



July 8, 2008

Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street NW  
Washington, DC 20552

Attention: OTS-2008-0004

Dear Office of Thrift Supervision:

Wolters Kluwer Financial Services, Inc. is a leading provider of content, compliance, technology, and services to the banking, mortgage, securities, and insurance industries in the United States. Many financial institutions use our compliance solutions, among other things, to help them comply with Truth-in-Savings and the best practices found in the Joint Guidance on Overdraft Protection Programs. Thus we submit the following regarding your proposed overdraft services Regulations:

**I. Whether the Initial Notice of the Right to Opt-Out Must Be Given to Existing Account Holders:**

There appears to be some inconsistency between the proposed unfair acts and practices regulations regarding overdraft services ("Unfair Acts and Practices Reg.") and proposed Reg. DD and their respective Section-by-Section Analyses as to whether the initial notice of the right to opt out of overdraft services must be given to existing account holders, or whether it is required only when new accounts are opened. Moreover, there appears to be some inconsistency and confusion in this regard within proposed Reg. DD and its Section-by-Section Analysis themselves.

The Section-by-Section Analysis of proposed Unfair Acts and Practices Reg. Section \_\_.32 states:

"Assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt out of the institution's overdraft service appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC.

\* \* \*

"Under... \_\_.32(a)(1), institutions would be prohibited from assessing any fees on a consumer's account in connection with an overdraft service unless the consumer is given notice and a reasonable opportunity to opt out of the service, and the consumer does not opt out."

\* \* \*

“The proposal would require notice of the opt-out to be provided both before the institution’s assessment of any fee...and subsequently at least once during or for each periodic statement cycle in which any overdraft fee or charge is assessed... .”

The Section-by-Section Analysis of proposed Reg. DD Section 230.10 (c) states:

“The Board anticipates that the requirement to provide notice before overdraft fees are assessed would apply only to accounts opened after the effective date of the final rule. Thus depository institutions would not be required to provide initial opt-out notices to existing customers. Nevertheless, the requirement to provide subsequent notice of the opt-out after the customer has overdrawn the account and fees have been assessed on the account would apply to all accounts after the effective date of the final rule, including those existing on the effective date of the rule.”

Moreover, despite its Section-by-Section Analysis, there is nothing in the actual text of proposed Reg. DD Section 230.10(c) indicating that the initial notice of the right to opt out does not have to be given to existing account holders and is required only when new accounts are opened. The actual text of proposed Reg. DD Section 230.10(c) is as follows:

“Timing. As applicable, the...[notice of the right to opt out]...must be given:

“(1) Prior to the institution’s imposition of any fee for paying a check or other item when there are insufficient funds in the consumer’s account, provided that the consumer has a reasonable opportunity to exercise the opt-out right prior to the assessment of any fee for paying an overdraft; and

“(2) (i) On each periodic statement reflecting any fee(s) or charge(s) for the paying of an overdraft, in close proximity to the disclosures required by...230.11(a); or  
(ii) At least once per statement period on any notice sent promptly after the institution’s payment of an overdraft.”

Thus, (a) the Unfair Acts and Practices Reg. Section-by-Section Analysis makes the assessment of an overdraft fee without prior notice of the right to opt out a prohibited unfair act or practice and requires both the initial notice and the subsequent notice, without distinction between existing accounts and new accounts; (b) the Reg. DD Section-by-Section Analysis indicates that the initial notice does not have to be given to existing accounts and is required only when opening new accounts; and (c) there is nothing in the actual Reg. DD text indicating that the initial notice does not have to be given to existing account holders and is required only when new accounts are opened.

Hopefully, the final regulations will clarify this inconsistency and confusion, so financial institutions will know whether the initial notice of the right to opt out must be given to existing account holders. Unless this is clarified, financial institutions will be left to

wonder whether Reg. DD really gives them the authority to assess overdraft fees on an existing account holder without prior notice of the right to opt out, even though this practice is prohibited as unfair by the Unfair Acts and Practices Reg.

## **II. Whether Less Than All the Holders of a Multi-Holder Account Can Opt Out of Overdraft Services For the Account:**

There does not appear to be anything in the proposed regulations indicating whether less than all the holders of a multi-holder account, such as a joint account, can opt out of overdraft services for the account. We believe that this needs to be addressed by the final regulations.

## **III. Whether Institutions Should Be Required to Provide a Form With a Check-Off Box That Consumers Can Mail in to Opt Out:**

You have asked for comment on whether institutions should be required to provide a form with a check-off box that consumers can mail in to opt out.

Requiring such a check-off box would certainly be convenient for consumers.

Moreover, it could be beneficial to both consumers and institutions in that it could avoid disputes such as whether an opt out was requested, whether the request was by the required number of account holders on a multi-party account, and whether the consumer provided the information (such as the account number) needed to accomplish the opt out.

We believe any such form should require the signature(s) of the account holder(s).

## **IV. Whether There Should Be an Option to Provide the Subsequent Notice of the Right to Opt Out on a Separate Document with the Periodic Statement, Rather Than on the Periodic Statement:**

Proposed Reg. DD Section 230.10(c)(2) provides that the subsequent notice of the right to opt out must be given as follows:

“(i) On each periodic statement reflecting any fee(s) or charge(s) for paying an overdraft...; or

“(ii) At least once per statement period on any notice sent promptly after the institution’s payment of an overdraft.”

We believe that consideration should be given to an option to provide the subsequent notice on a separate document with the periodic statement, rather than on the periodic statement. Such an option could be beneficial to both financial institutions and consumers, because it could be less expensive for financial institutions, it could be more conspicuous for consumers, and it could facilitate combining the notice with a form of opt-out that the consumer could complete, sign, and return to the financial institution.

## **V. Whether the Provisions of Proposed Reg. DD Appendix B-10 Are Model Clauses Providing Safe Harbors:**

Reg. DD Appendix B appears to provide safe harbors for its “model clauses” by stating that “Institutions that modify the model clauses will be deemed in compliance as long as they do not delete required information or rearrange the format in a way that affects the substance or clarity of the disclosures.”

Proposed Reg. DD Appendix B-10 is entitled “Overdraft Services Opt-Out Notice Sample Form”. The words “Sample Form” in this title suggest that Appendix B-10 and its contents may not be “model clauses”, and thus may not provide safe harbors.

However, the Section-by-Section Analysis of proposed Reg. DD section 230.10 states that “Sample Form B-10 provides a *model form* institutions can use to satisfy their disclosure obligations under the proposed rule” (emphasis added), thus suggesting that Appendix B-10 may be intended to provide safe harbors.

Hopefully the final regulations will provide clarification as to whether the provisions of Appendix B-10 provide safe harbors. And if they do provide safe harbors, the final regulations should clarify that the safe harbors are for Unfair Acts and Practices Reg. purposes as well as Reg. DD purposes.

## **VI. Whether the Requirement That Responses to Balance Inquiries Through Automated Systems Include the Account Holders’ Funds Only, and Not Funds Available Under Overdraft Services, Should Be Expanded to Include Automated Balance Disclosures Made Without Balance Inquiries:**

Proposed Reg. DD 230.11(c) provides that:

“In response to an account balance inquiry by a consumer through an automated system, an institution must provide a balance that solely includes funds that are available for the consumer’s immediate use or withdrawal, and may not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the customer’s account.”

Consideration should be given to expanding this provision to include automated balance disclosures made without balance inquiries. Automated balance disclosures made without balance inquiries are just as capable of misleading as those made in response to balance inquiries. Expanding this provision to include automated balance disclosures made without balance inquiries would avoid the possibility of disputes over the meaning of “balance inquiries”. Moreover, if this provision is limited to balance inquiries, institutions might avoid it by modifying their automated systems to volunteer account balances before balance inquiries can be made.

**VII. Clarification Is Needed as to Whether Providing an Account Balance at an ATM That Includes Funds Available Under an Overdraft Service Is an Unfair or Deceptive Practice and/or Requires Additional Disclosures at Account Opening or Otherwise:**

We understand that some financial institutions have been written up for unfair or deceptive practices for providing at ATMs account balances that include funds available under overdraft services, especially in the absence of additional disclosures at account opening or otherwise. Clarification is needed as to whether this is actually an unfair or deceptive practice, as to whether additional disclosures at account opening or otherwise would avoid such unfairness or deception, and as to the content of such additional disclosures.

Very truly yours,

WOLTERS KLUWER FINANCIAL SERVICES, INC.

A handwritten signature in cursive script that reads "Arthur L. Doten".

Arthur L. Doten  
Attorney  
Compliance Department

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