or in the past.

I. <u>The use of Regulation Z is far more appropriate than the use of Regulation AA to address the concerns raised by the Agencies.</u>

The Agencies' proposed use of its UDAP authority is simply misplaced. UDAP determinations are generally designed to be very fact-specific, and not the basis for sweeping – basically, legislative – changes to well-established, rational, and fair industry practices.

That is not to say that the Board lacks the authority to make regulatory changes to reflect practices it had not previously addressed. The Truth in Lending Act gives the Board a great deal of discretion to address areas of concern, and our preceding recommendations are based on the recognition of the Board's desire and authority to act.

For example, in its finding of substantial consumer injury in re-pricing the Agencies find that an increased annual percentage rate applicable to an outstanding balance increases interest assessed to a consumer.[37] If that finding is all that is required to meet this hurdle under a UDAP analysis, then every practice related to charging interest to a consumer meets this hurdle. Traditional UDAP assessment does not attack the pricing of a product unless tied to another factor (false advertising, for example).

Similarly, in payment allocation, the fact that the allocation methods proposed by the Agencies may result in less interest than other methods of allocating payments does not establish that other methods cause substantial monetary injury. Note that if the consumer takes advantage of a promotional offer and only pays the minimum payment, the Board's proposal does not have any effect. If the evaluation of substantial monetary injury is that one bank practice may result in greater interest charges than another bank process, then all bank processes are subject to the same type of determination, regardless of the level of disclosure.

The Agencies are also inconsistent with its view of avoidability. In proposing to effectively extend the payment due date from 14 to 21 days, the Agencies note that taking longer to make a partial payment results in more interest, but this harm can be avoided by the consumer electing to pay sooner. Here the Agencies are either saying that additional interest does not constitute a significant injury, or the ability to choose a different payment pattern makes the injury avoidable. Both of these conclusions are inconsistent with other sections within the proposal.

[37] 73 Fed. Reg. 28917 (May 19, 2008)(Application of an increased annual percentage rate to an outstanding balance appears to cause substantial monetary injury by increasing the interest charges assessed to a consumer's credit card account).

UDAP findings by the Agencies will have a reach, and consequences, wholly unintended and unanticipated. This will not be the case if the Agencies instead addresses areas of concern through the Regulation Z amendments we have proposed, and we therefore urge the Agencies to implement our recommendations through Regulation Z. This will also enhance the uniform application of these rules nationwide.

J. Time to Implement

As we discussed in our comment letter to the Board's 2007 Regulation Z amendment proposal, many of these changes proposed by the Agencies will require substantive changes to our periodic statement and account calculation/reconciliation processes. Our most recent project that we consider compatible in scope took us two years to implement. It is easy to confuse the simplicity in handling a credit card account with the complexity of supporting a credit card account. Bank of America, which acts as its own servicer for accounts, will have to bear the entire system-related cost of the rules itself. As we further noted in that letter, rules that have direct and dramatic development costs drive the industry to using just a few third party processors, which serves to reduce competition and innovation, because everyone has the same opportunities and limitations.

Based on an initial sizing, this project will cost at least $75 million to $100 million just in development costs, and will take approximately two years to implement.

IV. Conclusion:

Thank you for the opportunity to comment on this proposal. To the extent you have any questions about our response, please contact Gregory Baer at 202-442-7573.

Sincerely,

Susan Faulkner
Consumer Deposits Executive
Bank of America

Lance Weaver
Card Services Executive
Bank of America

Appendix A.

Comments on Specific Proposed Regulations Related to Overdrafts
And
Response to Specific Requests for Comment Related to Overdrafts

I. Comments on Specific Proposed Regulations Related to Deposits

In addition to the general comments above that primarily pertain to proposed section 227.32(a), the opt-out requirement general rule, the Bank would like to draw the Board's attention to certain specific sections of the proposed regulations.

A. Regulation AA, Section 227.32(6) Duration of opt-out and revocation of opt-out

The Board's proposed rule makes a consumer's choice to opt out effective until revoked by the customer. In its discussion of this rule, the Board has proposed that the consumer's revocation must be in writing, or, if the consumer agrees, electronically. We have two comments related to this proposal.

First, the Board has previously encouraged banks that allow customers to overdraw at the banks proprietary ATM to provide the customer with notice and an opportunity to opt out before allowing the customer to consummate the ATM withdrawal. Consistent with the previous guidance, the Agencies should clarify that revocation of opt-out at an ATM is an allowable and effective method of revocation.

Second, it is not clear why the board is requiring the revocation of the opt-out to be in writing. The Bank very much anticipates that customers who opt out and have their checks bounced or their debit card transactions declined will first contact the bank by telephone, and we further anticipate that many customers will want to revoke the opt-out during the telephone call. It seems antithetical to customer service and consumer protection to prohibit the consumer from being able to revoke an opt-out verbally.

B. Regulation AA, Section 227.32(b) -- Debit Holds

The Debit Holds proposal is fundamentally unworkable. Since signature debit transactions can take up to three business days to be submitted to the banks for payment, the bank may not know the terms of the transaction for three business days. If a bank has placed a hold based on the authorization amount, it will not be able to have confidence about the hold's effects on all intervening transactions until the actual transaction arrives.

The Bank strongly recommends that the Board take a completely different approach to its concern about debit holds and focus on the authorization process through Regulation E.

C. Regulation DD, Section 230.10

The Bank understands that if the Board is going to require banks to offer consumers the opportunity to opt out of discretionary overdrafts, consumers must be given sufficient information about their opt-out right to make it a meaningful right. However, the vast majority of the new requirements are duplicative of existing requirements and, hence, unnecessary. Most of the content prescribed in Section 230.10 (other than the right to opt-out itself) is information that the Bank already provides to its customers – though not necessarily in the format mandated by this proposed rule. For example, the Bank's fee schedule clearly identifies the fees imposed and the daily cap on the number of fees that the Bank has in place. The Deposit Agreement and Disclosures and related Schedule of Fees explain the Bank's overdraft policy, including the category of transactions for which a fee for paying an overdraft may be imposed. And, as part of its standard account opening process, the Bank offers customers the opportunity to link a credit card or savings account for overdraft protection. In fact, in the notice that the Bank mails to customers who have overdrawn their accounts, the Bank already includes information about the fee, and promotes overdraft protection from a savings account or credit card and also promotes other tools that customers can use to better manage their accounts.

Because almost all of the information required by the proposed 230.10 is already required, the Bank opposes the requirements of 230.10 as duplicative and burdensome. The Bank particularly thinks requiring all aspects of the requirements of Section 230.10 every month in which a consumer overdraws his or her account is particularly heavy handed and unnecessary.

The proposed opt-out notice is lengthy – and as noted above duplicative - but can fit into disclosures given at account opening. However, the requirement to use the long form opt-out notice for recurring notices has the practical consequence of mandating that the recurring notice only be given on periodic statements. The proposed notice is too long to fit on most forms of overdraft notice currently used by banks. It is also hard to see any customer benefit in continuously repeating the information listed as bullet points on the proposed form. Instead, two forms should be considered – one longer form as part of the initial account disclosures and a second shorter form for any subsequent notice. The shorter form should be limited to a statement about the customer's opt-out right and a statement about how to obtain further information.

That said, given that the disclosure is intended to allow customers to make an informed choice about whether to opt out of discretionary overdrafts, the Bank notes that the sample notice provides almost no information about why the customer might <u>not</u> want to opt out of discretionary overdrafts and so does not provide sufficient information to enable a consumer to evaluate whether an overdraft service and opting in or out of that service would best suit his or her needs.[38] For example, the notice makes no mention of the fact that, if the customer opts out,

[38] The Agencies have indicated that banks may supplement the information required in 230.10(b) with additional information, including "briefly describing the consequences of the consumer's election to opt-out. . ." See Proposed Official Staff Interpretation to section 230.10. However, by establishing the standard that the notice must be "substantially similar" to the model notice, the Agencies have effectively put a limit on how much variation a bank is likely to make. Banks have learned that any variation from a model disclosure is subject to a challenge through litigation. Therefore, while the Bank appreciates the proposed commentary that allows banks to supplement, we

the customer will have his or her debit transaction declined even if the customer is expecting a direct deposit that evening. The notice also does not spell out that, if the bank bounces a check, the bank will impose a fee and the merchant may also impose a fee.

The sentence that discusses the consequences of opting out in the proposed form merely says: "If you do [opt out], however, you may have to pay a fee if you make transactions that are returned unpaid." This is misleading as it suggests that only a single fee would apply to all bounced transactions. In contrast the remainder of the form paints a dire picture of overdraft services. While the single sentence is hardly sufficient, the sentence would be at least be reasonably accurate if it said something like: "If you do opt out, however, you will usually pay a fee to the bank, and you may also owe a fee to the merchant or creditor, for each overdraft item that is declined or returned unpaid." The Board should revise the sample notice to give a balanced presentation of the consequences of opting in or out.

The first bulleted sentence in the notice asserts that "[w]e will charge you a fee of $__ for each overdraft item." Since banks frequently waive overdraft fees this assertion should be changed to note the bank **may** charge a fee for each overdraft.

In addition, the Bank believes that the statement in the model form that states, "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" is highly misleading because it leads consumers to believe that the bank will have an obligation to pay other transactions, when, in fact, no such obligation exists. If a customer opts out of debit and ATM transactions, many banks will also decline to pay checks or ACH transactions because many bank's systems cannot distinguish between the two for purposes of overdraft fees.

The final paragraph of the notice states: "We also offer less costly overdraft payment services that you may qualify for, including a line of credit." This statement is likely to mislead consumers because some forms of traditional overdraft protection can be more costly than an overdraft fee. In addition many consumers will not qualify for a line of credit.

The notice makes no mention that the bank is still authorized to charge overdraft fees in certain situations. This failure to include the exceptions that the Board has specifically authorized will confuse and madden customers. The model notice needs to clearly indicate that any opt-out right is partial and incomplete.

The Board requested comment on whether the opt–out notice should be placed in close proximity to the fees on the periodic statement. We strongly recommend against this sort of micromanagement of the format of periodic statements. Since a typical consumer deposit statement is a simple and short document, usually only a couple of pages, listing the opt-out anywhere in the statement should be sufficient. Words like "close proximity" are subjective and are likely to result in litigation.

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believe that everyone would be better served if the regulation itself, and the model notice, includes reference to the adverse effects of opting-out.

Finally, this section does not include any discussion of how a customer can opt back in to overdraft services. We believe that opting in (or revoking a prior opt-out) should be as easy for consumers as the original opt-out as we expect that many consumers will not be pleased with the consequences of their initial decision.

D. Regulation DD, Section 230.11

When the Board amended Regulation DD in 2006, it identified the primary focus of the amendments to be on institutions that promoted overdrafts. The Board imposed additional disclosure requirements on those institutions because it feared that customers might be misled by those institutions absent regulatory disclosure requirements.

The Board is now proposing that the same disclosure requirements that it imposed only on institutions that actively promoted overdrafts apply to all institutions. By removing the disincentive of additional disclosure if an institution promoted overdrafts, the Bank believes that many more institutions will engage in the practices that the Board appeared to be concerned about in 2006.

In addition, Bank of America will need to devote substantial resources to update our monthly statements to comply with the requirements of section 230.11. Because we firmly believe that customers know and understand overdrafts and overdrafts fees, the Bank believes the proposed rule imposes substantial cost with little or no benefit. We therefore, strongly oppose the proposed changes to section 230.11.[39]

We are puzzled by the requirement to add overdraft and returned item fees for the calendar year to date since that is especially burdensome and conveys no apparent benefit. Certainly, to the extent the proposal that requires each monthly statement to include a total for the month is implemented, consumers will be provided with sufficient information to make their own calculations as to the aggregate costs of overdrafts. Requiring banks to invest in the technology that would be required to comply with the annual aggregation requirement does not strike us as serving any meaningful purpose.

Section 230.11 also proposes a format requirement – the aggregate fee disclosures must be disclosed in a table format and in "close proximity" to fees identified under section 230.6(a)(3). The Board requested comment on this requirement. Again, we strongly recommend against this sort of micromanagement of the format of periodic statements. Since a typical consumer deposit statement is a simple and short document, usually only a couple of pages, the sort of table format for this disclosure would be clearly visible and easy to find, no matter where it is placed on the statement. Words like "close proximity" are subjective and are likely to result in litigation.

II. <u>Response to Specific Requests for Comment Related to Overdrafts</u>

[39] The Bank notes that section 230.11(c) prohibits a bank from including an overdraft pad in response to a balance inquiry unless it has first indicated the actual funds available. Bank of America has never included the overdraft pad in response to a balance inquiry, and hence, has no objection to proposed rule 230.11(c).

The Board has specifically requested that interested parties comment on certain aspects of the proposed regulations. To that end, Bank of America submits the following responses to each of the Board's specific request related to the Overdraft proposal.

A. Regulation AA: Agencies Seek Comment on whether consumer's right to opt-out should be limited to overdrafts caused by ATM withdrawals and debit card transactions at point-of-sale.

As indicated above, most banks, including Bank of America, do not have the ability to distinguish between debit/ATM and checks for purposes of determining payment and/or imposing an overdraft fee. Since banks are not required to honor checks drawn against insufficient funds, many banks will simply apply the partial opt-out to all transactions. This will give the consumer the illusion that banks will treat the transactions differently when, in fact, the bank will have no obligation to treat transactions differently and will only create confusion and customer dissatisfaction.

If the primary concern of the Board is about the payment of debit card transactions, then the Board should considering allowing banks to limit the opt-out option to only debit card and ATM transactions, but should not require banks to do so.

B. Reg. AA: Agencies seek comment on whether exceptions are necessary to address the circumstances where the institution did not knowingly authorize a transaction, such as institutions that only update balances once per day or for off-line or stand-in transactions, and whether/how to craft such exceptions to not undermine the protections afforded by a consumer's election to opt out.

The Bank strongly believes that the Agencies should grant exceptions based on a principle, rather than trying to develop *ad hoc* exceptions. Moreover, the Bank believes that the most appropriate principle, one that is fair to customers and to banks, is the principle that a bank may charge an overdraft fee to a customer who has opted-out if the bank authorized the transaction on the basis of a good faith belief that funds were available at the time of the authorization. Only the good faith authorization standard will allow banks avoid the costs associated with changing their entire processing infrastructure in order to comply with this rule. Moreover, only a principled standard, like a good faith authorization standard will be flexible enough to adapt to changes in technology.

We want to emphasize that this standard is consistent with the underlying principle that the customer, not the bank, is responsible for managing his or her account. The good faith authorization standard recognizes that the customer, not the bank, is in the best position to know what other transactions may affect his or her available funds, while still having the bank decline approve or decline transactions in a manner that is consistent with the customer's requests.

If the Agencies insist on carving out specific exceptions, there certainly should be an exception for the stand-in processing situation that the Agencies identified in its proposal. But more importantly, the Agencies need to address situations in which a deposited item gets returned.

Because the Bank will not learn that a deposited item has been returned until batch processing at night, customers will often find themselves in overdraft status because of transactions that the Bank authorized during the day when it appeared that the account had sufficient funds. In these situations, because the returned item is outside the Bank's control, the Board should provide an exception to allow the Bank to charge its normal fees.

C. Reg. AA: Agencies seek comment on the operational issues and costs of implementing the proposed prohibition on the imposition of overdraft fee if the overdraft occurs solely because of the existence of a hold on a debit card transaction.

This issue is addressed at length in the general comments and in the discussion of that specific section of the proposed regulation above.

D. Reg. AA: Agencies solicit comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a consumer's account.

We have considered such a step, but our customers have consistently told us they want to ensure their larger items, mortgage loans, car insurance and auto-loans get paid first. If those items get declined for insufficient funds, the economic ramifications for the consumer are generally more significant than if smaller items get declined.

Experts have concluded that there is no uniform method of processing payments that would be "fair" to all customers as customers' payment behaviors and perceptions of value differ. The National Conference of Commissioners on Uniform State Laws has determined that it is inappropriate to establish a single rule for processing items presented against a deposit account. The NCCUSL is responsible for, among other things, creating and updating the Uniform Commercial Code, the code adopted by many states to govern the processing of payments, including payments of checks. The UCC takes no position about the order in which checks and other items should be processed, and, in refusing to take a position, the NCCUSL justified their neutrality "because of the impossibility of stating a rule that would be fair in all cases…" Similarly, neither the OCC nor the Federal Reserve have explicitly determined that any one method of processing is inherently fairer than another. See OCC Interpretive Letters 997 and 916; see also Joint Guidance on Overdraft Protection Programs.

That said, when a bank authorizes a debit card transaction, it is committed to paying it. However, a bank has not committed to paying a check until it processes the check during batch processing at night. For customers who opt out, most banks will switch to a system of paying items that they have committed to paying (debit transactions) before items that they can choose to decline (checks). In other words, the net effect of the proposed opt-out rule is to force debit card transactions to be processed before others. While not explicitly requiring banks to go from low to high, the proposed rule comes close, at least for customers who have opted out.

The clear and direct ramification of this change in processing will be that banks will bounce more checks than they currently do. For customers, this might mean fewer OD fees, but it also means that mortgage car loan payments are more likely to be bounced. The fees charged by these creditors for bounced payments usually exceed the overdraft fee. This outcome is contrary to what our customers have told us is their preference.

As indicated in the general comments, the Board should specifically study the effect of increasing bounced checks on the system before implementing this rule

E. **Regulation DD: Agencies seek comment on whether institutions should be required to provide a form with a check-of box that consumers may mail in to opt-out. Comment is also requested regarding whether consumers should also be allowed to opt out electronically, provided that the consumer has agreed to the electronic delivery of information.**

The use of a form seems excessively complicated and complex. As with other opt-out rights, if the proposal is implemented, banks should be given the flexibility to design the channels and methods through which the customer may exercise the opt-out as long as such channels and methods provide the customer a reasonable opportunity to opt out.

F. **Regulation DD: Agencies seek comment as to whether the proposed content of the disclosure provides sufficient information for consumers to evaluate effectively if an institution's overdraft service meets their needs. Agencies also seek comment on whether the content requirement should differ when the opt-out notice is provided after an overdraft fee has been charged to the consumer's account.**

As indicated above, the proposed disclosure does not have sufficient information, is not balanced and is heavily slanted toward encouraging customers to opt out. The model disclosure should be balanced in its approach, more clearly highlighting the consequences of opting out. The proposed disclosure is also highly misleading in that it implies that the bank has an obligation to pay items into overdraft for any category that the customer has not opted out of, and because it fails to clearly explain to the customer that the opt out is incomplete, and that the bank is still authorized to charge overdraft fees in certain situations.

G. **Regulation AA: Agencies seek comment as to whether the Agencies should extend the Credit Practices Rule allowance for state exemptions to the proposal.**

We agree with the Agencies' position that such an exemption would undermine the uniform application of federal standards and would provide no meaningful relief from regulatory burden. Hence, we support the Agencies' position that states should not be permitted to seek exemption from the proposed rules on overdraft service.

Appendix B.

Comments on Specific Proposed Regulations Related to Credit Cards

In this section, we take three of the rules as written and identify unresolved issues associated with the language. We provide what we think the answers are, but the lack of certainty reinforces the preferred approach that these technical proposals be addressed under Regulation Z, versus the broader brush of a UDAP determination.

A. §227.21(d) Promotional Rate

Is a purchase with a grace period a promotional rate – if the absence of a finance charge is viewed as a temporary rate that is lower than the standard rate for purchases?
No, that would lead to a circular logic problem – purchases with a grace period would be excluded from the calculation of the amount that must be paid in order for those purchases to qualify for the grace period.

If you have a tiered balance or a rate based on the size of the individual transaction, are the transactions that qualify for the lower rate promotional rates because other similar transactions otherwise qualify for a higher rate?
As a general rule, the amount of the transaction or overall balance should not drive the determination that the rate is a promotional rate.

In the billing cycle in which the "outstanding balance" is determined, are transactions that post before the determination date "promotional balances" because transactions that post after that date will have a higher rate?
Again, we think not, but there could be circumstances where the condition for a promotional rate may be driven solely by date, so the distinction may be difficult to draw.

If a transaction posts to a balance category other than its normal balance category and therefore at a lower rate, is it a promotional balance even though operationally only the definition of the transaction is changing (*e.g.* check as a balance transfer)? What if the transaction initially posts to a promotional rate and the promotional balance returns to a standard rate that is lower than the rate those transactions normally get?
On the face of the definition, these would be promotional rates, which is very problematic. If, for example, we characterize a cash advance as a purchase, then when it goes into the standard purchase balance, how are we to distinguish it from every other regular purchase that is part of the same balance?

B. §227.23 Allocation of Payments

We make the following initial assumptions:

- Creditors have discretion to choose which of the prescribed allocation methods to apply to each payment received.

- **§227.23** sets forth the rules for allocating payment amounts received in excess of the required minimum payment; this section does not in any way address creditors' rights to allocate the minimum payment in their sole discretion (note however §227.24 arguably addresses minimum pay allocation to outstanding balances).

How are current cycle "unbilled" balances to be treated for purposes of applying the prescribed payment allocation methods under §227.23?
This is a critical first step in determining how to apply the allocation methods set forth in this section. For example, assume the customer has purchase balances of $1000 from a prior cycle at 12% APR, and a current cycle cash advance of $200 at 17% APR. The customer then pays $1000:

- 227.23(a)(1): In determining the balance with the highest APR, does a creditor include the $200 cash advance at 17%?
- 227.23(a)(2) and 227.23(a)(3): In determining the balance amounts by category, does creditor include the $200 cash advance at 17%?

As drafted, this section would seem to not only permit the inclusion of current cycle transactions in payment allocation, but require it in certain circumstances. Note that as in the example above, this will lead to an odd result where the customer has a pure purchase balance which is paid in full, but because a new high rate cash transaction comes in before the payment, the customer will still have a purchase balance left, notwithstanding their "pay in full." In addition, it may mean that the bank can pay a balance that is subject to a grace period prior to paying a balance that is not subject to a grace period.

How does a creditor determine the "balance" or "total balance" when applying §227.23?

- We think that interest rate differentials create distinct balances for purposes of allocating payment.

- If interest rates are the same for different balance categories (*e.g.*, cash advances and purchases), the payments may be applied at the issuer's discretion.

For example, suppose that a customer pays $300 on an account that has $200 in balance transfers, $300 in cash advances, and $400 in purchases, each at a non-promotional standard rate of 12%. In allocating amounts in excess of the minimum payment, we think that under **§227.23(a)(1),** a creditor can allocate all of the payment to one balance. Under **§227.23(a)(2),** we think the creditor can allocate $100 to balance transfers, $100 to cash advances, and $100 to purchases.

Or suppose that a customer's balances include Balance Transfer and Cash Advance balances of $200 each, both at a non-promotional standard rate of 17%, and a $200 Purchase balance at a non-promotional standard rate of 12%. The Customer then pays $300. In this instance, when applying §227.23(a)(2) and 227.23(a)(3) we think that Balance Transfers and Cash Advances are a single aggregate "balance" because they are at the same interest rate.

Similarly, if a balance is subject to two rates in a given billing cycle, what rate is used to determine payment allocation?

We think that payment allocation is determined based on the rates on the account on the date the payment is applied. Interest rate differentials create a separate balance type for purposes of pro-rata calculation (for example, old purchase balance at a 14% rate vs. new purchase balance at 12%).

§227.23(b)(2) - If a promotional rate is higher than a standard rate on a different balance category, which balance is paid first?
We read §227.23(b)(2) to mean that promotional rate balances are excluded from payment allocation until there are no other balances. This would mean that all "promotional rates" whether lower or higher than standard rates are paid after the standard rate balances. The lower standard rate balances would be paid first following one of the prescribed methods in §227.23(a).

In allocating payments under §227.23(a)(3) when there are promotional rate balances, what balances are included in determining the "total balance"?
We think that the "total balance" would exclude promotional rate balances, though that is not clear by the words. But for the math to work, since none of the payments are applied to promotional rate balances, the denominator in the pro-rata calculation must exclude promotional balances.

§227.23(a)(3) - In determining allocation among balances in the same proportion as each balance bears to the total balance, are balances paid by the Minimum Payment included in the calculation of total balances?
We think that the phrase "total balance" means total unpaid balance. As a result balances paid by the minimum payment would not be included in the calculation of total balances; though again, that is more driven by the math than the words (See Appendix D).
Here is the operational complexity of such an approach – payment allocation will require multiple system runs. First the minimum portion is broken out and applied, and then a new calculation based on the remaining balances must be made. This will significantly increase the processing power dedicated to payment allocation, which will slow down systems and add complexity to the system.

If the Agreement provides that a customer must pay the previous balance in full in order to get a grace period on purchases, how is that amount calculated?
That amount becomes the sum of all balances outstanding at the end of the billing cycle, except for promotional rate balances. Grace periods traditionally require the customer's payment of the previous billing cycle's ending balance. That rule would remain, except that §227.23(b) prohibits requiring payment of promotional rate balances in order to have the grace period. Therefore, outstanding balances are included in the calculation, as they are not otherwise excluded. Note that the amount the customer must pay for the grace period is not a disclosed figure; a typical statement shows balances subject to interest, which is an average daily balance, not a breakdown by transaction type of ending balances. Therefore, the customer will not know how much money is left in a particular promotion to know the minimum amount they need to pay in order to preserve the grace period. Moreover, because other new balances could be paid first, the customer may get a grace period even though the purchase balance itself was not actually paid in full.

How does the rule that excludes promotional rate balances from pay-in-full calculations work if the promotion itself is on purchases? §227.23(b)(2)
Logically, in order to get a grace period, the customer must pay the entire balance in full. But if the entire balance is composed of purchases at a promotional rate, none of that amount can be included in the amount the customer must pay to get a grace period. However, this means that even though they need not be paid, the purchases would then get a grace period, so they would not even accrue interest at that promotional rate.

C. §227.24 Application of APR increase to outstanding balances

§227.24(a)(2) - What balances are deemed "owed" for purposes of determining the "outstanding balance" as of the end of the fourteenth day?
Credit card transactions generally have transaction dates and posting dates. We think only the posting date should be used in determining whether to include a transaction in the outstanding balance. Until the transaction posts, the bank has no knowledge of its existence. If the 14^{th} day fell after the transaction date but before the end of the cycle, and the posting date fell after the end of the billing cycle, would a new outstanding balance have to be calculated, and a new amortization schedule retroactively applied? We would consider that unworkable.

If a promotional rate has the potential to extend past five years, can a portion of that balance be subject to a five year amortization if it has a different return-to rate because it is part of an "outstanding balance?"
No, because the payment allocation rule is that promotional balances must get the full benefit of the promotion.

§227.24(b) - Are banks permitted to change a rate on existing balances from a non-variable to a variable rate (based on an external index), pursuant to the exception under §227.24(b)(1)?
This is unclear under the proposal as drafted. We would suggest that the answer is yes, in light of the exception permitting certain variable rate increases (the Board notes that we cannot *increase* the rate by changing the method, however, if we change the method without changing the rate at the time of conversion, then subsequent changes based on the index should be permissible). However, the mechanics of how this would be done without risk of liability are not set forth. An approach similar to that adopted by the State of Delaware (see 5 Del. Code §952(c)(4)) would provide lenders with a sound methodology for that kind of change in terms.

§227.24(c) - Can a promotional balance ever be a part of the outstanding balance?
Yes, if the promotion existed prior to a notice of increase, and the transaction under that promotion qualified from a timing perspective. The significance of this is that promotional balances have to also be tracked depending on when they were created within the promotion period itself, because they will return to different rates at the expiration of the promotion depending on if they are a part of the outstanding balance or not. Therefore, the bank will need to track payment allocation in order to know how much of each balance is moved. Again, all of this will be invisible to the consumer, and hard to explain, though it will be required by the rules.

§227.24(c) - Can minimum payments be used to pay down the outstanding balance at a rate faster than the five year amortization, if those payments take place prior to the first day of the higher APR?

Yes, because the minimum payment can be directed anywhere, and the amortization limitations of five years (or the doubling of the minimum payment) do not apply until the date on which the APR is increased, which will naturally trail the day the outstanding balance is determined because of the interplay of the 14 and 45 day rules. This means that there are really two outstanding balance calculations, one at the end of the fourteenth day, and one as of the first day of the new rate to determine what is left of the outstanding balance to be subject to the amortization limits.

§227.24(c) - Can the outstanding balance be paid down at the five year rate by directly applying portions of the payment that were in excess of the minimum payment – or do the payment allocation rules apply, and the five year amortization only acts as a limit and not an empowerment that overrides the allocation rules?

The five year amortization/doubling the minimum payment is a cap on the amount that can be allocated, and should serve to empower payment allocation outside of §227.23.

§227.24(c) - If the outstanding balance is a variable rate, how is the amortization schedule calculated?

The purpose of the amortization calculation, in essence, is to treat the unpaid balance as a five year closed end loan. From that, it follows that in a variable rate formula, the payment amount adjusts as the rate changes so that the time period (five years from the start) remains constant. Similarly, the doubling of the minimum payment calculation, which can include the amount of interest paid, can go up as interest rates go up. What is unclear is whether any minimum limit (*i.e.*, your payment will never be less than $15) of the minimum payment must also be accounted for in determining that five year time period. For example, if the minimum payment was interest plus 1% of the remaining principal, but in no case less than $15, then if the calculation is made so that the 59th month has a balance of $15, that will lead to a different time period than if the time period is interest plus 1% of the remaining principal.

Are outstanding balances paid before promotional rate balances?

Promotional Rate balances are paid last. However, as noted, Promotional Rate balances may be a part of outstanding balances, and then the question becomes, when paying outstanding balances, does that preclude payment of the portion of the outstanding balances that are comprised of Promotional Rate balances?

§227.24(c) - Are the outstanding balances included in the pro-rata determination of payment allocation, if the payment is in excess of the sum of the non-promotional, non-outstanding balances?

No, first the payments must be applied to all the non-promotional, non-outstanding balance balances. Then the outstanding balances would be paid with the payment applied on a pro-rata basis using just the outstanding balances.

§227.24(c) - If excess payments are applied to an outstanding balance, must the five year amortization cap be recalculated?

No, the five year repayment schedule is calculated once, upon the creation of the outstanding balance, and that cap applies even if excess payments might have paid more of the principal than necessary to amortize over five years.

Appendix C.

Comments on Proposed Regulation Z Amendments

In our letter we have strongly urged the Agencies to shift the proposed regulations from Regulation AA to Regulation Z. This recommendation is brought about by the inappropriateness of a UDAP determination around the practices subject to the proposal, the risks and uncertainties attendant to a UDAP determination, and the appropriateness and clarity that a Regulation Z change would provide. Therefore, our opening comment to the proposed Regulation Z amendments is that they should be further modified to incorporate and harmonize the recommendations in this letter.

<u>Commentary §226.5(b)(1)(iv) Membership fees.</u>
In the Commentary to §226.5(b)(1)(iv)-2, the Board proposes a safe harbor to permit creditors, after 60 days, to deem new accounts as "rejected" if the consumer has not used the account or made a payment. We recommend deleting that addition to the commentary, as it seems to add both operational complexity and uncertainty in ongoing account administration procedures. More significantly, the Board has modified the meaning we attached to Comment 1i in 226.5(b)(1)(i) in the June 2007 proposed clarification.

In that comment, the Board had noted that in the context of the assessment of fees (such as start-up fees), an account is not considered to be accepted until the consumer is provided with a statement and makes a payment. By replacing the context of start-up fees, which are generally only associated with sub-prime cards, and linking this concept to annual fees, the Board is radically changing the structure of what is an accepted account.

Presently, there are clear rules for when an account is accepted, and for when an account is rejected. If an account plan is rejected, the bank must clear the fees and the account. If an account is not rejected, the creditor need not do so. Under the proposed change to the commentary, however, the account is deemed rejected if it is not affirmatively accepted by payment of the fee. We urge the Board to preserve the current status, where, an account that is not rejected is not obliged to be cleared.

In addition, we are opposed to the proposed Comment 3 around activation not qualifying as acceptance. A consumer cannot activate a card until after they have received the account opening disclosures. At that point, if the consumer calls the bank and activates access to the line of credit, that action should clearly constitute acceptance of the account. The consumer knows everything about the account, and has chosen to secure access to that line of credit. The account is, simply put, accepted.

<u>Commentary §226.5a(b)(4) Transaction Charges</u>
Disclosing the foreign transaction fee in the table required under §226.5a as applicable to "purchases" may be misleading to consumers as some issuers also charge this fee on cash transactions in foreign currencies or in foreign countries. The June 2007 proposal had identified this fee as "a fee imposed by the issuer for <u>transactions</u> made in a foreign currency or that take

place in a foreign country." We encourage the Board to adopt similar "transaction" language in the current proposal.

§226.7(b)(11) Due date; late payment costs

At Bank of America, we offer many ways for our customers to make payments on their accounts in addition to mail, such as on line and by phone. In each of these channels, we disclose applicable cut-off times; we should not have to print these cut-off times on the periodic statement.

Comment 1 §§226.5a(b)(5), 226.6(b)(4)(iv), 226.9(b)(3)(E) Grace Period

As described in greater degree in our comment to the UDAP proposal §227.23(b), we urge the Board to reconsider the ramifications for grace period arising from the situation in which an issuer offers a promotional rate on a category of transactions (e.g., purchases) and is at the same time required to exclude that promotional balance from what is otherwise required to be paid to get a grace period on those same transactions.

Grace Periods Generally

Just as the Board excludes 0% APR offers from the definition of "deferred interest" (see the Commentary §226.16(h)-1), we request that the Board clarify that in similar fashion, a "grace period" does not by definition include 0% APR offers, as these are disparate financial concepts that, left without clarification, could result in additional compliance uncertainty and resultant complex disclosures.

§226.9(b)(3)(C): Disclosures for supplemental credit access devices and additional features

We think the Board's proposed changes to §226.9(b)(3)(C) create ambiguity as to whether the actual APR is required to be disclosed (in addition to "type of rate"), especially in light of §226.9(b)(3)(B) which clearly requires type of rate and applicable APR.

G-21 Penalty Rate Increase Sample – referenced in 2008 proposed commentary §226.9(g)1.ii.(C)

Proposed Model Form G-21 (the "Penalty Rate Increase Sample") contains a notification to the consumer that any promotional rate balances will be increased to the standard rate as of the same effective date as the penalty rate increase. Consistent with our October 2007 comments to the Board's 2007 Proposed Rule under TILA with regard to promotional rate loss to the standard rate, the Board's current proposed changes to this form run contrary to our understanding of the substantive prior notice timing requirements in both proposed §226.9(g), and in proposed §227.24(b)(2), and related commentary. We request the Board change this model form to clarify that promotional rate loss is not subject to the same 45 day prior notice requirement.

2008 Proposal §226.10(d) - Crediting of payments when creditor does not receive or accept payments on due date

The Board's proposed language in §226.10(d) creates confusion over the need to protect payments with due dates on Sundays and holidays. Bank of America accepts and receives mail from the U.S. Postal Service every hour, 365 days a year. We treat these pick up times as "receipt" under §226.10(d). A payment received by mail by 5pm on a Sunday or holiday is credited as of that day. As a result, the example offered by the Board, "if the U.S. Postal Service does not deliver mail..." is misleading when viewed in the light of our actual practices.

Although the USPS does not deliver mail to the general public on Sundays or holidays, we do "receive mail" on those days. However, to extend this processing regimen to other channels is inappropriate and unduly expensive.

§226.12(a) Issuance of credit cards

The Board has solicited comment on whether the proposed changes to the Commentary, §226.12(a)(2)-2.v. (creating a prohibition on creditors' ability to provide substitute credit cards due to a change in the merchant base when the account has been inactive for 24 months preceding the issuance of the substitute card). We recommend the Board adopt a 36 month standard for determining inactivity under Comment 12(a)(2)-2, as that period of time aligns with current card expiration and renewal timeframes.

§226.14 Determination of Annual Percentage Rate

We continue to recommend that the effective APR be removed from the periodic statement because it is neither informative nor easily explained. However, if the effective APR is retained, then we recommend that the Board use caution in its efforts to "conform" Comment 14(c)-10, as it currently provides helpful guidance for calculating the effective APR in situations such as when a cash advance transaction occurs in a prior cycle, but cannot practicably be posted until the current cycle.

§226.16(e)(2)(i) Promotional Rate

While we agree with the Board's decision to adopt a "promotional rate" definition, we think that the proposed definition of promotional rate is overly broad. As proposed, the "promotional rate" definition would encompass, for example, APR structures such as split rates with purchase balances below $1000 at a 17% [non-promotional] APR and purchase balances at or above $1000 at a 15% [non-promotional] APR. We also think the definition inadvertently confuses standard and promotional rates in certain situations such as when, pursuant to a pre-disclosed offer, the creditor routes a high rate cash transaction to a lower rate balance transfer category, at the standard rate that would apply to balance transfers. Under the proposed definition, the creditor would seem to be required to treat the resulting standard rate balance as a promotional rate balance. As noted in our 2007 response to the proposed amendments to Regulation Z, a promotional rate is a rate that is lower than the standard rate for a limited duration or circumstance, and which, upon expiration or termination, returns to that Standard Rate.

Also, because the term promotional rate is broader than the term introductory rate, we recommend that the Board clarify that the requirements of 226.16(e)(4) are limited to advertisements. This could be accomplished by modifying §226.16(e)(1) as follows: "The requirements of [this paragraph] 226.16(e) apply to any written or electronic advertisement…."

Appendix D

Payment Allocation Example

Outstanding Balances	**Beginning Balances**	Promotional Balances			Standard Rate Balances			
Category	Rate	Balance	5 year Amort Cap	Rate	Balance	Rate	Balance
BT	7%	$500.00	$53.00	4%	$200.00	9%	$1,000.00
Purchases	12%	$600.00	$63.00	5%	$300.00	15%	$1,100.00
Cash Advances	18%	$700.00	$72.00	10%	$400.00	19%	$1,200.00

Total Balances: $6,000.00

Minimum Payment: $125.00

Actual Payment: $4,000.00

$125.00 applied to $200 @ 4% balance

Remaining Payment: $3,875.00

Rate	Balance	%	Portion of Payment	5 year Amort Cap	Actual Allocation	Intermediate Balance	Remaining Payment
7%	$500.00	9.80%	$379.90	$53.00	$53.00	$447.00	
12%	$600.00	11.76%	$455.88	$63.00	$63.00	$537.00	
18%	$700.00	13.73%	$531.86	$72.00	$72.00	$628.00	
9%	$1,000.00	19.61%	$759.80		$759.80	$240.20	
15%	$1,100.00	21.57%	$835.78		$835.78	$264.22	
19%	$1,200.00	23.53%	$911.76		$911.76	$288.24	
Total	$5,100.00				$2,695.35		$1,179.65

$240.20 applied to the 9% balance
$264.22 applied to the 15% balance
$288.24 applied to the 19% balance
$792.65

$387.00 Remaining Payment

Rate	Balance	%	Portion of Payment
7%	$447.00	27.73%	$107.31
12%	$537.00	33.31%	$128.92
18%	$628.00	38.96%	$150.77
	$1,612.00		

Outstanding	Promotional		Standard			
Category	Rate	Balance	Rate	Balance	Rate	Balance
BT	7%	$339.69	4%	$75.00	9%	$0.00
Purchases	12%	$408.08	5%	$300.00	15%	$0.00
Cash Advances	18%	$477.23	10%	$400.00	19%	$0.00

Explanation of Payment Allocation Example

There are three types of balances: Balance Transfers, Purchases, and Cash Advances.

There are "outstanding balances" at three different rates, and a previously calculated 5 year amortization payment for each balance. There are promotional balances, each at a different rate, and there are three rates for balances that are neither an outstanding balance nor a promotional rate balance.

The minimum payment was approximately 1% of balances plus previous cycle's interest charges.

The actual payment significantly exceeded the minimum payment, and the bank uses the pro-rata payment calculation.

First, the minimum payment is paid at the bank's discretion– in this case to the lowest promotional rate balance.

The remainder of the payment must be paid using a pro-rata calculation that does not include promotional balances. However, because the payment cannot be applied to the outstanding balances at a rate in excess of a five year amortization, the actual allocation of the first pro-rata calculation would allocate more to the outstanding balances than is permitted by the five year rule.

As a result, the excess portion of the payment ($1,179.65) is then applied on a pro-rata basis to the non-promotional, non-outstanding balances. However, because the remaining amount of the payment exceeds the sum of those balances, those balances are simply paid off completely. This still leaves $387 of the payment unallocated.

This $387 is distributed among the Outstanding Balances in a pro-rata portion.

Programming for this sort of payment allocation is very complex, and will require numerous complicated calculations repeated several times for the processing of a single payment. A High to Low payment allocation method would be no simpler, because some of the Outstanding Balances are at higher rates, and so the iterative calculations would still have to be made. Programming and testing for all possible scenarios will take a tremendous effort. Therefore, this example illustrates that this sort of rule should not be implemented under a UDAP analysis, and why we recommend that a simpler, cleaner rule be adopted within Regulation Z.

V. Conclusion:

Thank you for the opportunity to comment on this proposal. To the extent you have any questions about our response, please contact Gregory Baer at 202-442-7573.

Sincerely,

Susan R. Faulkner

Susan Faulkner
Consumer Deposits Executive
Bank of America

Lance Weaver
Card Services Executive
Bank of America