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August 4, 2008

BY ELECTRONIC DELIVERY

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

Re: FRB Docket No. R-1314

Dear Ms. Johnson:

KeyBank National Association ("KeyBank") submits this comment letter in response to the Proposed Rule to amend Regulation AA ("Proposal") published by the Board of Governors of the Federal Reserve System (the "Board"), The Office of Thrift Supervision and the National Credit Union Administration (collectively, the "Agencies") in the *Federal Register* on May 19, 2008. KeyBank appreciates the opportunity to offer its comments on the Proposal.

General Comments

The Proposal would prohibit institutions from engaging in certain acts or practices in connection with consumer credit card accounts and overdraft services for deposit accounts. We will only provide comment regarding the provisions within the Proposal concerning Overdraft Services. Also, because the Board's Regulation DD Proposal ("Regulation DD Proposal") published in the *Federal Register* on May 19, 2008 works in concert with the Proposal, we have considered both Proposals together.

We request that the Agencies consider the significant impact to financial institutions of the Proposals. Both will impose substantial burdens on financial institutions without corresponding benefit to the customer, and could potentially lead to more customer confusion. If the Proposals are adopted as written, there will be a negative impact on certain customers. For example, more items will be returned, more returned item fees and other merchant fees will be assessed, and more negative information will be provided to the consumer reporting agencies.

The Regulation AA Proposal

Substantive Requirements

We disagree with defining current industry overdraft practices as unfair, and would argue that the Federal Trade Commission ("FTC") has not met the necessary burden of proof to declare such practices as unfair pursuant to the FTC Act (15 USC §45(n)). We do not agree that overdraft fees: 1) cause substantial economic or monetary injury from the payments of overdraft; 2) are unavoidable; and 3) that the injury is not outweighed by the countervailing benefits to customers. To the extent the Agencies are concerned about the impact of overdraft fees on customers, the Agencies should address such concerns within other consumer disclosure regulations.

While we acknowledge that institutions should review all aspects of their overdraft services in light of the current provisions of the FTC Act and the 'Best Practices' outlined in the Interagency Guidance on Overdraft Protection Programs, [1] we disagree that current industry practices do not provide customers with the opportunity to avoid overdraft fees. For example, certain institutions do permit customers to opt out of overdraft services. KeyBank currently provides deposit customers with the right to opt out of the payment of overdrafts within its Deposit Account Agreement and Funds Availability Policy, which customers receive at the time of account opening.

We would also argue that often the benefit of having an item paid is outweighed by the assessment of an overdraft fee. For example, the return of a mortgage payment with associated negative reporting to a consumer reporting agency may far outweigh the assessment of a fee. Also, we are very concerned that by defining current industry overdraft practices as unfair pursuant to the FTC Act, it may expose institutions to extensive state review pursuant to the various state provisions governing unfair and deceptive practices.

To the extent the Agencies adopt a requirement to provide an opt-out notice to customers, we would encourage the Agencies to add such requirement to other consumer disclosure regulations, including Regulation E. The Agencies' goal of ensuring that customers understand overdraft services and have the choice to avoid the associated costs *where such services do not meet their needs* could be accomplished through disclosure requirements within Regulation DD and Regulation E, without declaring current overdraft services as unfair under the FTC Act.

Opt – Out: General

The Proposal prohibits an institution from charging a fee on a customer account in connection with an overdraft service unless the customer is provided notice and a reasonable opportunity to opt out. The customer's right to opt out would apply to all transactions that overdraw an account, including payments by check, ATM, debit card purchase or recurring payments, with very limited exceptions. In addition, the Proposal would require institutions to

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[1] *See*, Interagency Guidance on Overdraft Programs (Joint Guidance), 70 FR 9127 (Fed 24, 2005)

provide customers with the option of opting out of overdrafts caused by ATM transactions and point-of-sale transactions ("POS") only.

We would ask that the Board confirm that the initial notice requirement under Regulation DD applies to customers opening new accounts at the institution and likewise does not apply to existing customers, unless they open a new account. We would also ask that the Agencies to confirm that an institution is permitted to assess an overdraft fee to existing customers prior to providing notice of a right to opt out, but would then be required to provide an initial notice of such right after the assessment of the overdraft fee.

To the extent that the Agencies require an institution to provide customers with the opportunity to opt out of certain overdraft policies, we agree with a requirement to provide an initial notice of the right to opt out of the policy. However, we disagree with a subsequent notice requirement for the same customers that have received a clear and conspicuous initial notice. Customers would have received an initial notice either at the time of account opening or, for existing account holders, after the assessment of the first overdraft fee subsequent to the effective date of the final rule.

We believe the subsequent notice requirement is unnecessary, provided the customer has received an initial disclosure of the right to opt out. We disagree that the subsequent notice will provide additional information to the customer. For example, the majority of institutions already provide an overdraft notice to the customer after the overdraft which contains information concerning the account activity that triggered the overdraft. The requirement to provide notice subsequent to each overdraft (one during a statement period) in the proposed format and containing an opt-out notice would require institutions to substantially change current statement and/or overdraft notices, imposing significant costs on the institutions.

In addition, we would request that the Agencies recognize that many banks do not process all transactions in a real time environment which results in certain types of transactions that a bank is required to honor once authorized. For example ATM withdrawals, transfers, bill payments, and debit card POS transactions are authorized and posted to the account at some time in the future (same day to three business days later). Also, there may be legal restraints put on the account after items have been authorized which might reduce the available balance for paying previously authorized transactions which when they post, the bank is required to pay. In certain of the situations in which the institution is required to honor an item, it will have to assume the risk, without the ability to mitigate such risk through the assessment of an overdraft fee.

Opt-out: Partial

KeyBank strongly urges the Agencies eliminate the requirement that institutions provide a "partial opt-out" right to customers. The cost associated with the development of a system to correctly handle partial opt-outs would be extremely high. In addition, it is unclear whether such a system could be built to address a customer's request for a partial opt-out in all cases. The complexity and cost of developing such a system to identify and segregate ATM and POS transactions for certain customers arguably will outweigh any benefit to the customer.

We are also concerned with the disclosure requirements pertaining to the partial opt-out. While we feel that in general the opt-out notice may lead customers to the mistaken belief that a financial institution will pay all items into overdraft if they do not opt out, we would argue that such confusion will be magnified if a "partial opt-out" requirement was in place. In that case, customers may be under the impression that the institution will pay all overdrafts for check and ACH transactions. In addition, ATM and debit card overdrafts are commonly misunderstood by customers. As a result, the choice to opt out of only those types of transactions may be misunderstood and made without a clear understanding of the impact.

Exceptions

While we agree with the exceptions provided in the Proposal, we would encourage the Agencies to expand the second exception to include other types of circumstances in which the institution does not have notice of the transaction, and therefore cannot verify whether the customer has sufficient funds until it receives the actual settlement. For example, card issuers may not receive notice of a debit card transaction under a certain threshold amount until the transaction settles. In this case, an institution should be permitted to assess an overdraft fee if the transaction causes the customer to overdraft his or her account, despite the customer's election to opt out.

Debit Holds

The Proposal would provide that an institution is prohibited from assessing an overdraft fee or charge the customer's account in connection with an overdraft service if an overdraft would not have occurred but for a hold placed on funds in the customer's account that exceeds the actual purchase or transaction amount. KeyBank requests that the Agencies clarify whether it would be permissible for an institution to assess a fee and then refund the fee once the institution has knowledge that the actual settlement amount was less than the amount authorized. We are concerned that the Proposal as written related to debit holds is far too complex for institutions to implement. It is unclear how an institution would identify these transactions in order to either avoid paying an item into overdraft or assessing an overdraft fee. In that case, the institution would arguably have to refund or credit the fee to the customer's account once the settlement has occurred.

While it is possible to reduce the impact of debit holds for certain types of merchant transactions that are likely to be in excess of the actual amount of the transaction, (e.g. gas station and hotel transactions) by excluding holds associated with these transaction codes from nightly batch decisions, the prohibition on assessing overdraft fees for all types of debit holds poses substantial risk to the issuing financial institution. The institution would be required to pay an item it has authorized, and will be forced to assume the risk, without the ability to mitigate such risk through the assessment of an overdraft fee.

We would additionally request that the prohibition against assessing an overdraft fee in connection with the type of debit hold described in Example 4 would be removed from the final rule. In other words, we request that the Agencies permit an institution to assess an overdraft fee

in cases where the merchant does not use the same transaction number for both the authorization and settlement. In such case, the authorization and settlement amounts are held for a period of time until the institution is able to reconcile the transaction. The institution does not have the necessary information from the merchant to avoid this situation and as a result, the merchant is in the best position to prevent this issue. It is unclear how the institution would identify this situation prior to the payment of funds into overdraft and the assessment of the overdraft fee. Therefore, to the extent the Agencies adopt the debit hold provision, we request that an institution be permitted to assess the overdraft fee in these circumstances.

Transaction Clearing Practices

The Agencies request comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a customer's account. We would urge the Agencies to avoid prescribing a certain method of transaction clearing practice and permit each institution to determine the appropriate approach. We do not feel that in cases in which the institution discloses its practices to customers, transaction clearing practices should be regulated pursuant to Regulation AA. The Interagency Guidance on Overdraft Programs includes providing an explanation of transaction clearing practices to customers as one of its "Best Practices." As a result, no further regulation concerning transaction clearing practices is required.

In addition, we believe that the payment of higher dollar items before smaller dollar items is not necessarily detrimental to the customer. Larger dollar items tend to be more significant to the customer, (e.g. mortgage payments), and a requirement to pay a smaller item before such larger dollar item may have a significant negative impact on the customer, including negative reporting to the consumer reporting agencies, bounced check fees, increases in default interest rates and additional merchant fees.

Regulation DD Proposal

Initial Notice Requirement

According to the Regulation DD Proposal, a bank must provide an overdraft disclosure: (a) prior to its imposition of an overdraft fee, provided that the customer has a reasonable opportunity to exercise the opt out right prior to the assessment of the overdraft fee; and (b)(i) on each periodic statement reflecting any overdraft fee(s) in close proximity to the disclosure of total overdraft fees; or (ii) at least once per statement period on any notice sent promptly after the bank's payment of an overdraft. The disclosure must contain specific information, including the dollar amount of overdraft fees, the disclosure of the customer's right to opt out and alternative payment options offered by the bank. The bank may also briefly describe the consequences of the decision to opt out of the bank's payment of overdrafts, including that the transaction may be denied and that the customer may incur returned item fees from the bank as well as the payee merchant. The Board has provided a model form of disclosure.

To begin with, we request that the Board to permit institutions to require customers to go through the opt out process by providing the initial opt-out notice at account opening. This would allow institutions to begin to assess an overdraft fee after account opening.

The Board requested comment on the content of the initial opt-out notice. To the extent the Board requires overdraft disclosures, we request that the Board modify the current requirements. We are concerned that both the content and form of the notice requirements may be misleading to customers. The current model notice emphasizes overdraft fees over other fees that the customer may be charged. Based on the format, it could lead customers to the mistaken impression that the bank would honor all overdrafts if they choose not to opt out. This is clearly not the case, and may actually lead to an increase in reliance on the overdraft service as a result, a result the Board and the Agencies are trying to avoid.

As part of the initial notice, the Regulation DD Proposal would require an institution to provide information concerning alternative "overdraft protection options" offered by the bank. We are concerned that by stating that alternatives to overdrafts are less costly, as described in the current model form, it will confuse customers as to the true cost of these alternatives. We do not believe such alternatives are less costly in all circumstances.

The Board requests comment as to whether institutions should be required to provide a form with a check-off box that customers may mail in to opt out and whether customers should also be allowed to opt out electronically, provided that the customer has agreed to the electronic delivery of information. We do not believe that the Board should require a bank to provide a check-off box that customers may mail. Instead, we request that the final rule allow institutions the flexibility of providing the notice of opt out in several different ways. We have requested, that the Agencies permit an institution to require customer's to make an opt-out election at account opening. We would request that a customer could opt out via the telephone, electronically or through a paper opt-out form mailed into the institution. This would allow institutions to incorporate the opt-out election into current account opening applications and procedures.

Subsequent Notice Requirement

The Regulation DD Proposal requires the overdraft disclosure to be given: (i) on each periodic statement reflecting any overdraft fee(s), in close proximity to the disclosure of total overdraft fee; or (ii) at least once per statement period on any notice sent promptly after the bank's payment of an overdraft. To the extent a customer has received the overdraft disclosures at account opening, we do not feel that the subsequent notice is necessary or adds significant benefit to the customer. Under such circumstances, the bank would already have provided a clear notice to customers. Customers do bear the responsibility for keeping track of their transactions and balances and will have received information and the ability to opt out of overdraft services prior to the assessment of the fee. We believe, as stated in the Regulation AA comment above, that the cost and complexity of this disclosure requirement outweighs additional benefit to the customer.

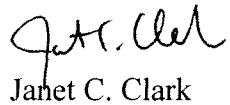
For existing account holders, the notice would be required only if the customer incurs an overdraft fee. At that point, an institution could provide a notice that was similar in content to the initial overdraft disclosure. We have already provided some comment as to the content of the initial disclosure requirements above. If however, the subsequent notice requirements are adopted, we would agree that the final rule should permit an institution to have flexibility with respect to the means in which it provides the subsequent notice. We ask the Board to permit a bank to provide the notice on or with the periodic statement or overdraft notice provided by banks.

Disclosure of Fee Totals

Under the Regulation DD Proposal , a bank would be required to disclose on each periodic statement, as applicable, the total dollar amount for all overdraft fees or charges and the total dollar amount for all fees imposed on the account for returning items. This disclosure must contain the total for the statement period and year-to-date. We request that the Board remove the requirement to disclose these totals on the periodic statement as customers already have access to the information in each periodic statement that they receive.

Again, we thank you for the opportunity to provide comment. If you have any questions or would like additional information, please contact me at 216.689.4118.

Sincerely,



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