



March 30, 2009

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

Re: Docket No. R-1343

Dear Ms. Johnson:

This comment letter is submitted by the Consumer Bankers Association (“CBA”) in response to the Proposed Rule (“Proposal”) to amend Regulation E to address overdraft issues in connection with one-time debit card transactions and ATM withdrawals (“Covered Transactions”) published by the Board of Governors of the Federal Reserve System (“Board”) in the *Federal Register* on January 29, 2009. CBA is the recognized voice on retail banking issues in the nation’s capital. CBA’s member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA represents over 750 federally insured financial institutions that collectively hold approximately 75% of insured deposits held by federally insured depository institutions in the United States. CBA appreciates the opportunity to share its views on the Proposal with the Board.

Executive Summary

CBA is pleased that the Board has chosen to address overdraft issues in the context of Regulation E as opposed to Regulation AA, as the Board originally proposed. We commend the Board for recognizing that a regulatory approach to overdraft fees is much better focused on electronic fund transfers, and we urge the Board to retain this focus in any final rule. For the reasons we provide below, CBA also believes the Board should:

- Adopt the opt-out version of the Proposal if it adopts a final rule;
- Not force banks to differentiate overdraft opt-outs;
- Avoid the regulation of transaction account terms;
- Retain the exceptions to the fee prohibition (with a suggested modification); and
- Decline to adopt the provision of the Proposal pertaining to debit holds (or, in the alternative, grant institutions modified safe harbors).

In addition to these key issues, we also ask the Board to retain the approaches it has taken with respect to the exceptions to the notice and opt-out requirement and the notice timing requirements. CBA also requests that the Board provide institutions two years to comply with any final rule.

Opt-Out vs. Opt-In

The Proposal includes two separate alternatives with respect to a consumer's choices for overdraft services¹ involving a Covered Transaction. Under one alternative, the institution would be required to provide a notice and opportunity to opt out of overdraft services before assessing an overdraft fee on a Covered Transaction ("Opt-Out Alternative"). Under the other alternative, the institution would be required to provide a notice and obtain the consumer's opt-in before assessing an overdraft fee on a Covered Transaction ("Opt-In Alternative"). CBA strongly urges the Board to adopt the Opt-Out Alternative.²

Banks generally provide overdraft services to their customers as a courtesy and a convenience to their customers. CBA members report that their customers are generally satisfied with this courtesy, and that it can be a valuable benefit in the event that an otherwise responsible customer accidentally overdraws his or her account. It would appear that the Board's research on this topic confirms the reports we have received from our members.³ As we discuss in more detail immediately below, we believe it would be a disservice to customers to have a regulation that essentially denies this service to the vast majority of consumers until they have learned the hard way of its benefits. It is reasonable to assume that the vast majority of consumers will not opt in to overdraft services, regardless of how the opt-in form is presented to consumers. Our members suggest that over 90% of consumers will not opt in, at least initially. This is due more to human nature and inertia than anything else. Therefore, the net effect of the Opt-In Proposal would be to initially deny overdraft services on Covered Transactions to the vast majority of consumers, at least at the outset. Although this will result in some consumers possibly avoiding an overdraft fee in connection with a transaction for which they would have preferred to have handled differently, it will also result in significant decreases in the functionality of debit cards for all consumers and strand many consumers at the point of sale without another viable option to make an important purchase. We do not believe this is in the best interest of consumers, and that the Opt-Out Alternative is preferable.

CBA believes that the majority of consumers generally manage their transaction accounts appropriately. Because consumers are generally responsible, it would therefore be reasonable to assume that any time a consumer attempts a Covered Transaction, the consumer does so with full knowledge of whether there are sufficient funds available in the account *even if the bank thinks otherwise*. Based on reports from our members, CBA believes that roughly 60% of debit card transactions that a bank authorizes into overdraft actually settle into good funds without the account actually becoming overdrawn (or the debit cardholder incurring a fee). Therefore, if a consumer initiates a transaction that appears to overdraw an account at the time of authorization, it is actually more likely to settle into good funds than overdraw the account. In those circumstances in which the transaction actually overdraws the account, the institution should reasonably assume the consumer

¹ For ease of use, CBA refers to "overdraft services" in this letter as such term is defined by the Board in the Proposal. Specifically, we refer to "overdraft services" as those that involve a fee or charge—not those that do not involve a fee or a charge.

² Unless specifically noted, our comments on the Proposal address the Opt-Out Alternative.

³ The report submitted by Macro International to the Board on this topic notes that consumers generally indicated that overdraft services were a "positive feature" for those who need it.

knows the status of his or her account and would like the transaction paid, even if it involves an overdraft fee. Regardless, the bank is not in a position to know whether the transaction will ultimately overdraw the account or not. But the statistics indicate that an overdraft is the less likely choice, and that even if there is an overdraft, the consumer's initiation of the transaction indicates a preference to have it paid. If the consumer, in fact, does not want the transaction authorized, the Opt-Out Alternative allows the consumer to inform the institution otherwise for future transactions. This would be a much more logical construct than requiring consumers who manage their accounts appropriately to opt in *twice* (i.e., by submitting an opt-in request, and by initiating the transaction) to allow a transaction that will ultimately settle into good funds to be authorized despite an initial appearance that it may overdraw the account.

CBA also believes that responsible cardholders should not be required to take affirmative action to preserve the functionality of their debit cards. Responsible consumers may not realize that they even need to take affirmative action to preserve the ability to use a debit card in circumstances where it appears to the bank, but not to the cardholder, that a transaction may overdraw the account. As noted above, the majority of transactions authorized into overdraft settle into good funds. If the Opt-In Alternative is adopted, millions of debit card transactions will be denied despite the fact that those transactions would ultimately settle into good funds. This will force responsible consumers to have decreased utility associated with the debit card, at least initially, and require them to take affirmative action to preserve their ability to use their debit cards responsibly. We believe this is unappealing from a policy perspective. The Opt-Out Alternative, however, would have a different outcome. Those who manage their accounts properly would not be inconvenienced at all by the final rule, even if they do not opt out. Those consumers who are less confident in their account management abilities would have the opportunity to opt out at account opening. We suspect that many such consumers would not opt out for a variety of reasons. However, the consumer who overdraws his account will be reminded of the opportunity to opt out shortly after incurring the overdraft fee, at which point the consumer can reevaluate the opt-out decision. This would appear to be the more appropriate outcome.

We also believe that the opt-out structure is the appropriate outcome because it has proven to be appropriate and successful in other consumer protection constructs. For example, we believe that consumers would likely rate telemarketing and the receipt of unsolicited commercial e-mails as greater concerns than overdraft services for Covered Transactions. CBA is unaware, however, of dissatisfaction among consumers regarding the opt-out rights serving as a primary consumer protection associated with these activities. Indeed, experience with these consumer protection statutes demonstrates that consumers will opt out when they believe it is appropriate and beneficial to them. The significant levels of opting out for telemarketing via the national do-not-call list is perhaps the best example of consumers exercising their opt-out rights when the issue is *truly* important and meaningful to them.⁴ If consumers believe that overdraft services for Covered Transactions are inappropriate for their specific circumstances, we are confident that they will opt out if a final rule is adopted.

CBA is also concerned about the broader effects associated with the hundreds of millions of transactions that will be declined if the Opt-In Alternative is adopted. Based on information gathered from CBA members, it would appear reasonable to assume that as many as 1 *billion* debit card transactions are authorized each year at a time when it appears to the institution that the transactions

⁴ According to the FTC, as of September 30, 2008, there were 172.5 million registrants on the National Do-Not-Call Registry. This demonstrates that large numbers of consumers know how to opt out of something if they value the benefit.

may overdraw an account (the majority of which do not). The Opt-In Alternative would result in a significant number of debit card authorization denials, far more than would result under the Opt-Out Alternative.⁵ A consumer who has had a debit card transaction denied at the point of sale may have significant difficulties completing the intended purchase. CBA does not believe it is fair to assume that such a consumer will have a checkbook, sufficient cash, or a credit card (or one with available credit) on hand. This means that the consumer may not be able to complete the transaction. CBA members report that almost half of debit card transactions occur at merchants of “necessity” (e.g., grocery stores, gas stations, drug stores). Just a back of the envelope calculation suggests that the Opt-In Alternative would result in tens of millions of additional consumers not being able to obtain necessities each year compared to the Opt-Out Alternative—the majority of these affecting consumers who would not have overdrawn their accounts in the first place.⁶

Finally, it is important for the Board to consider the impact an Opt-In Alternative may have on merchants and the economy as a whole. The Opt-In Alternative would likely result in hundreds of millions more debit card authorizations being denied than the Opt-Out Alternative. This creates customer service issues for the merchant, not only in connection with the cardholder whose transaction will not go through, but in connection with the customers in line behind the cardholder who is taking significant additional time to make an alternative payment. It should also go without saying that if hundreds of millions of transactions (or more) are thwarted by a final rule, there could be significant economic impacts that are difficult to estimate.

Combination of Opt-Out/Opt-In

CBA understands that some may suggest that the Board adopt a “compromise” position that would result in an opt-out approach for existing accounts and an opt-in approach for new accounts. *This is not a compromise, and may create additional consumer confusion.* Adopting an Opt-In Approach for new accounts does not mitigate any of the concerns we raised with respect to consumers who open new transaction accounts—and eventually the “compromise” will be the Opt-In Alternative for the vast majority of accounts. It may, however, confuse a consumer who may not realize that he or she has gone from an “opt-out regime” to an “opt-in regime” when changing accounts, even if the new account is with the same institution (e.g., the creation of a joint account due to marriage).

Instead of being a compromise, this approach also requires institutions to adopt systems to accommodate all the requirements of the Opt-Out Alternative and all the requirements of the Opt-In Alternative. For example, we assume the Board would require an institution to monitor the “Opt-Out Alternative accounts” and provide an opt-out notice each time the consumer has incurred an overdraft fee, but such notices would not be provided to, or even appropriate for, “Opt-In Alternative accounts.” This type of system segregation would be very difficult and costly. Indeed, some institutions may simply prefer to treat all accounts as subject to the Opt-In Alternative as opposed to having to adopt two completely different compliance programs.

⁵ Increasing the number of denied debit card transactions should not be the Board’s objective, especially since the majority of these transactions will settle into good funds, and the Opt-Out Alternative gives consumers appropriate tools to manage possible overdrafts on Covered Transactions if they so choose.

⁶ If 20% of consumers opt in, perhaps 800 million transactions will be denied. Of these, if only 25% of such transactions cannot be replaced by cash, check, or credit, that would result in 200 million complete transaction denials. Of those, roughly 90 million would be for necessities. If 20% of consumers opt out, perhaps 200 million transactions will be denied, and 50 million of them completely. Perhaps 20 million of these complete transaction denials will be for necessities.

Scope of Covered Transaction

The Proposal provides for a mandatory opt-out (or opt-in) opportunity with respect to one-time debit card transactions, but apparently not with respect to recurring debit card transactions or with respect to other types of electronic fund transfers, such as ACH transactions. Indeed, it would appear that the Board would prohibit pairing the mandatory Covered Transaction opt-out (or opt-in) opportunity with opportunities to opt out (or opt in) to overdraft services in connection with other electronic fund transfers. CBA asks the Board to give institutions the express authority to expand the scope of their opt-out (or opt-in) notice to cover these transactions. As currently drafted, we believe that consumers may not be able to understand when an electronic fund transfer is subject to the Proposal, and when it is not. For example, evolving payment products can appear to be a debit card (and be regulated under Regulation E), but actually initiate transactions from a consumer's transaction account using an ACH. It is also possible that consumers do not understand why a transaction is outside the scope of the final rule if they give a debit card number once to an entity to initiate monthly payments (*i.e.*, a recurring debit), but covered by the final rule if they provide the same number monthly to the same entity to pay a monthly bill (*i.e.*, a one-time debit card transaction).

Opt-Out Requirement

The Proposal would generally prohibit a bank holding a consumer's account from assessing an overdraft fee on a Covered Transaction unless the consumer is given an opt-out notice, is given a reasonable opportunity to opt out, and does not opt out. We believe that this approach is appropriate, and should be retained. The Proposal provides that an institution gives a consumer a "reasonable opportunity to opt out" if it provides: (i) a form the consumer may return by mail; (ii) a toll-free number that a consumer may call; or (iii) an electronic means to opt out, such as a form on a web site provided that the institution directs the consumer to the specific site address as opposed to its home page. In all circumstances, the Board's safe harbor involves a 30-day period to opt out beginning on the day the notice is provided. The Board also indicates that an institution may provide the notice prior to or at account opening and require the consumer to decide whether to opt out as a necessary step to opening the account.

We appreciate the fact that the Board envisions one notice being given to a consumer, as opposed to individual notices at the point of sale or ATM each time a transaction appears to exceed the available funds. The technology for such notices at the point of sale and at many ATMs does not exist. Even if the payment network could support the reconfiguration of its authorization system, it is not clear whether each and every merchant that accepts a card could support it. We also note that there are significant privacy and operational concerns associated with point of sale disclosures. It would be extremely awkward, for example, for the debit cardholder if the server at a restaurant has to come back to the table and ask the cardholder if he or she wants to affirmatively authorize the transaction despite a possible overdraft (assuming the server asks the cardholder in the first place).

CBA believes that the safe harbor for a reasonable opportunity to opt out is generally appropriate, and it is consistent with other opt-out requirements (*e.g.*, Gramm-Leach-Bliley privacy opt-out methods). We request the Board to note, as it has in other contexts, that an institution may control the method by which it accepts opt-outs, and that the institution is required to honor the opt-out request only if it is made using the designated channel(s).

The Board has asked for specific comment on whether the time period an institution must wait for a consumer's opt-out should be less than 30 days. We believe it should be less than 30 days, if only to allow a consumer more functionality on a debit card more quickly. In this regard, an institution may not authorize debit card transactions that appear to overdraw an account at the time of authorization during the proposed 30-day waiting period since the institution cannot be compensated for the risk if the transaction settles into overdraft. This will result in consumer dissatisfaction if the consumer has decided not to opt out. Therefore, the Board may weigh the equities of the circumstances and determine that a 15-day waiting period is more appropriate in the context of this specific rule.

The Board also asks for comment on whether it should require a toll-free number as one method to accept consumers' opt-outs. We do not believe this is necessary. It would seem that so long as an institution provides a reasonable means of opting out, such means should be sufficient. We ask the Board to finalize this rule in a technologically neutral way as it has similar rules in the past.

Conditioning the Opt Out

The Proposal would prohibit (or, in the alternative, specifically permit) an institution to condition the consumer's opt-out of overdraft services in connection with Covered Transactions on the consumer's decision to opt out of other overdraft services. The Board would also prohibit (or expressly permit) an institution from declining to pay checks or other non-Covered Transactions that overdraft the consumer's account because the consumer has opted out of overdraft services for Covered Transactions.

CBA urges the Board to reject the alternative that attempts to govern an institution's overdraft services that are not related to electronic funds transfers. As the Board notes in the Supplementary Information, many banks do not have the capability to implement an opt-out request based on the type of transaction that overdraws an account. This is not simply an issue for smaller banks, but also for some of the largest banks with sophisticated systems and the largest customer bases in the country. The Board appears to discount this concern, noting that the benefit of providing a stand-alone opt out for Covered Transactions "may" outweigh the costs. The Board also indicates that it would mitigate to a limited degree the impact of the systems revisions by giving sufficient lead time to implement any final rule.

Despite the Board's laudable effort to mitigate the systems costs, we do not believe they are justified to provide a narrow opt-out option for Covered Transactions. There is no doubt that this will be an extremely costly proposition for banks that are already overwhelmed by new regulatory compliance initiatives and a lack of resources.⁷ The Board likely recognizes that debit card programs are not high margin products, and any additional regulatory burdens associated with providing them will result in institutions reevaluating their product pricing and design. The question is whether this issue is so pressing that it justifies the costs all consumers will pay for the systems changes that would be mandated by the Board, especially when the harm the Board seeks to prevent can already be prevented by the consumer. We also note that the massive systems changes will likely result in

⁷ As the Board is aware, many of the institutions that will be affected by a final rule are also attempting to manage new regulatory burdens associated with Regulation Z, Regulation AA, mortgage lending, the FACT Act, and Regulation DD. This is in addition to the institutional stresses associated with the current financial circumstances and the regulatory response to those circumstances.

costs passed on to all consumers, resulting in responsible account holders paying more (or receiving less) for the benefit of consumers who are less responsible with their account management.

CBA recognizes that allowing institutions to broaden the scope of a consumer's opt-out may result in fewer consumers opting out of overdraft services for Covered Transactions, and more consumers having checks returned than perhaps otherwise would if given a more granular opt-out option. We believe it is important, however, for banks to have the operational flexibility to offer overdraft services in connection with transaction accounts in a manner that is least disruptive and that is cost effective. We also believe that a single opt-out choice will be much less confusing for consumers than a menu of overdraft opt outs and expecting the consumer to understand whether their electronic check transactions are going to be subject to the opt out. In the end, if the granularity of the opt-out option does prove to be important to consumers, banks will determine how best to offer it to consumers in the marketplace.

The Proposal would also prohibit a bank from refusing to honor items other than Covered Transactions if the consumer opts out with respect to Covered Transactions. This will likely restrict an institution's ability to dishonor such items, creating unnecessary risk for financial institutions. We fear that banks may feel that their discretion to dishonor these items for consumers who have opted out will come into question by consumers or examiners attempting to discern whether the institution violated the Board's prohibition. Therefore, it is very likely that at least some banks will narrow their standards for *all discretionary overdrafts* out of an abundance of caution and to avoid allegations of discrimination against those who have opted out of overdraft services for Covered Transactions.

Aside from the practical arguments above, CBA also offers a more legalistic reason for the Board to avoid regulating whether a bank honors overdrafts not associated with Covered Transactions. We respectfully suggest that the EFTA may not provide the Board with the necessary authority to regulate how, or whether, a bank honors an overdraft associated with a transaction that is not an electronic fund transfer. Although the Board suggests that it must consider the regulation of transactions that are not electronic fund transfers to effectuate the rights embodied in the Proposal, we are not convinced this is correct. As an initial matter, no institution is required to provide electronic fund transfer services to consumers, much less debit card services. It would appear that if an institution provides a debit card service to a consumer, it could condition the provision of that service on a variety of factors, such as a payment of a fee, an agreement not to engage in certain transactions, or to have overdraft services denied only if the opt-out is on an account level, not a transaction level. It seems unusual that a bank can take the position that it will not honor any overdrafts, but that if it honors some overdrafts in connection with Covered Transactions, it may not control how that feature is offered.⁸

Account Terms

The Proposal includes two alternative approaches to the regulation of transaction account terms. Under the first, the Proposal would require an institution to implement a consumer's opt out by providing to the consumer an account that has the same terms, conditions, and features (including interest rates paid and fees assessed) as are provided to consumers who do not opt out (except those

⁸ This is not to say the Board does not have the authority under Regulation E to address overdrafts relating to Covered Transactions. As we have noted in this letter and prior letters, we believe the Board has taken the correct approach for purposes of Covered Transactions.

features limiting the payment of Covered Transactions). Under the second alternative, a bank could vary such terms, conditions, and features provided the differences are not so substantial that they would discourage a reasonable consumer from exercising the right to opt out. The Board provides examples of variations, indicating that it would be permissible to price some account services differently but it would not be permissible to decline to provide ATM or debit card services altogether if the consumer opts out.

We strongly urge the Board to discard these portions of the Proposal, to adopt neither alternative, and to expressly recognize an institution's ability to vary account terms based on whether the consumer opts out. CBA believes that there is a *significant* risk that the adoption of either of these alternatives will ultimately harm all consumers in the form of higher prices, less product innovation, and less competition among financial institutions. For the reasons described above, we also question whether the EFTA grants the Board the authority to regulate the provision of transaction accounts generally based on whether a consumer opts out of overdraft services for Covered Transactions.

CBA believes that institutions must have the flexibility to design products based on how a consumer intends to use them, which may result in differing account terms. For example, if a consumer chooses to opt out of overdraft services for Covered Transactions, it may be that the institution can develop another feature that mitigates the likelihood of an overdraft occurring. This is not inconceivable, as a bank could develop a program that predicts whether a regularly scheduled deposit is about to be made (*e.g.*, a payroll direct deposit that is made on the last business day of every month) and authorize the transaction with the knowledge that by the time the transaction is presented for settlement, the transaction will likely settle into good funds. It would seem that this would involve different account terms if the bank provided this to consumers who opt out (it may not be offered to those who do not opt out for obvious reasons), and it would be prohibited under the first alternative.

CBA does not believe that a consumer who does not opt out should bear the consequences of reduced features or increased costs for the benefit of those limited number of consumers who will opt out. Even the second alternative raises significant problems in this regard. By its very terms, a bank would appear to be prohibited from offering incentives to reject the opt-out right for accepting overdraft services for Covered Transactions, or to explicitly opt in to such services. A bank may vary its menu of features and costs depending on a variety of factors, including whether the consumer opts out of overdraft services. We do not believe that a bank will be comfortable concluding that a "reasonable consumer" is not "discourage[d]" from opting out if the opt-out product is much different from the product offered if the consumer does not opt out. This will necessarily result in an institution essentially limiting its offerings to consumers who do not opt out to whatever it is capable of offering those consumers who do opt out. Indeed, despite a clear and commendable intent to provide institutions with some clarity, we fear the Board's examples may inadvertently invite additional confusion. For example, the Board indicates in the Supplementary Information that an institution could vary the fees associated with an opt-out account. Yet, at some point such a variation might discourage a reasonable person from opting out. It is not clear to us exactly what the Board intended, but it is unlikely that the Supplementary Information could reliably supersede the rule itself. Our concerns are heightened by the fact that, by basing the standard on what may discourage a reasonable person from opting out, the Board is inviting significant litigation risk as a result.

CBA believes that consumers would be better served if an institution were required to clearly disclose the relevant opt-out rights, the consequences of opting out, and allowing consumers to

decide whether they want an account with that institution and whether they want to opt out. There will undoubtedly be opportunities for consumers to make account decisions based, at least in part, on these factors. Not only will consumers be able to determine which products suit them best based on these disclosures, but institutions will be free to continue to develop new products and features that may, by necessity, vary depending on whether the consumer allows for overdraft services in connection with Covered Transactions.

Exceptions to Notice/Opt-Out Requirement

The Proposal would not apply to an institution that: (i) has a policy and practice of declining to pay Covered Transactions for which authorization is requested if the institution has a reasonable belief that the consumer's account does not have sufficient funds available at the time of authorization; or (ii) requires consumers to affirmatively consent to such overdraft services before assessing any overdraft fees. CBA believes these exceptions are appropriate, and we urge the Board to retain them with two minor modifications that are consistent with the Board's intentions. First, we believe the exception should apply to any *product* if the financial institution has the requisite policies and practices for *that product*. In other words, if it offers products with such policies and procedures, and products without such policies and procedures, it should be required to provide the notice and opt out only for the products without such policies and procedures. Second, we ask the Board to incorporate the examples from proposed Comment 17(b)(5)-1 into the Commentary for § 205.17(b)(4) for purposes of illustrating when an institution has a reasonable belief that a consumer's account does not have sufficient funds available.

Exceptions to Fee Prohibition

We applaud the Board for providing certain exceptions to the fee prohibition. Specifically, an institution may assess an overdraft fee for paying a Covered Transaction regardless of the consumer's opt-out election if: (i) the institution has a reasonable belief that there are sufficient funds available in the consumer's account at the time the institution authorizes the transaction; or (ii) in the case of a debit card transaction, the transaction is presented for payment by the merchant through paper-based means and the institution did not previously authorize the transaction.

The proposed Commentary provides several examples of when an institution may have a reasonable belief that a consumer's account may have sufficient funds. We believe these examples are reasonable and appropriate. The Board should retain them. The Board notes in the Commentary, however, that the exception for a "reasonable belief" does not apply if the transaction is not submitted to the institution for authorization, such as if the transaction is below a floor limit or the institution is relying on "stand in" authorization. We ask the Board to reconsider these distinctions.

CBA believes it is entirely appropriate for an institution to have the ability to assess an overdraft charge in those circumstances in which the institution does not have the opportunity to decline the transaction in the first place. In these circumstances, the institution has absolutely no ability to control the risks associated with a transaction that may overdraw an account, while the consumer has control over the risk. We do not believe it is appropriate to shift the risk of the transaction onto an institution that cannot control the risk when the consumer is in the better position to control it. Therefore, an institution temporarily relying on stand-in authorization, or an institution that is forced to pay a transaction that is not otherwise authorized (*e.g.*, the transaction is below a certain floor), should have the ability to assess an overdraft fee if the transaction overdraws the account.

CBA respectfully disagrees with the Board’s justification for a lack of an exception in those circumstances in which an institution does not authorize the transaction. Specifically, the Board states “[f]rom the perspective of the consumer who has opted out, it is reasonable to expect that the transaction would be declined if he or she did not have sufficient funds in the account. The merchant’s decision not to seek authorization for small dollar transactions generally is not transparent to the consumer.” Regardless of whether the lack of authorization is transparent to the consumer, a consumer cannot presume that there are sufficient funds in the account simply because the consumer believes the transaction was authorized. The Board recognizes this fact insofar as it has provided exceptions to the fee prohibition when the transaction has, in fact, been authorized. As the Board notes, an authorization does not mean that funds will be available when the transaction settles. We strongly urge the Board to reconsider its position in this regard, or at least to amend its reasoning. Consumers should not expect that a transaction will be declined if it will settle into overdraft and the Board should not encourage such an expectation.

If the Board believes that consumers will falsely assume that a transaction approval at the point of sale will be the signal that there were sufficient funds in the account for the transaction (at least at the time of the authorization request), the Board can address this issue more directly. For example, it could require merchants who do not seek authorization, or who operate under floor limits, to post clear and conspicuous signs in close proximity to the point of sale that the approval of the transaction may still result in a consumer’s account from becoming overdrawn. We also believe, as we note below, that the overdraft opt-out notice could also educate consumers in a more complete and accurate manner to address some of these concerns.

We also ask the Board to consider the logistical issues and costs that will arise if an institution must discern whether an overdraft fee relates to a transaction that was not authorized, or authorized pursuant to stand-in processing. CBA members report that this is simply not possible in certain circumstances—not that it would be too costly, but *that it is not possible* based on current network configurations. These members report that it is not possible to identify a settled transaction as having been previously authorized or not. Even if a bank could identify transactions in this way, it would still require additional significant systems revisions to do so. For the reasons provided above regarding the conditioning of Covered Transaction opt-outs with other opt-outs, we ask the Board to expand the exception to the fee prohibition to include transactions not authorized by the institution and transactions authorized pursuant to stand-in processing.

Notice Timing

For accounts opened on or after the effective date of the final rule, the Proposal would require an institution to provide the opt-out notice, and a reasonable opportunity to opt out, prior to the institution imposing an overdraft fee in connection with a Covered Transaction (“Initial Notice”). For any account, including accounts opened prior to the effective date, for which an opt-out is not in effect, the institution must provide the notice following the assessment of an overdraft fee in connection with a Covered Transaction (“Subsequent Notice”). The Subsequent Notice may be provided on the periodic statement that reflects the overdraft fee, in close proximity to the overdraft disclosures required by Regulation DD, or it may be provided separately at least once per statement cycle on any notice sent promptly after the institution’s payment of such transaction during the statement cycle.

CBA believes these notification requirements are appropriate, and we urge the Board to retain them. We especially agree that institutions should not be required to send millions of Initial Notices to existing accountholders prior to the effective date. We believe this would be extremely costly and unnecessary, especially since many of these consumers have been provided with information regarding the institutions' overdraft policies as part of an account agreement or other disclosure.

With respect to the Subsequent Notice, we ask the Board to provide a safe harbor with respect to sending a notice "promptly" if it is not included in the periodic statement. Specifically, we believe that if the notice is sent no later than the periodic statement that reflects the underlying transaction, it should be deemed to have been sent "promptly." We do not believe the Board intends for an institution to send the notice earlier if it is not part of the periodic statement, and we ask the Board to provide such clarification.

The Board has requested comment on whether the opt-out notice should be segregated from other account disclosures. CBA does not believe the notice should be segregated. We believe the Board has proposed the correct standard, *i.e.*, that the disclosure be clear and conspicuous, and it should be retained in the final rule. The overdraft opt-out notice is no more important than a variety of other account terms and disclosures that are provided to the consumer in connection with a transaction account. We do not believe the Board should elevate this disclosure's profile, necessarily at the expense of others since consumers have a finite attention span, beyond that of other disclosures' profiles.

The Board has also requested comment on whether the final rule should permit institutions to provide the opt-out notice on periodic statements in any cycle in which the consumer has incurred an overdraft fee not related to a Covered Transaction or, alternatively, on all periodic statements. We do not believe the Board needs to provide institutions express permission to provide consumers with this information. Indeed, we believe it would be troubling if the Board were to prohibit an institution from disclosing a consumer's rights on any communication with the consumer, including the periodic statement. We do not believe that consumers will dismiss the substance of the notice on periodic statements, especially since the consumer will actively look for overdraft information on the periodic statement if he or she is dissatisfied with the fee.

Content and Form of Notice

CBA believes it is critically important that the overdraft opt-out notice inform consumers of their opt-out rights, and that institutions also have the ability to inform consumers of the consequences of opting out. We believe the Board could meet these objectives without the need for a lengthy, overly detailed, full-page Initial Notice. We believe it is unusual that perhaps the longest single regulatory notice the consumer would receive in connection with opening a transaction account, if the final rule is adopted as proposed, would be the Covered Transaction overdraft opt-out notice. As we discussed above, this is but one of many features associated with a transaction account. A full-page notice is *significantly* disproportionate to the importance of the information in the notice. A full-page is also not necessary to provide the consumer with the information necessary for the consumer to understand the services and the right to opt out. For example, disclosures of fee limits and alternative products are unnecessary in this context. The formatting of the notice is also excessively inefficient in terms of how it uses space (*e.g.*, unusually wide margins). In fact, we see no reason why the model language for the Subsequent Notice could not be modified slightly (*e.g.*, to include fee amounts and to describe the consequences of an opt out) and used as the Initial Notice.

It is critical that the Board provide a more manageable notice for institutions to use, especially since many institutions believe it would be a disservice to omit from the notice the consequences of opting out of overdraft services. The Board's notice is clearly geared toward driving consumers to opt out of overdraft services for Covered Transactions (or preventing them from opting in), and it is appropriate for an institution to use more than the optional sentence the Board includes in the model to note the consequences of an opt-out. Therefore, not only is it important that the Board make the notice more concise as a general matter, but it is also important because institutions will likely need to add additional text to ensure consumers understand the consequences of their decision. Because such text will be necessary to provide consumers with a complete understanding of the choice offered in the notice, we also ask the Board to provide additional examples of language that can be used in the notice to describe the consequences of opting out.

For example, an institution should be permitted to include phrases, and still receive the benefit of the safe harbor, such as:

- “If you do not have sufficient available funds, based on information reasonably known to us at the time you use your debit card, we will decline your transaction.”
- “If we authorize a transaction, we will pay the transaction, but possibly at a later point in time. We may also pay transactions that are posted to your account even if we did not authorize them. If you do not have sufficient funds in your account when we pay these transaction, it will still be paid but you will have a negative balance and we may assess a fee.”

We also note that the model notice says that the consumer may tell the bank not to “pay overdrafts” for Covered Transactions. That is not an accurate description of the consumer's right, and it could be misleading to a reasonable consumer. The consumer would generally have the right to tell the bank not to “authorize” Covered Transactions. The model notice should be amended accordingly.

CBA also asks the Board to provide express flexibility for an institution to provide other overdraft opt-out choices on the notice in addition to those relating to Covered Transactions. For example, an institution may provide separate opt-outs for ATM withdrawals and for debit card transactions. Or an institution could provide an opt-out for Covered Transactions and another for paper checks. We do not believe the institution should be required to segregate the overdraft notices, as a consumer would expect to see an integrated disclosure. CBA therefore asks the Board to provide such flexibility in the final rule.

Time to Implement Opt-Out

The Proposal would require an institution to comply with a consumer's opt-out request as soon as reasonably practicable as the institution receives it. We believe this is appropriate and consistent with similar implementation standards in other regulations. The Board asks for comment on whether additional guidance is necessary regarding what may constitute “as soon as reasonably practicable.” CBA does not believe such guidance is necessary. What is “reasonably practicable” may vary by institution or by opt-out method. Furthermore, we have noticed no significant confusion in connection with use of this standard in other regulatory contexts.

Duration of Opt-Out

Under the Proposal, a consumer's opt-out is effective until revoked by the consumer in writing or electronically. We ask the Board to allow (but not require) a bank to offer other options to revoke an opt-out, including in writing, electronically, by telephone, in person, or in any other manner in which the consumer requested the opt-out. For example, we believe an institution should be permitted to allow a consumer to revoke an opt-out by telephone in the event the consumer needs to make a purchase but is prevented from doing so as a result of the opt-out. The consumer may be at a drug store buying a prescription and need to revoke the opt-out for purposes of that transaction. We also believe it would be an unfortunate consumer experience if the consumer were in the bank branch and was told that he or she could not revoke an opt-out in the branch, and that a consumer should be permitted to use the same method the consumer used to place the opt-out, as such method may have been chosen by the consumer as the most convenient method for him or her. Finally, we ask the Board to allow an institution to offer the consumer the ability to temporarily revoke an opt-out (or to temporarily opt in) for a specific transaction at an ATM.⁹

Opt-In Alternative

Many of the comments we have provided are applicable to both the Opt-Out Alternative and the Opt-In Alternative. However, although we hope the Board will reject the Opt-In Alternative, we offer the following brief comments:

- The Board should not require an institution to provide confirmation of an affirmative opt-in. If the consumer affirmatively opts in, it is unlikely that the confirmation is necessary to alert the consumer of his or her choice.
- We agree that the opt-in notice could be sent to existing customers on the periodic statement after the first overdraft fee after the effective date. We believe it would be more appropriate to require notice *no later* than this periodic statement, as opposed to on the first periodic statement after the effective date or the periodic statement after the first overdraft fee.
- CBA does not believe the Board needs to be as prescriptive regarding the content and format of the opt-in notice. If the Board believes that service is of the type that a consumer should not have it absent express consent, it is not a service the institution should be *forced* to highlight, as if to convince the consumer to opt in.
- If the Board intends to prescribe the specific content of the opt-in notice, it should be significantly redrafted to provide a more fair description of the choice presented to the consumer. We reiterate our comment above about the content and tone of the draft model notice suggesting that overdraft services for Covered Transactions should be avoided. Our concerns are amplified if the notice must be used to obtain an affirmative opt-in from the consumer.

⁹ The technology for this single transaction decision could exist at a bank's proprietary ATM for a consumer accessing an account at that bank, but it is not necessarily yet available if the consumer uses a nonproprietary ATM.

Overdraft Fees and Debit Holds

The Proposal would prohibit an institution from assessing an overdraft fee if the overdraft would not have occurred but for a “hold” placed on funds in the consumer’s account in connection with a debit card transaction if the actual amount of the transaction can be determined by the merchant or other payee within a short period of time after the transaction is authorized. CBA asks the Board to decline to adopt this portion of the Proposal in the final rule. We believe this portion of the Proposal is more complicated than it may appear on the surface, and we specifically direct the Board to the comment letters filed by our members on this topic, such as the letter submitted by Huntington National Bank, for a more fulsome discussion of the specific issues that arise as a result of how each bank processes debit transactions. Not only is this portion of the Proposal almost unworkable for banks, it provides relatively few benefits for consumers.

Before commenting on the substance of the Proposal, CBA asks the Board to clarify the scope of the debit hold portion of the Proposal by defining a “debit hold.” Based on the examples provided in the Commentary, it appears the Board believes that a “hold” results from actions taken by the issuer to hold funds in excess of an authorization amount. It does not appear that the Board intends to consider a merchant’s authorization request amount to be a “hold” for purposes of the Proposal. Indeed, such an interpretation would hold the institution responsible for the authorization behavior of the merchant. This would be an unusual result, especially since the Board could address merchant-related concerns directly to merchants under Regulation E.¹⁰ We agree that a “hold” is limited to the actions of an issuer, and we ask the Board to provide explicit clarification of this fact in any final rule.

Regardless of how a “hold” is defined, there are significant costs associated with the Proposal that we believe can be mitigated with a relatively straightforward revision by allowing institutions a safe harbor if they do not hold funds exceeding the authorization request. In this regard, an institution could not comply with the debit hold portion of the Proposal without significant systems changes that allow the bank to “look back” to the transactions that could have an impact on an account’s overdraft status and determine if the overdraft would not have occurred but for a hold that exceeded the final settlement amount. A more appropriate solution that would not result in these costs would be to provide an institution with a safe harbor if the institution has adopted reasonable policies and procedures to hold funds equal to (or less than) an authorization request. If an institution has such policies and procedures in place, it would not violate the prohibition, even if an overdraft fee is assessed due to a hold that exceeded the final settlement amount. If the Board were to take this approach, it would impose obligations on an institution but only to the extent the institution can control and manage them.

For those institutions that will not take advantage of a safe harbor, CBA believes it is important for the Board to provide a definitive list of the merchant transactions that would be subject to the prohibition. The Board currently proposes that the prohibition would relate to transactions if the actual amount of the transaction can be determined by the merchant or other payee within a short period of time after the transaction is authorized. The Commentary then indicates that transactions at pay-at-the-pump terminals and at restaurants would be of the type of transaction covered by the Proposal. The Supplementary Information states that multi-night hotel stays would not be covered by the Proposal. CBA appreciates the guidance that the Board has proposed, but we believe that

¹⁰ The Board has imposed obligations on the terminal operator in other contexts, such as those pertaining to preauthorized transfers and ATM operators.

institutions will face difficult choices now and in the future when trying to determine whether a transaction is covered by the final rule or not. Indeed, it may be that one institution comes to one conclusion, but other institutions conclude differently, leaving uneven application of the consumer protections envisioned by the Board. We therefore request that the Board provide a list of merchant categories whose transactions would be subject to the prohibition in the Proposal.

If the Board retains an example of transactions that are not subject to this portion of the final rule—which would be helpful if the Board does not provide a definite list of transactions that are subject to it—we ask that the Board revise the example relating to a hotel stay. The nature of *all* hotel stays is such that the merchant may not know the final transaction amount within a short period of time. Yet, the Supplementary Information refers to a multi-night hotel stay as a transaction that would be excluded from coverage under the debit hold prohibition, which suggests that a single night stay may not be excluded. CBA hopes this was not the Board’s intention, and we ask the Board to provide the appropriate clarification if the example is retained. We also ask that the Board provide the example in the Commentary to provide institutions with greater certainty regarding the applicability of the example.

By including certain transactions by merchant type within the prohibition, the Board clearly expects that an institution will be able to identify the type of merchant that initiated the debit card transaction. CBA asks the Board to expect that an institution will have policies and procedures to identify the type of merchant involved in a transaction, but not that the institution will know with certainty the type of merchant that initiated the transaction. Without this clarification, the Proposal could be read to impose liability on an institution even if the institution had no reasonable means of recognizing the transaction as being subject to the debit hold/overdraft fee prohibition. In particular, an institution knows only what information it is provided as part of a transaction authorization and settlement process. The best an institution can do is properly identify the merchant category code (or similar code) accompanying a transaction, and handle it accordingly. The institution cannot make an independent judgment regarding the nature of the transaction. Therefore, we ask that the institution not be tasked with determining with precision the type of merchant that originated the transaction, but that the institution use reasonable policies and procedures to identify relevant transactions, such as by reviewing merchant category codes or similar codes that may accompany a debit card transaction.

CBA appreciates the fact that the Board has offered a safe harbor for institutions if they have procedures and practices in place designed to release a debit hold within a reasonable period of time, such as two hours. We believe our proposed safe harbor, described above, for institutions that do not hold more than the authorized amount may be more reasonable. The safe harbor in the Proposal is technically feasible, as the Board indicates. However, it is costly and would apply only if all merchants and acquirers were *required* to clear and settle the specified types of transactions within two hours, such as by imposition of such requirements by the payment card networks. This would be a costly undertaking, especially for merchants and acquirers. We also note that the Proposal assumes continual clearing and settlement cycles, 24 hours a day, 7 days a week. This may not be the case. If the Board intends to keep this safe harbor, it may be able to mitigate the costs by providing a more realistic timeframe on the release of the debit hold. Specifically, it is our understanding that institutions generally assess overdraft fees as part of their batch processing at the end of the day. It would seem reasonable to allow an issuer to retain its own hold and either disregard it for purposes of assessing overdraft fees or release the hold prior to the time the bank calculates the account activity for purposes of assessing the overdraft fee.

Effective Date

CBA is pleased that the Board has indicated its desire to provide sufficient lead time for institutions to implement the final rule. As we describe above, we believe the Proposal has the potential to impose significant system change requirements on institutions. Based on the Supplementary Information, it would appear that the Board agrees. We recognize that there will be demands by some for a short implementation period. This would be a mistake, and ultimately harm consumers. Even the largest institutions have finite legal, compliance, and information technology personnel and resources. As the Board is aware, most institutions are already close to exceeding their capacity to handle the existing regulatory and other changes affecting the industry. For example, banks are working on implementing a variety of regulatory initiatives which have become almost overwhelming in their scope and demand for attention. These include revisions to Regulation AA, Regulation Z, Regulation DD, and the implementation of existing and upcoming FACT Act regulations, among others. We do not believe that this Proposal warrants a reduction in the diligence or resources allocated to these more pressing issues. We therefore ask the Board to provide institutions with two years to implement the final rule before compliance becomes mandatory.

Conclusion

CBA commends the Board for its efforts to develop an overdraft proposal outside of Regulation AA. We appreciate the opportunity to provide our comments on the Proposal. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

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