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Subject: Reg E - Electronic Fund Transfer

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Comments:

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Proposal: Regulation E - Electronic Fund Transfer  
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Comments:

On behalf of the Independent Bankers Association of Texas (IBAT), I would like to make a few comments on the most recent clarification of the overdraft protection rules and to request further clarification of previous provisions. IBAT is a trade association representing approximately 500 independent, community banks domiciled in Texas. Most of these members offer formal overdraft protection programs. However, some of them have never automated their overdraft procedures and do not offer overdraft protection in a systematic way. Next, most Texas banks only charge a single NSF charge and do not charge interest or any other fees related to payment of the overdraft. Texas usury law is extremely rigid, and the charging of a "daily fee" or a separate "overdraft fee" in addition to the NSF charge could be considered to create usurious interest. However, Texas banks may charge interest on an overdraft if they have a clear, written contractual authorization to do so. Such interest provisions still describe the overdraft process as discretionary and not guaranteed (and thus not an open end credit plan). With the foregoing as backdrop, IBAT would make the following observations regarding the proposed changes. First, the clarifications would provide that even a bank that has never offered overdraft protection but rather only covers overdrafts occasionally could not charge a fee. As noted in the original overdraft rules, there are times when a debit card or ATM transaction will not reject. The bank that does not have a program will not be able to charge a fee but will be required to honor the transaction. Under this proposal, in order to mitigate the risk, such a bank will probably have to either put strict limits on debit card transaction size, eliminate debit cards, or revoke cards for customers who abuse their use. This will put such banks at a competitive disadvantage. A further alternative might be to allow such banks to provide a modified "opt in" to its debit card customers with a notice that does not create a "program" but merely permits the truly inadvertent overdraft to be covered. Please consider such a modification to this rule. Otherwise, banks that truly have not

contributed to the perception that there is abuse of overdraft privileges will be put to a competitive disadvantage or alternatively will have a significant safety and soundness issue to resolve. Next, the proposal would require banks to establish a complex method for calculating overdraft balances for customers who do not consent to debit card coverage but who may overdraw their accounts through a combination of debit card and check or ACH transactions. Although most Texas banks do not charge interest on the overdraft balance, certainly a number find that this is an important source of revenue on these "inadvertent" extensions of credit. Typically (and hopefully) the debit card transaction will reject for a customer who has not opted in. However, the customer who benefits from a glitch in the system and whose card is covered should not then be able to continue overdrafting through checks and ACH payments and avoid the interest charge. As this rule is drafted, the complexity of the balance calculation is such that daily fees (in states other than Texas) and interest for IBAT members will become impracticable to calculate. Finally, although the following issues are not raised directly by the proposal, we would respectfully request clarification of several thorny problems that have emerged so far. The model notice is clearly just that—a model. However, we fear that the inclusion of the daily fee in the model gives the impression that somehow this rule permits a daily fee. As noted above, such a fee would encounter usury claims in Texas (and perhaps in other states). We would suggest that the model be edited to either delete this fee or to clearly show (on the model itself?) that this fee should be included if it is (a) imposed by the bank and (b) authorized by applicable state law. Another point raised by the notice is the appearance that the customer is specifically consenting based on the program described in such notice. Yet federal (and Texas) law clearly permits banks to amend fees by providing appropriate notice. (See Regulation E, Regulation DD, and Section 34.302 Texas Finance Code.) It would be helpful if this issue were further addressed. IBAT would suggest that the rule should clarify that fees are still subject to other law and can change upon provision of adequate notice. Banks should clearly have the right to modify the model notice to make sure that customers are aware of this possibility. Next, the rules for early adoption of the notice and consent procedure needs additional clarification. It is our understanding that banks may begin notifying their customers now of the changes to their overdraft program and the need to consent so that everyday debit and ATM transactions will continue to be covered. Unfortunately, not all data processors are ready to distinguish between electronic and check transactions for overdraft protection. Yet, it is critical that the education and consent process begin now so that there is adequate time to obtain responses from customers. The rule and the commentary indicate that early adoption is permissible. However, the preamble to the rule adoption would indicate that if early adoption is used, then banks must honor "opt out" notices immediately. This preamble language has created confusion for bankers and needs clarification. Provided that notices are clear, it should be permissible for banks to send notices now and to obtain a response now. We would suggest that not only should the notice and educational material reflect the effective date, but also the box for opt out should include the effective date to make sure that the consumer is not confused. Finally, in accordance with the original Best Practices guidance, banks may have implemented an "opt out" procedure for overdraft protection generally (i.e. checks, ACH and debit card transactions). Under the revised rule, the customer may opt in or out of everyday debit card and ATM transactions. Also, the parity rule indicates that customers who do not opt in must have the same services and fees as customers who have opted in including overdraft coverage of checks and recurring ACH transactions. This parity requirement would seem to negate opt-out of check coverage. Indeed, there is no benefit to opting out

of check coverage since the same NSF charge will apply and the consumer will be faced with hot check fees and other very real costs. Please clarify this issue. We would suggest that customers who opt out under the new rule (and who had opted out previously) could be treated as having opted out only as to debit card and ATM transactions and that checks could be covered regardless. If you disagree, please clarify the parity portion of the rule to make it clear that customers could opt out of check coverage! Thank you for this opportunity comment. Unfortunately, there are likely to be significantly more questions as this rather sweeping change is fully implemented. Additional commentary may be necessary to assist bankers to comply effectively.