

Subject: Regulation AA

Date: Jul 29, 2008

Proposal: Regulation AA - Unfair or Deceptive Acts or Practices

Document ID: R-1314

Document

Version: 1

Release

Date: 05/02/2008

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Comments on proposed amendments to Regulation AA - Unfair or Deceptive Acts or Practices [R-1314] Eduardo R. Larín, San Diego, CA 92163 These comments concern a deceptive practice involving the use of credit cards and credit lines linked to checking accounts for overdraft protection. Specifically, a bank should not be allowed to without disclosure use a consumer's credit card which is linked to a checking account for overdraft protection as a factor for not holding deposited items which it would otherwise hold. This practice is deceptive and harmful to many consumers. These comments relate to Regulation AA and the FTC Act, but because funds availability and check hold practices are involved they also relate to Regulation CC. Banks which follow this practice mislead consumers who enroll in programs linking a credit card to a checking account for overdraft protection. Overdraft protection credit lines are defined and advertised as protecting a customer from returned items drawn on their own account, so that their own checks don't bounce. The linked credit lines should not be applied without disclosure to determine holds and funds availability on third-party deposited items which would otherwise be held. This misapplication is unrelated to the defined and advertised function of overdraft protection. Because it is deceptively applied to

third party items this practice protects anyone except the customer. When undisclosed, this practice exposes customers to unnecessary and greater risk from unrecoverable losses and large overdrafts due to returned deposited items and fraud. This practice is intentionally undisclosed and is meant to protect banks from returned items and to increase profits from overdrafts and cash advance fees at high interest rates. In fact, banks even add the finance charge to the principal and then charge interest on the sum of these. A bank which follows this practice uses the customer's linked credit card for self-protection, self-insurance, increased profit, and to shift part of its usual operational risk to customers enrolled in such programs. It is very convenient for banks. Hence the push to enroll as many "credit-worthy" customers as possible in such overdraft protection programs. Regulation CC does not require banks to hold checks. Therefore for banks which do not place holds on deposited items the practice outlined here is not an issue and would make no difference as all customers are treated equally. However, banks which routinely hold certain usually high-risk items and follow the outlined practice treat customers who enroll in overdraft protection programs differently and without disclosure than those who do not enroll. Unless disclosed, customers who enroll in overdraft protection programs involving linked credit cards or lines should be treated no differently with regard to check holds and funds availability than customers without the service. Alternatively, customers should be able to opt out of the application of their linked credit card or credit line in this manner. Banks which follow this practice will want to argue that it benefits customers by providing funds earlier. They will play the "favorable funds availability" card to try to defend their clever practice. The problem is the non-disclosure of how the credit card is applied to items in a manner inconsistent with the commonly understood and advertised function of overdraft protection. The irony is that if the benefits were so great then why the non-disclosure. The lack of disclosure reflects the bad faith and lack of fair dealing involved in this practice. If such a practice were truly beneficial to customers then it would be openly advertised and competitive. But that is not the case. Customers would not like the idea that their credit card was being used as collateral to not hold someone else's possibly bad check that would otherwise be held if not for the linked credit card, unless they knew about it and could make an informed choice. Many customers might unknowingly benefit and as long as they remained unscathed. A customer might not know what the bank is doing until adversely affected. This is clearly a deceptive practice designed to more specifically benefit the bank while putting customers at greater risk. Otherwise, a customer may be misled into thinking a deposited item has cleared because the bank makes funds available prematurely because of the linked credit card, in good standing of course for the bank's own calculated

self-protection. If customers knew this was going on, they would prefer the usual hold. Such banks aren't bending over for customers. These aren't "risk-based" loans but "profit-based" loans which exploit customers. This practice presents self-protection for the bank and opportunities to service high-interest loans by facilitating increased overdrafts from returned large items. The linked credit card is used to secure a supposedly more "favorable" provisional funds availability. If customers knew of the practice they could make more informed choices. This practice can result in damages to a consumer far in excess of the typical fees and interest most consumers complain about. Consumers which become victims of external fraud due to this deceptive practice can unnecessarily wind up paying the bank thousands of dollars in interest alone. This is due to the unusually large and unexpected overdrafts which can occur upon charge back with this practice. This amounts to a lucrative opportunity for such banks involving high fees and interest for the bank from cash advances at high rates which are not allowed to be paid off before balances with lower rates, etc.. Customers can suffer multiple fees and damages stemming from the bank's behavior. In this sense consumers without overdraft protection are far safer than those who enroll. Their losses would be far less given that limited funds are made available according to the banks usual practice within the Regulation CC guidelines. Many banks acknowledge that check holds are also meant to protect consumers. It also appears that most banks do not follow this practice, which is thus not a prevailing practice, and recognize that it is not customer friendly nor would customers like the fact that it is undisclosed. When asked, these banks say "we wouldn't use your credit against you in that manner." However, the banks who follow the outlined practice cannot make the same claim. These banks are only interested in maximizing profits and are willfully negligent in exposing customers. The linked credit card should not be part of the check hold criteria, not if undisclosed. When this practice is studied closely, it is not simply deceptive and unfair, it is a form of fraudulent deceit. It deceptively facilitates harm to customers in order to benefit. Simply do the math on the high volume of large returned items and external fraud affecting depository accounts. Also take into account that check holds are here to stay for a while and for good reasons. There is no doubt that many customers have been harmed by this practice and the banks involved have benefitted and increased profits by setting up customers in this manner. This is particularly egregious given that overdraft protection programs are optional services into which customers are enticed. Banks who follow this practice have kept it secret because if disclosed profits would decrease. Consumers would not be misled and could make more informed choices as to when and how to use funds made available in this manner. In fact, it would be an intelligent and good idea for banks

in the future to be required to differentiate between not only “total balance” and “available balance,” but also between “collected funds” and “provisional funds” instead of mixing collected and provisional funds into one big container called “available balance.” The comment in the FRB Consumer Compliance Manual (in the section on Regulation CC, Miscellaneous Provisions (§ 229.19), Effects of the Regulation on Depository Bank Policies (§ 229.19(c)) and elsewhere which states that banks may provide funds earlier than the availability guidelines of Regulation CC based on whether the consumer has a linked credit card for overdraft protection needs to be eliminated or amended to state that the bank must disclose such a practice. Neither can the comment be interpreted as authorizing that banks can follow the procedure without disclosure. Such an undisclosed practice cannot be considered to be in good faith and clearly violates existing federal guidelines concerning deceptive and unfair practices and overdraft protection including the FTC Act Sec. 5, Joint Guidance on Overdraft Protection Programs, OCC Guidance on Unfair or Deceptive Acts or Practices, etc.. It also violates many sensible state consumer protection laws which the FRB and OCC have been lately too eager to challenge in order to side with companies which have an insatiable thirst to plunder consumers, all of which has adversely affected the economy and the public’s confidence in government. Thus the current financial situation which has been due to a steady increase of unregulated and sometimes government backed deceptive and unfair financial practices. The FRB comment is ill-formulated and inconclusive and banks involved could attempt to misuse it in bad faith and as a loophole for deceptive and unfair practices. FRB field examiners questioned have reasoned that the comment is meant to protect banks from returned items and thus secondarily meant to allow funds to become available sooner as the comment purportedly applies. They also admit that if undisclosed such a practice could be a problem. Otherwise, it’s like letting someone use your credit card for a specific purpose and without telling you uses it for something unrelated which can seriously harm you. This practice violates the trust which customers place in a bank and its supposed professional standards and to do what it contractually says it does. Banks are responsible for the manner in which they disclose information and the manner in which they process items and are expected to do so in good faith and fair dealing. When the practice outlined here is carried out without disclosure it poses significant risk to consumers. Consumers are not only exposed to unexpected overdrafts, fees, and interest which would otherwise not occur but also to numerous forms of external fraud. Banks who follow this practice attempt to profit from what they will want to call “consumer mistakes.” However, if not for the bank’s practices which facilitate such losses, the losses could otherwise not occur. The funds

would simply not be as readily available as per the bank's own standard practice. The bank's action is clearly an intervening cause. This has nothing to do with the bank's right to charge back nor the fact that customers are expected to know that a deposited item may be returned. The problem occurs much earlier in the process when the bank decides not to hold such items in the first place because of the linked credit card. For a consumer a credit line is not an asset but a liability. These credit lines are not like those of the highly abused "bounce-protection" programs. Traditional overdraft protection in the form of linked credit cards or lines can have credit limits of thousands of dollars and can even go "over-the-limit," opening the door to leaving a customer thousands of dollars in debt to the bank. Without the linked credit line banks would hold far more items. This also relates to Check 21. Consumers don't want deceptive and risky funds availability practices, they want banks to in good faith improve the collection process. The practice outlined here and which should be prohibited is simply another example of abuse of "overdraft protection" programs in order to impose fees and high interest rates on unsolicited "loans" from the bank. This is perhaps the sneakiest and most overlooked overdraft protection abuse practice of all given that it is applied in a totally unsuspected manner unrelated to its advertised and traditional function. This is a problem resulting from the introduction of credit based "services" into checking accounts which has insidiously attempted to transform a collection system into a lending system. It would be suspect for banks or the FRB to argue that such a practice need not be disclosed. It is clearly better for consumers that such a practice require disclosure.