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August 4, 2008

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

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

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Unfair or Deceptive Acts or Practices; Docket No. R-1314 (Federal Reserve Board); OTS-2008-0004 (Office of Thrift Supervision); RIN 3133-AD47 (National Credit Union Administration)

Truth in Savings; Docket No. R-1315 (Federal Reserve Board)

Regulation Z Docket No. R-1286 (Federal Reserve Board)

Dear Sir or Madam:

The Financial Services Roundtable ("Roundtable") respectfully submits these comments on the proposal by the Federal Reserve Board (the "Board"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA") to classify certain acts and practices in connection with consumer credit card accounts and overdraft services as unfair or deceptive under the authority of section 5(a) of the Federal Trade Commission Act.[1] We would reiterate the statement we made in our comment letter last year on Regulation Z that the consumer lending industry supports appropriate

[1] The Roundtable represents 100 of the nation's largest integrated financial services companies. Roundtable members provide banking, insurance, investment products and services to American consumers and businesses. Roundtable member companies manage over $18.3 trillion in assets, have revenues in excess of $670 billion, and employ over 2.1 million individuals.

and meaningful disclosures. Of course there must always be a consideration of the consumers and financial cost to lenders with any new disclosure. Inasmuch as these proposed regulations represent a step in helping consumers make more informed decisions, we do not disagree. However, we are very concerned that the proposal would label practices that have been deemed acceptable to this point as "unfair and deceptive." We recommend that rather than label these practices as "unfair and deceptive" that the agencies address these acts and practices in the proposal through revisions to Regulation Z, Regulation E or Regulation DD, or through existing safety and soundness authority. Such an alternative approach could help to empower consumers without the potential negative impact on consumers and financial institutions we discuss in our letter.

I. Introduction

The proposal by the Board, OTS and NCUA represents a dramatic change in the regulation of consumer credit. Traditionally, consumer credit transactions, including overdraft services, have been regulated through disclosure requirements. Public disclosure has been viewed as an appropriate means to allow consumers to make informed choices, without imposing unnecessary constraints on the availability of credit. The proposal takes a different approach. It identifies certain acts and practices that may be unfair or deceptive under section 5 of the Federal Trade Commission Act, and would prohibit institutions from engaging in those acts or practices. We submit that there is a better way to address the issues raised in the proposal.

The agencies have alternative means to address the acts and practices identified in the proposal. Indeed, the agencies have an obligation to consider the potential unintended consequences of the proposal and to pursue alternatives that are less disruptive to consumers and the economy. Reasonable alternatives are amendments to Regulation Z (Truth in Lending) to enhance existing disclosure requirements, amendments to Regulation E (Electronic Funds Transfer) to better inform consumers about the use of ATM and POS transactions, amendments to Regulation DD (Truth-in-Savings) to enhance disclosures related to overdraft services, and the promulgation of additional safety and soundness standards.

The proposal also is not consistent with the traditional method of addressing unfair or deceptive acts or practices. Unfair or deceptive acts or practices are very fact specific. As such, they are typically addressed on a case-by-case basis. General rules, such as the proposal, can inadvertently prevent legitimate acts or practices that otherwise benefit consumers. A case-by-case application of section 5 of the Federal Trade Commission Act has been the long standing approach of the Federal Trade Commission ("FTC") and the banking agencies.

Several of the acts and practices identified in the proposal cannot reasonably be classified as unfair or deceptive. Some of the acts and practices, such as risk-based

pricing, have been sanctioned by the agencies, and provide benefits to consumers that outweigh the potential for individual harm. Others, such as the proposed treatment of overdraft services, are unworkable.

Finally, the proposal could expose the industry to significant liability based upon its retroactive effect and its relationship to state law. We, therefore, urge the agencies to pursue a different approach.

II. Analysis

A. The Agencies Must Consider Less Burdensome Means to Achieve Regulatory Goals

Citing the case of American Financial Services Association v. FTC,[2] the notice of proposed rulemaking states that the agencies have wide latitude to determine the remedy necessary to prevent an unfair or deceptive act or practice, and that they are not required to adopt the least restrictive means.[3] While we acknowledge that the agencies are not required to take the least restrictive approach, we believe that for both legal and policy reasons the agencies must consider minimizing regulatory burden as part of this rulemaking, and should take the approach that provides the least burdensome effective solution to the identified problems.

The Supreme Court has long held that an administrative agency must consider the consequences of its proposed actions, and should not choose a remedy without considering less burdensome alternatives. For example, in Burlington Truck Lines, Inc. v. U.S., the Supreme Court struck down an Interstate Commerce Commission ("ICC") order because it was overly broad and a narrower, less burdensome remedy was available. The Court noted that the ICC did not have unlimited discretion to apply either remedy simply because either might be effective, but instead had to weigh the competing public interests, e.g. costs and benefits. The remedy chosen by the ICC was struck down, in part, because the agency did not address the different consequences that would result from the different potential remedies, and the ICC's choice of the broader but more burdensome remedy, rather than a more precise and narrower remedy, could not stand "without a compelling justification."

In an earlier case involving the FTC, the Supreme Court reviewed an FTC order that required flour retailers to cease using the trade names that contains the words "mill" or "milling" if a company did not actually mill wheat, but simply packaged already milled flour.[4] The Court noted that the stores were willing to disclose the fact that they

[2] 767 F.2d 957 (D.C.Cir. 1985).
[3] 73 Fed. Reg. 28909.
[4] FTC v. Royal Milling Co., 288 U.S. 212 (1933).

did not mill the flour, but that such a remedy was not selected by the agency. The Court overturned the FTC's order, explaining:[5]

> We think ... the commission went too far in ordering what amounts to a suppression of the trade names. These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and the public, and this can be done ... by requiring proper qualifying words to be used in immediate connection with the names.

Several years later the Supreme Court considered an FTC order barring the use of the word "Alpacuna" as a trade name for coats that did not contain vicuna. Again, the Court ordered the FTC to consider whether a less drastic remedy could satisfy the purposes of the Act.[6]

Even the case cited in the preamble to support the proposition that the agencies have "wide latitude" in fashioning a remedy (American Financial Services Ass'n v. FTC) involved a consideration of alternative remedies. In that case, the court did not simply dismiss the argument that the FTC's order was overbroad. Rather, the court concluded that the FTC's decision was reasonable, and specifically found that the FTC considered narrower, alternative remedies but determined that these alternatives failed to address the full range of problems being addressed.

Furthermore, when the courts have deferred to the FTC's discretion in fashioning a remedy, the justification used was that the FTC "was the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practice."[7] In contrast, the banking agencies are not the administrative agencies selected by Congress to be the experts in unfair or deceptive acts or practices. The special status the courts have given the FTC in this area does not apply to the banking agencies. In addition, the general deference the courts give to actions by administrative agencies under the Chevron doctrine does not apply in this instance, since the banking agencies are not the appropriate agencies to receive such deference under the rules the Supreme Court has developed to implement the Chevron case.[8] In fact, the agency that is given judicial

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[5] Id. at 217.
[6] Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).
[7] Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-613 (1946); American Financial Services Ass'n. v. FTC, 767 F.2d 967, 988 (D.C. Cir. 1985).
[8] When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 n.30, 90 L. Ed. 2d 584, 106 S. Ct. 2101 (1986) (because multiple agencies promulgated rules under statute, "there is thus not the same basis for deference predicated on expertise as we found" in *Chevron*); *Salleh v. Christopher*, 318 U.S. App. D.C. 123, 85 F.3d 689, 692

deference here, the FTC, has chosen not to implement similar regulations for credit card related products offered by non-banking companies, but instead has followed a case-by-case approach to controlling unfair or deceptive acts or practices.[9]

The abovementioned cases indicate that the banking agencies have a legal responsibility to consider and evaluate all of the potential remedies that may address a perceived unfair or deceptive act or practice. While the courts have given considerable deference to the FTC in selecting a particular remedy, a careful reading of the case law shows that the FTC does not have unlimited discretion, and the courts will look to see if the agency has a rational basis for choosing a more burdensome remedy when a less drastic one can achieve the same goal. The banking agencies have the same obligation. Furthermore, judicial deference afforded to the FTC will not apply to the banking agencies, and therefore the burden on the banking agencies to review and consider all possible alternative remedies is even greater than the burden upon the FTC. In the present rulemaking, the banking agencies clearly have a less burdensome remedy that they themselves advocated only several months ago – enhanced disclosure. The agencies must fully consider this option, and provide a rational basis for rejecting this less burdensome approach.

This obligation is good public policy and required as a matter of law. The banking agencies are proposing regulations that could have significant consequences for consumers and the economy. The proposal could reduce options for, and the availability of, credit to consumers. It also could create major liabilities for the nation's financial services providers. Public policy dictates that all less restrictive and burdensome options should be considered, and only rejected as a last resort. Certainly it would be better public policy to at least move forward with the recently proposed enhanced disclosures before taking the more drastic steps contained in this proposal.

B. Unfair and Deceptive Acts or Practices Are Better Addressed On a Case-by-Case Basis

Experience has shown that section 5 of the Federal Trade Commission Act is best implemented through specific actions rather than broad regulations that cannot take into account the specific circumstances in consumer transactions. A practice that may be unfair with respect to certain consumers, or under certain conditions, may be entirely appropriate for another consumer. With only minor exceptions, the FTC has enforced the

(D.C. Cir. 1996) (no *Chevron* deference applied to agency's interpretation of statute it administers "when more than one agency is granted authority to interpret the same statute").

[9] See, e.g. "FTC Sues Subprime Credit Card Marketing Company," FTC Press Release dated June 10, 2008; "Final Judgment Bans Seller of Advance-fee Credit Cards," FTC Press Release April 2004.

statute on a case-by-case basis, and the FTC has advocated that approach to the banking agencies.[10]

Until this rulemaking, the Board consistently advocated a case-by-case approach to the enforcement of section 5. In a 2002 letter to Congressman John LaFalce, Board Chairman Alan Greenspan noted "... because a determination of unfairness or deception depends heavily on the facts of each individual case, the Board believes it is effective for the banking agencies to approach compliance issues on a case-by-case basis."[11] Similarly, in a 2006 letter to Congressman Barney Frank, Chairman Bernanke stated:

> Because a determination of unfairness or deception depends heavily on the facts of an individual case, however, compliance with the FTC Act has been approached typically on a case-by-case basis. A rule attempting to define a specific practice as unfair or deceptive and, therefore, prohibited in all circumstances, is often difficult to construct. Broad rules covering a wide range of possible circumstances could unintentionally prohibit legitimate practices, while narrower rules might have only limited effectiveness.[12]

And, just one year ago, Governor Kroszner told the members of the Financial Services Committee of the U.S. House of Representatives:

> The lack of rules under the FTC Act does not appear to be an impediment to the agencies' enforcement efforts because a finding of unfairness or deception depends heavily on the facts and circumstances, and must be determined on a case-by-case basis. Rules seeking to define all the circumstances when a particular practice is unacceptable can be too narrow or too broad and, as a result, they may be ineffective or have unintended consequences. In our view, enforcement of the FTC Act on a case-by-case basis, reinforced by agency guidance that establishes standards and recommended practices, is a more effective way to address these concerns.[13]

Basic tenets of administrative law require a rational basis for agency actions. In this case, we are aware of no change in facts or circumstances that substantiates a reversal in the long-standing application of a case-by-case approach to the identification of unfair and deceptive acts or practices.

[10] Letter to John E. Bowman from Lydia B. Parnes, Director, Bureau of Consumer Protection, Federal Trade Commission, December 12, 2007, page 26.
[11] Letter to Honorable John. L. LaFalce from Board Chairman Alan Greenspan, May 30, 2002.
[12] Letter to Honorable Barney Frank from Board Chairman Ben S. Bernanke, March 21, 2006.
[13] Testimony of Board Governor Kroszner Before the House Committee on Financial Services, June 13, 2007.

C. Some of the Acts or Practices Identified in the Rule Have Been Accepted by the Agencies

The proposed regulation would brand as unfair or deceptive acts and practices that have been accepted by the federal banking agencies. The following are examples to consider:

- On September 14, 2004, the Office of the Comptroller of the Currency ("OCC") issued an Advisory Letter stating that the re-pricing of credit card interest rates due to a consumer's failure to make timely payments on another account, including an account with another creditor, or because of other behavior that reflects poorly on the consumer's credit rating "*may well be appropriate measures for managing credit risk on the credit card issuer.*" The Advisory Letter cautions banks to make sure that these policies are adequately disclosed in the promotional materials, but does not in any way discourage banks from using these credit risk management tools.
- In 2006, the OTS published a Handbook on Credit Card Lending that advises thrift institution management to monitor profitability and losses carefully, and notes as an example institutions that use risk-based pricing to reflect changes in the customer's overall risk profile.[14] It is impossible to rationalize these recent statements by the federal banking agencies that implicitly sanction, if not encourage, the use of risk-based pricing, with this proposal that would effectively prohibit the practice as unfair and deceptive.
- In its proposed revision to Regulation Z issued on May 23, 2007, the Board specifically rejected calls for a prohibition on risk-based pricing, and instead determined that enhanced disclosures and advance notice would be a better alternative. The Board even published proposed model notices for consumers who would be subject to so-called penalty rates.

Clearly, the federal banking agencies have maintained a long-standing policy of permitting risk-based pricing. We believe the use of risk-based pricing is an appropriate business practice that should not be deemed as unfair and deceptive.

D. Some of the Acts and Practices Identified in the Regulation Provide Broad Consumer Benefits

The FTC has established a three-part standard for determining whether an act or practice is unfair. That standard requires the agencies to weigh a particular act or practice against the ability of consumers to avoid harm and against any wider consumer benefits that may be associated with the particular act or practice. Additionally, in the application

[14] OTS Handbook on Credit Card Lending, § 218 (2006).

of this standard, the FTC has taken the approach that well-informed consumers generally are capable of making choices for themselves.[15] Some of the acts or practices identified in the proposal fail to meet this balancing test as they provide benefits to consumers that outweigh the potential for individual harm. These acts or practices include risk-based pricing and payment allocation.

1. Risk-Based Pricing

It is a basic tenet of safe and sound banking to adjust the cost of credit with the risk to the lender. This is especially true with respect to unsecured open-end consumer loans. That is why pricing for credit risk is viewed as a fundamental precept of bank management.[16] As noted previously, the OTS specifically cited risk-based pricing as an appropriate policy in its Handbook on Credit Card Lending,[17] and the Board rejected suggestions to prohibit this practice when it issued its proposed revisions to Regulation Z in 2007.[18]

In addition to safety and soundness concerns, a prohibition on risk-based pricing may force lenders to increase rates for all credit card borrowers, including the most creditworthy. In essence, this regulatory action will result in a credit subsidy for one segment of borrowers, and the imposition of higher credit charges for another segment.

This can be easily illustrated. Before the late 1980s, credit cards were a one-size-fits-all proposition. In other words, consumers typically were assessed a $20 annual fee for a card, and interest rates were nearly 20 percent, regardless of the risk profile of the consumer. During the past fifteen years, the credit card model has changed dramatically. Card issuers have adopted risk-based pricing systems that identify the risks posed by different consumers, and permit consumers with better credit histories to receive lower priced cards.

The benefits of risk-based pricing on consumers was also highlighted in a 2006 report on credit cards prepared by the General Accountability Office ("GAO") in response to a request by Senator Levin. The GAO Report, which included a survey of attributes of 28 different cards offered by the nation's six largest card issuers, found that since the advent of risk-based pricing:

- The number of active card accounts increased from just over 100 million to almost 700 million;

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[15] Letter to John E. Bowman from Lydia B. Parnes, Director, Bureau of Consumer Protection, Federal Trade Commission, December 12, 2007, page 6.
[16] See, e.g., OCC Handbook, "Rating Credit Risk," (April 2001), which explains "Risk rating should guide price setting. The price to taking credit risk must be sufficient to compensate for the risk to earnings and capital."
[17] OTS, Handbook and Credit Card Lending §218 (2006).
[18] 72 Fed. Reg. 32948 (June 14, 2007).

- The average interest rate on cards declined by almost 6 percentage points;
- Most card issuers eliminated annual fees; and
- Risk-based pricing policies permitted almost half of account holders (48 percent) to avoid all finance charges.[19]

Finally, to the extent that risk-based pricing acts as a deterrent to acts that adversely impact credit standing, the rule will have the unintended consequence of making it easier for borrowers to default on one or more credit obligations, knowing that they will not be subject to penalty rates on credit balances held by other creditors.

We would urge the agencies to address consumer protection concerns with risk-based pricing through enhanced and more understandable disclosures. In particular, we believe that it would be more appropriate for the Board to finalize the enhanced disclosures proposed in its 2007 Regulation Z amendments, rather than switch course before the industry or the agencies have seen the results of that rulemaking.

Further, we urge the consideration of alternative approaches such as a notice and opt-out regime for changes or identification of certain triggering events for changes, such as two events (late or over limit) within a twelve month timeframe.

2. Payment Allocation

The proposed regulation would characterize certain payment allocation practices as unfair acts or practices. We are particularly concerned about restrictions on allocating payments to the lowest APR balance. Lenders are able to offer and price lower rates for certain balances, such as balances resulting from transfers, or balances resulting from certain types of purchases, because they can estimate the length of time those lower rates will apply. If payments cannot first be allocated to the lower rate balance, lenders will recalculate the amount of discount that can be offered. As a result, the discounted rate will not be as great, or will not be offered at all. It is hard to see how this will benefit consumers, or why this practice is viewed as unfair or deceptive, provided that the terms of the discounted rate are clearly explained. This proposal will have the unintended consequence of diminishing consumer options and limiting, if not preventing, lenders from offering attractive promotional plans.

In addition, the proposed payment allocation method is simply too complex. The complexity will add significant burden to the financial services industry, and expose financial institutions to liability for technical and unintentional errors. Most banks will attempt to avoid the complexity by going to a pro rata or equal allocation approach, but

[19] GAO-06-929, *Credit Cards, Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures for Consumers*, September 2006.

for this to be viable there must be an exception for balances that are subject to low introductory rates.

E. The Proposed Treatment of Overdraft Services is Unworkable

1. Proposed Opt-Out Requirement

The proposal would declare that overdraft services are unfair and deceptive unless the consumer is given notice and an opportunity to "opt out." Further, consumers must be given the right to opt out of certain types of overdrafts, such as overdrafts resulting from a debit card transaction, but receive the benefit of overdraft protection for other transactions. As a practical matter, it would be very difficult and costly for institutions to comply with these requirements.

Most bank customers have several means to access their funds, including debit transactions, POS transfers, ATM withdrawals, and paper checks. The length of time between the initiation of the payment and the actual distribution of funds varies with the method used. For example, it might take several days to a week or more for a bank to receive a paper check, while a debit transaction might be processed within minutes. Further, there may be a significant lag between the authorization for a future POS transaction and the actual transaction itself. Also, a growing number of merchants are converting checks into POS or debit transactions and process them without going through the paper clearinghouse systems. As a result, banks do not always know when an overdraft is created, or even the precise instrument that created the overdraft. To mandate that depository institutions must permit a partial opt out exceeds the current capabilities of depository institutions.

The proposal also would prohibit a depository institution from considering funds subject to a "hold" when determining if the consumer overdrew his or her account. However, in many instances, a bank has no way of knowing the amount of the actual transaction until after it is processed, which is often many hours, or even days, after the merchant placed the hold on the account. There is no way for the bank to know the extent to which the hold does not represent the entire amount of the transaction. The logical solution is to require the merchants to either reduce the amount of the hold to an amount much closer to the expected amount of the transaction and to process the actual transaction closer in time to the placement of the hold. To accomplish this goal, regulatory action directed at the merchants, for example through Regulation E, would be far more effective.

In addition to the practical problems noted above, the proposed regulation would have unintended consequences. By mandating a notice and opt out right, a consumer may mistakenly believe that by not opting out he or she has a right to overdraw their account. This incorrect impression may be very difficult to overcome.

A reasonable alternative to the proposal is to more narrowly focus the regulation on particular overdraft practices that have raised concerns. For example, the regulation could target overdraft programs that are heavily marketed to lower income consumers, or that are promoted through misleading marketing material. Another factor that the regulations might consider is the extent to which the overdraft program considers factors such as the length of time the customer has had a relationship with the bank, and the customer's history of overdrafts when the bank makes the decision to honor the overdraft.

If the proposal is not revised, many banks will end discretionary overdraft accommodations for their customers. As a result, consumers will face non-sufficient fund fees, and in many cases, a second fee for bouncing a check or other payment. We fail to see how this would better serve consumers or public policy.

As noted, we recommend that the revised regulation should be incorporated into Regulation E. Also, Regulation DD could be revised to expand the disclosure requirements associated with overdraft services.

2. *Debit Holds*

The regulation would prohibit institutions from assessing a fee if an overdraft is the result of a debit hold. There is little, if any, practical need for this provision and we would recommend that this aspect of the proposal be deleted. As the preamble to the proposed rule notes, there are a limited number of merchant transactions in which the prohibition would apply: car rentals, hotels, restaurants and gas stations. For a variety of reasons, there are no significant problems at car rentals, hotels and restaurants. Consumers rarely use their debit cards for hotel charges. In those instances in which a debit card is used for hotel charges, the potential for a mismatch between the hold price and actual transaction amount is slight. Hotels have a good understanding of the per night costs of a room and related expenses. Similarly, debit cards are not often used to rent cars, and rental companies can avoid a mismatch; they know the per day and expense charge for a car. Debit cards are used in low cost restaurants, but when a tip is added to the bill, the potential gap between the hold and the actual transaction is very small in dollar and percentage terms. That leaves gas stations. Debit cards are used frequently at gas stations, and delays in processing purchases can create mismatches between the hold price and the actual transaction. Clearly, this is not required based on industry trends, as demonstrated by two Roundtable member companies, Visa and Mastercard. Visa has introduced a service for gas stations called "real-time clearing" which permits transactions to be processed immediately, rather than at the end of the day. This would significantly reduce the potential for overdraft charges based upon debit holds by gas stations. MasterCard also is exploring ways to reduce the settlement and hold time that can be implemented on a system-wide basis.

3. Transaction Clearing Practices

The agencies have requested comment on the impact of requiring institutions to pay small dollar items before larger dollar items when received in the same day. High-to-low clearing practices are widespread within the industry. Such practices also have been sanctioned by other regulators, see OCC interpretative letter 916. Before the agencies propose to mandate any change in these practices, consideration should be given to enhanced disclosure requirements.

F. The Proposed 21-Day Safe Harbor Conflicts with the Current 14-Day Grace Period

The proposal would require that a consumer be given a reasonable period of time between the date a statement is mailed and the payment due date. The proposal also would establish a 21-day safe harbor for such purposes. The proposed 21-day safe harbor conflicts with the current 14-day grace period that is recognized in Regulation Z, and creates a potential for consumer confusion. A consumer must pay a balance in full within 14 days to take advantage of a grace period, but under the proposal would have 21 days to make a minimum payment. This effectively creates two different payment due dates for consumers. Additionally, we would suggest that the 21-day safe harbor period is overly conservative given the level of service provided by the postal system, and the increasing use of electronic payment methods.

G. The Rule Could Expose the Industry to Significant Legal Liability

The proposal could have the unintended consequence of imposing significant liability on the banking industry. If the banking agencies determine through regulation that common banking practices are, by definition, "unfair and deceptive" in all cases and for all consumers, untold and unfair liability will result on our financial services industry. Many states have laws that permit state enforcement and private claims against companies that engage in unfair and deceptive acts or practices as defined pursuant to the standards of section 5 of the FTC Act. If the federal agencies determine that existing and common banking practices meet the definition of "unfair and deceptive" under that section, banking organizations would be subject to both state and private party lawsuits, including class actions. The agencies should consider this consequence carefully before going forward.

III. Recommendations

We urge the agencies to address the acts and practices identified in the proposed rule through revisions to Regulation Z, Regulation E or Regulation DD. We also believe that the agencies could base their actions on general safety and soundness authority rather than any findings under section 5.

A. Regulation Z

The Board has the authority to address the credit card practices identified in the proposed regulation through Regulation Z, which implements the Truth in Lending Act ("TILA"). TILA gives the Board general authority to adopt rules "to carry out the purposes of the [Act]",[20] and one of the stated purposes of TILA is "to protect the consumer against inaccurate and *unfair credit billing and credit card practices*" (emphasis added).[21] This authority has been recognized in the U.S. Supreme Court:

> Because of their complexity and variety, however, credit transactions defy exhaustive regulation by a single state. Congress therefore delegated expansive authority to the Fed to elaborate and expand the legal framework governing commerce in credit.[22]

We urge the Board to exercise its authority under TILA and revise Regulation Z to address the credit card acts and practices specified in the proposed rule.

B. Regulation E and Regulation DD

The Board also has the authority to address overdraft services through revisions in Regulations E and Regulation DD. Overdraft services that are provided electronically can be addressed through Regulation E, which implements the Electronic Funds Transfer Act ("EFTA"). Congress gave the Board general authority to prescribe regulations to carry out the purposes of the Act,[23] and the stated purpose of the EFTA is "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems."[24] Such systems are defined in the EFTA to include ATM and POS systems. Therefore, to the extent that overdraft services are provided through such systems, the Board could use its authority under Regulation E to regulate such services. Additionally, the Board already has relied upon Regulation DD to establish certain disclosure requirements with respect to overdraft services, and those disclosure requirements could be enhanced.

C. Safety and Soundness

Under section 39 of the Federal Deposit Insurance Act, the Board and the OTS are required to prescribe standards, by regulation or guideline, for depository institutions within their scope of supervision. Subjects to be included in these standards are credit

[20] 15 U.S.C. 1604(a).
[21] 15 U.S.C. 1601.
[22] Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) at 559.
[23] 15 U.S.C. 1693b(a).
[24] 15 U.S.C. 1693(b)

underwriting, interest rate exposure, asset quality and "such other operational and management standards, as the agency determines to be appropriate."

This statute provides sufficient authority for the Board and OTS to promulgate regulations relating to consumer credit practices along the lines suggested in the proposal, without denominating such practices as unfair or deceptive.

The Federal Credit Union Act ("Act") provides the National Credit Union Administration with similar authority to provide oversight with respect to safety and soundness. This is evidenced in the Act in a number of provisions, including the findings of Congress. One of the five congressional findings in the Act states that "improved credit union safety and soundness provisions will enhance the public benefit that citizens receive from these cooperative financial services institutions."[25] Congress supported its finding by providing the NCUA broad rulemaking authority to "prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merger, consolidation, and dissolution of corporations organized under this chapter)."[26] Importantly, section 1786 provides that if the NCUA finds that an insured credit union or affiliated party is engaging or has engaged in "an unsafe or unsound practice in conducting the business of the credit union" or engaged in a violation of law, rule, regulation, or condition imposed upon the credit union, the NCUA may issue and serve charges in respect thereof.[27]

These explicit authorities highlight the broad safety and soundness oversight authority Congress has provided for the NCUA. Similar to OTS and the Board, the NCUA has sufficient authority under the Act to promulgate regulations related to consumer credit practices and provide effective enforcement without invoking unfair and deceptive language.

D. Mitigating Legal Liabilities

Should the final regulation be based upon section 5 of the FTC Act, we urge the agencies to clarify that, as a matter of law, the acts and practices identified in the regulation have not been determined to be unfair or deceptive, but only could be so classified depending upon specific facts and circumstances. In other words, we urge the agencies to state that the listed acts and practices are not *per se* unfair or deceptive. Such a statement would help to reduce the potential for legal liability based upon state law. Additionally, we urge the agencies to clarify that the prohibitions contained in the regulation are to be applied prospectively. Again, such a clarification would mitigate some legal liability for institutions.

[25] 48 Stat. 1216; 12 U.S.C. 1751 et seq.
[26] *Ibid,* Section 1766.
[27] *Ibid,* Section 1786, part 206.

IV. Conclusion

In conclusion, the Roundtable believes that there is an alternative approach for the regulators to address "unfair and deceptive" practices and avoid the unintended consequences that will result should this proposal move forward. Therefore, we recommend that the agencies address the acts and practices identified in the proposal through revisions to Regulation Z, Regulation E or Regulation DD, or through existing safety and soundness authority.

Thank you again for the opportunity to share our views with you on this subject. If you have any questions, please feel free to contact me or Paul Begey at 202-289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel