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Consumer Banking

August 4, 2008

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

Re: Regulation AA; Docket No. R-1314

Dear Ms. Johnson:

The Board of Governors of the Federal Reserve System (the “Board”) has requested comments to its proposed revisions to Regulation AA and the staff commentary to provide account customers the right to opt out of overdraft services (the “Regulation AA Proposal”). The Board has also proposed revisions to Regulation DD, which would require disclosures about the opportunity to opt out of overdraft services and certain other account terms and costs associated with overdraft services (Docket No. R-1315) (the “Regulation DD Proposal,” and, together with the Regulation AA Proposal, the “Proposal”). JPMorgan Chase & Co., on behalf of JPMorgan Chase Bank, N.A. and its other subsidiaries, appreciates the opportunity to submit this response.

JPMorgan Chase & Co. (NYSE: JPM) (“Chase”) is a leading global financial services firm with assets of \$1.6 trillion and operations in more than 50 countries. The firm is a leader in investment banking, financial services for consumers, small business and commercial banking, financial transaction processing, asset management, and private equity. Under its JPMorgan and Chase brands, the firm serves millions of consumers in the United States and many of the world's most prominent corporate, institutional and government clients. Information about the firm is available on the Internet at www.jpmorganchase.com.

Chase has already commented on the Regulation DD Proposal in a separate letter dated July 18, 2008, in which we expressed concerns about the proposed disclosure requirements and suggested new language for the model form disclosure. Please also note that Chase Bank USA, N.A., JPMorgan Chase & Co.’s consumer credit card subsidiary, will also be commenting separately on the Regulation AA Proposal as it relates to credit cards.

General Comments

Chase recognizes that overdraft fees can impose an unwanted expense on consumers who have not effectively managed their accounts. That being said, we believe that consumers are in the best position to manage their checking accounts and avoid overdraft fees, as only they know their resources and spending needs. Accordingly, we believe the most effective way to help

consumers avoid overdraft fees is to ensure the consumer is fully informed about overdraft services and associated fees.

As required by current Regulation DD, banks already provide to customers at account opening clear and conspicuous disclosures about the fees and charges associated with the bank's checking accounts, and account statements disclose by line item any overdraft fee charged. Accordingly, consumers already have all necessary information to make an informed decision about whether to open or maintain a particular checking account at a specific bank. We believe that a key element of that decision is whether the bank provides an account with the terms and services the customer deems important. Due to the highly competitive nature of the retail banking industry, with over 8,400 financial institutions offering checking accounts, banks will continue offering new products and services featuring terms that are important to consumers. Hence, we do not believe there is any need to mandate an opt-out of specific product features in order to protect consumers; if consumers thought a particular feature was important, the market would strive to offer it in order to be competitive.

To provide consumers with more tools and resources to help manage their accounts, Chase has initiated customer information programs and provides services such as free online and telephone alerts, free mobile banking, free 24x7 telephone banking support, free 24x7 online banking, and over 9,000 free Chase ATMs, as well as options for committed overdraft protection, including links to credit card accounts, home equity lines and savings accounts.

While we believe that robust disclosure is the best way to address some of the concerns about overdraft fees, we agree that another way is to provide consumers with an opportunity to opt out of overdraft services. However, we believe the proposed opt-out in the Regulation AA Proposal would be very confusing and would have several unintended consequences that would likely be harmful to consumers and banks.

The Proposal reflects the Board's conclusion that charging overdraft fees without an opt-out opportunity is an unfair practice. We respectfully submit that this view is based on little if any quantitative study, insufficient consideration of the economic impact on consumers and the economy, and minimal data regarding any countervailing benefits that might outweigh the purported unfair practices. We believe, therefore, there is no basis for treating this practice as unfair. In addition, we believe that arbitrarily deeming this long-standing and accepted banking practice to be unfair will create unjustified potential liability for banks regarding their past practices. Accordingly, we urge the Board to consider other alternatives.

The OCC's existing deposit fee regulation recognizes that one of the legitimate purposes of deposit fees is the "deterrence of misuse by customers of banking services"¹ and yet the Proposal eliminates any incentive for consumers to take responsibility for monitoring their own deposit account balances and not writing a check or using a debit card when they do not have a sufficient account balance. To encourage responsible account use, there should be a consequence for

¹ 12 C.F.R. 7.4002.

consumers attempting a debit transaction that would overdraw an account. The Proposal not only removes any consequence for this behavior but also imposes (as a matter of legal requirement) operational, transitional and service costs on banks, debit transaction acquirers and merchants to support an opt-out election.

The Industry Practices Addressed by the Proposal Are Not Unfair

In its comments, the Board states that assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt out of overdraft services appears to be an unfair act or practice under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) (the “FTC Act”). The Regulation AA Proposal, however, provides very little support for this proposition. We are very concerned about the potential characterization of this long-standing and accepted banking practice as unfair, and believe that it does not meet the requirements for unfairness as articulated by the Federal Trade Commission (the “FTC”). Proposing to revise Regulation AA by classifying long-accepted banking practices as unfair exposes banks to significant potential liability under state laws that would be inappropriate and unjustified.²

We are not aware of any empirical studies conducted by the Board on this issue. In many instances, we believe the Board’s conclusions lack adequate support. For example, it appears the Board has conducted no studies of the Proposal’s impact or the effectiveness of alternatives. The Board cites various general articles, reports and statements made by others on which it has relied to draft the Regulation AA Proposal. However, it is not clear whether these studies are relevant to the issues at hand, or that they provide any reliable support for the Board’s proposed conclusions.

The FTC has established a three-part standard for determining whether an act or practice is unfair.³ That standard requires the agencies to weigh a particular act or practice against the ability of consumers to avoid harm and against any wider consumer benefits that may be associated with the particular act or practice. Additionally, the FTC has taken the approach that well-informed consumers generally are capable of making choices for themselves. The OCC has endorsed a similar approach in its Advisory Letter on Unfair and Deceptive Practices, stating:

“The OCC will not find a practice unfair solely on the grounds that a consumer could have obtained a more appropriate or satisfactory product or service elsewhere. Rather, consumer harm caused by a practice that is coercive or that otherwise effectively inhibits

² See, e.g., Guidance on Unfair or Deceptive Acts or Practices (UDAP), OCC Advisory Letter dated March 22, 2002 (AL 2002-3).

³ The three tests, as outlined by the FTC, are:

- The practice causes substantial consumer injury;
- The injury is not outweighed by benefits to the consumer or to competition; and
- The injury caused by the practice is one that the consumer could not reasonably have avoided.

FTC Policy Statement on Unfairness (December 17, 1980).

the consumer from making an informed choice would be considered not reasonably avoidable.”⁴

The acts or practices discussed in the Proposal fail to meet this balancing test. In each case, the act or practice provides wider benefits to consumers that outweigh the potential for individual harm. As described in more detail below, the practice of honoring overdrafts provides substantial benefits to consumers, including convenience, support of controlled spending habits by using available funds on deposit to fund purchases rather than depending on revolving debt, and immediate use of funds. There is no evidence that the cost of debit card overdraft fees outweighs these benefits. If consumers disapproved of current practices, they would have cut up their debit cards long ago and chosen other payment methods, when in fact they have increasingly made debit cards their payment method of choice.

In addition, the practice of offering overdraft services does not meet the third FTC test for unfair practices, because consumers can easily avoid overdraft fees by keeping track of their available balance and not initiating transactions if sufficient funds are not available. We strongly disagree with the Board’s comment that “[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.” Federal Reserve Regulation CC specifically requires banks to disclose a detailed funds availability schedule specifying exactly when deposited funds will be available. Banks must give consumers a funds availability schedule at account opening and upon request, and must display the schedule in each branch. Consumers are well-informed about when deposited funds will become available through disclosures and are able to access balance information through convenient channels.⁵ The Board does not identify or explain why it believes that these disclosures do not provide sufficient information for a consumer to understand when a deposit will be made available.

We are extremely concerned that the Board’s characterization of discretionary overdraft services as an unfair practice could subject the banking industry to significant legal risk for past conduct that was lawful and consistent with then-current regulations. If the banking agencies determine through regulation that accepted and common banking practices are, by definition, “unfair” in all cases and for all consumers, the financial services industry will be exposed to significant potential liability. Many states have laws that permit state enforcement and private claims against companies that engage in unfair and deceptive acts or practices as defined under Section 5 of the FTC Act. Accordingly, the Regulation AA Proposal in its current form would likely subject banks to both state and private party lawsuits, including class actions. We believe such exposure is neither appropriate nor justified.

We strongly urge the Board, if it issues the Proposal, to include the broadest possible safe harbor for banks’ past practices. Otherwise, the Proposal, if adopted, would expose banks to unwarranted litigation, benefiting class action practitioners rather than consumers, while potentially costing the banking industry significant sums. In order to minimize such an unfair

⁴ OCC Advisory Letter 2002-3.

⁵ Chase customers can check their available balance 24x7 via online banking, telephone banking, ATMs and by Mobile Banking (on a cell phone).

and undesirable outcome, a broad safe harbor from past practices is an essential element of any UDAP regulation, particularly one targeting specific practices.

Further, we urge the Board to expressly provide in any final rule for prospective federal enforcement *only*, and to provide that any use of its final rule, or the rulemaking process, to challenge practices prior to the rule's effective date would be inconsistent both with the Board's intent and the overall exercise and enforcement of its authority to regulate unfair practices. This should encompass federal or state regulatory enforcement, as well as private litigation.

We also urge the Board to reconsider the effect of deciding, under the FTC Act, that certain practices are unfair. There is a difference between enacting new disclosure rules or substantive rules to govern conduct on the one hand, and imposing the "unfairness" label on the other hand. The former creates new rules, to which private parties can adjust their conduct. The latter, however, imposes a judgmental standard on conduct using labels ill-suited for this context. Moreover, it unfairly raises questions about currently permissible conduct that occurred prior to the rulemaking, rather than simply enacting new rules to govern future activity. As a result, the Board should consider other alternatives to further its aims.

In summary, we urge the Board not to regulate overdraft services practices as unfair practices under the FTC Act. They have not been adequately evaluated to be, nor is there substantial evidence to support the treatment of the targeted practices as, unfair.

Unintended Consequences of the Proposal

We believe that the Proposal would cause significant unintended consequences for all who participate in making and receiving transaction payments, including consumers, payment networks, merchants and banks.

Consumer Confusion

Payment transactions are processed through a number of different networks and clearinghouses and are subject to a variety of different laws, regulations and contractual arrangements. Transactions are processed via checks, automated clearinghouse ("ACH") transactions, debit card transactions (PIN and signature-based), wire transfers, online transfers and ATM withdrawals. Check processing is governed by Federal regulations, as well as Articles 3 and 4 of the Uniform Commercial Code, as codified into state law (the "UCC"). Debit card transactions are subject to contractual agreements such as the debit card network rules (including the VISA, MasterCard, NYCE and Star operating rules), as well as Federal Reserve Regulation E. ACH transactions are subject to the NACHA rules and Regulation E. Participants in this complex, multi-faceted payment system include banks, payment networks, merchants, merchant processors, ACH originators, ATM operators and consumers. Some transactions are processed intra-day and are immediately debited to the consumer's account. Other transactions are not presented to the consumer's bank until batch processing that night, and still others are not sent to

the bank until several days after the transaction was initially authorized. Banks do not unilaterally control the methods and timing of payments processing, nor are they able to unequivocally identify for customers the exact payment process and timing for each transaction. As a result, it would be difficult for banks to identify for consumers the benefits or detriments of opting out, and consumers likely will be confused.

Even if a consumer opts out of overdraft services, some transactions still would cause the consumer's account to be overdrawn. The Proposal, if adopted, must permit banks to create these overdrafts, even if the consumer has opted out, as long as the bank does not charge a fee in violation of the Proposal. For example, an overdraft may be created when an account is debited because the paying bank returns a previously deposited check because of insufficient funds in the maker's account. Many consumers who opt out of overdraft services likely will mistakenly believe, however, that they had opted out of the creation of all overdrafts.

Banks May Restrict Current Payment Practices That Benefit Consumers

If the Proposal is adopted, banks will most likely change their method of making automated payment decisions to a method less advantageous for consumers, as discussed below. As a result of these changes, more checks and ACH payments will be returned unpaid, which is the worst case for consumers because obligations they intended to pay are not satisfied, they may be charged merchant fees, their credit rating may suffer, and most banks will charge an insufficient funds fee.

A. Paying Against Ledger Balances

If the Proposal is adopted, it will effectively require banks to pay transactions only against available balances in order to avoid overdrawn accounts, and to restrict the more consumer-friendly payment practices that many banks have adopted.

Regulation CC requires banks to make funds available on a specified schedule and to disclose that schedule to consumers, but many banks currently go beyond the regulatory requirements and make payment decisions for checks and ACH debits based on ledger balances instead of available balances, without charging an overdraft fee.⁶ Many banks use ledger balance in order to provide better customer service, if they are comfortable through risk analysis that most of the deposited funds in ledger balances will be good funds and will become available under the bank's funds availability schedule. Customers benefit because they get quicker access to their deposited funds before they become available under the availability schedule without paying an overdraft fee.

Under the Proposal, banks will probably not be able to continue this practice. We believe banks will continue to reduce available funds immediately upon authorizing a debit card transaction, but will make decisions about honoring checks or ACH items based on the available balance,

⁶ Many banks use available balance to decide whether to approve debit authorization requests and ledger balance to decide whether to pay checks or ACH debits.

rather than the ledger balance. Banks will make this change in order to reserve the amount of a debit authorization to pay the final debit transaction and to avoid having the final debit transaction overdraw the account. Under the Proposal, therefore, banks most likely will return more checks and other payments due to insufficient funds and charge an insufficient funds fee, whereas previously they may have honored the check based on ledger balance and not charged a fee. These changes will likely impact all customers, not just those who have opted out, because it will be too complex and expensive for banks to develop different processing methods only for customers who have opted out.

B. No-Fee Flexible Debit Authorization Practices

Banks currently use a risk-based approach to make payment decisions about consumer deposit accounts, and generally do not manage to a zero dollar balance. Consumers benefit from the flexibility of this approach, and often receive the benefit of having their debit transaction authorized into overdraft without paying an overdraft fee. For example, when a customer deposits her paycheck at a branch on Saturday morning, under most banks' funds availability schedules, the funds would not be available for withdrawal until at least Tuesday (the next business day after the effective date of the deposit, which is Monday). Many banks, however, currently will authorize debit card transactions over the weekend without charging an overdraft fee, if the consumer has a history of handling her account in a responsible manner. While these transactions create overdrawn accounts, most banks would not charge an overdraft fee because the deposit would be credited first in Monday night batch processing and would be used to satisfy the debit obligations incurred over the weekend. Today, many authorized debit transactions settle in this manner, allowing customers the use of not-yet-available funds without an overdraft fee.

Under the Proposal, however, banks will not have the flexibility to offer this type of service for customers who have opted out, and therefore will probably not offer it to any customers. Banks will authorize debit transactions only if sufficient funds are available at that time, according to the funds availability schedule, because of the risk of creating an overdraft. Therefore, customers who had previously benefited by having debit transactions authorized and paid against funds that were not yet available, without paying an overdraft fee, likely will now have those debit transactions denied.

Reduced Availability of Low-Cost Checking Accounts

If the Proposal is adopted, it may become more difficult for consumers to obtain a low-cost checking account with low balance requirements. Banks may be less likely to offer such accounts, because they will not be able to mitigate the risk and costs of overdrafts by charging an overdraft fee for those customers who have opted out of overdraft services. As a result, banks may be less likely to offer low cost accounts, and may add monthly service fees or higher balance requirements for these accounts. This would be unfortunate for consumers who want a low-cost account and who today manage their accounts responsibly in order to avoid overdraft fees.

Restrictions on Use of Debit Cards at Hotels and Rental Car Companies

Payment networks such as VISA, MasterCard, Star, Pulse and NYCE may need to change their rules to prohibit hotels, rental car companies and other merchants from initiating estimated debit authorizations. The Proposal may make it difficult for these merchants to accept debit cards, which would seriously harm consumers, especially those who do not qualify for a credit card or are trying to manage their credit card debt. Hotels and rental car companies use two-step debit transactions, because the amount of the final transaction is not known when the debit card is presented and before the service is provided. The merchant estimates the final amount of the transaction and requests a debit authorization in that amount. The customer's bank may place a hold for the estimated amount of the transaction. If a final settlement transaction is sent to the bank, the hold is released and the final transaction is processed. If the bank does not receive a final settlement transaction within a specified period, the hold drops off.

Many banks do not include debit holds in their payment decisions because a large percentage of debit authorizations drop off without a final settlement transaction ever being presented to the bank. Many consumers use debit cards for hotel and rental car reservations, but present a credit card or other payment method for the final payment. If the Proposal is adopted, payment networks may no longer permit two-step transactions because it would be difficult to completely avoid creating overdrafts via two-step transactions and also to comply with the debit hold proposal included in Section 227.32(b) of the Regulation AA Proposal. Banks will likely be unwilling to extend these authorizations and take the risk of processing debit transactions that may overdraw the account without the ability to mitigate the risk by charging an overdraft fee. As a result, consumers may no longer be able to use their debit cards at these merchants.

Restrictions on Use of Debit Cards at Restaurants

Similar issues often arise when debit cards are used at restaurants, because the final amount of the transaction (which may include a tip) is usually not known at the time the restaurant requests authorization for the transaction. The Proposal includes a specific exception permitting banks to charge an overdraft fee when the amount of the transaction exceeds the authorization amount, even if the customer has opted out. However, confusion and dissatisfaction from customers who believed they had opted out of overdraft services is likely to outweigh the benefit of charging a permitted overdraft fee in such cases. As a consequence, payment networks may restrict two-step debit transactions to avoid the adverse impacts of authorization holds and banks may be less willing to extend authorizations. The networks will need to devise other approaches to the use of debit and credit cards for certain purchases at restaurants, including possibly requiring the merchant to wait until after the customer specifies a tip amount before authorizing a transaction. Another potential solution might be the use of PIN debit but, unfortunately, many restaurants are not currently equipped to process one-step debit transactions, and may be forced to purchase mobile PIN pads or stop accepting debit card transactions. It will take the industry significant time and effort to identify and implement possible alternative approaches, yet the Board's

Proposal would likely impact these practices in the near term, seriously injuring consumers by limiting their ability to use debit cards in their preferred manner.

Potential Increase in Number of Checks Written

As debit card usage is restricted, both by merchant choice and by consumers experiencing many more declines at the point of sale, consumers may again begin to use cash or write more checks in situations in which they had previously used debit cards. This may strain future check clearing capacities. The Federal Reserve has been consolidating its check clearing operations in recent years, due to reduced check usage and the expectation that this trend will continue. Further, such changes in consumer behavior may stifle innovations that rely on debit card infrastructures like mobile payments and chip-based stored value cards. We urge the Board to carefully study these impacts before issuing a final regulation.

One Opt-Out

We believe that the proposal that banks must offer two forms of opt-out of overdraft services - one for debit card and ATM withdrawals only, and one for all types of withdrawals (including checks, ACH transactions and other debits) - is impractical. While we understand that some consumers might want to opt out of only ATM and debit card overdrafts, we believe that mandating two options will only increase customer confusion, as many customers may not fully realize exactly which overdrafts will not be paid pursuant to the opt-out that they have elected, or may have forgotten which opt-out election they had made. Moreover, mandating two opt-outs will increase the length of the required disclosures, adding printing and mailing expenses, and will complicate the opt-out process. Customer service likely will suffer and customer service costs will increase, as the length of customer service calls on this topic will likely increase dramatically and branch personnel will have to be trained to handle these inquiries. For all of these reasons, we strongly recommend that if any opt-out is adopted, it should be a single opt-out.

Additional Exceptions

The Board also requested comment as to whether additional exceptions beyond the two proposed would be appropriate to allow a bank to assess a fee for paying an overdraft, even if the consumer has opted out of overdraft services. Specifically, the Board discussed that banks employ stand-in processors from time to time when ATM or debit card networks are off-line, and in such cases are unable to determine whether the requested authorization is made against sufficient balances when the request is received. The Board suggested it might be appropriate to allow banks to charge a fee when a customer's account is consequently overdrawn in these situations even if the customer opted-out of overdraft services. We agree. This exception would be limited in scope, and will not undermine the benefits otherwise provided by a consumer's opt-out election. It is also similar to the first two exceptions proposed by the Board, in that it also

involves a circumstance in which the bank is not able to decline an authorization request, or a transaction being posted to an account against insufficient funds. We strongly urge the Board to provide an additional exception to permit banks to charge a fee to consumers who have opted out in the circumstance in which the card networks are temporarily off-line.

Debit Holds

The Board has asked for comments on the proposed debit holds provision in Section 227.32(b), which would prohibit a bank from assessing an overdraft fee on a consumer's account if the overdraft would not have occurred but for a debit hold in an amount greater than the final transaction amount, even if that customer had not opted out of overdraft services.

We recognize that consumers may be caught unaware by debit holds placed on their account in response to a debit authorization request, and may incur overdraft fees as a result. Under the current process, consumers may not be informed about the amount or duration of a debit hold by their merchant or bank, so they cannot effectively manage their account to avoid incurring overdrafts. We believe, however, that the Proposal relies on banks entirely to address this concern when merchant behavior and network operation are better suited to solve these challenges. It is in the best interests of consumers, banks, merchants and networks to improve the transparency of the debit hold process and to help customers better manage their accounts. The Proposal, however, is too narrowly focused, and may cause banks to refuse to authorize certain types of debit transactions, ultimately harming consumers rather than effectively addressing the concerns.

Many deposit systems today are programmed to assess overdraft fees on a daily basis during batch processing, when a transaction causes the account to become overdrawn. If adopted in its current form, the Proposal would require banks to modify their deposit system so that when a final debit transaction is received, the system attempts to match that amount to a prior corresponding debit hold and determines whether an overdraft fee can be assessed on each intervening transaction, based on the amounts of the hold and the final transaction. If the amount of the hold is greater than the amount of the final transaction, no fee could be charged on subsequent transactions that would cause an overdraft. This would require significant programming and expense. In lieu of incurring these costs, banks may decide to categorically reject certain types of debit transactions where the final settlement amount is uncertain, including transactions at hotels, rental car companies and gas stations. This would be a significant harm to consumers and the broader economy. Consumers who do not have a credit card may not be able to rent a car or stay at a hotel without being required to pay cash for the transaction up front, a major inconvenience and a significant financial impediment for many.

Banks and payment networks already have an incentive to solve this issue, in order to improve customer satisfaction. VISA operating rules have already been amended, effective October, 2008, to address this problem for gas station pay-at-the-pump transactions. The amended rule will provide a new payment authorization method that requires these transactions to be settled within two hours of the initial debit authorization, and provides interchange incentives for station

operators to adopt this improved process. VISA has also recently restricted restaurants from adding the amount of anticipated tips to the amount of a transaction being authorized, because of the perceived adverse effects that account holds were placing on consumers who had decided to provide a tip with cash instead of adding it to the amount of the card purchase. These are examples of payment system innovations that are already underway to improve customer service without the need for additional regulation.

Clearing Order of Transactions

The Board solicits comment on the impact of requiring banks to pay smaller dollar items first for purposes of assessing overdraft fees, unless a consumer affirmatively elects otherwise. The Board also seeks comments on how such a rule would impact a bank's ability to process transactions on a real-time basis.

Most banks' deposit account agreements provide that (i) consumers agree not to write checks or otherwise authorize payment instruments when there are insufficient funds in their account at the time such item is written or authorized, and (ii) when presented with an item inconsistent with that commitment by the customer, the bank has the right but not the obligation to pay such item. The Regulation AA Proposal would enable consumers to avoid overdraft fees by opting out of overdraft services. With certain limited exceptions explicitly permitted by the Proposal, if consumers opt out of overdraft services, then overdraft fees will not be imposed by banks, regardless of the order in which banks process transactions. Chase strongly objects to what would be an inconsistent and unnecessary opt-in approach to processing transactions in a particular order.

As an initial matter, banks must be able to process transactions the bank already is committed to pay before any other transaction, regardless of whether that transaction is for an amount higher or lower than what had been authorized. Similar logic would apply to checks drawn on that institution that had been "cashed" earlier in the day. Therefore, certain transactions must be paid before any other transaction is decided, and it would be inappropriate to apply a different payment order logic for purposes of assessing overdraft or insufficient funds fees.

In addition, the Uniform Commercial Code's longstanding provision that a bank has the right to pay items in any order (UCC 4-303(b)) has been examined by the courts on numerous occasions. Courts repeatedly have held that a bank using its discretion to implement a high-to-low posting method does not violate good faith. (See e.g., Hill v. St. Paul Federal Bank for Sav., 329 Ill. App. 3d, 705 (1st Dist. 2002), Fetter v. Wells Fargo Bank Texas, N.A., 110 S.W.3d 683, (Tex. App. Houston 14th Dist. 2003). Chase believes these judicial and statutory determinations of good faith cast significant doubt on the wisdom or propriety of any Board determination that such practice is unfair or that any alternative clearing order is more appropriate than another payment order.

Moreover, as previously mentioned, the consumer is ultimately responsible for managing his or her account and matching balances against withdrawals. Chase provides its customers ample tools to monitor their account balances in real time. Mandating any specific method of payment order processing is not justified in light of the availability of information and tools the consumer has to manage his or her account.

The Board has also solicited comments on whether a requirement for low-to-high transaction processing would interfere with a bank's ability to process transactions on a real-time basis. We believe that it would. Each year, increasing numbers of transactions are processed in real time, rather than in batch processing, due to the increasing volumes of electronic transactions and the electronic imaging and presentation of checks. Many banks are modifying their processing systems to accommodate more real-time transactions. Consumers benefit from real-time processing because balance information becomes more accurate, and more transactions can be immediately reported as final, rather than pending, transactions.

Mandating a specific order of processing transactions is incompatible with real-time processing, and would seriously impact its development. Real-time transactions are processed in the order in which they are presented to the paying bank. Once a bank makes a payment decision in real time and money leaves the bank or the bank makes a commitment to a merchant to pay a transaction, the bank cannot reverse the decision during batch processing if a different payment order would result in a different payment decision.

Effective Date of Final Regulations

The Proposal would require banks to make significant changes to payment processing systems, develop a system to capture consumers' opt-out choices, train personnel, redesign statements and educate consumers. In order to give banks sufficient time to make and test the necessary changes, we recommend that the effective date of the final regulations should be at least eighteen months from the date on which the final regulations are issued, except that banks would need at least 24 months in order to make the systems changes necessary to comply with Section 227.32(b) regarding debit holds.

JPMorgan Chase & Co. appreciates the opportunity to comment on the Regulation AA Proposal. If you would like to discuss any of our comments in more detail, please contact Andrea Beggs at 312-732-5345.

Very truly yours,



Scott E. Powell
Chief Executive Officer, Consumer Banking