

To: Board of Governors of the Federal Reserve System
Subject: Docket No. R-1343 Comment on Proposed Rule change
Date: February 22, 2010

Dear Sirs:

The original drafting of the regulation and the actual passing of the final in November 2009 CLEARLY differentiates those originations that have formal overdraft programs and those that do not. Everything is geared towards the option to Opt in or Opt out before charging. When you have a program, opting in or opting out makes sense. Now however the playing field has been severely tipped to where even if you do not have an overdraft program, you have to play. But you can't because there is no way for a customer to opt in or out of a program that DOES NOT EXIST! Our bank has never artificially inflated balances to approve transactions which create overdraft situations. Our policy has been, and continues to be we authorize on balances available at the time of the request. If a customer inadvertently overdraws an account (no matter the source or method) we believe a fee associated with the paying or return of the overdrafted item is fair and warranted. Being a smaller community bank affords a number of constraints on our ability to offer all the bells and whistles that many larger financial organizations can provide. One of these is the ability to support our own ATM/Debit card program in house to where we could approve and process transactions real time. Thus we participate in networks along with thousands of smaller banks and credit unions which allow us to provide services the customers are asking for. These networks, such as STAR, provide the infrastructure which would be too costly for a \$160 million dollar bank to justify or maintain. What this means in terms of processing, which obviously the framers of the November 2009 regulation were aware of, is there will be times when a customer's transactions will be delayed, generally only a day or so, which could result in other customer initiated transactions clearing prior to the final settlement of the previously approved transactions. We provide our processor (STAR) with updated balances at least three times during the day, but only pull back the transactions once per day. If an approved transaction is not included in the same business days file, it won't post that day, which leaves the account open for an overdraft to occur. Even though we approve the transactions against the actual account balance at the time, other activity by way of checks, ACH, ATM, etc may result in insufficient funds being available when the previously approved item is presented. And as you know, network rules do not allow for the denial of a previously approved ATM or POS debit transaction. So I have no option but to honor the item even in an overdraft status. As you clearly indicate in the commentary, a bank can return a check or ACH but not an ATM/POS. There clearly is a difference between ATM/POS and all other debit items. But as you glossed over in the commentary a bank cannot return the preauthorized ATM/POS debit and now you are preventing a fair and equitable fee from being assessed.

This regulation, in its original form, made sense because it clearly stated that those organizations that elected to have some type of overdraft program (and they all work off some level of line or phantom balance to approve transactions) would need to EITHER go back to only paying on actual balances or give the customer the option to be in or out of the program. This made sense. It protects and educates the customer of what is involved in the program while at

the same time it does not penalize the organizations that have not participated in formal programs. The press release clearly implies that this regulatory change is aimed at consumer consent into an overdraft service; “*The Federal Reserve Board on Thursday announced final rules that prohibit financial institutions from charging consumers fees for paying overdrafts on automated teller machine (ATM) and one-time debit card transactions, unless a consumer consents, or opts in, to the overdraft service for those types of transactions.*”

Your clarification proposal not only does not clarify based on the original intent of the regulations, but alters the target the original complaints were directed towards. For those banks such as ours, that have not participated in these types of overdraft programs, you are attempting to dictate what and when an organization can charge for services by virtually eliminating any charges on an overdrawn account when it is a result of a customer initiated transaction through the ATM or at a POS terminal. Your clarification states that the exception is for the Notice requirement and Opt-in requirement only and not the fee assessment for paying the insufficient transaction (71(b)(1)(i)-(iv)). If there is not an overdraft program in place, there is not a way to opt-in or out of something that does not exist. Logically you would assume that being exempt from the Notice or Opt-in portion of the regulation would imply that you have a program which you provide disclosure notices and opt-in/out options *from the program*. *If no program exists, the exception is an exception to something that is not applicable. You have nothing to Opt-In too! Isn't it ironic that a rule that originally was the result of excessive charging of overdrafts against phantom balances is now forcing those institutions that did not participate in that process to seriously consider implementing a similar program with Opt-in options?*

Please consider modifying the revision of 205.17(b)(4) to exclude institutions that BOTH do not have a formal overdraft program and have a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions when the institution has a reasonable belief at the time of the authorization request that the consumer does not have sufficient funds available to cover the transaction from the prohibition on assessing overdraft fees under 205.17(b)(1).

Respectfully,

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