Comerica Incorporated

August 3, 2004

Jennifer J. Johnson
Secretary
Docket Number OP-1198
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Office of the Comptroller of the Currency
Docket Number 04-14
250 E Street SW
Public Information Room
Mail Stop 1-5
Washington, DC 20219

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Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Regulation Comments
Chief Counsel's Office
Attention: No. 2004-30
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

RE: Interagency Proposed Guidance on Overdraft Protection Programs

Dear Sirs and Mesdames:

The following comments are provided on behalf of Comerica Bank, a $54 billion bank with offices located in Michigan, California, Florida, and Texas. The bank does not offer or market a "bounced check protection" service, but does pay overdrafts for some customers on a traditional discretionary basis and that practice would be affected by adoption of the proposed Guidance. Comerica appreciates the opportunity to comment of this important proposal.

**OVERALL COMMENTS**

We are troubled by the Guidance being issued the same day as extensive revisions of Regulation DD-Truth in Savings are proposed by the Board of Governors. To issue guidance on an issue that is significantly influenced by a proposed regulation seems to be either too early or too late. Guidance should be proposed after the regulation is finalized or should have been proposed prior to proposing revisions to the regulation. If the Guidance had been issued earlier, parts of the regulatory amendment might well be unnecessary.

The issue the Guidance attempts to address is driven by the substantial increase in the active marketing of "bounced-check protection." The proposal expressly acknowledges that historically institutions have not promoted this accommodation. That is where we believe the proposal goes too far. It does not recognize that those institutions that have not promoted this accommodation are causing no harm and, instead, addresses the conduct of some as if it was the conduct of the entire industry. This is evidenced by the proposal's assumptions as to the characteristics that the Notice states overdraft programs have in common.

We agree that the marketing of these programs needs attention. The proposed guidance should be focused in that area.

**PRINCIPAL ELEMENTS OF THE GUIDANCE**

**SAFETY AND SOUNDNESS CONSIDERATIONS**

We certainly support the proposal's recognition of the need to incorporate prudent risk management practices related to account eligibility, repayment, and suspension. Our ad-hoc traditional discretionary process incorporates these practices and has not created any issue of safety and soundness.

However, we question the need for a prescriptive requirement of charging-off within a 30 day period from the date first overdrawn. The Uniform Retail Credit Classification and Account Management Policy adopted by the Federal Financial Institutions Examination Council on behalf of the banking agencies generally requires charge-off of various types of retail credit past due 120 days or 180 days. In the case of fraud, charge-off is required in 90 days after discovery. Unsecured bankruptcy, under that Policy, requires charge-off within 60 days of receipt of notification of filing. It is not clear why the banking agencies would propose a charge-off period for overdrafts that is even shorter than for past retail credits, fraudulent loans, and even bankruptcies. The likelihood of ultimate collection of any overdraft certainly would seem, on the average, to be much greater than that for a fraudulent loan or an unsecured loan to a bankrupt, and, thus, a 30-day mandatory charge-off requirement seems draconian.

We do support the practice suggested in the proposed Guidance that institutions should monitor carefully their programs on an ongoing basis and adjust them as needed to account for risk. This is a sound risk management process.

However, we disagree with the proposal's apparent premise that an unmarketed ad-hoc discretionary traditional relation-based overdraft payment program has the same risk as a marketed program. As the proposal states, the existence of the traditional discretionary

relation-based process has existed for many years. If one risk-ranks the types of programs, one would certainly agree that a marketed program that encourages overdrafts creates higher risk than a traditional relation-based unmarketed ad-hoc process.

The bottom-line is that risk increases when a program is marketed in a misleading manner. We respectively ask that you consider the difference between a traditional unmarketed relation-based ad-hoc process and a marketed program.

**LEGAL RISKS**

Overall we agree that legal risks must be considered. We have considered those risks and chose not to market the overdraft product. We would strongly suggest that regulatory and legal risk is much more prevalent when an institution actively markets the product. A traditional relation-based discretionary ad-hoc process does not raise the same level of regulatory and legal risk. For example, active marketing programs increase the risk of liability for misleading or deceptive acts.

**BEST PRACTICES**

Overall many of the proposed best practices appear to be true best practices. However, we do question the following:

Opting Out:

With a truly marketed product, this may be feasible. However, we believe the proposal fails to recognize the illogic of requiring an opportunity to opt out in the case of an ad-hoc traditional discretionary relation-based process that is not marketed that may not even be available to the customer being offered the opportunity to opt out.

Apart from that irony, the cost of such an opt-out process will be high in the case of many banks as it will have to be a manual process in many cases. The benefit to be weighed against that cost also is likely to be non-existent where, as here, the amount of the overdraft fee equates to the amount of the return item fee, which the customer would be forced to incur if the customer opts out of the discretionary overdraft program.

Discretionary:

While we have no issue with the concept of not leading a consumer to expect payment of an overdraft, we question why the agencies suggest that a discretionary best practice is to tell the consumer customer base in advance when overdraft payments will be made. In other words, the non-marketed traditional discretionary relation-based overdraft programs that many banks have would no longer really be discretionary if the banks were to be required to adopt formal standards that they are required to publish to their customer base.

Affirmative Consent:

We disagree that a best practice is to obtain an affirmative consent of consumers to receive overdraft protection. Requiring such a process will discourage the offering of non-marketed automated parameter-driven traditional discretionary relation-based ad-hoc processes. This best practice should be limited to truly marketed programs.

Specific Consumer Notice:

We question the practicality of the "best practice" requiring a notice of overdraft fees at ATMs and other access devices. The issue is not a need for more disclosure, but the manner in which the "bounced check" protection has been marketed. This "best practice" would be extraordinarily burdensome, potentially rife with privacy concerns (imagine a waiter returning with your debit card and telling you its use to pay for a meal would overdraft your account and asking you, in front of your guests, whether you wish to proceed and pay a specified overdraft fee or a grocery clerk doing the same thing), and is not the best way to address the issue at this time.

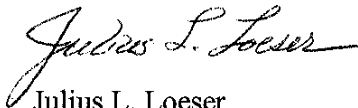
**OTHER THOUGHTS**

It is somewhat ironic, from the perspective of an offeror of an unmarketed traditional relation-based discretionary program, that this proposal seems to proceed in the premise that overdrafting deposit accounts is some type of legal right that needs more protections. We believe that there is considerable case law to the effect that deposit customers have a duty to know the balance in their deposits accounts and a duty not to overdraw such accounts. That case law arises under state "uttering and publishing" statutes that we believe most states have enacted as part of their criminal codes. Those laws make it a crime to overdraft a deposit account intentionally. It is in that context in which the instant proposal contemplates giving customers of traditional discretionary overdraft programs a right to opt in or out of intentionally overdrafting their accounts (i.e. opting in or out of committing a crime).

**CONCLUSION**

We believe the proposed guidance is flawed in several ways. It does not take into account the existence of non-marketed relation-based traditional discretionary ad-hoc processes even though the Notice acknowledges that this type of process has existed historically. In addition, we believe the proposal needs to target the misleading marketing of the product. It seems to do so in many aspects, but unfortunately at the expense of the historical non-marketed relation-based discretionary ad-hoc service.

Sincerely,



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