

June 18, 2008

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

RE: PROPOSED AMENDMENTS TO REGULATION DD; DOCKET NO. R-1315

Dear Ms. Johnson:

We appreciate the opportunity to comment on the proposed amendments to Regulation DD¹ issued by the Board of Governors of the Federal Reserve System ("Board"). For almost 15 years, Strunk & Associates has consulted with banks, thrifts and credit unions throughout the country in connection with Strunk's Overdraft Privilegesm Service ("OPS") and Occasional Overdraft Privilege Service ("OOPS!"tm); collectively the Strunk "Program" or "program"[©]. With over 1,500 active financial institution clients of all charter types nationwide – who collectively have *over twenty-five million (25,000,000) consumer checking, or share draft checking, accounts participating in the program* – we have a tremendous amount of experience in overdraft protection/payment services. We share the Board's concerns with the practices of some in the industry that may have misled consumers with respect to the true nature of discretionary overdraft protection services, and we agree that more uniform disclosure requirements, such as the ones found in the proposed amendments to Regulation DD,² which implements the Truth in Savings Act,³ would benefit consumers and improve competitiveness among financial institutions. While we agree with many provisions of the Proposal, we have concerns about some of the specific amendments that have been proposed. Our comments on the Proposal are set forth below and are identified by the title of the section of the Proposal to which they relate.

Opt-Out Disclosure Requirements for Overdraft Services

Among other things, the Proposal sets forth content and timing requirements for the substantive opt-out right established in the proposed amendments to Regulation AA.¹ As a company, we have always advised our clients to offer their customers a meaningful opportunity to opt out of any overdraft services that they do not want. Therefore, *we strongly support the Board's decision to require all financial institutions to provide a meaningful opt-out opportunity to consumers.*

¹ 73 Fed. Reg. 28739 (May 19, 2008) ("Proposal").

² 12 C.F.R. Part 230 ("Regulation DD" or "Regulation").

³ 12 U.S.C. §§ 4301 *et seq.*

¹ 73 Fed. Reg. 28904 (May 19, 2008).

Section 230.10(b)-Format and Content.

The Proposal requests comment on the preferred channel for a consumer to exercise his or her opt-out right. *We believe that the best approach would be to allow consumers to opt out by calling a toll-free number, visiting the financial institution's website, or by speaking in person with an employee of the institution at one of the institution's physical locations.* We believe that a "mail in" form with a check-box would be neither effective nor efficient. It would not only need to be stamped and mailed by the consumer, it would also result in a tremendous waste of resources, as most consumers would likely be disposing of it as waste. In addition, it would raise problematic consumer identification issues.

We also strongly support the Proposal's provision that would allow financial institutions to provide consumers with a brief explanation of the consequences of opting out of a discretionary overdraft payment program. *One of our concerns with the substantive opt-out right is that it will confuse consumers by making them think that their decision to opt-out from discretionary overdraft services will prevent financial institutions from charging insufficient funds fees. Therefore, the opportunity for financial institutions to explain the consequences of an opt-out decision is necessary to afford consumers a chance to weigh the impact of their decision.* We believe this aspect of the Proposal would ensure that consumers have all the information necessary to make an informed decision about the merits of their overdraft services.

Section 230.10(c)-Timing

The Proposal requires that opt-out notices be given before a financial institution assesses any fees for providing overdraft services and requires that subsequent notices be provided in one of two ways: the institution could either include the notice on the consumer's periodic statement or on a separate overdraft notice submitted shortly after the overdraft has been paid. Regardless of which method the institution chooses, the consumer must receive an opt-out notice at least once during each statement period in which an overdraft service fee is assessed. While we agree that subsequent opt-out notices may benefit some consumers, *we do not believe that a lengthy, detailed notice should be included on each periodic statement. We fear that providing such notice, which will almost certainly be accompanied by an explanation of the potential harms that might result from the consumer's decision to opt out, would bury consumers with information while imposing a substantial compliance burden on financial institutions.*

A brief consideration of the information already included on almost every financial institution's periodic statements illustrates the informational burden that additional, detailed opt-out notices would impose. Most statements record the consumer's account activity for the statement period and disclose other fee information. In addition, *a typical financial institution is already providing its customers with line-item disclosures for each new NSF (or overdraft) fee incurred during a statement period, as well as a daily NSF (or overdraft) notice for each transaction resulting in an NSF (or overdraft).*

Furthermore, *millions of consumers are already receiving aggregate, or cumulative, overdraft fee disclosure, on their monthly statements.* After factoring in the reality that most consumers also receive overdraft/NSF fee disclosures at account opening and again if their fees change, *it seems likely that a large majority of consumers are already, or will shortly be, receiving at least three separate notices, or disclosures, of overdraft related fees.* We do not believe that—in addition to the separate fee disclosures that most consumers are already receiving—an additional opt-out notice should be included with each periodic statement that contains a new overdraft fee, especially since the opt-out notices must contain excessively detailed information. Rather, *we believe that the unintended product of providing consumers with a well-meaning-but-bewildering amount of disclosures will be consumer confusion and more, not less, fees and costs.*

Instead of requiring such a large amount of information to be included in each periodic opt-out notice, we recommend that the final version of the Proposal allow financial institutions to place a concise statement of the consumer's right to opt out on the consumer's periodic statement, with a more detailed explanation mailed to the consumer on a less frequent basis. The concise opt-out notice, which would be printed in close proximity to the aggregate fee disclosures mandated by 12 C.F.R. Part 230.11, might read as follows: "If you have questions about the fees associated with your discretionary overdraft services, or if you would like to opt out of your discretionary overdraft protection service, please call us at XXX-XXX-XXXX." Thereafter, financial institutions could mail a separate, full-fledged opt-out notice on a less frequent basis—perhaps annually or bi-annually. *We believe that this approach, which would be substantially similar to the policy requiring financial institutions to provide annual disclosures of the institution's privacy policy, would offer a practical way to address the Board's concerns over overdraft service disclosures while avoiding a policy that requires consumers to sift through mountains of information on their periodic statements.*

Section 230.11(a). Disclosure of Aggregate or Total Fees on Periodic Statements.

Current regulations require financial institutions that promote or advertise the payment of overdrafts to list on each customer's periodic statement the aggregate dollar amounts for overdraft fees and for returned item fees incurred by the customer, both for the statement period and for the calendar year to date. The Proposal would discard the distinction between those financial institutions that promote overdraft services and those that do not, imposing instead *a requirement on all institutions to disclose on their periodic statements the aggregate dollar amount for overdraft and returned item fees assessed.* *We fully endorse this approach.*

If the Proposal's aim is to improve consumers' access to information about the costs of their overdraft services, then whether or not a financial institutions advertises its overdraft services has no bearing on the fees they will incur for using those services. In fact, making the aggregate fee disclosure requirements contingent upon whether or not a financial institution advertises its overdraft services greatly *diminishes* the total amount of overdraft costs and fees being disclosed to consumers. *Because the largest financial institutions are also the institutions making most frequent use of the non-advertising loophole to avoid disclosing their aggregate overdraft fees, the lion's share of overdraft service fees are not currently disclosed in aggregate on periodic statements.*

Moreover, the failure to place an aggregate disclosure requirement on all institutions undoubtedly restricts, if not eliminates, the ability of most consumers to compare how account terms vary among institutions, resulting in less, not more, choices for consumers. Therefore, we *fully agree with the Board that requiring all financial institutions—regardless of whether an institution advertises its overdraft services—to disclose aggregate fee information would further the Proposal's goal of providing consumers with relevant information and should be included in the final version of the amendments to Regulation DD.*

Section 230.11(c). Disclosure of Account Balances.

A different provision in the proposed amendments to Regulation DD's aggregate fee disclosure requirements targets potentially misleading account balance disclosures. Under the Proposal, if a consumer makes a balance inquiry through an automated system, such as an ATM, website, or automated telephone response system, into the balance of his or her account, the Proposal would "prohibit institutions from including in the consumer's disclosed balance any funds the institution may provide to cover an overdraft item. . . . institutions must disclose an account balance that solely includes funds that are available for the consumer's immediate use of withdrawal, and may not include any additional amount that the institution may include to cover an overdraft."²

Nevertheless, *the Proposal would allow an institution to disclose a second balance that includes funds that could be advanced through the institution's overdraft service. But such a "second balance" would have to be accompanied by a prominent disclosure indicating that it includes funds provided to cover overdrafts.* In addition, the Proposal would not apply to telephone conversations, in-person discussions, or internet chats, although such conversations could not be deceptive.³ The Proposal does not require institutions to reconfigure their internal systems to provide "real time" account balances. Instead, the Proposal merely requires that balance disclosures not include funds that the institution may provide to cover an overdraft.

We agree with the Proposal's treatment of automated account balance disclosures. Yet, *we believe that this particular provision would be more useful if the Board were to include "safe harbor" language in the final version of the rule. Such safe harbor language would provide examples of what the Board considers to be a "prominently disclosed" notice that a given amount includes funds provided to cover overdrafts.*

Appendix B to Part 230.

Finally, we disagree with one aspect of the model opt-out notice included as Appendix B to the proposed amendments to Regulation DD. One of the clauses listed in the model notice states: "*We also offer less costly overdraft payment services that you may qualify for, including a line of credit.*"⁴ We believe the phrase is unnecessary and misleading. Traditionally, most financial institutions have offered multiple overdraft protection products/services.

² 97 Fed. Reg. 28745.

³ *Id.*

⁴ *Id.* at 28749.

Therefore, it is much more likely than not that most consumers have been, and continue to be, offered multiple, alternative overdraft protection products. However, *the actual cost of any overdraft product depends on many variables, making it impossible to state with any certainty which product is the "less costly" alternative in all circumstances.* For example, if a consumer's overdraft protection stems from a line of credit arrangement, the cost of that service will depend on the amount of the overdraft, the interest rate charged on the line of credit, and the amount of time the customer takes to repay the overdraft amount. Such an arrangement could prove to be more expensive than paying a one-time discretionary overdraft payment fee.

Conclusion

We strongly support the Board's efforts to bring greater uniformity to the contents of opt-out notices and aggregate fee disclosures, regardless of whether an institution "advertises" their overdraft services. We further support the Board's requirements to give consumers a meaningful opt-out opportunity both before and after the consumer incurs fees for overdraft services. *We do, however, urge the Board to reduce the number of times that the opt-out notice must be provided. In its current form, the proposed opt-out notice contains over twenty items of information for the consumer to digest.* The Proposal mandates that the opt-out notice accompany each periodic statement that reflects an overdraft charge (or that it be sent at least once during such a statement period). A typical periodic statement contains hundreds of items of information, ranging from basic account transactions (credits and debits of all types) to fee itemizations. Under the Proposal, future periodic statements will also contain additional aggregate and periodic overdraft and NSF fee disclosures. To add an additional requirement to include an opt-out notice with every such periodic statement will heap even more data onto wary consumers and will place new compliance burdens onto financial institutions, burdens that will eventually be borne by consumers. *Instead of burying consumers with information during each statement period in which overdraft charges are applied, we believe that a brief, concise statement notifying customers of where they can easily find more information about opting out, placed on each periodic statement, and followed by a more detailed annual (or even bi-annual) opt-out notification, would effectively inform and protect consumers and provide them with abundant information about the costs of their overdraft services.*

If the board or any of the agencies would like clarification of any of our comments, or has any questions, or would like additional information, please do not hesitate to contact me directly. Thank you for your consideration of our comments.

Very Truly Yours,

