First PREMIER Bank
Member FDIC

July 10, 2008

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

RE: **Docket No. R-1314**, Proposal to amend Regulation AA related to prohibition of practices in connection with overdraft services for deposit accounts.

And

RE: **Docket No. R-1315,** Proposal to amend Regulation DD, Truth-in-Savings Act

Dear Ms. Johnson and Board of Governors:

Thank you for providing First PREMIER® Bank with the opportunity to provide its comments to the proposed rules on practices relating to overdraft services for deposit accounts and proposed changes to Regulation DD. The Federal Reserve should be applauded for its efforts to protect the consumer through this rulemaking.

This comment letter focuses on the proposal to prohibit certain practices relating to overdraft services and proposed amendments to Regulation DD.

By way of introduction, First PREMIER Bank is an $850 million community state chartered Federal Reserve Bank operating from 15 branches in eastern South Dakota. In addition, First PREMIER Bank is the 28th largest originator of ACH transactions. First PREMIER Bank does not promote an overdraft service, but will pay debits for a fee that create an overdraft.

For years, the regulatory agencies have enforced unfair or deceptive practices through the Federal Trade Commission's section 5(a), which provides for a multi-step analysis. The Federal Reserve's proposal to change the current approach in determining unfair or deceptive practices in favor of specific practices is unprecedented and may have unintended consequences. While defining specific practices as unfair or deceptive will undoubtedly curtail the practice, developing a list of such practices may impair competition and innovation and ultimately increase costs and reduce financial services to consumers.

Docket No. R-1314
Regulation AA - Overdraft Service

The proposal's primary objective is to prohibit assessing any fees in connection with an overdraft service unless the consumer is given a notice and a reasonable opportunity to opt out.

Like most institutions, First PREMIER Bank provides a courtesy of paying certain debits to consumer accounts that exceed the balance. For a fee, this service is considered consumer-friendly because it saves the consumer additional fees and avoids potentially embarrassing situations with merchants.

The proposal is largely misdirected by preventing a bank fee for paying debits that overdraw an account, but is short-sighted as it does not consider the broader consequences.

First, Banks take on the risk of loss by paying debits that overdraw an account rather than returning the items. Some consumers will not cover their deficit balance, thus leaving the bank to absorb the loss. The fee assessed for paying the overdraft is used in part to cover this risk.

Second, the fee for paying an overdraft is often the same or similar to the fee assessed for returning a debit. However, the costs to a consumer for a return item may also include substantial fees from the merchant. The consumer may incur other negative consequences from a return item versus paying an overdraft item such as derogatory reporting to consumer reporting agencies and the embarrassment and time of resolving the transaction with merchants.

Third, the proposal for a notice and opt out would be confusing to consumers in at least two ways. First for those who may think they are avoiding a fee by opting out may actually be incurring additional fees and negative consequences through returned items. Secondly, consumers may become confused when given an opt-out for paying fees on overdrafts and feel by NOT opting out that the bank will pay all debits overdrawing their account when this is not the case.

Finally, the Federal Reserve Board does not appear to have considered the impact to merchants if the proposal is adopted. If consumer's choose to opt out of overdraft services, banks will return more debit transaction, which will cost merchants more in losses and administrative costs. Ultimately, merchants will have to increase prices and refuse to accept checks because of the burdens this proposal would have.

First PREMIER Bank does not consider the Federal Reserve's proposal of assessing fee for paying overdrafts as an unfair practice. In addition, First PREMIER Bank does not believe there is a need to expand the scope of the February 2005 guidance on overdraft protection programs. Consumers would be subject to more fees and other negative consequences if the proposal were to be finalized as drafted.

The proposal requests comment on the following related to overdraft services:

1. Whether the scope of the consumer's opts out rights should be limited to ATM transactions and debit card transactions at the point of sale. Under this approach, institutions would be permitted, but not required, to provide consumers the option of opting out of the payment of overdraft for check and ACH transaction.

Response: The scope should not include check and ACH transactions for reasons stated above. In addition, the current authorization controls for debit card/point-of-sale controls

prevent most transactions from being executed if funds are not available. In addition, ATM machines will not allow withdrawals in excess of the available balance.

2. The potential costs and consumer benefits for implementing a partial opt-out that applies only to ATM transactions and debit card transactions at the point-of-sale.

Response: Again, it should not be an unfair practice if a consumer is not given an opportunity to opt out of fees for paying an overdraft. However, if the proposal were to be finalized in its current form, the costs and risks to banks will certainly rise. Operationally, if the consumer were to opt out of paying fees for overdrafts caused by an ATM or debit card point-of-sale transaction, the underlying cause for the overdraft would likely be related to an under floor limit transaction. Floor limits are used to expedite small dollar transaction by not authorizing the transaction with the issuing bank or authorizing for a nominal amount to verify a good account. A transaction creating an overdraft due to being under the floor limit can be disputed with the merchant, but the cost for processing such a dispute would not be offset by the overdraft fee. Thus, the Banks will either choose not to dispute the transaction and accept the risk with the overdraft or will incur more costs to dispute items.

3. Whether there are other circumstances in which an exception may be appropriate to allow and institution to impose a fee or charge for paying an overdraft even if the consumer has opted out of the institution's overdraft service, and if so how to narrowly craft such an exception so as not to undermine protections provided by a consumer's opt out.

Response: First PREMIER Bank does not believe an opt out of overdraft service is in the best interest of the consumer, when returning the debit unpaid is the alternative. However, if the proposal should be adopted, there will be exceptions, but no reasonable way to anticipate and account for all such circumstances. Exceptions will have to be addressed by allowing for reasonable deviations to the overdrafts opt out process which is implemented in good faith.

Handling exceptions is another reason why regulating specific examples of unfair or deceptive practices can be very difficult and create unintended consequences.

Debit Holds

The proposal would provide that an institution must not assess a fee or charge on a consumer's account in connection with an overdraft service if an overdraft would not have occurred but for a hold placed on funds in the consumer's account that exceeds the actual purchase or transaction amount.

This proposal is consistent with the proposal that would prohibit banks from imposing a fee when a credit card credit limit is exceeded solely because a hold is placed on available credit. The proposal has merit on the basis that consumers do not understand the process that merchants use to place transaction holds. However, for many, if not most debit card transactions, authorizations are required before the transaction is approved. In such cases, a hold on the

balance would not authorize the transaction and prevent an overdraft from occurring. Similar to the response to # 2 above, transactions under the merchant floor limit are not authorized or authorized for nominal amount and could cause an overdraft. Allowing the consumer to opt out of overdraft fees on debit card transactions would be increase costs and risk to the bank.

Docket No. R-1315
Regulation DD – Truth-in-Savings

Disclosure of Consumer Opt Out of Overdraft Services

The proposal would provide the content and timing requirements for disclosing the right to opt out of overdraft services. As stated above, First PREMIER Bank does not believe that it is in the best interest of the consumer to allow an opt-out of paying overdraft.

In lieu of abandoning the proposed opt-out provision, the following responses are provided for the opt out notice content and timing proposals:

Format

The proposed notice content in model form B-10 is reasonable and flexible enough to accommodate varying institution practices. The proposal states that institutions may wish to explain the consequences of opting out of overdraft services. The most important disclosure may be the costs and consequences of opting out of the overdraft service, thus should be required in the notice.

Timing

The opt-out notice at account opening (or before enrollment in an overdraft service) is appropriate. The proposal to provide subsequent notices every time an overdraft fee is assessed will incur substantial burdens and create an unnecessary volume of disclosures. It is recommended that one opt-out disclosure per year would serve its purpose while not causing substantial burdens for the institution or consumer confusion by repeat notices. It is reasonable to conclude that if a consumer does not opt out at account opening or subsequently when an overdraft fee is assessed, that they have chosen not to opt out.

Disclosure of the Aggregate Costs of Overdraft Services on Periodic Statements

The proposal would require all institutions, not just those that promote overdraft services in an advertisement, to provide aggregate dollar amount totals for overdraft fees and for return item fees for the statement period and year-to-date. First PREMIER Bank does not believe that consumers have requested aggregate overdraft fee information or has been harmed by not disclosing such fee information. It must be considered why other account fees are not being recommended for aggregation as well since many consumers will not incur overdraft fees, but incur other fees such as ATM charge and maintenance charges.

Balance Inquiries

The proposal would prohibit institutions from including funds the institution may provide to cover an overdraft item in the disclosed balance. First PREMIER Bank concurs with the proposal and currently complies with the recommended practice.

In Conclusion:

First PREMIER Bank appreciates the opportunity to share its comments on the proposed amendments to Regulation AA and DD in relation to overdraft services. The proposals are an attempt to protect consumers that frequently overdraw their account and incur overdraft fees. However, in proposing well intended rules, unintended consumer consequences can and will occur which contradict the original intent. Banks have managed consumer overdrafts for years through a risk-based approach to pay or not pay items causing the consumer account to overdraw. The consumer advocate claims that the practice of paying overdrafts encourages more overdrafts and pyramiding fees is misdirected. The Banks take on additional risk by paying items that overdraw the account and save the consumer from more severe consequences and fees that may be incurred by returning an item. In addition, merchants will feel the brunt of this proposal if adopted through increased returned check volume, losses and administrative collection costs. Thus, the proposals to promote opt out of paying fees for overdrafts is not recommended.

Respectfully submitted,

First PREMIER Bank

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