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WACHOVIA

August 4, 2008

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

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552
Attention: OTS-2008-0004

Re: Federal Reserve Regulation, 12 CFR Part 227
Regulation AA; Docket No. R-1314

Office of Thrift Supervision, 12 CFR Part 535
Docket ID. OTS-2008-0004
RIN 1550-AC17

Ladies and Gentlemen:

In connection with their authority under Section 18(f)(1) of the Federal Trade Commission Act (the "FTC Act") to prescribe unfair or deceptive acts or practices, the Board of Governors of the Federal Reserve System (the "Board") and the Office of Thrift Supervision (the "OTS" and together with the Board, the "Agencies") have published notice of proposals to prohibit certain acts or practices by financial institutions with respect to consumer credit card and deposit accounts. Through amendments to the Board's regulations at 12 CFR Part 227 and the OTS' regulations at 12 CFR Part 535 (collectively referred to herein as the "UDAP Regulations"), the Agencies propose to designate seven acts or practices with respect to consumer credit card accounts and two acts or practices with respect to consumer deposit accounts as unfair or deceptive (the "Proposed Rules").

Wachovia Corporation and its subsidiaries, including Wachovia Bank, National Association, Wachovia Bank of Delaware, National Association, Wachovia Mortgage, FSB and Wachovia Bank, FSB (collectively referred to herein as "Wachovia"), appreciate the opportunity to comment on the Proposed Rules. Although Wachovia endorses the comments submitted to the Agencies by the American Bankers Association, the Consumer Bankers Association and the Financial Services Roundtable, we also wish to raise specific issues and concerns we have with respect to the proposed consumer deposit account provisions. With respect to these accounts, the Agencies propose to amend the UDAP Regulations to prohibit institutions from (i) charging overdraft service fees unless the consumer has been provided the right to opt out of overdraft services and a reasonable amount of time to exercise the opt out right, and the consumer does not opt out; and (ii) charging a fee for overdrafts if the overdraft results solely from a hold in excess of the actual purchase or transaction amount.

In addition to the substantive concerns we have with certain aspects of these proposals discussed below, Wachovia urges the Agencies to reconsider including these requirements within the UDAP Regulations. The Agencies have long recognized that institutions may charge fees for services rendered and acknowledged the benefits to consumers of overdraft protection, including avoidance of non-sufficient funds fees for items returned as unpaid and potential merchant charges. Including the proposed provisions within the UDAP Regulations may lead to the perception that the imposition of fees or charges for overdraft services is inherently unfair or deceptive and possibly expose institutions to a heightened risk of class action litigation as well as increased reputation risk. Subject to our comments below, we believe these provisions should be considered as part of proposed amendments to Regulation DD.

As noted above, Wachovia believes that characterizing these activities in an indiscriminate manner as unfair and deceptive practices is not warranted, and doing so in the context of the UDAP Regulations would compound this error. In any event, should the Agencies elect to retain the designation of these activities as unfair or deceptive acts or practices, Wachovia believes that:

- (i) with respect to the provisions regarding the new opt out requirements, the Agencies should retain the distinction made by the Board in the context of current Regulation DD and apply the requirements only to institutions marketing overdraft services and also eliminate the proposed partial opt out election;
- (ii) with respect to the debit hold overdraft provisions, the Agencies should work with the interchange networks in developing methods to ensure that authorizations better match actual transactions;
- (iii) the proposed rules may create a number of unintended consequences that unfavorably impact consumers and financial institutions alike, and

- (iv) institutions will require at least 24 months to develop and implement the systems, policies and customer documentation necessary to comply with the Proposed Rule.

Opt Out Requirements

The Agencies propose to prohibit all institutions from charging overdraft service fees unless a consumer has been provided the right to opt out of such services and a reasonable amount of time to opt out, and the consumer has not opted out.¹ As part of the opt out right, the Agencies propose to allow consumers to opt out of overdraft protection for all transactions or elect to opt out only for the payment of overdrafts at automated teller machines (ATM) and point-of-sale (POS) transactions initiated by a debit card.

Some institutions are currently required to make certain disclosures to consumers regarding overdraft charges or fees under Regulation DD, which makes a distinction between institutions that market their overdraft services and those that do not. When the Board first considered the disclosure requirements, it proposed to apply them to all institutions. After receiving and considering comments on the proposal, however, the Board determined that it was unnecessary to subject all institutions to these compliance burdens and instead applied the requirements only to those institutions that marketed their overdraft services. The Agencies now propose to eliminate the non-marketing exception. Wachovia urges the Agencies to reconsider this proposal. Given the substantial operational and compliance costs associated with the Proposed Rules, we believe the requirements should be borne only by institutions that market overdraft services to consumers.

We also recommend that the Board not permit consumers to elect a partial opt out only for the payment of overdrafts at ATMs or POS transactions. Because of operational considerations and complexities in how and through what channels transactions flow, Wachovia strongly recommends that opt out of payment of overdrafts be permitted only for all transaction types. Consider the following example:

A consumer notifies an institution of his or her election to opt out for ATM and POS transactions but not for overdraft on checks. The consumer has a deposit account with the institution with a \$200 balance. On Monday morning, the consumer executes a \$100 POS transaction, and the transaction is authorized. The consumer's ledger balance remains unchanged until settlement but the consumer's available balance is reduced to \$100. On Monday evening, a check comes in for \$150, which is paid despite the potential overdraft because the consumer did not opt out for checks. This leaves the customer a ledger balance of \$50. On

¹ If the Proposed Rules are adopted, Wachovia also requests clarification from the Agencies regarding the treatment of opt out elections provided by one, but not both, parties to a joint account.

Tuesday, the debit card transaction settles. The institution is required to pay this item, because it was properly authorized. The institution must then force-post the item to the consumer's account, creating a \$50 overdraft in the consumer's ledger balance. The consumer may well be confused because it appears to the consumer that the account was overdrawn when the POS transaction posted. The consumer would most likely conclude that the institution should not have authorized the POS transaction because the customer opted out. The consumer may further conclude that any overdraft fees would therefore be associated with the POS transaction. In reality, it was the check that caused the overdraft. Such confusion is significantly reduced or eliminated if all transactions are treated the same under the opt out provisions.

Additionally, transactions can change form between channels, often without the consumer's knowledge. For example, the consumer may write a check, which the merchant may change to an ACH transaction. Also, merchants and vendors who subscribe to Visa's "POS Check" product will convert checks to what are essentially debit card transactions. These checks follow the Visa debit card processes, including authorization and routing through Visa's debit card network and will be posted on the consumer's account along side, and looking very much like, a POS debit transaction. In this case, both consumers and financial institutions will face uncertainty whether an opt out would or would not apply to the transaction.

Overdrafts resulting solely from debit holds

The Agencies propose to prohibit institutions from charging a fee for overdrafts resulting solely from a vendor's placement of a hold on funds in the consumer's account that exceeds the actual purchase or transaction amount. Although we understand the Agencies' concern that consumers may be incurring some charges that result solely from actions beyond the consumer's control or knowledge, Wachovia strongly disagrees with the Agencies proposal to categorize overdrafts charges in this case as an "unfair" or "deceptive" practice when institutions face similar uncertainty in these transactions.

The Proposed Rule with respect to the debit holds requires some level of clairvoyance for institutions to implement. For example:

Assume that a consumer has a deposit account with a \$100 balance and has not elected to opt out. A gasoline station authorizes a \$70 hold on the account but the consumer actually purchases only \$20 of gasoline. The bank believes that the customer has \$30 in remaining available balance; in reality, the customer still has \$80 in purchasing power. If a check comes in for \$50, the bank is not in a position to determine whether the hold is in excess of the actual purchase amount until the transaction settles days later.

In order to assure compliance with the proposed rule and to avoid claims of unfair or deceptive practices, institutions may need to eliminate holds based on authorizations, which would expose institutions to significant levels of fraud and account abuse loss.

We also receive very few customer complaints about holds that exceed the authorized amount, and question whether the costs and risks of this proposal are warranted in light of the magnitude of the issue.

Rather than attempting to hold financial institutions responsible for overdraft consequences resulting from excessive holds placed by vendors, Wachovia believes it is more appropriate to address improving industry standards and systems. Wachovia recommends that the Agencies work with interchange networks to establish industry standards and a common infrastructure to ensure that authorizations better match actual transactions. The interchange networks have already made progress in this area. For example, Visa recently announced new policies and procedures that will provide a mechanism for debits from automated fuel dispensers to settle within hours of the authorization.

Unintended Consequences

The Proposed Rule may have several unintended consequences. The Agencies should ultimately implement rules which are sensitive to, and avoid, these possible outcomes:

- The Proposed Rule may inadvertently create more overdrafts. Today, Wachovia provides overdraft coverage only on an ad-hoc basis. We do not imply, let alone promise, that we will cover overdrafts. If we are required to provide consumers with opt out elections, we are concerned that some consumers may believe that by not making the election they have “opted in” to overdraft protection and that we will cover all overdrafts. This may legitimize overdraft behavior and ultimately increase overdrafts.
- Consumers who opt out may be prevented from making legitimate, needed purchases. Consider the example of a consumer who is attempting a debit card purchase on Friday evening, knowing that her paycheck will be deposited over the weekend and processed Monday. Although no overdraft would have occurred, the consumer has lost the ability to purchase needed items over the weekend.
- Consumers may incur additional fees and inconvenience by opting out of overdraft coverage. For example, if the depository institution rejects a consumer’s ACH or check transaction, then the item is returned unpaid to the payee. The payee (a merchant, landlord, mortgage holder, etc) may then charge additional fees or report the consumer to a bad check data base (eg. Telecheck), which may cause the consumer to be turned down elsewhere. In addition, consumers will also face the further inconvenience of clearing up the check with the payee.

- Depository institutions may be forced to increase other fees, or install new fees to cover added costs and revenue gaps. For example, consumers may swipe their card at ATMs and POS more often, testing to find the limit that they can withdraw, which will add transaction volume at a cost to institutions. Overall increased costs and reductions in overdraft fees may need to be offset by increases in other fees, such as applying minimum balance requirements and service fees on many accounts that are currently free checking accounts.
- The Proposed Rule may drive transactions from electronic channels to paper channels. This particularly may be the case if the Agencies elect to allow consumers to opt out of ATM/POS transaction overdrafts without check opt out. Consumers may find that they can complete transactions by utilizing paper checks that would otherwise be denied using a debit card.

Implementation Period

The Agencies have proposed a 12 month implementation period. Given the nature and extent of the changes under the Proposed Rule, we do not believe this proposed implementation period is sufficient. Institutions, many of whom were not previously subject to any overdraft charge disclosure requirements, will need significant time to develop the new disclosure documentation required by the Proposed Rule, revise existing policies and procedures, and develop, test and implement new systems to ensure compliance with the new requirements, including systems to store and track opt out elections. In light of the foregoing, we recommend at least a 24 month implementation period.

We appreciate the opportunity to respond to the Proposed Rule, which will have a significant impact on our relationship with customers and our internal operations. If you have any questions regarding this letter, please contact me.

Sincerely,



Eugene M. Katz