The Huntington National Bank
Legal Department
Huntington Center
41 South High Street
Columbus, Ohio 43287

July 11, 2008

By e-mail to: regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Attn: Docket Number R-1314

Re: Proposed Rule Under Regulation DD, 73 *Fed. Reg.* 28739 (May 19, 2008); Proposed Rule Under Regulation Z, 73 *Fed. Reg.* 28867 (May 19, 2008)

Dear Ms. Johnson:

This letter is submitted on behalf of The Huntington National Bank ("Huntington Bank")[1] in response to the above referenced rules proposed by the Board of Governors of the Federal Reserve System (the "Board") under Regulation DD with respect to certain new disclosures required in connection with overdraft programs and under Regulation Z with respect to certain credit card and other open-end credit matters. We appreciate the opportunity to provide the comments set forth below with respect to the proposed rule.

The Board has also separately proposed related substantive rules covering overdraft programs pursuant to the Board's authority under section 18(f) of the Federal Trade Commission

[1] The Huntington National Bank ("Huntington Bank") is a national bank and the principal subsidiary of Huntington Bancshares Incorporated, which is a $55 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington Bank has more than 142 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 600 regional banking offices in Indiana, Kentucky, Michigan, Ohio, Pennsylvania and West Virginia. Huntington Bank also offers retail and commercial financial services online at huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of approximately 1400 ATMs. Selected financial service activities are also conducted in other states including: dealer sales activities in Arizona, Florida, Nevada, New Jersey, New York and Tennessee; private financial and capital markets group services in Florida; and mortgage banking offices in Maryland and New Jersey. Huntington Bank's affiliate, Sky Insurance, offers retail and commercial insurance agency services in Ohio, Pennsylvania, Michigan, Indiana and West Virginia. International banking services are made available through the headquarters office in Columbus, a limited purpose office located in the Cayman Islands and another office located in Hong Kong.

Act with respect to unfair and deceptive acts or practices (the Board's "UDAP authority"). 73 *Fed. Reg.* 28904 (May 19, 2008). The comment period for these related substantive rules closes on August 4, 2008. We will also be submitting comments on these related substantive rules, some of which may impact the Board's proposal under Regulation DD.[2]

Our comments in this letter on the Regulation Z proposal are limited to the two provisions related to receipt of payments. Huntington Bank does not offer its own credit card and thus is not directly affected by most of the provisions of the Regulation Z proposal which are applicable only to credit cards. However, these two provisions related to receipt of payments apply to all open-end credit, and not just to credit cards.

Disclosure of Opt-Out Right for Overdraft Services

The Board's related substantive rule proposal under its UDAP authority requires depository institutions, before any fees are assessed for paying overdrafts, to provide consumers with notice and opportunity to opt out of payment of overdrafts by the institution. In this instant proposal under Regulation DD, the Board has proposed a new section to Regulation DD that would set forth rules with respect to the opt-out disclosure required to be provided by the Board's proposed substantive rule, and the Board also provides a model opt-out notice for depository institutions to use.

As an initial matter, our comments to be submitted on the Board's proposed substantive rule will indicate several reasons why the Board should not be using its UDAP authority to issue the proposed substantive rules on overdraft programs, but should instead issue any such substantive rules under the Board's authority in the Electronic Funds Transfer Act and Regulation E. If the Board's substantive rules on overdrafts are issued under Regulation E, it would then be somewhat odd for the Board's disclosure rule with respect to the opt-out notice and model form of notice to be proposed under Regulation DD, and should instead be moved to Regulation E.

The Board is proposing to require a detailed opt-out notice to be provided at account opening, and also subsequently for any month in which a consumer who has not opted out incurs an overdraft fee. We do not believe this subsequent notice requirement is necessary or useful, and it creates significant additional cost and expense for depository institutions in the form of reprogramming statements and/or overdraft notices and because of additional paper and postage expense to accommodate the additional disclosure. There is no similar requirement that depository institutions provide special disclosures informing consumers how to avoid incurring fees for other optional services when such fees are incurred (such as how to avoid minimum

[2] We understand that the Board has an earlier comment period closing date for the Regulation DD proposal than for the substantive overdraft proposal under the Board's UDAP authority so as not to delay consumer testing of the model form of opt-out notice which is contained in the Regulation DD proposal. However, it is difficult to understand how the Board can proceed with consumer testing of the model form of opt-out notice without taking into consideration comments to be submitted on the substantive overdraft proposal.

balance fees or various transaction fees), and such a requirement with respect to overdraft fees gives undue prominence to this particular fee as distinguished from any other fees that the consumer could avoid. The account opening disclosures clearly are sufficient to alert the consumer as to how to avoid these fees.

With respect to the items required in the content of the opt-out notice, the Board is requiring the same content for the initial opt-out notice as for the opt-out notices that must be sent during any statement period in which there is an overdraft (either on the statement or on an overdraft notice sent promptly after the payment of any overdraft). If the Board does not eliminate the subsequent notice requirement, there is at least no need to include the full set of information that is required on the initial notice to also be included on the subsequent opt-out notices. The Board states that the point of the subsequent notice requirement at the time an overdraft fee is incurred is to remind the consumer of the right to opt-out of the payment of overdrafts at a time when the consumer is more likely to be focused on the cost impact when the consumer has just been charged an overdraft fee. In that context, presumably the only important information is how to opt-out if the consumer wants to do so, and all of the other information required in the initial notice serves only to clutter the form with essentially irrelevant information that can detract from the important information about how to opt out. There will already be information on the statement or overdraft notice about the overdraft fees being assessed that the Board apparently believes will capture the consumer's attention to do something about paying overdraft fees, and that, along with instructions on how to opt-out, are all that should be needed on the subsequent opt-out notice, if the subsequent notice is needed at all.

With respect to the initial notice, the Board should clarify that (as with privacy notices) the depository institution may request the consumer to review the initial opt-out disclosure and make a choice before actually opening the account. This would allow the institution to pay any overdrafts that may occur shortly after account opening and avoid issues over what is a reasonable time that the institution has to wait. Otherwise, depository institutions face additional programming and design issues with respect to blocking all overdrafts for some initial "reasonable" period of time even if the consumer never opts out.

The model form proposed by the Board has significant problems in wording that also reflect problems in the substantive opt-out rule proposed under the Board's UDAP authority. These problems in the substantive opt-out rule will be addressed in our subsequent comment letter on the substantive opt-out rule. Problems with the wording of the model form notice are as follows:

- The statement in the first paragraph that "We provide overdraft services for your account" is confusing and not necessarily accurate. It is confusing because consumers are not likely to understand the phrase "overdraft services" as the defined term that it is under the Board's substantive proposed rule. Rather, consumers are likely to think of "overdraft services" as some kind of formal program, or even to include the types of overdraft protection programs that are not covered by the Board's substantive proposed rule, such as separate overdraft lines of credit or payment of overdrafts from funds available from a linked credit card or savings account. Thus, the consumer could easily misunderstand this sentence to be telling him or her that the bank is providing overdraft protection that the bank is not providing at all to that consumer.

- The second sentence of the first paragraph is also somewhat misleading since it says that if there is a debit when there are not sufficient funds "we may pay your overdraft". That is a more affirmative statement than the actual process of discretion that is employed with respect to any given account. A more accurate statement is that the depository institution has the discretion to pay or not pay items that overdraw the account, and is never required to pay such items.

- The third paragraph of the notice contains the statement "You have the right to opt out of this service and tell us not to pay any overdrafts". We are concerned that this will be a misleading statement for consumers. As we will explain in the comment letter to be submitted on the substantive rule, regardless of whether or not the consumer opts out of overdrafts, there will still be many circumstances under which items will nonetheless overdraft the account. This sentence tells the consumer that he or she can tell the depository institution "not to pay any overdrafts", and that is simply not true. This kind of language will make it look like the depository institution is not complying with the opt-out request if the institution continues to pay any overdrafts, which at best is likely to cause customer misunderstanding and customer service issues and at worst could be interpreted by a court to mean what it literally says. There are similar language problems in the proposed substantive rule which could make it appear that opt-out means that the depository institution is not permitted to pay any overdrafts, whereas the actual requirement in the substantive rule appears to be not that the depository institution cannot pay overdrafts if the consumer opts out, but rather that the institution cannot charge a fee (except under certain circumstances set forth under the proposed substantive rule) for payment of any overdrafts if the consumer opts out.

- The third paragraph has a sentence that references the partial opt-out right granted by the proposed substantive rule. For reasons to be set forth in our comment letter on the proposed substantive rule, this grant of a partial opt-out right appears on its face to be either illusory or to require the bank to pay items other than ATM withdrawals and debit card purchases when those other items overdraw the account (which we do not believe can have been the Board's intent). Because the issues around overdraft programs primarily concern debit card point-of-sale transactions, and because of other problems with the Board's substantive opt-out requirement proposal that will be set forth in our comment letter on the substantive rule, our comment letter on the substantive rule will be recommending that the Board provide a more targeted opt-out right applicable only to debit card point-of-sale transactions, leaving the depository institution with discretion to pay or not pay other items that overdraw the account. If the Board adopts a more targeted approach to the opt-out right or otherwise eliminates or modifies the partial opt-out, this would mean that the language in the notice about the partial opt-out right, as well as other language in the notice describing the opt-out right, would need to be changed to conform to a revised or more narrowly tailored opt-out right.

- The last paragraph of the notice contains a statement that "We offer less costly overdraft payment services that you may qualify for". We are not certain that other forms of overdraft protection will necessarily be "less costly", and "lest costly" than what? Depending on particular circumstances, other forms of overdraft protection offered will not necessarily always be "less costly".

In general, the model form of opt-out notice inappropriately suggests that the benefits of opting out are greater than the harms, and this is simply not accurate. Depending on what type of item is returned or rejected as a result of the consumer's opt-out, the consumer may not only be charged the same amount for returning the item as paying it, but the consumer may also suffer additional costs of bounced check fees from the merchant to whom the check was written, late fees on loan payments, negative reporting to a consumer reporting agency, or even criminal liability for writing a bad check. We draw the Board's attention to the brochure published by the Board and other federal banking agencies entitled "Protecting Yourself from Overdraft and Bounced-Check Fees"[3] in which is provided a table showing the consumer's choices from best to worst, with the worst option in that list being a "bounced check" and with "courtesy overdraft protection plan" ranking better than "bounced check". This brochure is clearly right about that ranking, but the Board's model form of notice in this Regulation DD proposed rule ignores this reality. While the Board permits depository institutions to "briefly" describe the consequences of opting out of overdrafts, that appears to be a very limited authority that depository institutions may be hesitant to utilize except very narrowly for fear of being accused of undermining the rest of the prescribed form of notice.

The Board has requested comment as to whether depository institutions should be required to provide a form with a check-off box that consumers may mail in to opt out. We strongly disagree with any such requirement. Paper forms with check off boxes are more costly for the depository institution to handle, in that they require data input by institution employees once received, and despite instructions on the form, may not be sent to the right place at the institution for prompt processing and are subject to data entry errors in processing. Furthermore, the portion of paper forms completed by the consumer may not be legible, will typically require sensitive consumer information to be sent through the mail (the depository institution will at least need to know the account number, for example, of the deposit account for which the consumer is

[3] On the Board's website at http://www.federalreserve.gov/pubs/bounce/default.htm.

opting out), and will take more time to be completed and sent by the consumer and received and processed by the depository institution. The most efficient process is for the consumer to call a toll-free phone number (as is the case with Gramm-Leach-Bliley privacy notice opt-outs) to a voice response unit that can direct the consumer through appropriate choices and automatically enter the consumer's opt-out choice into the depository institution's computer systems. Consumers should also be allowed to opt-out electronically consistent with the applicable requirements of the federal E-Sign Act.

Statement Disclosure of Aggregate Cost of Overdrafts

We do not believe it is necessary or appropriate to highlight overdraft and returned item fees as required by the proposed statement disclosures of the aggregate costs of overdrafts and returned items for the statement period and year-to-date. There is no reason that these fees are any more important than any other fees that the consumer may incur or may be able to avoid by taking certain actions. If, however, the Board does not eliminate this requirement, the Board should at least clarify that this box/table disclosure of aggregate cost of overdrafts and returned items does not have to be provided on the statement if the consumer has incurred no such fees in the statement period or the year-to-date. There does not appear to be any utility to including the box/table containing only zeros.

Disclosures of Account Balances

The Board is proposing to add a provision to Regulation DD which would require, in response to an account balance inquiry by a consumer through an automated system, that the balance disclosed (i) must be a balance "that solely includes funds that are available for the consumer's immediate use or withdrawal" and (ii) must not include "additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the consumer's account". This provision goes on to allow an institution to disclose, at its option, a second balance that includes additional amounts that the institution provides, as long as it is prominently indicated that this second balance includes funds provided by the institution. Proposed §230.10(c). The Board also indicates that the reference to ATM balance inquiries applies equally to inquiries at ATMs owned or operated by the consumer's account-holding institution, as well as balance inquiries at ATMs not owned or operated by the consumer's account-holding institution.

With respect to amounts provided by the institution which are not permitted to be included in the first balance, it is not clear from the proposal whether those excluded amounts are only intended to be the informal amounts that the institution makes available on a discretionary basis in an automated overdraft processing system, or whether the institution is also prohibited from including in that first balance overdraft amounts provided from formal overdraft protection programs, such as overdraft credit lines or amounts available through other linked credit card or savings accounts. For example, on a given day a consumer may have the following: (i) $100 of his or her own "available" funds in the account, (ii) $500 of informal discretionary overdraft allowance provided by the institution's automated overdraft processing system, and (iii) a $2,000 formal overdraft protection credit line. The language of the proposed rule says that what must be excluded from the first balance is "additional amounts that the institution may provide", which in the above example would appear to require exclusion of the $500 informal discretionary amount, but it is not clear that such language also excludes the $2,000 formal overdraft protection amount because arguably that amount is provided by the consumer (i.e., the consumer's credit line) and not the depository institution. If the third item in the example is a balance in a linked savings account available to cover overdrafts, such amount looks even less like an amount that "the institution may provide". On the other hand, there is a sense that the institution provides even the formal credit line or other linked overdraft protection sources, since the institution is providing the credit line or the ability to link to other accounts providing overdraft protection. It would be helpful if the Board clarified this issue in the Commentary.

The language which requires that the first balance "solely includes funds that are available for the consumer's immediate use or withdrawal" may cause potential unnecessary disputes and litigation with consumers over what is actually "available". The Board in the supplemental information and in the proposed Commentary attempts to address these issues by clarifying that the "available" balance may, but need not include deposited funds not yet available under Regulation CC, or may, but need not, include funds held to satisfy a prior obligation (i.e., pending items), and the Board also attempts to recognize that methods used by depository institutions for determining "available" balances may vary significantly by institution, and that institutions are not expected to reconfigure their internal systems to provide "real-time" balances.[4] However, the point of this proposed new provision is to tell depository institutions what <u>not</u> to include in the first balance disclosed rather than also necessarily telling depository institutions what <u>to</u> include in that balance. The language telling depository institutions what to include (i.e., the "available" balance language) is not necessary to accomplish the Board's goal of excluding from this balance amounts provided by the institution. The negative prohibition is sufficient. Because, as the Board recognizes, there is great variation from institution to institution over how "available" balances may be determined, and because of the complexities of determining what is "available" or not, we are concerned that the Board is creating opportunities for unnecessary disputes and litigation. Thus, we recommend that the Board delete this language about what must be included, and focus this proposed new section solely on what must be excluded.

Our final comment with respect to the account balance disclosure requirement is surprise at the Board's requirement that a depository institution be responsible for the balances that display at ATMs not owned or operated by the institution. This is not something that the account-holding institution can control and we ask the Board to reconsider this requirement. The data fields available for transmitting balance information to the other institution's ATM include multiple balance fields, and if, for example, the account-holding institution provides two balances—the first excluding institution provided amounts and the second including such

[4] See 73 *Fed. Reg.*, at 28745, col. 2.

amounts along with a prominent indicator—the other institution may display all of that, may display only the first or only the second balance, and with respect to the second balance may or may not include the prominent indicator. If instead we provide only the first balance (the one without any institution provided amounts) and leave the data field for the second balance empty, the other institution may still choose both or either data fields, in which case if the second data field is displayed it may show nothing or default to a zero, which would be inaccurate and confusing to the consumer. The account-holding institution could presumably populate both data fields with only the first balance number in order to be sure that the second balance number (the one with institution provided funds) would not be displayed inappropriately by the ATM-owning institution, but then the ATM-owning institution could display both numbers (which would be the same) on the screen and/or receipt, which could be confusing to consumers as to why the balance is shown twice. The account-holding institution could attempt to comply with this requirement by not sending any balance information to the ATM-owning institution, which could result in those empty data fields being presented on the ATM screen or receipt of the other institution as either blank or zero, which again would be inaccurate and confusing to the consumer. There are similar problems with balances that would appear on a receipt after the consumer makes a withdrawal or deposit at another institution's ATM. Balance information is clearly helpful to the consumer in determining whether or not the consumer is in danger of going overdraft by a withdrawal at the other institution's ATM, and the Board's proposal appears to have the unintended effect of discouraging the provision of that information or resulting in disclosures to consumers that can be inaccurate and confusing. It is not at all clear why the Board has included this requirement, since it is generally adverse both to consumers and to depository institutions, and thus we recommend that the Board eliminate the application of this requirement to ATMs which the depository institution does not own or control.

Regulation Z Payment Receipt Proposals

The Board is proposing two new rules to be added to Regulation Z §226.10 regarding prompt crediting of payments: (i) a requirement that a creditor may specify reasonable requirements for payments that enable most consumers to make conforming payments, with a conclusion that it would <u>not</u> be reasonable to have a cut-off time for the receipt of mailed payments earlier than 5 p.m. on the payment due date at the location specified by the creditor for the receipt of payments, and (ii) a requirement that if the due date for payments is a day on which the creditor does not accept payments by mail, that the creditor may not treat a payment received by mail the next business day as late for any purpose. While the Board's Regulation Z proposal generally applies only to credit card accounts, these particular proposals regarding receipt of payments apply to all open-end credit, and not just credit card accounts.

We strongly oppose the Board's establishment of any particular cut-off time for receipt of mailed payments and we request the Board to delete this determination. The general rule in §226.10 is that creditors may specify reasonable requirements that enable most consumers to make conforming payments, and creditors should be left to make that determination based on their specific procedures. If, for example, a creditor makes only morning mail pick-ups from the

Post Office box designated as the location for making payments, the creditor would apparently be in violation of the rule as proposed by the Board because the creditor would not be processing and crediting on the day of receipt any payments received at the Post Office box in the afternoon before 5 p.m. Creditors would be required to make their last mail pick up after 5 p.m., and then process all payments picked up that day so as to be credited on that same day, or else have the system capability of processing the payments the following day but crediting the payments as if made on the day they are actually picked up. Cut-off times are designed to enable depository institutions to cut off the inflow of transactions as of a given time on that day so as to be able to process by the end of the day what has come in prior to the cut-off time, and the Board is arbitrarily establishing a much later cut-off time than is standard for such processing. Many creditors cannot open, process, and credit a payment on the day it is received unless it is received by a time certain that leaves enough time to complete the processing by the end of the day, and thus for many creditors this time certain appears to be in the early or mid-afternoon. Other creditors may not have systems that easily permit payments to be processed on the day after receipt, but credited as received on the day of receipt. The Board's proposal would require these creditors to modify significantly their current payment processing systems and procedures in order to credit a payment received at the Post Office box at 4:59 p.m. as being received on that day.

The Board does not provide any justification in terms of net benefits as to why 5 p.m. is a preferable cut-off time compared to an earlier cut-off time. We note, however, that in other consumer protection regulations, the Board has avoided dictating cut-off times for purposes of bank operations. For example, under Regulation CC, the crediting of certain deposits depends on the "banking day" established by the depository institution, and the Board does not dictate actual deposit cut-off times.

The Board's second new payment receipts rule is also problematic. Presumably, this rule means that if the creditor does not receive mail on Saturday or Sunday and the consumer's grace period for late charges expires on Saturday, that the creditor cannot charge a late charge on the payment if it arrives in the mail on Monday. Substantial programming changes are likely to be needed to creditor loan processing systems in order for creditors to have late charge grace periods that systematically accommodate the calendar in this variable way each month. Alternatively, institutions that have systems that process on the basis of a 5-day business week may have to modify their systems (if possible) to allow for a 7-day processing week. There is no reason why the Board should be establishing a rule that rewards those consumers who play it close to the edge in making their payments rather than rewarding those consumers who are more responsible in the management of their payment obligations by allowing plenty of time for payments to be received before the due date.

Furthermore, this second new payment receipts rule does not appear to be limited to avoidance of late charges for payments received over a weekend, but has a reach that is difficult to determine. The proposed rule says that the creditor may not treat the payment received by mail the next business day as "late for any purpose". Thus, it is possible that a depository institution's delinquency grading system could be impacted if an account is reported to a consumer reporting agency as 30 days or 60 days past due, for example, when the 30th or 60th day occurred on the weekend. Rather than have the rule be open-ended with the "late for any purpose" language, the Board should determine just what problem it is intending to address and then circumscribe the proposed rule to meet that particular problem. If the problem is with assessment of late fees, then the rule could be revised to limit its application to that situation, which would help avoid potential litigation over esoteric and marginal ways not yet thought of in which an institution's processing systems could run afoul of the "late for any purpose" language.

Thank you for the opportunity to provide these comments.

Very truly yours,

Daniel W. Morton
Senior Vice President & Senior Counsel