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Marissa K. Briggs
Vice President and Associate General Counsel

July 18, 2008

VIA ELECTRONIC MAIL

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

RE: Regulation AA – Docket No. R-1314
Regulation DD – Docket No. R-1315

Dear Ms. Johnson:

M&T Bank appreciates the opportunity to comment on the recently proposed changes to Regulation AA (Unfair or Deceptive Acts or Practices) and Regulation DD (Truth in Savings) (individually a “Proposal” and collectively, the “Proposals”) regarding overdraft services and related fees.

While we understand many of the consumer protection objectives underlying the Proposals, we are concerned that certain aspects of the Proposals do not fully take into consideration debit card network processing and liability rules, the extraordinary costs of compliance for banks and the potential unintended consequences for banks and consumers. We have outlined our primary concerns and comments below.

A. Opt Out From Paying Overdrafts –

Although we have no issue with the general idea of providing consumers with the ability to opt out of a bank’s overdraft protection program, we are concerned about specific aspects of the Proposals in the context of the unfair practices rule and a bank’s related disclosure obligations.

1. There should be only one mandated version of the opt out – “Full Opt Out.”

The proposed changes to Regulation AA would require banks to offer not only the right to opt out of coverage of overdrafts caused by all types of transactions (i.e., a “full opt out”), but also the right to opt out only of coverage of overdrafts caused by ATM and point of sale debit card transactions (i.e., a “partial opt out”). While we understand the rationale behind this proposal, we do not believe the final rule should include a partial opt out.

Payment systems are becoming increasingly complex and intertwined. A consumer may write a paper check and that check may ultimately be processed as an electronic image or an ACH entry. A debit card transaction may be processed through signature

or PIN based networks and which network is used may not be based on whether the customer used a PIN or signed for the transaction (e.g., telephone bill payments, which could be processed through either network or small-dollar POS transactions that can be made without signature or PIN). In this dynamic environment, it is often difficult, and sometimes nearly impossible, for consumers to know and understand the implications of the final form that their payments will take.

In addition, there are situations in which a bank cannot avoid paying an ATM or point of sale debit card transaction that overdraws a consumer's account notwithstanding a consumer's opt out from having his or her bank pay overdrafts. Based on this fact, it seems particularly confusing to offer a right to opt out only with respect to these transactions. In fact, as discussed in section 2 below, we believe that certain overdrafts caused by card transactions should be exempt from the prohibition against charging overdraft fees because the payment of such overdrafts are entirely beyond the control of banks.

In light of the growing complexity of payment systems and the unavoidable overdrafts that may occur as a result of ATM and debit card transactions, we suspect that offering multiple opt out options, and in particular, a partial opt out with respect to ATM and point of sale transactions, is likely to cause customer confusion. It will be difficult enough to clearly and concisely explain the consequences of a single opt out option. We believe that describing two options and the differences between them will add to the length and complexity of the disclosure without affording customers a significant benefit.

Offering and supporting both total and partial opt out options will also magnify the already large technological and systems costs associated with implementing and maintaining an opt out process.

In sum, we believe that the potential for consumer confusion and the increased compliance burden on banks make requiring two mandatory opt out options undesirable for all involved.

The Agencies requested comment on the potential costs and consumer benefits associated with mandating only a partial opt out applicable to ATM withdrawals and debit card point-of-sale transactions.

For the reasons outlined above, we support a single opt out option that would apply to all forms of transactions. Regardless of what form of opt out the Agencies ultimately require, there should be exceptions to allow a bank to assess fees whenever it does not make a decision (whether automated or not) to allow the overdraft (Please see section 2 below).

2. Opt out should not prevent a bank from charging a fee for an overdraft it has no opportunity to prevent or return.

The Agencies requested comment on whether there are circumstances in which an exception is appropriate to allow a bank to charge a fee for paying an overdraft even when a consumer has opted out of overdraft coverage. The Agencies inquire how to narrowly define any such exceptions.

We strongly believe that there are situations in which, despite a consumer's opt out, a bank should be allowed to charge a fee in connection with paying an overdraft when the bank did not have the ability to prevent or decline the transaction resulting in that overdraft. In many, if not all of these situations, the consumer is in the best,¹ although not necessarily a perfect, position to determine whether the transaction would overdraw his or her account and to decide whether to proceed with the transaction.

The Agencies considered a proposal to allow banks to charge a fee despite a consumer's opt out when the bank did not "knowingly" authorize a transaction. Although the Agencies dismissed this standard as potentially diminishing a consumer's opt out right, we think it is actually an appropriate standard.

The issues associated with systems that are not "real-time" (whether these systems are never real-time or have periods where they are not real-time) are not easily addressed. However, in these situations the customer possesses the best information to understand his or her own true balance. The wrinkle in this may be debit card holds that exceed the amount of the actual purchase but this issue should be separately addressed in card network rules.²

The Agencies note that it may be appropriate for banks to charge overdraft fees notwithstanding a consumer's opt out when the actual amount of a debit card purchase exceeds the amount for which the merchant requested authorization (e.g., the customer adds a tip to a restaurant bill or the merchant seeks a \$1 approval for a gas purchase that actually totals \$50).

We agree with this exception and believe the final rules should also include an exception to the opt out rule for any situation in which the bank does not have the option to allow or avoid the overdraft. Other relevant examples include: (1) ATM withdrawals that occur when the balance information available at the ATM is not real time³; and (2) debit card transactions for which the network processing rules do not require the merchant to

¹ We note that customers typically have access to account information nearly 24/7 through online channels, ATMs, telephone call centers, etc., and that they know if they have written checks that have not yet been cashed.

² Rules to improve issues relating to the timing and size of authorization holds in relation to actual card transactions should be addressed by card processing organizations such as Visa and Master Card. These organizations dictate processing and liability rules and are best equipped to address and balance the interests of participating consumers, merchants and banks.

³ We note that the proposed debit hold rules are likely to create greater inaccuracies with respect to available balances because, as discussed in section B below, banks will either have to stop using debit holds (and balances will appear too high) or they will have to continually look back in time and reassess account balances, fees and transactions whenever a debit hold turns out to have been higher than the actual purchase (which will make it nearly impossible to provide a reliable balance to any customer making debit card purchases).

submit an authorization request but the bank is nonetheless required to pay the transaction (e.g., transactions below the threshold established in the network rules). In these types of situations, a bank should be allowed to charge fees without being deemed to have engaged in an unfair practice, regardless of whether a customer has opted out of the bank's discretionary overdraft service.

3. The opt out notices proposed to be provided when a consumer overdraws his or her account (referred to herein as the "periodic notices") are not necessary but if required, should be simplified to increase effectiveness.

The Board requests comments with respect to whether the content of initial and periodic opt out notices should be the same.

We support the Agencies' objective to require a full, complete and accurate description of discretionary overdraft services and fees at the time of account opening. However, we think that providing consumers with such a notice at account opening is sufficient and that no further notices are necessary. We see no compelling reason to emphasize overdraft fees over other fees charged to consumers. Providing repeated notices to consumers will likely numb them to the message and the impact of the message will be lost.

However, if the Agencies believe that periodic notices are necessary, we think that they should be very brief. We are concerned that re-providing the same detailed opt out notice at the time a customer incurs an overdraft will not be effective. Experience indicates that a long and detailed notice on a statement or NSF notice is likely to be overlooked and to go unread.

Instead, it would be more effective to include a short, clear, statement of the customer's right to opt out and a link to a website, address and/or telephone number by which the customer can request further information and/or exercise his or her opt out right.

4. The initial opt out notice should make clear that: (a) opting out does not ensure that overdrafts will not occur; and (b) refraining from opting out does not mean that the bank will cover overdrafts.

The Board requests comments on whether the proposed content of opt out notices is sufficient to provide consumers with information to evaluate whether to opt out of a bank's overdraft services.

We have no issue with the basic information that the Board proposes to include in opt out notices; however, we do have a few specific concerns.

We believe that consumers may misinterpret the proposed opt out notice to mean that if they opt out, no overdrafts will be paid and that if they do not opt out, all overdrafts will be paid. The term "opt out" is often used in more black and white contexts and we are concerned that consumers may be inclined to reduce their decision to a simple question of whether they wish their banks to pay overdrafts or not. Therefore, we think it important that any detailed opt out notice clearly indicate that (1) overdrafts will occur in

certain situations despite an opt out and (2) a consumer's decision not to opt out does not mean that overdrafts will always be paid (*i.e.*, banks decide, in their sole discretion, whether or not to pay each overdraft).

Note that the first sentence of the second to last paragraph of the sample notice form (B-10) states that the consumer may tell the bank "not to pay ANY overdrafts" (emphasis added). We believe this should be modified to take into account the fact that some overdrafts will be paid regardless of a consumer's opt out.

5. Banks should be given flexibility with respect to the methods by which consumers may opt out.

The Board requests comments with respect to whether banks should be required to provide a mail-in opt out form with each opt out notice and whether consumers who have agreed to electronic delivery should be allowed to opt out electronically.

We believe that banks should be given flexibility with respect to implementing opt out procedures and that it would be wasteful to require banks to provide paper opt out forms with every opt out notice. Banks may wish to provide paper forms at account opening but it would seem wasteful and excessive to require them for all subsequent periodic notices – particularly if a consumer may opt out electronically or by calling a telephone number.

We also believe that there is no reason to prohibit consumers who have agreed to electronic delivery from opting out electronically. To prohibit such an opt out appears inconsistent with the principles of the E-Sign Act.

6. Reasonable time to exercise opt out right at account opening.

We believe that banks should be permitted to provide opt out disclosure at account opening and to charge overdraft fees at any time thereafter unless and until a consumer opts out.

We understand that it may not be practical in all scenarios to specify what would be considered "a reasonable opportunity to exercise the opt-out right prior to the assessment of any fee for paying an overdraft." However, we believe that it is appropriate to provide a clear rule addressing when a bank may begin to charge fees if a consumer does not opt out at account opening.

We believe that most consumers will either make a decision to opt out at account opening or, in the alternative, will not opt out until they have incurred overdraft fees (at which time they will receive another notice of their right to opt out). Therefore, we think it reasonable to permit a bank to charge overdraft fees any time after account opening when customers have been provided with opt out disclosures during the account opening process and have not elected to opt out at that time.

7. Exception to unfair practice rule necessary for existing customers.

We concur that an initial opt out notice should not have to be provided to existing consumer customers at the time the Proposals take effect. However, we believe that

there must also be a corresponding exception from the unfair practices rule to allow a bank to charge overdraft fees to these customers unless and until they opt out. In other words, since existing customers will not be given the opt out notice until after they overdraw their accounts, it should not be an unfair practice to charge them fees before they receive opt out notices and, in fact, opt out.

8. Guidance with respect to joint accounts.

We assume that opt out rights with respect to joint accounts would be handled similarly to the opt out right associated with privacy and information sharing; however, we would appreciate specific guidance with respect to how the Agencies expect banks to handle overdraft opt outs (e.g., any account owner may exercise the right) and revocation of such opt outs (e.g., any account owner may opt back into coverage) with respect to joint accounts.

9. Establishing and maintaining an opt out program will be costly.

While we support the concept of providing opt out rights to consumers, we note that, contrary to the Agencies' assessment of the impact of this proposal on banks, we anticipate that the technology, systems and hard costs necessary to create and maintain such an opt out program will be very significant.

Not only must opt out notices be created and incorporated into each of our several online, telephone and branch account opening processes and systems (some of which we maintain directly and some of which involve vendors), but we will also have to include the notice on our statements or NSF notices.

If we include the notice on our statements, we anticipate that this notice and the additional disclosures of cumulative fees on statements will likely increase the length of many statements by as much as a page. This will result in additional cost for paper, printing and increased postage. Including the periodic opt out notice with the NSF notice would hamper the ability of banks to leverage postal savings associated with using sealed post cards rather than traditional envelopes (i.e., because the proposed text is too long to fit on a post card). Additionally, whichever option a bank uses for providing the periodic opt out notice will necessarily involve programming and technology changes.

Banks will also have to develop, test, establish and run different procedures for processing transactions for the accounts of customers who opt out and those who do not. This will be particularly complex if customers have both full and partial opt out options because the bank will have to establish a separate set of rules for those who opt out in full, those who elect a partial opt out, and those who do not opt out at all.

The possibility of having different sets of processing rules for different consumer groups based on opt outs will also increase the complexity for customers as well as customer support staff who research account issues and respond to customer questions.

B. Debit Holds –

The proposed rules surrounding overdrafts associated with debit card transaction holds trouble us greatly. While the intent of these rules is laudable, we believe that the proposed changes

will have unintended consequences for consumers and banks that the Agencies should carefully consider.

1. Debit hold practices are not unfair trade practices but are reasonable risk mitigation tools in light of card network rules.

As the Agencies acknowledge, merchants generate debit card authorization requests through the card processing networks (e.g., Visa, MasterCard, etc.) to ensure that they will be paid for transactions at settlement. Merchants pay for this service and obtain these approvals (authorizations) in order to obtain a payment guarantee.

The merchant's authorization is passed on to the cardholder's bank to notify it of an impending transaction. Because network rules obligate banks to pay for transactions for which authorization is given, most banks post the authorization as a hold on the account to ensure the funds are available when the transaction settles, typically several days later.

Once an authorization has been given through the network, the cardholder's bank must pay for the transaction whether funds are available at settlement or not. In contrast, if the consumer wrote a check and funds were not available at the time of presentment, the bank has the right to return the check for non-sufficient available funds.

For certain types of transactions, the actual purchase amount is not known at the time a merchant obtains authorization (e.g., gasoline purchases and restaurant and hotel charges). Gas station merchants typically request authorization for an arbitrary amount (often \$50 or \$ 75 but we understand networks may soon increase the limit for gas authorizations to \$500) and hotel merchants often submit authorization requests for approximately 150 percent of the anticipated room charge. The actual charges for these transactions rarely match the authorization holds.

Bank processing systems typically seek to match the actual transaction amount to the authorization hold. These systems look for a matching transaction code or a transaction with a common merchant and a similar amount and will release the hold if a match is found. If no match is found (e.g., because the amounts are largely dissimilar), the hold may not be released for several days.

Banks have no control over the accuracy of the hold amount compared to the actual transaction amount or the merchant's use of inaccurate transaction codes. The authorization amounts and transaction codes are controlled by merchants.

The practice of placing holds based on information provided to banks in these situations can hardly be characterized as an unfair practice by banks. The banks are simply holding funds that they have been notified they may be obligated to pay to a third party. It seems that the only appropriate solution to this situation would be to encourage card networks to revisit their processing and liability rules to improve the accuracy of the authorization holds submitted by merchants.

2. Banks may no longer be able to place debit card holds.

The Proposals prohibit banks from charging overdraft fees for overdrafts caused by

authorization holds that exceed the actual transaction amounts. Further, banks are required to make consumers whole (reimburse all fees and costs).

As a practical matter, this rule will force banks that offer debit cards and charge overdraft fees either to (a) monitor and retroactively adjust posted transactions and fees or (b) stop placing holds altogether.

We believe the complexity and cost of retroactively monitoring transactions and fees (see below) will be prohibitive and the practical effect of the proposed rule will be that banks can no longer utilize debit holds as a risk management tool.

If a bank places debit card holds, it would have to develop and maintain a complex system to monitor transactions retroactively and identify each situation in which a debit hold exceeded the settlement amount and to retroactively reassess every fee and transaction that took place in that account after that hold was placed to ensure that the treatment of all such fees and transactions is appropriate given the new information provided to the bank regarding the actual amount of the debit card transaction.

While this is appealing in theory, it would be extremely complicated because settlement may be several days after the hold and, in that time there may have been numerous transactions of all types processed based upon the hold amount, including numerous other debit card transactions for which authorizations may have been given or refused based upon the original hold information and which may themselves ultimately be determined to involve holds that exceed the relevant transaction amount. If a merchant fails to use the same transaction code for authorization and settlement, it may take additional time to realize that the hold and actual settlement did not match.

This places an incredibly heavy burden of reconciliation and proof on banks. There are millions of debit card transactions conducted daily. The proposed regulation places the entire burden on banks for the accuracy of transaction holds they do not generate.

In addition, the process of reassessing transactions and fees calculated based on debit holds that do not match settled transactions puts a customer's account balance in nearly constant flux. It would seem nearly impossible for a bank to provide accurate account balances to any customer who uses debit cards.

Given this incredible complexity and the obligation imposed on banks to reassess the appropriateness of every decision following such a debit hold situation, as a practical matter banks will not be able to use debit holds to manage payment risk.

3. Consumers and banks will be harmed if banks cease to apply debit card holds with respect to pending transactions.

Disregarding debit card holds in the calculation of available balances will likely result in additional consumer overdrafts because consumers are likely to assume that their purchases have been deducted from their balances. Because card transactions often settle days later, if no hold is placed, consumers will be allowed to access the same balance multiple times. This is a disservice to consumers.

In addition, the practical inability of banks to apply debit card holds places banks at great risk of loss since debit card purchases generally must be paid regardless of account balance if the merchant obtained pre- authorization or if the transaction falls below certain threshold amounts. This is likely to be an untenable position for banks.

Particularly in the current economic environment, banks cannot safely assume this increased risk of non-payment. As a result, they are likely to restrict access to debit cards. In other words, if debit holds can no longer be used to help ensure funds are available to pay debit card purchases, debit cards become more like credit products and will be subject to credit review.

We wish to echo the thoughts of other bankers in pointing out that authorization holds are not created to generate overdrafts; they are created to reduce overdrafts. If authorization holds are not posted, banks will incur more operational losses due to overdrawn balances and will likely limit further access to debit cards and checking accounts to the detriment of consumers.

4. Summary of debit card hold rules.

In summary, we request that the Agencies reconsider the proposed changes with respect to debit card transaction holds. Consumers, merchants and banks are dependent upon card processing systems and these systems would be changed dramatically by the proposed changes.

These systems have rules that require payment of preauthorized transactions. The sheer volume of these types of transactions requires that they be handled by computers and that banks be able to determine how to handle subsequent transactions and fees taking into account the holds associated with authorization requests – even if the holds later turn out to exceed the actual transaction. If authorization amounts differ from actual transaction amounts, holds may not be released in a timely manner. Banks have no control over the accuracy of the authorization amount.

The cost and complexity of compliance to banks will likely end the practice of posting debit card transaction holds. Without debit card holds: (1) consumers will likely overdraft more because they will be able to access the same balance multiple times, and (2) banks will incur more risks and losses and will probably limit access to debit cards as they begin to present more credit risk.

For all of these reasons, we believe that this proposal will do more harm than good.

C. Fees on Statements –

Although the Agencies' proposals with respect to fee disclosures on statements will have less impact on banks than will most of the Agencies' other proposals, these changes will require significant programming and technology efforts – including development and testing – and, therefore, will involve substantial time and cost. Given this fact and the fact that there are numerous other significant initiatives to which banks must respond, we request that sufficient time be provided for compliance. Bank resources are already committed to various initiatives and we believe that the statement changes alone would likely take more than a year to implement.

In addition, we note that the proposed changes to Regulation DD appear to omit the existing sentence at the end of section 230.11 (a)(3) that "Any institution may disclose total fees imposed for the calendar year by aggregating fees imposed since the beginning of the calendar year, or since the beginning of the first statement period that year for which such disclosures are required." Although this sentence may have had particular relevance when a bank first promoted its overdraft service in mid year and its disclosure obligations became effective at that point in time, we believe that it has continuing relevance to situations in which a consumer's statement cycle does not coincide with the beginning or end of a calendar month. Accordingly, we request that this concept be included in any final rule.

D. Providing Account Balance -

We concur with other banking industry representatives in requesting that the Board clarify that the proposal regarding providing appropriate account balance information applies when and to the extent that the bank chooses to provide balance information and does not require that banks provide such information on all automated systems available to consumers.

E. Posting Order –

The Agencies request comment on whether they should require banks to post checks in low to high dollar order.

We do not believe that this is appropriate and question whether a regulation of this type would be legally effective to supercede the nearly universal state UCC laws that specifically authorize banks to determine posting order as they see fit (subject, in some cases, to disclosure of this posting order).

In addition, although there are arguments on both sides of the issue, the common practice of posting in high to low dollar order is advantageous for customers in that it prioritizes payment of large dollar items that are likely to be most important to the customer.

Regardless of the dollar order employed in a bank's posting order, banks should be at liberty to choose when to post any item that the bank has already paid (e.g., ATM withdrawals) or is obligated to pay (e.g., pre-authorized or small dollar debit card transactions and ACH transactions), regardless of size. To do otherwise would substantially increase banks' potential liability.

In addition, we strongly discourage the Agencies from adopting a rule that would involve offering customers the right to opt into different posting orders. This would add yet another layer of complexity to the posting and overdraft process that would have to be developed and described to consumers. This would seem impossibly complex when integrated with the possibility of consumers opting out of overdraft services in full, in part or not at all and, again, would be so difficult to understand that it would hamper the ability of consumers to make educated decisions.

F. Effective Date –

The Agencies request comment on when final rules should be effective and whether a one-year period is appropriate.

Given the tremendous systems, technology, training, disclosure and budget (both with respect

to compliance costs and lower revenue) implications of the Proposals, we request that the Agencies provide more than a one-year compliance window.

The systems development and change management process for changes of the magnitude proposed would typically be scheduled for at least 24 months. In addition, budget expenditures and allocation of technology resources at our institution are already mapped for 2009 and there are other significant legal and regulatory initiatives facing banks (including Regulation Z, Internet gambling, FACTA, etc).

Based on these issues, we request that the Agencies set a mandatory compliance date at least two years after the publication of the final rules in the Federal Register.

G. Safety and Soundness and Consumer Impact – Risk and Economic Concerns

We are in the midst of very difficult times for many consumers and businesses and we are concerned that the Proposals saddle banks with risks that they will be unable to safely manage without changing their product offerings in ways that ultimately are detrimental to most banking customers.

As noted in our discussion of the debit card hold proposal, we are concerned that banks may be forced to address the complexity associated with assessing overdraft fees under the proposed debit card hold rules by ceasing to place such holds. If this happens, banks will assume greater risk of non-payment for these transactions and will likely tighten their eligibility requirements for debit cards.

By discouraging banks from applying debit holds and requiring banks to bear the corresponding increased risk of non-payment, the Agencies are, in effect, converting debit cards into a quasi-credit product. As a result, debit cards may become unavailable to consumers who lack strong credit histories. This seems a disservice to those consumers who may not be good credit risks but who, today, have access to debit cards and the conveniences they afford.

In addition, we note that until relatively recently in banking history, banks primarily offered checking accounts with monthly service fees avoidable only by maintaining specified minimum balances. Based in part on the advent of new sources of fee revenue, including NSF fees, banks began to offer accounts with lower monthly fees and minimum balances and even “free accounts.”

We believe that this was a positive development for consumers and are concerned that the Proposals may cause this trend to reverse due to a significant reduction in NSF fee revenue – which some bank consultants expect to decrease by 25% to 60%. While this reduction in NSF fees is certainly one aim of the Proposals, the depth of the reduction in this difficult economic time may have unintended consequences for consumers as well as banks.

In this economic environment, banks may have little choice but to find other business models. Some bankers believe that banks will be forced back into more traditional models that existed before fee revenue became a significant factor on bank balance sheets. For example, depending on market conditions, banks may no longer provide free accounts and may resort to more traditional accounts with monthly service fees that can be avoided by maintaining large balances. This could have the undesirable and unintended consequence of making basic

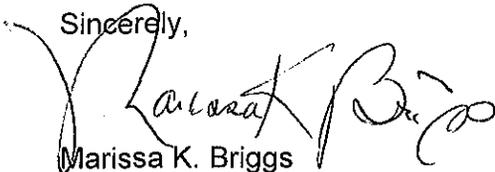
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deposit accounts less affordable for the vast majority of consumers who manage their accounts responsibly.

While it would be pleasing to think that the Proposals would simply be a panacea for injustices suffered by the relatively small group of customers who frequently overdraw their accounts, we believe that the Proposals will force banks to react in ways that are not in the best interest of the vast majority of customers who handle their accounts responsibly.

Once again, we thank you for the opportunity to comment on the Proposals. Should you have any questions regarding our comments, please do not hesitate to contact David Burstein at (212) 350-2580 or the undersigned at (716) 842-2366.

Sincerely,

A handwritten signature in black ink, appearing to read "Marissa K. Briggs". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

Marissa K. Briggs
MKB:rms