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Wells Fargo Bank, N.A.

March 30, 2009

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
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Facsimile: (202) 452-3819

Re: Regulation E; Proposed Rule
Federal Reserve System [Regulation E; Docket No. R-1343]

Dear Sirs and Madams:

This letter is submitted on behalf of Wells Fargo & Company and its affiliates, including Wells Fargo Bank, N.A., Wells Fargo Financial National Bank, Wells Fargo Financial Bank, and Wachovia Bank, N.A. (collectively, "Wells Fargo") in response to the proposed rule regarding Regulation E, which implements the Electronic Fund Transfer Act, published in the Federal Register on January 29, 2009 at 74 FR 5212 (the "Proposed Rule").

Wells Fargo appreciates the opportunity to comment and respectfully requests that the members of the Board of Governors of the Federal Reserve System ("Board") consider adopting the suggestions set forth herein.

Wells Fargo & Company is a diversified financial services company with \$1.3 trillion in assets, providing banking, insurance, investments, mortgage and consumer finance in more than 39 states and the District of Columbia. We are the nation's second largest debit card issuer.

The Board is proposing to amend Regulation E to limit the ability of a financial institution to assess an overdraft fee for paying ATM withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer is given an opportunity to opt-out or opt-in to the payment of overdrafts for such transactions. In addition, the Proposed Rule would prohibit financial institutions from assessing an overdraft fee if the overdraft would not have occurred but for a debit hold placed on funds in the consumer's account that exceeds the actual amount of the transaction.

Wells Fargo would like to thank the Board for listening to our concerns and not taking action with respect to the May 2008 FTC Act (Regulation AA) and Regulation DD proposal regarding consumers' right to opt out of overdraft services and debit hold provisions. We support the Board's decision to issue the Proposed Rule pursuant to the Board's authority under the Electronic Fund Transfer Act.

Wells Fargo, however, has some concerns with the Proposed Rule, including (1) the failure to distinguish between payment into overdraft and authorization into overdraft, the latter being the point at which the financial institution has meaningful control and the point at which the consumer preference should be applied; (2) an "opt-in" requirement, particularly as to existing customers; (3) the exclusion of recurring debit card transactions from the consumer's opt-out or opt-in preference for debit card transactions; and (4) the operational challenges with the proposed safe harbors/ fee exceptions, which rely in part on third parties over whom the financial institution has no control.

This response will summarize the feedback from Wells Fargo into four primary areas:

1. Opt-out vs. Opt-in
2. Authorization vs. Settlement
3. Partial vs. Full Opt-Out of Overdraft Services
4. Excess Holds and Need for Safe Harbor

We have included specific comments to questions raised by the Board in the Appendix to this letter.

Opt-Out vs. Opt-In

The Proposed Rule sets forth two alternatives for the implementation of the consumer's preferences regarding the payment of their ATM withdrawals and one-time debit card transactions into overdraft – one specifically seeks the consumer's affirmation or "opt-in" and the other provides that consumers have the right to "opt-out."

We support the opt-out alternative rather than the opt-in alternative.

The opt-out alternative would be better for consumers because it allows existing customers to avoid a change to their account that could come as an unwelcome surprise, and still allows the consumer to exercise choice with respect to his or her preference. The opt-in alternative, however, presents the risk of implementing a potentially significant negative change to a large number of consumers that requires an affirmative action by the consumer before an identified due date. Despite a financial institution's efforts to communicate and highlight that a change will happen as of a certain date, it is likely that a significant number of consumers will fail to review the material and take action by the due date and thereby default to a result that may not be in the consumer's best interest.

The majority of consumers do not overdraw their accounts, and the occasional coverage of overdrafts is a positive benefit to consumers. Financial institutions have for many decades reviewed transactions, evaluated risk, and paid potential overdrafts when possible as a customer service. In recent years, this practice has been extended to new channels, including debit card and ATM withdrawals. The customer benefits from this discretionary overdraft service in several specific ways, including:

1. avoiding the embarrassment of being turned down at the point-of-sale;
2. being able to complete needed transactions and purchases; and¹
3. minimizing the need to carry cash or use paper checks with attendant security and convenience issues.

We believe that the opt-out alternative allows consumers to maintain a level of service with respect to their accounts to which they have become accustomed and allows those consumers who would like a change to notify the financial institution and opt out.

In contrast, if the Final Rule required specific opt-in, we would need to closely evaluate the risk and customer impact associated with failure to read and respond by the due date. A consumer who failed to read the notice would not even be aware that a financial institution practice has changed. After the effective date, a transaction at the point-of-sale that previously may have been authorized will be declined. The impact to consumers can range from embarrassment to a significant detriment if the consumer does not have an alternative form of payment (compounded if the consumer is in an emergency situation such as car trouble).

Opt-in will result in more declined transactions even though the consumer may have preferred to have the transaction authorized into overdraft. The majority of debit card purchases are for important every-day items, such as essential groceries or fuel purchases, which the consumer needs and may not want to have declined.

In addition, the opt-in alternative could create significant customer servicing issues in our front-line stores and phone channels to process opt-in requests. For example, if even a small percentage of the bank's consumer checking deposit base unintentionally failed to opt-in, and then experienced a surprise decline at an ATM or a merchant location, a significant number of consumers would be affected. If a portion of these affected customers then approached the bank for help in resolving their situation, the bank could experience a very significant number of customer resolution calls, which could have a significant impact on our front-line stores and phone channels.

Conversely, if the Final Rule provides for opt-out, the impact to customers is minimized. It is important to remember that only a small portion of consumers actually overdraw their account in an average year. Under an opt-out approach, existing customers would receive a notice of their right to opt-out if and when an overdraft occurs. This

¹ We post deposits to our customers' accounts before debits. This allows customers to proceed with their transaction at a point-of-sale or an ATM and then make a subsequent deposit or transfer that same day to avoid overdraft fees.

notification would be more relevant to the customer at that time and they could then contact the financial institution to change the authorization of future transactions. Also, the final Regulation DD requirements for aggregate overdraft fee disclosures should help provide consumers with the information they need to make informed decisions regarding overdrafts.

We recommend that the Board adopt the opt-out alternative for both existing customers and new customers.

As with any change that is introduced into an existing environment, special consideration must be given to existing customers who may have become accustomed to a certain practice. We recommend that the Board adopt the opt-out alternative for both existing and new customers rather than a hybrid approach providing for opt-out for existing customers and opt-in for new customers. A hybrid approach would mean that we would have to track two groups of customers with different requirements. This would be difficult to support from a systems, procedural and customer service perspective. If, however, the Board insists on an opt-in approach, we would urge that the Board retain opt-out for existing customers. Under such circumstances, we would support a hybrid approach to avoid disrupting our existing customers.

Under the opt-out alternative outlined in the Proposed Rule, new customers would have an opportunity to express their preferences from the beginning. New customers would be provided a notification at new account opening and have a period of time (30 days) from new account open to communicate their preference. During this time, transactions would not be authorized unless the financial institution had a reasonable belief that funds were available.² The consumer must, of course, retain responsibility for managing his or her account balance. Previously authorized transactions have to be paid when received by the financial institution for payment and fees could be assessed if presented against insufficient funds.

We also support the exception to the notice and opt-out/opt-in requirements provided in the Proposed Rule for a financial institution that has a policy and practice of declining ATM/debit card transactions for which authorization is requested if the financial institution has a reasonable belief that the consumer's account does not have sufficient funds available to cover the transaction at the time of the authorization request.

Authorization vs. Settlement

We strongly encourage the Board to focus the Final Rule and the Model language on the *authorization* of debit card transactions – not the *payment* of these transactions into overdraft.

² As we state throughout this letter, we believe that the Final Rule should focus on the consumer's option to ask the bank not to *authorize* their ATM/Debit card transactions if there are insufficient funds in their account.

For debit card transactions – authorization is the point in time that risk is transferred from the merchant – and assumed by the financial institution.

Section II (Background) of the Proposed Rule states that the payment of an overdraft is a discretionary decision by a financial institution. For checks and ACH transactions – it is in fact discretionary (the financial institution can choose to pay or return the transaction); and it is also a risk decision – the financial institution assumes the risk for the overdrawn amount at this time or can choose to avoid the risk by returning the transaction unpaid. In the case of a debit card transaction, the response to an authorization request is also a risk decision and is analogous to an overdraft decision in the paper check environment. At the point of an authorization request, risk is being transferred from the merchant to the card issuing financial institution if the transaction is approved because it has become a guaranteed transaction to the merchant and a “must-pay” transaction for the financial institution.

The bank generally places a memo debit on the account when the transaction is authorized. If the debit card transaction is not received for payment that day, the funds in the account may no longer be available (i.e., a previously credited deposit is returned unpaid or the funds were used to pay other transactions initiated by the consumer such as previously authorized debit card transactions, checks, transfers, etc.). The point of authorization properly aligns the opportunity for the bank to implement the consumer’s preference (for example, decline transactions if funds do not appear to be available) and the risk the bank is assuming (i.e., the promise to pay the merchant). Therefore, we believe the final language should focus on the point of authorization instead of settlement.

The Proposed Rule focuses on “payment” of overdrafts, which is inappropriate and potentially misleading. In our prior response (to the May, 2008 proposed rules under Regulation AA and Regulation DD), we pointed out that a debit card transaction – once authorized – MUST be paid by the financial institution when the merchant submits the transaction for settlement. While most transactions are received by the financial institution within a day or two, it is feasible for the transaction to be received for payment after some time has passed (up to a week or even longer if a debit card is used for a mail/internet purchase and the card is charged when the merchandise is shipped). Current payment system infrastructure does not allow for a real-time (immediate) settlement of debit card transactions. Financial institutions must abide by card association rules and may not keep a pending “hold” on these transactions for longer than 3 days. As a result, the consumer must retain the responsibility for keeping track of his or her purchases and ensuring that transactions (including checks, transfers, or automatic withdrawals) do not exceed their account balance. Any alternative would unjustly shift the risk to the financial institution from the consumer, who is in the best position to manage his or her expenditures.

The current “model” language – specifically “We will not *pay* your overdrafts for ATM and debit card purchases... unless you tell us that you want overdraft services...” – is misleading. We believe that it may give the consumer the perception that opting out will stop all debit card transactions from “being paid.” This is not accurate.

In our previous response, Wells Fargo was a strong advocate for language to communicate that if a customer opts-out of “overdraft services,” the financial institution will not authorize an ATM or debit card transaction if funds do not appear to be available in the deposit account. We believe a more accurate communication of the model opt-out language should focus on a consumer’s request to opt-out of the *authorization* of their debit card transactions. This means:

1. The financial institution will not authorize transactions using “overdraft services.” A consumer must have sufficient funds available in his or her deposit account or in a linked account for overdraft protection (i.e., funds in a consumer-owned savings or credit account). If not, the transaction may be denied at the time of purchase.
2. If authorized, the transaction will be paid from the deposit account when received by the financial institution for payment – creating a negative balance if funds are not available. We believe the Board should separate the “payment” of this transaction from the assessment of overdraft fees.
3. A consumer’s choice to adopt partial opt-out and the subsequent denial of these transactions should result in fewer transactions posting into negative available funds and a reduction in related overdraft fees.

We have included a proposed alternative to the draft “model opt-out” language to address this important distinction between authorization (the point at which the financial institution can execute on the consumer’s preferences) and the payment of the transaction (the timing of which is controlled by the merchant). We also request that the Board allow financial institutions the flexibility to further modify this notice to make it accurate and clear as it relates to the bank’s overdraft services and the options available to consumers.

The model language should also be modified to highlight that fees may be assessed on *debit card transactions* regardless of a consumer’s decision regarding overdraft services as noted in the “reasonable belief exception” of the Proposed Rule.

We appreciate that the Board recognized that the burden of the gap between authorization and settlement can not be placed solely on financial institutions. We strongly support the inclusion in the Final Rule of the exception provided in proposed section 205.17(b)(5)(i), that fees can be assessed on transactions – regardless of consumer’s preference for “overdraft services.” Please note that, in the absence of these exceptions, the bank would not be able to support partial opt-out and would likely choose to limit (or “condition”) consumers’ options to full opt-out in order to minimize the bank’s risk.³ Since these transactions must be paid by the bank, the assessment of a fee will help compensate the bank for the risk it takes when paying transactions with imperfect information (e.g., a deposit can be returned at a future date or a previously authorized debit card transaction

³ The bank would need to be immensely conservative on the payment of returnable items such as checks or ACH transactions due to uncertainty regarding debit card transactions that could post after the hold is dropped.

may arrive as a “must pay transaction” in a week.) Fee assessment is also designed to encourage proper account management. Only the consumer can know the sum of his transactions – including those that he has completed (e.g., at a merchant), checks he has written, and transactions that he has authorized for payment at a future date.

The fee exception is currently limited to authorized transactions, which assumes a level of precision and payment system infrastructure support that does not exist today.

The examples of transactions not covered by the fee *exceptions* in the Proposed Rule assume a level of precision that is not currently supported within the framework of current payment systems – and will present extraordinary challenges to implement.

We believe the examples provided in proposed comment 17(b)(5)(2) of the Proposed Rule include transaction exceptions that are very much the exception rather than the norm. The vast majority of transactions (98% of transactions initiated in the United States) are authorized at the point-of-sale, which provides an opportunity for the financial institution to execute on the consumer’s preference regarding authorization using overdraft services. Based on current transaction volume, only 1.44% of the transaction volume is not authorized prior to settlement, which represents 2.5% of the dollar volume (average purchase amount of the non-authorized transaction was \$68.74). In fact, merchants are incented to authorize transactions because it transfers risk to the card issuing institution and reduces merchant losses.

The proposed regulation include two types of transactions that may not have been authorized by the financial institution – and allow the financial institution to charge a fee for one type (transactions not authorized, but submitted as a paper-based item), but not for another (transaction not submitted by the merchant for authorization because of “below-floor” small dollar authorization). In both cases, the consumer is providing his card to a merchant at time of purchase. Current payment system infrastructure does not easily support the identification of a “non-authorized” debit card transaction to ensure that a fee is not assessed for consumers that declined overdraft services – nor can the financial institution currently differentiate fee assessment for subsets of debit card transactions as suggested in this regulation. Significant system development is required throughout the payment processing system (financial institutions, VISA/MC, merchant and card processors) to appropriately identify that a transaction was previously authorized (or not) when the transaction is ultimately submitted to the financial institution for settlement.

Because transactions are not currently “flagged” as authorized or unauthorized, financial institution systems do not currently return (or charge-back) non-authorized debit card transactions to merchants (unless informed by our customer that the transaction was fraudulent). While the examples provided in the proposed regulations imply that non-authorized transactions are limited to small dollar purchases, this is not true. If a large dollar non-authorized transaction was submitted for payment, the financial institution would need to consider the risk of paying this transaction for the customer or charging it

back to the merchant. Today, these transactions are paid for our customers – even if a financial institution through its normal course of business does not authorize transactions if funds are not available – and fees are assessed as applicable. The financial institution will need sufficient time to build processes that will allow not only for a fee differential (if retained), but also for the return of non-authorized debit card transactions. If the implementation date for the Final Rule does not allow enough time for financial institutions to build charge-back processes into posting, financial institutions could be exposed to significant risk associated with payment of non-authorized transactions.

The Board also proposes that debit card transactions authorized during payment system “stand-in-processing” are not eligible for the fee exception. The payment system includes many participants – including merchants, VISA/MC, processors and the financial institutions. A system failure can happen at any one of these communication links and “stand-in” processes (which exist at each system link) are designed to balance the consumer’s need to have access to their account funds and financial institution risk. In the event of a system link failure, a stand-in balance (which, by definition, does not reflect the consumer’s account balance, or overdraft services preference) is used. Fortunately, these system failures are rare (estimated at less than 0.5% of transactions processed); however, current financial institution systems do not include information regarding this authorization exception and would require significant system development to have this information passed to financial institution processing systems to ensure that overdraft fee waivers were applied in the event the customer did not have sufficient funds at settlement.

We believe that drafting a regulation that highlights with specificity the scenarios that can be subject to fee assessment is risky – both in the potential failure to include a scenario and the introduction – over time – of new transaction processes not originally contemplated by the regulation. The transactions identified by the Board as needing to have a fee waiver are extremely rare and we urge the Board to consider the cost and benefit of this requirement. Wells Fargo (and most financial institutions) has fee waiver policies that can reverse fees upon customer request and we remind the Board that less than 10% of our customers incur an overdraft in an average month. We recommend that the Final Rule focus on the aspects of this complex, multi-party payment process that can be controlled by consumers and financial institutions – specifically that the customer can request that the financial institution NOT authorize a transaction if funds do not appear to be available in the account based on information known to the bank at the time of authorization. The Final Rule should not specify when fees can and can not be assessed.

<u>Partial vs. Full Opt-out</u>

We could conceivably develop the technical capability to support a Partial Opt-Out provision, but would require adequate implementation time to develop required systematic and operational support.

Wells Fargo systems do not currently support customer requests to opt-out of “overdraft services” by transaction type (i.e., treat debit card transactions uniquely). We have a manual process to allow a customer to request full opt-out of all transactions – but this process is not fully integrated into our servicing platforms (e.g., store, phone or online banker systems). We could modify our systems to support “partial” opt-out, which would modify the authorization processes for the debit card (ATM and debit card transactions) upon customer request, but this will require significant time and development to support systematically.

The Final Rule should focus on opt-out of debit card transactions into overdraft – but not differentiate between one-time and recurring debit card transactions, nor include ACH transactions.

Wells Fargo systems do not currently differentiate between one-time and recurring debit card transactions. Even if such a systematic solution was implemented, it would be dependent on merchant behavior for accuracy, as some merchants identify recurring debit card transactions with a unique transaction identifier, while others do not. We have identified system modifications that we could develop to support partial opt-out of debit card transactions. These system modifications – as well as the customer communication - - become significantly more complex if the opt-out requires two variations (i.e., one-time vs. recurring debit card transactions). If the Final Rule requires the distinction between recurring and one-time transactions, we strongly encourage the inclusion of language that financial institution support of this distinction relies on merchant identification of a recurring transaction and a corresponding safe harbor to charge fees where a transaction has not properly been identified.

We strongly support the Board’s rationale for excluding ACH transactions from the Proposed Rule. However, the Board expressly seeks comment as to whether the proposed scope of transactions should be expanded to include ACH transactions. We feel strongly that ACH transactions should not be included. ACH transactions are very similar to check transactions – and in fact, an increasing number of checks are converted by merchants into ACH transactions for processing. From a consumer’s perspective, these transactions may represent a debit they have pre-authorized with a biller (mortgage, car payments, and insurance bills are often processed as ACH transactions). Also, an increasing number of other transactions that may “start” as checks are converted to ACH (merchants convert these transactions to ACH and in the future financial institutions are considering converting small dollar checks to ACH rather than sending checks between financial institutions for settlement). It would be immensely challenging – if not impossible – to exclude or include ACH “overdrafts” based on customer preference and deliver the experience that the customer was expecting.

Unlike debit card transactions, ACH transactions are not authorized or approved by the financial institution prior to submission, which eliminates the ability for a consumer to substitute another payment method at the point-of-sale. If a customer opted-out, the ACH transaction could be returned unpaid and the customer would be charged a returned transaction (insufficient funds) fee from the financial institution, and potentially late fees

from a returned payment. Finally, Wells Fargo can not effectively segregate ACH debits from other check and returnable transactions to provide overdraft services on ACH transactions for a subset of customers that request inclusion (or exclusion) of overdraft services. We encourage the Board to not include these transactions in the opt-out proposal – which we believe should focus on opt-out of authorization (not payment) of debit card transactions. If ACH transactions are ultimately included in the Final Rule, Wells Fargo would not support “partial opt-out,” but would deem a customer’s request to opt-out of overdraft services to apply to all of her transactions (i.e., full opt-out).

Excess Holds and Safe Harbor Proposal

We recommend that financial institutions be provided a safe harbor for processing transactions and charging fees if we cannot determine whether an authorization generates an excess hold.

Wells Fargo has implemented practices that are specifically designed to minimize “excess holds” from adversely affecting our customer’s access to their account funds or that contribute to the assessment of overdraft fees.

However, in the current environment, financial institutions cannot know for certain if an authorization request exceeds the actual amount of the transaction because the final amount of the transaction is not known at the time the card is presented for payment. A financial institution can only act on the information it receives in an authorization request from the merchant. For instance, fuel merchants that submit a transaction from automatic fuel dispensers are instructed to submit an authorization request for \$1 at the time the card is inserted at the fuel pump and are guaranteed payment for the actual transaction amount up to \$125. Restaurants are instructed to submit a transaction amount equal to the cost of the meal excluding gratuity, but are guaranteed up to the actual amount of the purchase plus 20% for gratuity.

The Board has included a reference to a nascent industry process enhancement that encourages fuel merchants to submit final settlement amount of a gas purchase within a short period of time (e.g., 2 hours). Wells Fargo supports this industry movement and has updated its systems to support it. However, it should be noted that (1) this process has not been adopted by the payment industry as the de facto standard, and implementation in the merchant community has been limited; (2) it requires system enhancements on the part of merchants, processors, financial institutions, and payment networks; and (3) the process design is not foolproof. A financial institution can only act on the information it receives from the merchant according to a timetable driven by the merchant. How is a financial institution to know if they will be receiving an updated authorization request from the merchant to reflect the actual purchase amount? What if the updated information is received after a financial institution has initiated its nightly processing? In addition, the authorization request may be less or greater than the actual purchase amount. The only two parties that know the specific transaction amount when the purchase is completed are the merchant and the consumer. A financial institution can

only make a decision on the information that it has received at the point in time a decision needs to be made.

The Proposed Rule includes an example that has the financial institution *increasing* the hold amount for gas purchases beyond what is submitted by the merchant for authorization – and, as a result, fees can not be assessed on subsequent transactions. Wells Fargo does not modify the amount submitted by the merchant for authorization, which could lead to an “excess hold.” As an alternative, the Board could consider a proposal to place limitations on a financial institution’s ability to increase an authorization amount submitted by a merchant. We specifically request the Board to include a safe harbor provision that would allow a financial institution to assess fees (in accordance with the exceptions noted in proposed section 205.17(b)(5)(i)) if the financial institution simply holds the amount submitted by merchant for authorization.

Summary of Recommendations

To summarize our recommendations:

- We urge the Board to focus on opt-out, rather than opt-in, particularly because of the impact on existing customers. We recommend against a hybrid approach because of the difficulty of tracking two groups of customers with different requirements. New customers may have a “reasonable opportunity to opt-out” of 30 days to communicate their opt-out preference. During this period, ATM or debit card transactions should not be authorized if the financial institution does not have a reasonable belief that funds are available, but fees may be assessed if transactions are presented for payment against insufficient funds. We support the Board’s position in the Proposed Rule that the notice and opt-out (or opt-in) requirements should not apply if a financial institution has policy and practice of authorizing debit card transactions only if it has a reasonable belief that funds are available at the time of authorization.
- The Final Rule and model language should focus on obtaining the consumer’s preference on the *authorization* of debit card transactions. If a consumer opts-out or fails to opt-in (depending on the Final Rule), it should be made clear that these transactions may still be paid regardless of their preference and that fees may be assessed if the financial institution reasonably believed that funds were available when the transaction was authorized.
- The examples provided to the fee exceptions (in proposed comment 17(b)(5)(2), which require a financial institution to know with certainty at posting if a transaction was authorized or was a paper-based transaction should be deleted because they present significant operational challenges. The vast majority of transactions are submitted for authorization and current systems do not allow for the specificity outlined in the Proposed Rule. Depending on the Final Rule, the bank may need to create a unique account based on customer preference for overdraft services, if the exclusions in proposed comment 17(b)(5)(2) are retained in the Final Rule. For example, the bank may be required to modify the type of card provided to consumers (PIN only or require authorization) to minimize bank

risk while systems are built to provide a method to return (charge-back unauthorized debit card transactions that exceed bank risk tolerance) during the posting process. These merchant charge-backs will affect merchant losses – and conceivably merchants will either require authorization or, depending on the type of merchant, no longer provide consumers with the convenience of accepting debit cards.

- The bank could conceivably modify its systems to provide for “partial” opt-out of authorization of ATM and debit card transactions. If the Proposed Rule requires differentiation between one-time and recurring debit card transactions, however, or if the scope is expanded to include ACH transactions, Wells Fargo would not be able to support partial opt-out.

Wells Fargo requests a minimum of 24 months to implement the Final Rule. As the Board is well aware, the bank is already working on implementing a number of new regulatory proposals, including revisions to Regulation AA, Regulation DD, and Regulation Z, which require significant systems development. The requirements in the Proposed Rule will require significant additional modification to financial institution systems – including back-end system processing and front-room systems to gather consumer preferences. Finally, a number of significant issues were open to feedback in the Proposed Rule – and depending on the requirements in the Final Rule, the bank will need time to ensure that the end-to-end process is effective for our customers and bankers, and appropriately manages bank risk.

If you have any questions or would like to discuss any of the issues raised in this letter, please contact me at (415) 222-5350 or shirley.n.thompson@wellsfargo.com.

Sincerely yours,



Shirley Ng Thompson
Managing Counsel

cc: Ken Zimmerman
Karen Moore
Ed Kadletz
Brenda Yost
Craig Litsey
Ken Bonneville

APPENDIX

Specific Comments in Response to Board's Requests for Comment

The Board requests comment on which approach (opt-out or opt-in) is optimal for both consumers and financial institutions. Does either approach represent unique operational or cost issues that would not be associated with the other approach?

Opt-out is the better option for both consumers and financial institutions.

- Consumers understand and expect existing levels of service, including the discretionary overdraft service provided with respect to their accounts.
- Maintaining the status quo (a large number of banks allow customers to opt-out of overdraft services) is more consistent with customer expectation and helps financial institutions to avoid cost and negative customer experience if the customer fails to read and respond to an opt-in notice.
- Consumers are best able to manage their expenditures and avoid overdraft fees, but may benefit from the occasional authorization of a transaction into overdraft, notwithstanding a fee, for the convenience of being able to complete his or her transaction.
- Opt-out notices provided when an overdraft occurs will help ensure that financial institutions are complying with consumer preference.
- Opt-in may create customer confusion – consumers may expect that their overdrafts will be paid.
- Opt-in will result in more declined transactions even though the consumer may have preferred to have the transaction authorized into overdraft. Although consumer groups have been focused on small dollar transactions (such as \$5 coffee at Starbucks), debit card transactions include both small and large dollar transactions. Failure to act on opt-in notice may result in rejection of important larger dollar transactions, such as grocery purchases, medical supplies or gasoline.⁴

The Board has asked under what circumstances, if any, should institutions be permitted to alter some of the terms, conditions or features of an account that does not permit the payment of overdrafts on ATM withdrawals and one-time debit card transactions? For example, should an institution be permitted to price the account differently compared to an account that permits the payment of such overdrafts?

- Financial institutions should be allowed flexibility to alter account pricing, terms and features for its customers' accounts.
- Modified terms, including pricing terms, help financial institutions manage risk and modify behavior.

⁴ Our average consumer debit card transaction in 2008 was \$38

- If the Final Rule requires:
 - fee exceptions to differentiate between authorized and unauthorized transactions, or
 - recurring debit card transactions to be included (without a safe harbor based on merchant identification of recurring transactions)
 Wells Fargo may consider the creation of a new account that would likely treat card-based transactions differently (e.g., PIN only or a new authorization-required card).
- If a new account is created:
 - We would need to retain the right to vary pricing to manage bank risk
 - If the bank could not contain the risk associated with non-authorized transactions (i.e., we had to pay the transactions because we would not stop the authorization, and payment systems were not modified to appropriately “flag” these transactions) then the bank would need to retain the right to vary the monthly service fee or other fees to help manage risk.
 - We do not believe that the Board needs to regulate the terms associated with an account provided to customers who request to opt-out of overdraft services. In a competitive banking environment, retention of existing customers and attracting new customers is of paramount interest to financial institutions. As a result, banks will be sufficiently motivated to create product terms and conditions that meet our customer’s needs.
- If the regulation included ACH transactions – we would likely not allow partial opt-out and would only offer full opt-out as explained in detail on pages 9-10 of this response.

Under the proposal, if the consumer opts out (or does not opt in), an institution could still charge a fee for paying an overdraft for a debit card transaction if the institution had a reasonable belief that there were sufficient funds available in the consumer’s account at the time the institution authorized the transaction, or if a debit card transaction was presented by paper-based means. Are these exceptions appropriate? Are any additional exceptions necessary?

- While both “Reasonable belief” and “Paper-based means” exceptions are helpful, they do not capture all instances where a fee should be chargeable.
- Under the “reasonable belief” exception, we would request that the Board add an example to clarify that a financial institution has a “reasonable belief that there are sufficient funds available in the consumer’s account” if it authorizes the transaction based on the “amount requested for authorization.” This would help address the situation where a merchant may have submitted a request for authorization which is less than the actual transaction amount and the bank authorizes based on the amount requested for authorization.
- The Final Rule should not prohibit fee assessment when the bank did not authorize the transaction. The requirement to distinguish between transactions for which an authorization has been received and one where an authorization has not been received is not supported by existing systems.
 - Such distinction is not necessary as 98% of US initiated transactions are

submitted for authorization.

- Fee exceptions should apply (i.e., the institution should be allowed to charge a fee) any time a transaction is not submitted for authorization (example: “below floor” transactions).
- A fee exception should also apply where an authorization may have been given, but the actual account balance was not available at the time of authorization request (example: transactions authorized in “stand-in” processing).
- The Final Rule should focus on consumer’s preference as to whether or not a transaction should be authorized into overdraft, not on the specific instances in which fees may be assessed.

The Board has also requested comments regarding Debit Holds. The proposal would generally prohibit institutions from imposing an overdraft fee when a consumer’s deposit account would not have been overdrawn but for a hold placed on funds in the account, unless the hold amount is equal to or less than the transaction amount. The proposal also provides a safe harbor if an institution has adopted procedures to release the hold within two hours after the institution authorized the transaction.

a. **What are the operational issues associated with implementing this proposal? Does this proposed two-hour safe harbor sufficiently reduce the burden on financial institutions that might otherwise have to recreate transactions involving an excess hold to determine whether an overdraft fee was properly assessed? Is the proposed safe harbor appropriate, particularly for smaller institutions which may only receive authorization and settlement information periodically during the day?**

- Wells Fargo does not place “excess holds”; we hold only the amount submitted by the merchant.
- The Final Rule should focus on aspects of the hold that issuing financial institutions have control over; thus, institutions should not be prohibited from charging a fee if an account is overdrawn due to a hold that exceeds the final settlement amount if that hold was the same as the authorization amount submitted by the merchant.
- The two hour safe harbor does not adequately address financial institutions’ risk because they cannot control when a merchant will submit a transaction for settlement. Thus a financial institution should be allowed to keep a hold in place until settlement (but still in compliance with the card association requirements) and charge a fee if the account has insufficient funds to cover transactions received for settlement.

b. **Should the rule also require merchants (or their acquirers or processors) to promptly submit transactions covered by this rule for settlement?**

- The proposed rule places the risk of delayed settlement on the issuer. In other

words, although the merchant controls the timing (submission of final transaction amount for settlement), the Proposed Rule focuses on actions that the issuing card bank must take – including ensuring that no overdraft fees are assessed if the final amount (still unknown to the bank) exceeds the amount held by the bank based on merchant-submitted authorization request. The issuer must then pay the transaction when received for settlement – regardless of whether funds remain in the deposit account.

- In order to properly allocate risk among the various participants in the payments process, participation by all participants (issuers, acquirers, merchants) should be required.
- We would not recommend that the rule “require” merchants to submit transactions within a fixed period of time as this will introduce a number of new challenges and exceptions that may vary by industry, but we do think the rule should provide a safe harbor to financial institutions for actions outside their control.

The Board has requested comment on the opt-out timeframes, specifically the 30 day safe harbor for a “reasonable opportunity to opt out” and whether there is a need for further guidance on the “as soon as reasonably practicable” standard for institutions to implement the consumer’s opt-out request.

We support the 30 day safe harbor for new customers to communicate their opt-out preferences. We do not believe that further guidance is necessary on the “as soon as reasonably practicable” standard so long as the Board allows an institution to determine what is a reasonable period to effectuate a request.

The Board has requested comment on reasonable methods of opting out or revoking opt-out.

Wells Fargo supports the Board’s position that notice may be provided through a variety of means, including a toll-free telephone number (as long as it is acceptable to use our existing customer service teams and not create a unique phone queue/number for overdraft opt-out), other electronic means (such as the internet) or written form (mail). Because consumers utilize a variety of different means to manage their bank relationship, the maximum flexibility should be provided to financial institutions to determine what will work best for their customers.

The Board has requested comment on an appropriate implementation period for the Proposed Rule.

Wells Fargo requests a minimum of 24 months to implement the Final Rule. The bank is already working on implementing a number of new regulatory proposals, including revisions to Regulation AA, Regulation DD, and Regulation Z, which require significant systems development. The requirements in the Proposed Rule will require significant additional modification to financial institution systems – including back-end system processing and front-room systems to gather consumer preferences. Finally, a number of

significant issues were open to feedback in the Proposed Rule – and depending on the requirements in the Final Rule, the bank will need time to ensure that the end-to-end process is effective for our customers and bankers, and appropriately manages bank risk.

Model A-9 (A) Model Opt-Out Form

Explanation of Overdraft Coverage

Suggested deletions are noted via strikethrough. Suggested additions are underlined. The bank retains its right to modify this language to reflect bank-specific details, while retaining intent of model language.

Overview of Coverage

We currently provide overdraft coverage for your account. This means that if you attempt to spend more money than you have in your account, we may decide to pay the transaction and create an overdraft in your account. Having overdraft coverage does not guarantee that we will pay your transactions. If we do, we will charge you a fee. This coverage differs from other overdraft protection services we offer, such as linking your account to another account you have with us such as a savings or line of credit account.

Your Right to Opt-Out of Overdraft Coverage

You may tell us not to ~~pay~~ authorize ATM withdrawals or debit card purchases you make at a store, online or by telephone if you do not have sufficient funds available in your account, based on information reasonably known to the bank at the time of authorization.

- If you do not have sufficient available funds, we will decline your transaction.
- If we authorize the transaction, the bank will pay this transaction when it is submitted for payment by the merchant. If you do not have sufficient funds available at that time, it will be paid – creating a negative balance in your account and a fee may be assessed.

Your decision to opt out will not affect whether we pay overdrafts for other types of transactions, including checks. We may still cover these transactions and charge you a fee. See below for more information about your overdraft coverage, including how to contact us to opt out.

Overdraft Fees:

- We will charge you a fee of [up to][\$_] each time that we pay an overdraft.
- We will also charge you a fee of [\$_] for each day your account remains overdrawn.
- [There is no limit on the daily fees we can charge you for overdrawing your account.]

Other Ways We Can Cover Your Overdrafts

We offer other ways of covering your overdrafts that may be less expensive, such as linking your account to another account with us or an overdraft line of credit. Contact us to learn more about these options.

How to Get More Information:

To opt –out... bank specific options.