



KeyBank National Association

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March 30, 2009

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: Proposed Rule and Official Staff Interpretation of Regulation E Docket No. R-1343

Dear Ms. Johnson:

KeyBank National Association (“KeyBank”) submits this comment letter in response to the Proposed Rule to amend Regulation E and the official staff commentary to the regulation published by the Board of Governors of the Federal Reserve System (the “Board”), in the *Federal Register* on January 29, 2009. KeyBank appreciates the opportunity to offer its comments on the Proposal.

General Comments

The Proposal replaces the proposed rule regarding overdraft services and debit holds that was issued by the Board in May 2008 pursuant to its authority under the Federal Trade Commission Act (“FTC Act”). That proposal would have applied to overdrafts resulting from all methods of payment, including checks, ACH transactions, ATM withdrawals recurring payments and debit card transactions at POS. In the Proposal the Board has indicated that it does not intend to take further action on the FTC Act proposal. We agree with the Board taking no further action on the FTC Act proposal and instead acting pursuant to its authority under the Electronic Funds Transfer Act (“EFTA”). The Proposal would prohibit financial institutions from engaging in certain acts or practices in connection with overdraft services associated with automated teller machine (“ATM”) withdrawals and one-time debit card transactions.

To the extent that the Board intends to further regulate overdraft services, we generally agree with the regulation of overdrafts for certain Electronic Funds Transfer (“EFT”) services pursuant to EFTA. However, we request that the Board consider the significant impact to financial institutions. The Proposal will impose substantial burdens on financial institutions without significant corresponding benefit to the consumer, and could potentially lead to more consumer confusion. For example, the significant cost to change systems in order to distinguish between one-time debit card transactions and other debit card transactions could be prohibitive, forcing institutions to limit or eliminate entirely overdraft services. In addition, in certain circumstances, consumers may not recognize the difference between one-time debit card transactions and recurring debit card transactions, which could serve to confuse consumers.

Opt-Out Approach is Preferred

The Board is proposing two alternative approaches under which institutions are permitted to assess or charge fees related to certain overdraft services. Under the first alternative, an institution would be prohibited from charging a fee on a consumer account for paying an ATM withdrawal or a one-time debit card transaction in connection with an overdraft service unless the consumer is provided notice and a reasonable opportunity to opt out (“Opt-Out Approach”). The consumer’s right to opt out would apply to all ATM withdrawals and one-time debit card transactions that overdraw an account, with limited exceptions. The Opt-Out Approach would apply to any one-time debit card transaction, regardless of whether the consumer uses a debit card at a point-of-sale, in an online transaction, or in a telephone transaction and would not apply to other types of transactions, including check transactions and preauthorized EFTs.

Under the second alternative, institutions would be prohibited from assessing a fee or charge on a consumer’s account for paying an ATM withdrawal or a one-time debit card transaction pursuant to the institution’s overdraft service, unless the consumer is provided with notice explaining the institution’s overdraft service and a reasonable opportunity to affirmatively consent or opt in and the consumer opts in to the service (“Opt-In Approach”).

To the extent that the Board requires an institution to provide consumers with the right to either opt-out of or opt-in prior to assessing or charging a fee related to ATM withdrawals and one-time debit card transactions, we strongly urge the Board to adopt the Opt-Out Approach. We feel that the majority of consumers benefit from overdraft services including those related to ATM withdrawals and one-time debit card transactions. Consumers are in the best position to know what their balances are and to responsibly make decisions about their transactions. In adopting the Opt-Out Approach, the Board would continue to provide consumers with the choice to take advantage of overdraft services. However, the Opt-In Approach would serve to limit consumers’ choices. Not only would the Opt-In Approach limit consumers’ choice, but there would be enormous cost and complexity added to a financial institution’s compliance burden.

We appreciate that the proposed commentary acknowledges that the payment of any overdrafts remains at the discretion of the financial institutions. However, we are concerned that

by requiring a consumer to specifically consent or opt in to the payment of overdrafts for such services, consumers may be under the impression the institution is agreeing to pay such overdrafts in all cases. This confusion is more likely to occur if the consumer is required to opt in to the overdraft services versus an option to opt out of such service.

Finally, although a consumer may not incur additional fees if a one-time debit card transaction is declined at the merchant location, the consumer may not want to sustain a certain level of embarrassment or may not have emergency funds available during non-business hours. We believe that customers should retain the choice to have funds available in an emergency situation at the ATM or process a one-time debit card transaction. It is more likely under the Opt-In Approach that consumers would have given up the ability to obtain funds or make such purchases. As a result, to the extent the Board adopts one of the two alternative approaches, we urge the Board to adopt an Opt-Out Approach.

Debit Card Transactions

The Proposal is limited to ATM withdrawals and one-time debit card transaction and would not apply to other types of transactions, including recurring debit card transactions. We are concerned that the complexity and cost of developing a system to distinguish between one-time and recurring debit card transactions would outweigh the benefit to the consumer. In addition, there may be circumstances where it would be impossible for the institution to differentiate among debit card transactions. For example, in certain cases a merchant may obtain a consumer's authorization for a recurring debit card transaction, but fail to submit it as a recurring transaction. In that case, the institution would more than likely code the transaction as a one-time debit card transaction. We are concerned that an institution could potentially be held liable under those circumstances for improperly declining the transaction.

In addition to the operational challenges, we are concerned that requiring different treatment of one-type debit card transactions from other types of debit card transactions will cause significant consumer confusion. It also will be very difficult for institutions to provide consumers with a clear explanation. This could drive consumers to make a choice to waive their opt-out choice in order to avoid unwanted results. Therefore, we believe that the better approach is to permit institutions at their option to include all debit card transactions in their overdraft services.

Reasonable Belief Exception

While we agree with the exceptions provided in the Proposal, we would encourage the Board 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 consumer has sufficient funds until it receives the actual settlement. For example, card issuers may not receive notice of a one-time debit card transaction under a certain threshold amount until the transaction settles. We believe that this type of transaction is similar to the

circumstances where the merchant takes an imprint of the consumer's card. In both cases, the institution is unable to authorize the transaction because of the way in which the transaction is processed. Therefore, in this case, an institution should be permitted to assess an overdraft fee if the transaction causes the consumer to overdraft his or her account, despite the consumer's election to opt out.

In addition to the above mentioned circumstances, there are several other situations where an institution may receive an authorization, but the final settlement amount is larger than the authorization. For example, a restaurant may submit an authorization for the amount of a meal without including a tip. However, the settlement amount may then include the tip amount. We believe that in those circumstances, to the extent the amount of the tip would overdraft the account, an institution should be permitted to assess an overdraft fee whether or not the consumer has opted out, based on the institution's belief there were enough funds in the account at the time of the authorization.

Segregation of Opt-Out Notices

The Proposal would require an institution to provide an opt-out notice before the institution assesses a fee or charge for paying an ATM withdrawal or one-time debit card transaction pursuant to the institution's overdraft service. The Proposal requests comment on whether the institution should be required to segregate the opt-out notice from other account disclosures. We urge the Board to provide institutions with flexibility concerning the placement of the opt-out notice within both the account opening documents and on any subsequent notice required to be sent promptly after the ATM or debit card overdraft. We disagree that consumers will fail to notice the opt-out disclosure if included with other account disclosures. In addition, the requirement to segregate such notice could significantly increase the cost and complexity of complying with the Proposal.

Notice to Existing Customers who have previously opted-out

The Proposal requires institutions to provide a notice to existing accountholders of their right to opt out of the overdraft service following the assessment of any overdraft fees or charges for paying certain transactions. The Proposal states that the subsequent notice requirement would apply to all accounts, including existing accounts as of the effective date of the final rule. We request that the Board clarify how the Proposal would apply to customers that have previously opted-out of all transactions.

In February 2005, the federal banking agencies published Interagency Guidance on Overdraft Protection Programs¹ ("Joint Guidance") which included best practices recommendations for institutions that provided, but did not market, overdraft services. For

¹ See, Interagency Guidance on Overdraft Protection Programs, 70 *Fed. Reg.* 9127 (Feb 24, 2005).

example, the Joint Guidance recommended that institutions provide customers with the opportunity to opt out of overdraft protection by providing a clear disclosure outlining the customer's right to opt out. The Joint Guidance did not distinguish between transaction types, but instead focused on a customer's right to opt out of all transactions. To the extent institutions provided a right for customers to opt out of all transactions and customers actually opted-out, it is unclear how the Proposal would apply to those customers and their existing opt-out. We request that the Board clarify whether under the Proposal institutions would be required to provide a new opt-out notice to those customers as they most likely would not be assessed an overdraft fee. We urge the Board to provide an institution the flexibility to allow institutions to retain the customer's current opt-out elections without further actions as the consumers have made a choice and are free at any time to change their opt-out election.

Debit Holds

The Proposal would provide that an institution is prohibited from assessing an overdraft fee or charge the consumer's account in connection with an overdraft service if an overdraft would not have occurred but for a hold placed on funds in the consumer's account that exceeds the actual purchase or transaction amount. Although we commend the Board for limiting the circumstances under which this prohibition applies, we remain concerned that the Proposal as written is 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, assessing an overdraft fee or removing the provisional hold within two hours of authorization.

In addition, we request that the Board 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 Board adopt the debit hold provision and the transaction does not fit into another exception, we request that an institution be permitted to assess the overdraft fee in these circumstances.

Reasonable Time For Implementation

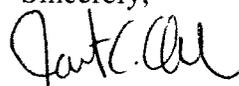
Due to the complexity of the final regulation, we request that the Board allow at least 12 months for institutions to implement the final regulation. Any final regulation will require significant system, operational and documentation changes. In addition, institutions will need sufficient time to develop training materials for employees to use with clients.

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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,



Janet C. Clark
KeyBank National Association
Senior Vice President and
Managing Counsel