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Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
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Regulation Comments
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1700 G Street, NW
Washington, DC 20552
Attn: OTS-2008-0004
www.regulations.gov

Ms. Mary Rupp,
Secretary of the Board
National Credit Union Administration
1775 Duke Street
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regcomments@ncua.gov

RE: **Proposed Regulation AA Unfair or Deceptive Acts or Practices (UDAP) in Connection with Overdraft Services for Deposit Accounts**
Board (Docket No. R-1314)
OTS (OTS-2008-0004)
NCUA (RIN 3133-AD47)

Ladies and Gentlemen:

Thank you for the opportunity to comment on amendments to Regulation AA proposed by the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, the "Agencies"). In this letter, we will be commenting only on those aspects of the proposal relative to overdraft protection. The New York Bankers Association (NYBA) has consistently supported providing consumers with full disclosure regarding the products and services offered to them by their financial institutions. We therefore commend the Agencies on their efforts to ensure that financial institutions provide appropriate disclosures regarding the overdraft protection

services they offer to their customers. Nevertheless, we do not think that mandated opt-out notices are appropriate for overdraft protection accommodations, which are strictly discretionary, and not an obligation of the financial institution. In fact, we believe that the proposal, which makes it an unfair and deceptive practice to assess an overdraft fee before a consumer has been provided with a notice and reasonable opportunity to opt out, can have substantial unintended consequences, including encouraging some consumers to overdraw their accounts, in the mistaken belief that overdraft protection is guaranteed. NYBA is comprised of the commercial banks and thrift institutions that do business in New York State. Our members employ more than 300,000 New Yorkers and have assets in excess of $9 trillion.

As an initial comment, we are concerned that the scope of these amendments is inappropriately far-reaching, as they apply not only to banks who market or promote overdraft programs, but also to banks who do not do so. Banks would be required to give deposit account customers potentially overly broad opt-out disclosures initially, as well as subsequent to any individual overdraft that the financial institution covers. We believe that this requirement can actually cause confusion and harm to consumers who bank in institutions which do not "promote" overdraft services but yet may cover an individual overdraft, consistent with long-established and traditional discretionary bank practices. In such instances, the consumer might not understand the consequences of this decision: that if he opts out, his transactions will not be paid if there are insufficient funds in his account. Moreover, such a consumer might not understand that his decision to opt out may lead to charges when items are returned unpaid, including fees which may be imposed by the payment recipient.

Similarly, we are concerned that the new restrictions set forth in this proposal (in conjunction with the notice requirements set forth in separately proposed amendments to Regulation DD) can create an untrue presumption in consumers' minds that, in the event a consumer does not opt out, overdrafts will always be covered by the financial institution – when, in fact, they are discretionary, even when marketed or promoted by the financial institution. Indeed, use of the term "overdraft services," in both the proposed Regulation DD notice requirements and in these proposed amendments to Regulation AA, may give customers the false impression that the term refers to an overdraft line of credit, which is a very different and specific product offering that serves different purposes, has a different fee structure and, in general, contractually obligates the covering of overdrafts. Moreover, any false impression created that overdrafts will always be covered can have the unintended consequence of encouraging consumers to rely on such coverage. Such an outcome would clearly be in contravention of the Agencies' goal of minimizing consumers' use of overdraft protection coverage, and additionally could potentially create inappropriate and unnecessary safety and soundness challenges for banks.

The proposed amendments to Regulation AA require banks to provide an initial opt-out notice to consumers. NYBA is consistently supportive of customer disclosure, and therefore has no objection to a requirement that a clear notice setting forth the bank's overdraft practices be supplied to a customer at account opening. In fact, New York state-chartered banking institutions already adhere to such a standard. However, the proposal goes further, by requiring both an opt-out at the beginning of the customer relationship and further requiring that consumers be given additional subsequent disclosures of their right to opt out in any periodic statement cycle where an overdraft fee is assessed. We believe that these notices are unnecessary, and will be confusing to consumers who will be given the false impression that courtesy overdraft coverage is a right or benefit of their account, rather than an accommodation made at the discretion of their financial institution. Thus, we believe the proposal should be amended to exclude all opt-out requirements.

We are particularly concerned that the proposal also contemplates providing consumers a partial opt-out right, which would essentially direct financial institutions to reject overdrafts occurring by debit card at ATMs and POS terminals, but allowing them to cover overdrafts occurring by other means, such as by check. Once again, this partial opt-out right will mistakenly give the impression that overdraft protection will be guaranteed for those types of transactions for which they have not opted out. It should be emphasized that banks have no inherent legal obligation to pay overdrafts (see Uniform Commercial Code 4-402(a)), and that in numerous instances safety and soundness concerns can cause a financial institution to reject transactions. Indeed, the Agencies have recognized in Regulation Z, Regulation DD, the Overdraft Protection Program Guidance adopted by the banking agencies in 2005, and elsewhere in the proposed rules, that banks cover overdrafts as an accommodation and not as a consumer right. It is the customer's legal responsibility to manage his or her own funds availability. A bifurcated opt-out can unfortunately be expected to leave the consumer with an erroneous expectation, however, that selected overdraft protection privileges are guaranteed. Therefore, we urge that even if opt-out notices continue to be required in a final rule, that the Agencies either eliminate this partial opt-out choice, or make it elective for those financial institutions who wish to offer this choice to their customers. This is particularly true, as the cost and operational challenges of partial opt-outs should not be an obligation for banks who, in the first analysis, are not legally required to offer overdraft protection at all. Moreover, the cost differential could be so significant that some smaller institutions may be forced to decline to offer customers overdraft accommodations, rather than endure the costs of a multi-option program.

Proposed Regulation AA provides two specific instances, both debit-card related, where overdraft fees may be assessed despite a customer opt-out.

These exceptions are when (1) the actual purchase amount exceeds the amount that was authorized in a debit card transaction; and (2) a debit card transaction is presented for payment by paper-based means and was not previously authorized. We believe, however, that, should opt-out notices continue to be required, a number of other exceptions are warranted. For example, an exception is necessary where insufficient funds result when another withdrawal is processed after a debit card transaction is authorized but before it is presented for settlement. In this situation, the bank must cover the transaction because it was authorized – even though there are insufficient funds in the account. Since the consumer has knowledge and control of the transaction, he should bear the consequences of overdrawing his account by paying an appropriate overdraft fee. Similarly, financial institutions may not be able to avoid overdrafts created when deposited checks are returned unpaid. In such a situation, a customer may have relied on Regulation CC availability rules to spend funds by debit card that he has deposited into his account, but ultimately are not collected. Such an overdraft could not be prevented by the customer's bank.

Overdrafts created as a result of debit hold practices could also require numerous exceptions to address a variety of presentation scenarios. These in turn could create further operational and compliance challenges and costs. Given the complexities of debit hold scenarios and the operational consequences of opt-out exception processing, we respectfully request that the Agencies withhold issuance of any final rules relative to debit holds at this time. Should there be a continuing need for rules relative to debit holds, we urge that they be proposed under Regulation E governing electronic transactions, which would incorporate the relevant card systems and merchants, who are integral parts of these transactions.

As previously stated, these proposed amendments to Regulation AA will require financial institutions to make significant operational and systems changes. As such, we request that any final regulation not be implemented for at least one year from its publication. We also urge that the Board use its authority under existing banking statutes and regulations, such as the Truth in Savings Act, to establish whatever additional overdraft protection requirements it ultimately imposes, rather than relying on the Federal Trade Commission Act as the current proposal contemplates. Use of UDAP standards, which can have wide-ranging negative implications, including making financial institutions vulnerable to action by other agencies, state governments and individuals, would appear to be inappropriate for overdraft protection services which, at their heart, are completely discretionary, a customer accommodation, and not compelled by law. Moreover, reliance on UDAP standards is likely to chill retail banking innovation, resulting in higher costs and less convenience for bank customers - the vast majority of whom welcome overdraft protection and appreciate being saved from the

embarrassment, inconvenience and greater costs which often result when overdrafts are not covered by their financial institution.

We thank you for the opportunity to comment on the Agencies' proposed amendments to Regulation AA.

Sincerely,

Michael P. Smith