August 14, 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 Southern First Bank, N.A., I appreciate the opportunity to provide comments to the Board of Governors of the Federal Reserve System ("Board") on the proposed amendments to Regulation DD, implementing the Truth in Savings Act ("TISA"), Docket No. R-1315.

Southern First Bank, N.A. is a mid-size community bank headquartered in Greenville, South Carolina with offices located in both Greenville and Columbia, South Carolina.

I. Summary

The Board is proposing several amendments to Regulation DD, implementing TISA, which would require credit unions, banks and savings institutions (hereafter collectively referred to as "financial institutions") to provide additional disclosures about account terms and costs associated with overdraft services provided to consumers. Specifically, the amendments would require all financial institutions to provide additional disclosures regarding overdraft fees prior to any overdraft fee being charged to a consumer and would require financial institutions to disclose aggregate overdraft fees in monthly statements. These would be significant changes because Regulation DD currently requires only financial institutions that market overdraft services to provide such information. The Board also proposes to require financial institutions that grant consumers the right to decline or opt-out of overdraft services to provide consumers with written notice of this right.[1]

The Board's stated goal with regard to these proposals is to give consumers sufficient information regarding a financial institution's overdraft service so that 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 all essential information about a financial institution's overdraft service. However, certain aspects of the Board's proposal

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[1] We note that in a separate proposal under Regulation AA, the Board is proposing to prohibit financial institutions from paying an overdraft unless the consumer had been given an opportunity to opt-out, which would negate the issue of whether or not a financial institution permits consumers to opt-out.

would cause significant regulatory burden, increase costs to financial institutions, disproportionately affect smaller community financial institutions, and lead to consumer confusion, as discussed in detail below.

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 be required to provide consumers with a form to opt-out of the financial institution's overdraft service via a check-off box that consumers then mail 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.

We believe that the Board should not mandate a particular method of opting out, but should enable each financial institution to determine how best to provide the opt-out. Such a decision would enable the financial institution to be responsive to the needs of its consumer base without providing undue burden or restraint on the financial institution. A check-off box may require more effort by the consumer to complete and fill out, and may cost the financial institution more to provide than some other methods, but it also creates a paper trail that can be beneficial to both the financial institution and the consumer. Similarly, financial institutions may identify other methods that achieve the same result but that are more appropriate to how the majority of their consumers conduct business.

We also believe that the Board should enable financial institutions to determine if providing an opt-out electronically is appropriate. For example, an electronic opt-out mechanism may be an effective method for some institutions, but may be too complicated for others. Additionally, to the extent that there is concern about a consumer not reading all of the essential disclosures before opting out, electronic disclosure may exacerbate the problem.

Enabling financial institutions to select the most appropriate method of opting out will ensure that financial institutions are not locked in to opt-out methods that may not be the best options for their consumers.

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 they offer any alternatives to overdraft, and if one of those alternatives is an overdraft line of credit, that must be disclosed as well. Furthermore, the proposal suggests that financial institutions *should* disclose other alternatives, if any, that the financial institution offers for the payment of overdrafts, including transfers from a credit card or 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, a check could bounce 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 consumers with beneficial information, provided that the Board enables financial institutions to provide the disclosures in a way that meets the needs of their customer base. The Board should clarify *in the text of the regulations*, however, that these disclosures may inform consumers not only of the possibility that a bounced check could lead to both financial institution and merchant fees, but also that bounced checks and declined charges may negatively impact the consumer's credit score. If the true purpose of providing additional information to the consumer is to provide the consumer with full disclosure of the costs associated with different service options, then the consumer 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, consumers may not understand that a bounced check could cost them more than an overdraft if both the financial institution and the merchant both charge a bounced check or insufficient funds fee. The check that bounces could be the consumer's mortgage check, rent check, or tuition check; bounced checks can also lead to negative information on the consumer's credit report, which could result in a lower credit score and higher cost of credit. As this example shows, the Board's proposed mandated disclosures, alone, could fail to show the full picture to consumers, which may not only be misleading to them, but may ultimately lead them to choose a more costly option if, for example, they opt-out of overdraft protection only to find that total charges for one bounced check exceed the cost of the overdraft charge itself.

There may come a point, however, where in the effort to provide full disclosure to consumers of all their options, and all the potential costs of each, would become so wordy as to either be too confusing or simply not worth their time to read in the first place. Either result would clearly defeat the Board's original purpose in mandating the disclosures in the first place. Additionally, and as mentioned elsewhere in this letter, lengthy disclosures would require significant new costs to be borne by financial institutions in terms of ink, paper and postage, all of which may be absorbed with no expected corresponding benefit to the consumer. We therefore suggest that the Board carefully consider these concerns before mandating specific disclosures, as the costs to both consumers and financial institutions may far outweigh their intended benefit.

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 very 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 burden of cost 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. Currently, most financial institutions' disclosures fit on a standard sheet of paper, despite specific requirements relating to both substance and font size. Requiring additional disclosures will require additional pages, potentially increasing monthly postage costs simply to mail statements with previously provided information. It is also 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, so that the consumer can obtain the information upon demand, rather than after a fee has been charged. The approach taken under the Gramm-Leach-Bliley Act,[2] 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 other government entities[3] 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.

The Board should maintain the requirement that full disclosure be provided prior to paying the first overdraft fee, but should not impose a mandate that full disclosures be provided on a monthly or periodic basis.

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[2] Gramm-Leach-Bliley Financial Services Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (November 12, 1999)

[3] 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

D. Content requirements, generally.

As stated previously, the proposed content requirements will significantly increase the regulatory and financial burden on financial institutions, and consumers will receive a disproportionate amount of information relative to what is necessary or helpful. 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.

The Board should revise its proposal to require a full disclosure only at the time that the customer 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 and serve only to indicate to the consumer what is absolutely necessary. The model form 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 in each statement that would also be material to consumers (e.g., the potential for bounced check fees 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 require a full-page disclosure for the overdraft services alone. This would significantly increase the production and postage costs of monthly statements to financial institutions, and the disclosure would likely be too long for most consumers to read carefully each month, if they read it at all.

A more effective alternative disclosure may be for the Board to require only that each monthly statement indicate that consumers may find important overdraft disclosures on their initial statement and may get them again in certain indicated ways (e.g., by telephone, by mail, by e-mail, by reviewing disclosures at a website, etc.) A "layered" consumer disclosure such as this – a short-form notice that indicates where to get additional information quickly and easily for those consumers who wish to learn more – has gained increasing favor among the Federal Trade Commission as well as industry in recent years and we recommend that the Board examine its benefits in this instance.

It is also worth noting that the fees charged to consumers are intended not only to cover the processing of the transaction, but also to cover the cost borne by financial institutions themselves to cover the overdraft. When a financial institution effectively gives temporary credit to a consumer in the form of an overdraft, the financial institution is using funds that could have been used for other purposes, including for loans that would bear interest and thus provide income to the financial institution. These charges are therefore not simply a source of fee revenue; they also cover the cost the financial institution bears by forgoing other uses of the funds. We urge the Board to bear this in mind as it finalizes the proposal because increasing the costs to financial institutions may likely result in increased fees charged to consumers to offset those costs.

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 placed 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. Financial institutions already maximize the space available for monthly statements. To require additional documentation will increase both the production and postage cost and the burden to the financial institutions. Additionally, there is a reasonable argument that if the disclosure is *not* physically located near the fees paid, the consumer might actually notice the disclosure rather than focus on the fees, which would trigger a review of the fees; essentially, there would be two places within the statement that might indicate to the consumer that fees were charged. The Board should not mandate specific statement formatting requirements 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 generally disclose only the amount of funds available for the consumer's immediate use, exclusive of any overdraft funds. However, as discussed in further detail below, it is not reasonable or technologically feasible for financial institutions to be required to provide "real time" available balance information. It is unclear how prevalent the practice is of providing only a balance that includes all overdraft or credit available, but we believe that the practice is not widespread. We suggest, however, that sufficient time be given to implement this change if it is adopted, as financial institutions may be required to purchase new software, retrain employees, and change procedures to ensure compliance.

A potential technical issue may arise, however, with respect to balance inquiries made through ATMs that are not owned or operated 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 funds 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.

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; there are no known computer systems with the capability to perform this task for the millions of accounts in existence due to the nature of payment processing and the shear 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 that have not been processed or debit transactions where the debit hold is not accurately known. 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 he has more funds than are actually available, and thus to potentially overdraw his account. If the consumer does not have overdraft, the consumer would likely be charged bounced check fees by both the financial institution and the merchant.

Although the <u>analysis</u> provided by the Board indicates that such "real time" reporting of balances is not intended to be required by the proposal, the <u>actual text of the proposal</u> does not on its face permit the flexibility intended by the Board. Therefore, the proposal should be amended to specifically state 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 "[p]rior 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 that the opt-out be given prior to any transaction where there are insufficient funds in the consumer's account, rather than before the *first* time there is a potential overdraft. 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 would be all too easy for the notice to be inaccurate. 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 to be able to provide such notices to individuals who are not their consumers. Aside from requiring every ATM in the country to be updated to permit such a disclosure, a monumental and expensive task, 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 likely that consumers will not receive an overdraft notice before completing a transaction (again, putting the financial institution on the hook 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 consumers that may cause dissatisfaction.

The Board should consider the technical realities in finalizing its proposal and should not impose mandates that will decrease the efficiency of electronic payments.

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 or for having insufficient 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 as consumers are unlikely to recall overdrafts from several months prior.

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 is likely to 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 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 creates a false sense that the consumer was overcharged, as the consumer does not see the true, full picture of what might have occurred had the items not been paid.

The potential for consumer confusion over the aggregate fee disclosures undermines the perceived benefit of providing the disclosures. 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

Southern First Bank, N.A. appreciates the hard work that the Board has undertaken with respect to crafting this proposal and it shares the Board's interest in making sure that 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, Southern First Bank, N.A. urges the Board to consider the foregoing comments and the extent to which some aspects of the proposal could lead to significant regulatory burden on financial institutions and increased consumer confusion.

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

Sincerely,

Terry Garner

Terry Garner
Vice President
Deposit Operations