



P. Terry Tuggle  
Chairman of the Board & CEO

July 8, 2008

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

Re: Docket No. R-1315

Dear Ms. Johnson:

On behalf of First National Bank Texas, I appreciate the opportunity to provide comments to the Board of Governors of the Federal Reserve System's ("Board") on the proposed amendments to Regulation DD, implementing the Truth in Savings Act ("TISA"), Docket No. R-1315.

First National Bank Texas is a federally chartered bank headquartered in Killeen, Texas. First National Bank Texas provides full service banking products and services throughout the State of Texas.

#### **I. Summary**

The Board is proposing several amendments to Regulation DD, implementing TISA, which would require banking and savings institutions (hereafter collectively referred to as "financial institutions") to provide additional disclosures about account terms and costs associated with overdraft services to consumers. Specifically, the amendments would require all financial institutions to provide information regarding aggregate fees in periodic statements (whereas Regulation DD currently only requires financial institutions that market overdraft services to provide such information). Additionally, they would require financial institutions that grant consumers the opportunity to decline or opt out of overdraft services to provide consumers with written notice of this right.

The Board's stated goal with regard to these proposals is to give consumers sufficient information regarding a financial institution's overdraft service so the consumer can evaluate the service and determine if it is one that the consumer wants. Certainly, this is a worthy goal; consumers should have access to information about a financial institution's overdraft service. However, aspects of the Board's proposal would cause

significant regulatory burden, increase costs to financial institutions, disproportionately affect smaller community financial institutions, and lead to consumer confusion.

It is also worth noting the fees charged to consumers are intended not only to discourage a consumer from overdrawing their account and cover the costs of processing the transaction, but also to cover the cost borne by financial institutions themselves to cover the loss on the overdraft itself. Additionally, when a financial institution grants an overdraft, the financial institution is using funds that could have been used for other purposes, including for loans or other investments that would bear interest and thus provide income to the financial institution. Thus, it is not simply a source of fee revenue; it also covers the costs the financial institution bears.

## **II. Specific Requests for Comment**

### **A. Requiring financial institutions to provide a form with a check-off box to allow consumers to opt out of overdraft service and enabling consumers to opt out of overdraft service electronically.**

The Board seeks comment on whether financial institutions should provide consumers with a form to opt out of the financial institution's overdraft service via a check-off box that consumers then may fill in to opt out. The Board also seeks comment on whether consumers should be able to opt out of the financial institution's overdraft service through electronic means if the consumer has consented to receipt of electronic communications.

The check-off box, while posing some increased burden to financial institutions, is preferable to permitting consumers to opt out of overdraft via electronic means. With the check-off box used on written statements, it is likely more consumers will actually read the text and understand the potential consequences of opting out of overdraft protection. The process of completing the form and putting it in the mail requires greater attention than simply clicking a box on a computer screen, and thus will likely lead consumers to pay closer attention to what they are signing. Additionally, the financial institution would have the ability to further explain the entire opt out process to the customer providing greater clarity.

### **B. Whether the proposed content requirements provide sufficient information for consumers to evaluate whether a financial institution's overdraft service meets their needs.**

The Board's proposal would require financial institutions to disclose if the financial institution offers an overdraft line of credit, and suggests that financial institutions *should* disclose other alternatives, if any, that the financial institution offers for the payment of overdrafts, including transfers from other accounts. The Board indicates that some

financial institutions may also wish to explain to consumers the consequences of opting out of the overdraft service, including the possibility that without the overdraft service, a check could be returned to the submitting financial institution "bounced" and the consumer would be charged a fee by both the financial institution and the merchant.

Disclosing alternative product offerings is not overly burdensome and will provide customers with beneficial information. The Board should clarify in the text of the regulation, however, that these disclosures may inform the customer that in addition to the possibility that a bounced check could lead to both financial institution and merchant fees, that bounced checks and declined charges may negatively impact the customer's credit score. As the purpose of providing additional information to the customer is to provide the customer with full disclosure of the costs associated with different service options, the customer should be given information not just about the fees that the financial institution may charge for an individual overdraft charge, but also about the potential negative impacts of opting out of the overdraft service. For example, customers may not understand that a bounced check could cost more than an overdraft if both the financial institution and the merchant charge a bounced check or insufficient funds fee. Customers may also have to pay fees imposed by the payee of the check such as late fees. The check that bounces could be the customer's mortgage check, rent check, or tuition check; which if not paid timely could also lead to negative information on the customer's credit report, possibly resulting in a lower credit score and the resulting higher cost of credit.

**C. Whether the content requirements should differ when opt-out notice is provided after an overdraft fee has been charged to the consumer's account.**

Requiring identical disclosures regarding overdraft fees after every overdraft charge is unnecessary for consumers and expensive for financial institutions. As proposed, the initial "full" disclosure would require several lines of text, along with the explanatory information associated with the disclosure. In addition, as the Board indicates, financial institutions will likely want to include additional information regarding the consequences of opting out of the overdraft, as this, too, will give consumers a more accurate picture of the potential cost of opting out of the overdraft program.

The "full" disclosure described above would likely be lengthy, and thus consumers would be less likely to read the disclosures that are being provided to enable them to evaluate the program. In addition, the cost burden to financial institutions, especially smaller financial institutions, would be disproportionate relative to any perceived benefit. Monthly statements are already designed in an efficient, consumer-friendly format. Requiring significant additions in the form of new text and lengthy disclosures would increase the length of the statements, and thereby increase the costs to financial institutions and reduce the likelihood that consumers will actually read the statements. For example, additional disclosure will require additional pages, potentially increasing monthly postage costs simply to mail statements with previously provided information. Additionally, it is more appropriate that the "full" disclosure be given at the time that the consumer

relationship is initiated and that subsequent disclosures be significantly shorter and limited to the actual fee charged.

It is also advisable that the text of the disclosure be available via the financial institution's web site, enabling the consumer to obtain the information upon demand, rather than after a fee has been charged. The approach taken under the Gramm-Leach-Bliley Act (GLBA), where a financial institution's privacy policy is provided at the start of the consumer relationship and then annually thereafter, is preferable to the current Board proposal that the full disclosure be given with each monthly statement. It is worth noting that the federal banking regulators and others<sup>1</sup> are currently evaluating public comments regarding improvements to GLBA privacy notices, as research has shown that consumers do not find the lengthy disclosures useful and only a small percentage of consumers actually read the disclosures.

**D. Content requirements, generally.**

As stated previously, the content requirements are such that there will be significantly increased regulatory and financial burden on financial institutions. Specifically, the Board proposes that every disclosure include: the categories of transaction for which an overdraft fee may be imposed; the dollar amount of any fees or charges in the event there are insufficient funds in the account; the potential impact of the fee in relation to the overdraft amount; any limits on fees charged; disclosure of the opt-out right; and alternative payment options, in a format similar to sample Form B-10. The sample form includes verbiage that addresses the right to opt-out of overdraft coverage dependent upon the type of transaction. While recognizing the form is being provided as a sample, it is premature to include this partial opt-out verbiage given the feasibility of such has not yet been established.

The requirement of full disclosure should be required only at the time the consumer relationship is initiated. At that time, the consumer is most focused on the actual fees, costs, terms and conditions offered by the financial institution, and it is at that point that the consumer can best compare one financial institution against another. Subsequent disclosures should, as indicated above, be limited in scope. The sample Form B-10 provided by the Board in its proposal includes sample language for these disclosures and consists of one-half of a standard piece of paper. To include additional information that would also be useful to consumers (e.g., the potential for bounced check fees and late charges to outweigh any overdraft charges, the potential for bounced checks to negatively impact credit score, and the consequences if "important" checks, such as rent, mortgage or tuition bounce) would be to have a full-page disclosure for the overdraft alone. This would significantly increase the production and postage costs to financial institutions, and the

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<sup>1</sup> Federal Reserve Board, Office of Thrift Supervision, Securities and Exchange Commission, Office of the Comptroller of the Currency, National Credit Union Administration, Commodity Futures Trading Commission, and Federal Deposit Insurance Corporation

disclosure would be of such length that most consumers would likely not read it carefully, if they read it at all.

**E. Potential burden on financial institutions of requiring that the opt-out disclosures appear in close proximity to the fees.**

The Board's proposal requires that opt-out disclosures be in close proximity to the fees charged for overdraft services. The increased burden of this proposal, while well-intentioned, will disproportionately outweigh any benefits to consumers. As discussed previously, the proposed disclosures will take up at least one-half of a standard page, but would likely end up being nearly a full page. To minimize production costs, financial institutions already maximize the space available for consumer statements. To require additional documentation will increase both the production and postage cost resulting in an increased financial burden to financial institutions. The Board should not mandate specific formatting but should provide financial institutions with sufficient flexibility to determine the best method of communicating overdraft fees, terms and conditions to their consumers.

**F. Disclosure of account balances.**

The Board's proposal would require financial institutions, in response to an account balance inquiry from a consumer, to disclose only the funds actually available to the consumer and not include any funds available through any overdraft or similar service. The stated purpose of this proposal is to prevent financial institutions from including available overdraft or line of credit funds in the amount available to the consumer. The proposal would apply to any balance inquiry made through an automated system, including an ATM, call center, or via the Internet. Financial institutions would be permitted to provide a second balance that includes the total amount available (including overdraft or line of credit).

It is reasonable that financial institutions be required to provide consumers with a "current amount available" that does not include the amount of any available overdraft or line of credit; however it is not reasonable or technologically feasible, for financial institutions to be required to provide "real time" amount available information.

A technical issue may arise, however, with respect to balance inquiries made through ATMs that are not owned by the consumer's financial institution. It is unclear how the consumer's financial institution would require that in every occasion, any "foreign" ATM would be capable of providing the available balance. It is also unclear to what extent the consumer's financial institution could be subject to liability for failing to provide an accurate account balance, if the "foreign" ATM and its network are unable to provide the accurate balance.

The Board's proposal should be amended to indicate that the requirement to state the funds actually available be limited to automated systems belonging to the consumer's financial institution. An alternative for the "foreign" ATM may be to provide notice to the

consumer that use of the ATM may result in overdraft fees similar to notices currently provided to the consumer for fees related to use of “foreign” ATMs.

In addition, the proposal should not impose any requirement that could be interpreted as requiring financial institutions to provide “real time” amount available information. It is technologically impossible to provide an exact amount, taking into consideration any pending charges, deposits, or other transactions; even the most powerful computer systems do not have the capability to perform this task for the millions of accounts in existence due to the nature of payment processing and the sheer volume of transactions. As drafted, the proposal does not address common situations in which the funds available may not reflect pending charges, such as checks and other debit items that have not been processed. In such an event, the financial institution could disclose an amount of funds available in the account, when the actual amount available is less. This, of course, could lead a consumer to believe they have more funds than are actually available, and thus to potentially overdraw the account. If the consumer does not have overdraft protection, the consumer would likely be charged bounced check fees by both the financial institution and the merchant in addition to other fees such as late fees that may be imposed.

Although the analysis provided by the Board indicates that such “real time” reporting of balances is not intended to be required by the proposal, the actual text of the proposal does not on its face permit the flexibility intended by the Board. Therefore, the proposal should be amended to clarify that the balance statement need not include transactions that have not yet been fully processed and reconciled.

#### **G. Timing of opt-out notice**

The Board’s proposal would require that the overdraft notice must be provided to the consumer “prior to the financial institution’s imposition of any fee for paying a check or other item when there are insufficient or unavailable funds in the consumer’s account, provided that the consumer has a reasonable opportunity to exercise the opt-out right prior to the assessment of any fee for paying an overdraft...”.

The wording of the proposal is troubling, because on its face it requires the opt-out be given prior to each and every transaction where there are insufficient funds in the consumer’s account. Requiring financial institutions to notify and provide an opt-out for each individual transaction that may result in an overdraft is not feasible from a practical or technological standpoint. It is highly likely that inaccurate notices would be provided. For example, if funds have been deposited but not yet processed, the consumer may receive a notice indicating that a transaction might lead to an overdraft, when in reality sufficient funds are available. Alternatively, the account could appear to have sufficient funds, but some of the funds may not be available due to pending charges. In the former case, the consumer receives an inaccurate notice, and in the latter, the consumer receives no notice at all but risks overdrawing the account. Also, in the latter case, the Board would prohibit the financial institution from charging an overdraft fee, enabling the consumer to avoid

legitimate charges intended to compensate the financial institution for the cost of the overdrawn transaction that it honored on the consumer's behalf.

In addition, the Board's proposal would require all foreign ATMs and POS terminals to be able to provide such notices to individuals who are not their consumers. Aside from requiring every ATM and POS terminal in the country (not to mention such devices in foreign countries) to be updated to permit such a disclosure, a monumental and expensive task by itself, the Board presupposes that in all instances, the necessary networks will be online and available so that any foreign ATM can access the consumer's information to provide such a notice. As a practical matter, this is not always the case and it is highly likely that consumers will not receive an overdraft notice or will receive an inaccurate notice before completing a transaction (again, putting the financial institution at risk for the cost of the overdraft).

Finally, requiring such a notice would lengthen the overall transaction time, whether at an ATM or a merchant with a POS terminal. The communication of these transactions takes, on average, approximately 9 seconds. However, if another disclosure and an opt-out are required for any transaction where an overdraft may occur, the transaction time will increase, creating increased burden on the processing systems which are built on the shorter timeframe as well as delays for customers that may cause dissatisfaction.

#### **H. Disclosure of aggregate fees**

The Board's proposal includes a requirement that all financial institutions offering overdraft services separately disclose both the total dollar amount for all fees or charges imposed on a consumer's account for paying checks with insufficient available funds, and the total dollar amount for all fees imposed on the account for returning items unpaid. The figures must be reported both for the statement period and for the calendar year to date. This requirement would involve further disclosures, which will take up additional space on an increasingly lengthy monthly statement, and will almost certainly lead to consumer confusion.

Fees are already disclosed on monthly statements, but the Board suggests reorganizing the statements to move the fee disclosure closer in physical proximity to the general disclosure of fees imposed. The burden of having to reorganize and include significantly more information in monthly statements will increase the supply, printing, and mailing costs of all financial institutions, disproportionately affecting smaller financial institutions. In addition, the consumer may view the disclosure of the aggregate fees negatively, as the statement will not be able to provide a full picture to remind the consumer of why the fees were incurred.

For example, if the aggregate fees reflect three overdraft charges where previous checks were paid by the financial institution several months prior, the consumer will only see the overall total, which may seem disproportionate. However, what the consumer may

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not recall is that the items paid were mortgage checks, car payments, or checks for tuition, all of which are extremely important and which would likely have created more problems for the consumer if the financial institution had not paid the checks. The lack of historical context may create a false sense that the consumer was overcharged, as the consumer may not see the true, full picture of what might have occurred had the items not been paid.

It is recommended that the Board eliminate the requirement to disclose aggregate fees as described, and that the Board afford financial institutions flexibility in how they make required disclosures.

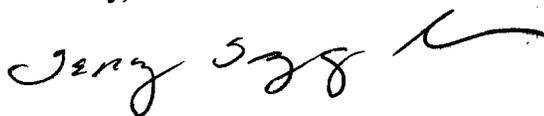
### III. Conclusion

First National Bank Texas appreciates the hard work the Board has undertaken with respect to crafting this proposal and it shares the Board's interest in making sure consumers have sufficient information about a financial institution's overdraft program to evaluate whether or not it is a product they wish to utilize. However, First National Bank Texas urges the Board to consider the foregoing comments and the extent to which some aspects of the proposal could lead to significant regulatory and financial burden on financial institutions and increased consumer confusion.

We agree the customer should be well informed and be able to make individual decisions on the use of overdraft services. We believe the best time for this is when they are opening an account and they have the opportunity for trained, informed bank personnel to address any questions they may have. Individual situations and perceptions may change over time therefore a periodic (annual) update of written disclosures would be adequate. Such disclosures could include language that if the need for further information arises, the customer may contact a bank representative to address any questions they may have.

Should you have any additional questions or need any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Terry Tuggle", with a stylized flourish at the end.

P. Terry Tuggle