



One Astoria Federal Plaza
Lake Success, NY 11042-1065
(516) 327-3000

August 4, 2008

VIA FACSIMILE

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

Attn: OTS-2008-0004

RE: Unfair or Deceptive Acts
Or Practices
OTS-2008-0004
Subpart D to Part 535
Of Title 12 of the Code of
Federal Regulations

Dear Sir/Madam:

Astoria Federal Savings and Loan Association ("Astoria Federal") is pleased to comment on the new Subpart D to Part 535 of Title 12 of the Code of Federal Regulations (the "Proposed Overdraft Rule") proposed by the Office of Thrift Supervision ("OTS") which, together with the Federal Reserve Board's proposed amendments to Regulation DD (the "Proposed Reg DD Amendments"), will govern the provision of overdraft services by savings associations in connection with consumer deposit accounts. While we previously submitted a comment letter dated July 17, 2008 such letter was specific to the provisions of the Proposed Reg DD Amendments. Certain comments set forth herein, however, relate to both the Proposed Overdraft Rule and the Proposed Reg DD Amendments.

We strongly believe that not only are overdraft services beneficial to consumers but that they are an accommodation many consumers have come to expect from their financial institution as well as an accommodation that they appreciate. We strongly disagree with the assertion that imposing fees for such services, without providing a right to opt-out, is somehow unfair to consumers. Declaring the imposition of overdraft fees without providing a right to opt-out, to be an unfair act or practice, would effectively shift

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
August 4, 2008
Page 2

the responsibility for account management from the consumer to his/her financial institution. The OTS should not lose sight of the fact that the consumer is in the best position to know his/her account balance since only they know what checks they have written or which payments they have authorized. By keeping track of all of their transactions, including checks, automatic clearinghouse transactions ("ACH Transactions"), automated teller machine transactions ("ATM Transactions"), and point-of-sale debit transactions ("POS Transactions") consumers can easily avoid overdraft fees. While we do not believe charging customers overdraft fees without providing them with a right to opt-out, is necessarily an unfair act or practice, we do believe that educated consumers make the best consumers and that consumers should be provided with a choice. That is why since its inception, Astoria Federal's overdraft process called "OD Enhancement" has, in compliance with the OTS Guidance on Overdraft Protection Programs issued in February 2005, included the provision of a disclosure and "Opt Out Notice."

Such disclosure and "Opt Out Notice" is set forth in our "Checking Account Rules & Regulations" which is provided to customers at account opening. Through our "OD Enhancement" process, we may, in our discretion, pay overdrafts created by checks, ACH Transactions, ATM Transactions or POS Transactions even though the account on which they are drawn contains insufficient or uncollected funds. In the spirit of providing customers with choice, however, we do permit our customers to "opt-out" of the payment of overdrafts. Our customers may "opt-out" of either: (i) the payment of all overdrafts or (ii) the payment of only overdrafts created by ATM Transactions or POS Transactions. Note, however, that if a customer chooses to "opt-out" of the payment of overdrafts created by ATM Transactions, they must "opt-out" of the payment of overdrafts created by POS Transactions and vice versa. Based on the fact that only approximately 3% of our checking account customers have chosen to opt out of having us pay overdrafts on their account since the inception of our OD Enhancement process in February, 2005, we believe that most consumers prefer paying the fee associated with the payment of an overdraft than facing the consequences of the alternative (i.e., the return of the item, payment of a fee for such return, payment of a fee imposed by the payee of the item or possible adverse information being reported to a credit bureau). Although our "opt-out" practices presumably already comply with the requirement set forth in section 535.32(a)(2) of the Proposed Overdraft Rule, we do have two comments relating thereto.

First, although we permit customers to opt-out of the payment of overdrafts created by ATM Transactions and POS Transactions, we believe it must be made clear to

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
August 4, 2008
Page 3

the customer that providing them with such a choice does not obligate us to pay overdrafts on transaction types of which they have not opted out. The customer should understand that the payment of an overdraft is always within our discretion. Consequently, we believe the language contained in Sample Form B-10 set forth in Appendix B to the Proposed Reg DD Amendments, which states "You also have the *right* to tell us not to pay overdrafts for ATM withdrawals and debit card purchases, but to continue to pay overdrafts for other types of transactions," should be revised. The customer does not have the *right* to have overdrafts created by any type of transaction paid. Second, since POS Transactions may be PIN based or signature based and may be performed either in-person or online, we believe such phrase should be defined in the Proposed Overdraft Rule. At Astoria Federal, if a customer opts out of the payment of overdrafts for "POS Transactions," they opt out of the payment of all POS Transactions whether PIN based or signature based and whether performed in-person or online as we cannot distinguish between PIN based transactions and signature based transactions or between transactions performed in-person as opposed to online. Consequently, what constitutes a "POS Transaction" within the meaning of the Proposed Overdraft Rule is significant.

You have solicited comments regarding whether the Proposed Overdraft Rule is clear and understandable and specifically whether it contains language or jargon that is not clear. We have one comment regarding the defining of terms in the Proposed Overdraft Rule. While section 535.1(c) states "this part applies to savings associations and subsidiaries owned in whole or in part by a savings association," the remainder of Part 535, including the Proposed Overdraft Rule, simply uses the term "You." For example, section 535.32 (a)(1) of the Proposed Overdraft Rule reads, in pertinent part, as follows: "*You* must not assess..." Presumably, "*You*" means a savings association or any subsidiary owned wholly or in part by a savings association but it is not formally defined anywhere in Part 535, including Subpart D thereof. We believe, for the sake of clarity, that "*You*" should be a defined term as it is in other rules and regulations promulgated by the OTS.

You also requested comment on the operational issues and costs of implementing the proposed prohibition on the imposition of overdraft fees if the overdraft occurs solely because of the existence of a hold. Financial institutions have no control over a merchant's request for an authorization amount in connection with a debit card transaction. For this reason, as well as others, we believe section 535.32(b) of the Proposed Overdraft Rule prohibiting the imposition of overdraft fees if the overdraft occurs solely because of the existence of a hold, should be deleted from the Proposed Overdraft Rule in its entirety. Astoria Federal's computer system essentially processes transactions as follows: All transactions for a customer's account are pooled at the end of

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
August 4, 2008
Page 4

each day. First, all credits are posted to the account. Next, all in-person withdrawals are posted to the account in the order of highest dollar amount to lowest dollar amount. Then, all other debit items (whether checks drawn on the account, ATM Transactions, POS Transactions, etc...) are posted to the account in the order of the item of the highest dollar amount to the item of the lowest dollar amount. As each debit item is posted, the system confirms whether the balance of the account is sufficient to pay the next debit item. If it is, the item is paid from the account balance. If the account balance is insufficient, the system determines whether the balance is insufficient simply because there are not enough funds in the account or because there is a hold of some type on the account. A determination is then made whether to pay the debit item from overdraft. It is important to note, however, that although the system can detect a hold on an account, it cannot distinguish between different types of holds (i.e., it does not know whether the hold is a "check float hold," a "legal process hold" or a "debit card hold"). Therefore, it is incapable of preventing the imposition of an overdraft fee in connection with an overdraft that occurs solely because of the existence of a debit card hold.

In addition, although it appears from the Section-by-section analysis that precedes the Proposed Overdraft Rule, that the intent of section 535.32(b) is to prohibit the imposition of overdraft fees that occur solely as the result of an "authorization" hold in connection with a debit card transaction, the actual language of section 535.32(b) does not necessarily reflect such intent accurately. Section 535.32(b) states "You must not assess a fee or charge on a consumer's account for an overdraft service if the consumer's overdraft would not have occurred but for *a hold* placed on funds in the consumer's account that is in excess of the actual purchase or transaction amount." The Proposed Overdraft Rule does not define "*a hold*." We fear, therefore, that section 535.32(b) may be read to prohibit a financial institution from imposing an overdraft fee for the payment of an overdraft that may occur as the result of a "legal process hold" that is placed on an account in excess of some transaction or purchase amount. Thus, we believe that, if section 535.32(b) is not deleted, that, at the very least, either the term "*a hold*" should be defined or section 535.32(b) should be revised to specify the type of hold intended.

Moreover, the two parties who play a significant role in the debit card transaction process (the merchant and the card system) are not covered by the Proposed Overdraft Rule. We believe, therefore, that this issue would be better addressed within the framework of Regulation E, so that the role of all relevant parties to the process may be covered.

Finally, you also requested comment on the impact of requiring financial institutions to pay smaller dollar items before larger dollar items when received on the

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
August 4, 2008
Page 5

same day for purposes of assessing overdraft fees on a consumer's account. You indicate that under such an approach, financial institutions could use an alternative clearing order provided they disclose this option to the consumer and the consumer affirmatively opts in. It should be noted that section 4-303(2) of the Uniform Commercial Code of the State of New York (the "NY UCC") states that "items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank." As support for such rule, comment 6 to NY UCC §4-303, states "this rule is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other difficulties. Further, where the drawer has drawn all the checks, he should have funds available to meet all of them and has no basis for urging one should be paid before another..." Although ACH Transactions, ATM Transactions and POS Transactions do not appear to be "items" as that term is defined in NY UCC §4-104, we believe the justification set forth in comment 6 applies to all types of debits to a customer's account. Again, it is the customer who authorizes all such transactions and who "should have funds available to meet all of them." As most financial institutions do, Astoria Federal currently pays items received on the same day for clearing purposes from highest dollar amount to lowest dollar amount. Assuming all consumers "opted-in" to our method of paying items for clearing purposes, in order for us to comply with your proposed requirement to pay small dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees we would have to process all payments to each consumer's account twice each day, once for payment clearing purposes and once, for overdraft fee assessment purposes. Our computer system simply does not function in this fashion. The cost and expense of enhancing or upgrading our system to be able to do this would be exorbitant. And in the event that all consumers did not "opt-in" to our current method of paying items for clearing purposes, we would not only be forced to enhance or upgrade our system for the purpose of assessing overdraft fees but we would also be forced to implement, at some unknown cost, another computer system to process payments for clearing purposes from lowest dollar amount to highest dollar amount. The operational issues this proposal would cause if promulgated would be both extremely burdensome and expensive.

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
August 4, 2008
Page 6

In sum, while we support certain objectives of the Proposed Overdraft Rule and have already incorporated many of them into our OD Enhancement process, we believe revisions to such rule are necessary in order to avoid what we believe will be unintended consequences. Astoria Federal appreciates the opportunity to comment on the Proposed Overdraft Rule. Please do not hesitate to contact the undersigned if you have any questions or wish to discuss any of our comments in further detail.

Very truly yours,



Michele M. Weber
Vice President and
Senior Counsel