

Massachusetts Bankers Association

August 4, 2008

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

Chief Counsel's Office
Office of Thrift Supervision
1700 G Street NW
Washington, D.C. 20552

Re: Docket No. R-1314, Regulation AA
Docket ID. OTS-2008-0004

To Whom It May Concern:

On behalf of our 200 commercial, savings, cooperative, and savings and loan members throughout Massachusetts and New England, the Massachusetts Bankers Association (MBA) appreciates the opportunity to comment on the proposed amendments to Regulation AA issued by the Federal Reserve, the Office of Thrift Supervision, and the National Credit Union Administration (the agencies). The proposed amendments address two regulatory issues with regard to overdraft protection programs, a consumer's right to opt-out of the programs as well as debit card holds. In addition, the agencies have requested comments on transaction clearing policies as they relate to overdraft protection programs.

MBA has worked with our member banks over the last several years to promote responsible implementation of overdraft protection plans. In 2006, the Association produced "Recommended Practices" that encourage our member institutions that offer these products to adhere to the regulatory guidance issued by the federal banking regulatory agencies, as well as adopt policies that closely monitor customer usage and outreach to those individuals who may be facing financial difficulties. The Recommended Practices have been distributed to our member banks on a regular basis over the last two years.

General Comments

As you know, the payments system has become far more efficient in recent years. Checks are no longer the only method consumers have to pay bills and pay for goods and services. The vast majority of our member banks offer debit cards, online banking, automated debits, and other payment options to their customers. Transactions, both debits and credits are posted faster than ever before thanks to advances in the electronic payments system.

While this has been positive for consumers in providing access to their funds, it is more important than ever for individuals to keep track of their transactions and account balances. Customers must keep track of transactions by balancing their checkbooks and regularly checking their account balances to avoid inadvertent overdrafts. Ultimately, it is the customer's responsibility to know what their actual balance is on a daily basis.

However, even the most careful customers sometimes will have inadvertent overdrafts. Historically, most banks paid overdrafts on a discretionary basis, based on the historical activity of the account and the likelihood that the customer will cover the overdraft. At many institutions today, that process has been automated to promote consistent treatment of all customers. Customers have come to appreciate these services, which can help them avoid the embarrassment of bouncing a check and also preventing NSF fees and returned item fees from merchants. These can range from \$25-\$90 per bounced check depending on the retail store, utility or other payee. Since the bank will cover the bounced check or electronic transaction, the retailer's or other fees are avoided.

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 opt-out requirements could benefit consumers. While many of our member banks already provide an opportunity for customers to opt-out of the program as well as detail fees on periodic statements, we are concerned that the proposed amendments regarding debit card holds and transaction processing procedures may overreach and that the cost and regulatory burden of compliance with these new requirements would be extensive, particularly for smaller institutions that offer these products. Our comments on these specific issues are below.

Consumer Right to Opt Out

The proposed amendments create a substantive right for consumers to opt-out of any overdraft protection service offered by a depository institution. This would include any program or service that charges a fee for paying any transaction that overdraws the consumer's account. Under the proposal, consumers would not be assessed any overdraft fees until the institution has provided the consumer with a notice of their right to opt-out as well as a reasonable opportunity to exercise that right. MBA has always recommended to our member banks that customers should be offered an opportunity to opt-out of any overdraft services that they do not want.

In addition to the initial notice at account opening, the agencies have also proposed that banks provide the opt-out notice "at least once during or for each periodic statement cycle in which any overdraft fee or charge is assessed." Thus, if a customer were to overdraw their account five times in a particular year, the opt-out notice would be required on each of those periodic statements.

MBA Position

While MBA generally supports providing consumers with an opportunity to opt-out of overdraft protection programs, we are concerned with some aspects of the proposed rule. Specifically, the agencies are proposing that no fees may be charged until the consumer has a "reasonable" amount of time to opt-out. We would encourage the agencies to better define this term and provide appropriate examples so that institutions could ensure compliance with this regulation.

In addition, the requirement that banks provide the notice during each statement period when a customer incurs an overdraft fee is overly burdensome and creates a significant cost and operational challenge. Depending on the format of a periodic statement, extra pages might be required, increasing mailing and production costs with little benefit to the vast majority of consumers.

MBA supports providing the opt-out notice at account opening, when all other disclosures are provided to the customer. If the Fed moves forward with a periodic notice requirement, we would encourage the use of an annual notice, similar to the annual privacy notice required under Title V of the Gramm-Leach-Bliley Act. This would substantially reduce costs and compliance burden, while still providing customers with at least one notice per year. Alternatively, a local or toll-free number and a short explanation of the opt-out process could be provided on the periodic statement without the detail of the full notice.

Partial Opt-Out

The agencies have also proposed that consumers have the right to opt-out of overdraft programs only for payment of overdrafts at Automated Teller Machines (ATMs) and point-of-sale (POS) debit card transactions. In proposing the partial opt-out right, the agencies state that "while the payment of overdrafts may allow consumers to avoid merchant fees for a returned transaction, there are no similar consumer benefits for ACH withdrawals and point-of-sale debit card transactions." The agencies also note that a consumer whose POS debit transaction is denied will not incur the standard insufficient funds charge that would accompany a returned check.

MBA Position

We believe the proposed partial opt-out will create significant confusion among consumers and may be technically prohibitive in certain situations. While the agencies provide some examples of transactions that would be covered under the partial opt-out, it is by no means a comprehensive list. Many consumers use their debit cards for online transactions, recurring payments with creditors, and telephone payments, among others. Would all of these payments be considered POS debit transactions under the proposed rule? ATM transactions can also take different forms with advances in technology. For example, some ATM users may transfer funds to pay a loan held at the same institution. Would these types of transactions be included in the partial opt-out?

The wide variety of transactions that can be undertaken with a debit card or at an ATM will necessitate lengthy, confusing disclosures that most consumers will ignore. However, if a recurring payment, such as an auto or mortgage loan payment is initiated via a debit card or an ATM, the institution would be required to deny payment due to insufficient funds. As more and more consumers utilize internet banking, online bill payment systems, and other electronic payment methods, the partial opt-out will become even more confusing as consumers are subject to inconsistent application of overdraft fees.

The proposal does not recognize any potential benefits for providing overdraft services on POS debit transactions. MBA also encourages member banks that offer overdraft services to consider a de minimis fee waiver, so that small overdrafts, which appear to be the source of many consumer complaints, do not incur the fee.

Finally, we are deeply concerned with the costs as well as the regulatory and operational burden a partial opt-out will place on the banking industry. In particular, many small banks that offer these services rely on an outside vendor or core processor to provide the service. As the proposal acknowledges, "some processors do not currently have systems capable of paying overdrafts for some, but not all, payment channels." We urge the agencies to rely solely on the comprehensive opt-out, along with the enhanced disclosure requirements proposed under the amendments to Regulation DD, since financial institutions will face significantly higher costs without substantial consumer benefits.

Debit Holds

The agencies' proposal also addresses the relationship between overdraft protection programs and debit holds placed on a consumer's account by a merchant. Specifically, the proposed regulation prohibits any financial institution from assessing an overdraft fees in cases where the overdraft is caused solely by a hold placed on funds as the result of a debit card transaction, the hold amount exceeds the actual amount of the transaction, and the actual purchase amount would not have caused the overdraft. Institutions could assess overdraft fees in cases where the actual purchase amount, prior to the hold, would incur an overdraft.

MBA Position

We are concerned that, similar to the proposed partial opt-out requirement, the agencies' proposal regarding debit card holds will be costly and complicated to implement for financial institutions and

potentially confuse consumers. Under the proposal, financial institutions could only assess an overdraft fee if the amount of the transaction ultimately presented for payment would have caused an overdraft to occur at the time of the original transaction. Unfortunately, most banks use a daily transaction clearing method, which makes such real-time balance computations almost impossible.

The bank also has no ability to determine the amount of the hold placed by the merchant, outside of limits imposed by the card associations. Once the pre-authorization is presented to the bank, it must place a hold on the customer's funds, making that amount unavailable to apply to other transactions. In reality, there is no distinction between funds subject to a debit hold and funds that are no longer in the account.

Additionally, some transactions, such as those for hotel stays and rental cars, may not be settled for several days after the initial hold has been placed. It would be extremely difficult for a bank to determine which overdrafts were subject to a fee and which were not over that period. During that period, banks would have the additional risk of covering transactions with no ability to recoup their costs in some cases. An institution might decide to deny all transactions in these cases, causing further confusion for consumers. Depending on the transaction settlement systems and balance computation methods in use by the institution, consumers could also face inconsistency in the application of such a policy, since some banks might choose to calculate the balance on the date of the pre-authorization, while others might use the date of settlement.

The technological and operational costs to implement this regulation would be substantial. In addition to programming existing systems or purchasing or developing new systems to track transactions in this manner, banks would be required to provide significant training for staff to answer potential questions raised by consumers. We would encourage the agencies to address this issue in a different manner, possibly with disclosure requirements for merchants as to the amount of the hold they will place on a customer's transaction.

Transaction Clearing Practices

While the agencies have not proposed any new rules regarding transaction clearing policies in the proposal, they have solicited comment on this issue. Specifically, the agencies ask whether they should impose a requirement that would, absent consumer consent to the contrary, require financial institutions to pay smaller dollar items before paying larger dollar items when those items are received on the same day. According to the proposal, the agencies are concerned that some institutions' clearing practices have a substantial impact on the overdraft fees incurred by consumers.

As the agencies know, transaction clearing policies vary widely between institutions. Some banks might post teller withdrawals prior to posting any other transactions, while some banks might post checks first, followed by other types of transactions. In addition, even check posting can vary, with some institutions ordering transactions by amount and others using check numbers.

MBA Position

MBA is concerned that requiring consumers to affirmatively consent to a particular transaction posting method will cause significant problems both for consumers and financial institutions. While we encourage our member banks to disclose their transaction clearing policies in their account agreement and apply these policies uniformly, creating a situation where different customers would be subject to different policies would only serve to confuse consumers, who would be forced to determine which method is most appropriate for them in their circumstances.

We believe that most consumers would rather have their largest payments, such as mortgage loan payments, rent, or utility bills, paid first. Most of these payees charge late fees or returned check fees, and the consumer will still be subject to their own financial institution's NSF fee as well. In addition, late payments for a mortgage or car loan could have a detrimental effect on the consumer's credit score, while small

transactions from a merchant most likely will not be reported to the credit bureaus. A small-items first policy could actually increase costs to consumers over the long term. Due to the complexity of the transaction clearing processes, MBA does not believe that the agencies should propose regulations in this area.

Conclusion

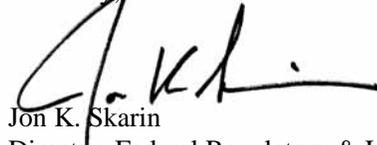
MBA generally supports efforts to provide consumers with choices regarding overdraft protection programs. While we strongly believe that overdraft protection programs offer a valuable service to consumers and that the level of customer complaints at our member banks in Massachusetts is extremely low, providing a substantive right to opt-out of these programs could help some consumers who do not wish to utilize these services. We are concerned with several of the other provisions in the proposal, particularly those sections addressing the partial opt-out right and debit card holds. These proposals would be extremely costly for banks, particularly small community banks to implement with little benefit for the vast majority of consumers.

We appreciate the efforts of the agencies to address some of the issues that have been raised regarding overdraft protection programs. MBA believes that, used responsibly, these products can save consumers money on NSF and returned check fees from retailers and other merchants, while ensuring that individuals have funds available when checks such as mortgage payments or utility bills are presented for payment. Ultimately, it is the customer's responsibility, not the bank's, to accurately determine their account balances and avoid overdrafts.

Finally, if the agencies decide to move forward with a final rule, we strongly encourage you to extend the effective date at least one year, since many of the technical issues will take time to implement. In particular, smaller banks must wait for third party vendors to make the required changes to ensure their compliance with any new regulations.

Thank you again for the opportunity to comment on the proposed amendments to Regulation AA. If you have any questions or need any additional information, please contact me at (617) 523-7595 or via email at jskar@massbankers.org.

Sincerely



Jon K. Skarin

Director, Federal Regulatory & Legislative Policy

JKS