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To: Federal Reserve Board RE: Docket No. R-1314; Unfair or Deceptive Practices Act To Whom it may concern, My name is David Eberhard. I work for a community bank with assets of about \$600 million. I am writing concerning the proposed rule addressing the Unfair or Deceptive Practices Act. The proposed rule contains provisions governing credit cards and also overdraft services. I would like to focus my remarks on the rules pertaining to overdrafts. I am respectfully requesting the agencies to withdraw the rules regarding overdraft services as they do NOT fall under the FTC act as an unfair or deceptive practice. Specifically, the FTC Act provides that that the FTC has no authority to declare an act or practice is unfair unless: (1) It causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. As noted in the Section-by-Section analysis of Overdraft Services, it has been a standard practice that if a consumer engaged in a transaction that overdrew his or her account, depository institutions used their discretion on an ad hoc basis to pay the overdraft, usually imposing a fee. With the increased use of technology, many financial institutions are using computer automation

to performing this daily task. I do not believe the FTC has ever proposed that paying an overdraft and imposing a fee has been an unfair or deceptive practice. However, the agencies with this proposal are in essence doing this. Under the Legal Analysis section it states, "Assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt out of the institution's overdraft service appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC." I completely refute this statement and believe it is totally untrue. As mentioned above, an act or practice is not unfair unless (1) it causes substantial injury, (2) injury is not reasonably avoidable, AND (3) injury is not outweighed by countervailing benefits. Overdraft services generally do NOT meet all three requirements that rise to the level of unfair or deceptive as I will explain below. **SUBSTANTIAL CONSUMER INJURY.** The analysis states that consumers incur substantial monetary injury due to the fees assessed in connection with the payment of overdrafts. I would like you to consider what does "substantial" really mean? This is a very subjective term. The analysis states that the fee associated with overdraft loans is about \$26 per item. One could argue that \$26 per item is not substantial at all while others could argue that even a \$5 per item fee is substantial. All I am pointing out is that this is a very subjective term that should not be easily defined. **INJURY IS NOT REASONABLY AVOIDABLE.** The analysis states, "It appears that consumers cannot reasonably avoid this injury if they are automatically enrolled in an institution's overdraft service without having the opportunity to opt out." This statement is not true. Consumers can in almost every instance reasonably avoid this injury. Elementary financial education tells a consumer that he or she should keep a check register in which the consumer records all deposits and withdrawals through their account. If a consumer keeps an accurate check register, the consumer knows how much money is in their account and knows when the account will go overdraw. An overdraft is almost always avoidable; hence the injury (overdraft fee) is also avoidable. I am a banker, but I am also a consumer. I keep a check register and I know how much I should have in my account to spend. At times that I did overdraw my account, the overdraft was not unexpected. The analysis goes on to state that "consumers often lack sufficient information about key aspects of their account. For example, a consumer cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available." I somewhat disagree with that statement. I agree that no one knows when a specific check will actually clear through an account. But once the check is written (or any other debit made), the consumer should show that in the register and know the funds for that check (or debit), although not yet cleared, are not available. As far as uncertain deposits and credits, the

consumer should not be spending funds for deposits that have not actually been made to the account. Financial Institutions have gone to great lengths to make information more widely available to consumers. For example, with telephone and internet banking, it is reasonably easy for a consumer to regularly check the activity in their account. Further, if the consumer is expecting a deposit, the consumer can call the bank and see if the deposit has been posted. It should not be unreasonable for the consumer to do at least that before funds are spent. INJURY IS NOT OUTWEIGHED BY COUNTERVAILING BENEFITS. The analysis states that particularly with ATM and POS debit card transactions benefits to overdraft services do not appear to out-weigh the injury. Again I believe this is a very subjective benchmark. Who is to say that the emotional distress (embarrassment) avoided that otherwise may have been caused by having a POS transaction declined, for example, is not worth more than the average \$26 overdraft fee? There are more than monetary benefits to these transactions. It provides a convenience to the consumer that also may outweigh the injury. The proposal for a partial opt-out of ATM and debit card transactions is not technically feasible. To allow an opt-out for ATM and POS transactions, a massive amount of additional programming will have to be made for all card swipe machines. And what about those financial institutions that inadvertently take a POS transaction overdraft because their system is not on-line real-time. Up until a little over a year ago, our bank was not real-time. What that means is each night we would send a batch "Positive Balance File" to our debit card processor. This file would be loaded to the debit card network and the balance from that night would be available for purchases throughout the next day. However, because it was not on-line, the bank would receive checks that would post against the account up to two days before the POS transaction actually posted to the account. This would cause an overdraft situation for the POS transaction. We couldn't return the POS transaction because it had been properly authorized, and we couldn't return the check that really made the account overdraft because it was past the midnight deadline for returning checks. We had no other option than to overdraft the account. Requiring an opt-out feature on debit card transactions, although it sounds nice, would be technically unfeasible unless every bank went with on-line real time systems. For smaller community banks, this option also is not financially feasible. I would like to mention that State Bank of Southern Utah does have an overdraft service. As I stated previously, a little over a year ago we switched our debit card processing to be on-line real time. It was a major process to go through the change, but it has helped our customers. We generally do not allow customers to use their debit cards to go overdraft. When a customer swipes their card for a pre-authorization, it is based on the balance we are showing on their

account. If the transaction would cause an overdraft, the pre-authorization is declined and the customer must find some other way of paying for the purchase. I wanted to bring this up to show that the proposed rules, if passed, generally will not have a significant impact on our current operations. However, in order to remain competitive with other banks that provide this service we may have to as well. Please be aware that a lot of times it is the consumers' demands for better access and convenience that require us to make such changes. In conclusion, I am requesting the agencies to withdraw the proposed rules for overdraft services as, according to the FTC standards, they do not rise to the level of unfair or deceptive. The test for substantial injury is purely subjective. The criteria for the injury not being reasonably avoidable is not met as in nearly all cases an overdraft is reasonably avoidable by the consumer properly managing his or her account. Finally, I believe the benefits to provide an opt-out opportunity do not outweigh the injury, and the requirement to provide an opt-out for POS transactions is not technically feasible. The consumer already has the ability to opt-out: **DON'T SPEND MORE THAN YOU HAVE.**