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March 3, 2009

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

Re: Proposed Amendments to Regulation E, Docket No. R-1343

Dear Ms. Johnson:

We appreciate the opportunity to comment on the proposed amendments[1] to Regulation E[2] issued by the Board of Governors of the Federal Reserve System (the "Board"). For 15 years, Strunk & Associates has consulted with banks, thrifts and credit unions throughout the country in connection with Strunk's Overdraft Privilege℠ Service ("OPS") or an Occasional Overdraft Privilege Service ("OOPS!"™) (collectively the "Program" or "program"©). With almost 2,000 active financial institution clients of all charter types nationwide – who we estimate have over *thirty-million (30,000,000) consumer checking, or share draft checking, accounts participating in the program* - we have a tremendous amount of experience in overdraft protection/payment services.

We share the Board's concerns with the practices of some in the financial services industry that may have misled consumers with respect to the true nature of discretionary overdraft protection services, and we applaud the Board's efforts to increase uniformity and disclosure among overdraft service programs. And while we agree with many provisions of the Proposal, we have concerns about some of the specifics contained therein. We hope that our comments will be useful.

OVERVIEW

1. *The Proposal sets forth two alternative approaches to the assessment of fees in connection with the payment of overdrafts* resulting from automatic teller machine ("ATM") withdrawals and one-time debit card transactions. One alternative, the "partial opt-out" approach, would ban financial institutions from charging consumers a fee for paying overdrafts that result from an ATM withdrawal or one-time debit transaction without first providing consumers notice and a reasonable opportunity to opt out of overdraft coverage for these types of transactions. Under the second alternative, the "partial opt-in" approach, a financial institution would be required to obtain the consumer's affirmative consent before assessing a fee in connection with overdrafts resulting from ATM withdrawals or one-time debit transactions. Neither approach would affect an institution's ability to charge a fee for denying or paying an overdraft resulting from a check, ACH or pre-approved (recurring) debit transaction.

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[1] 74 Fed. Reg. 5212 (January 29, 2009) (the "Proposal").
[2] 12 C.F.R. Part 205 ("Regulation E").

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2. *Given only the preceding two alternatives, we urge the Board to adopt the partial opt-out approach.* In our experience, an opt-out approach to overdraft services provides the most prudent and consumer-friendly method for delivering consumer value while minimizing the compliance burden on individual financial institutions. Recent research confirms what we have known for years, that consumers attach a high value to overdraft programs, so long as they are informed about how the service works, including its costs, and are given an opportunity to decline overdraft coverage. These observations are why we have always counseled our clients to fully disclose their overdraft programs and to include an opt-out mechanism in their overdraft programs. Therefore, if the choice is between a partial opt-in or a partial opt-approach, we urge the Board to adopt the opt-out approach. *However, we think a much better alternative is for financial institutions to provide notice and a reasonable opportunity for consumers to opt out of overdraft coverage entirely and for all transaction types.* We will discuss this "all or nothing" opt-out alternative more fully throughout our comments.

3. *The Proposal appears to derive its support for the partial opt-in alternative from two sources: (1) consumer advocates and (2) a small sample of social science research.* Neither source provides a compelling reason for mandating a partial opt-in approach. Consumer advocates claim that overdraft services include many fees that are not disclosed until after they are assessed. However, no matter how sincere their motivations, consumer advocates consistently advance positions that conform to their broader political philosophies without giving voice to established consumer preferences. This is especially true with overdraft services, where our experience and recent survey research indicate that consumers appreciate and approve of properly administered overdraft services. *We note that certain social science and other theories suggest that "default rules" (i.e. baseline rules that parties are free to change) should be geared toward consumer's "best interests" - as determined by consumer advocates, researchers, regulators and legislators – and not by consumers themselves.* From this "default rule" theory, the Board requests comment on whether a partial opt-in approach would create the best default rule. Unfortunately, the research cited in the Proposal does not analyze overdraft programs. Instead, the cited research relates to complex programs, such as 401(k) administration and withholdings, with intricacies that are difficult and intimidating to the average consumer. By contrast, our experience shows that consumers understand how a basic "opt-out" overdraft program operates, and that they appreciate such programs, provided that the programs are adequately disclosed. *An opt-in regime would inflict unnecessary administrative burdens on financial institutions without offering any countervailing benefits to consumers.*

4. *The Proposal would also forbid financial institutions from "conditioning" the consumer's decision to partially opt out (or partially opt in)*, meaning that an institution could not use substantial differences in terms of service to coerce consumers into declining to opt out (or deciding to opt in). The purpose for the ban on "conditioning" is to prevent financial institutions from effectively depriving consumers of their partial opt-out privileges. *This approach seems good in principal, but would be impossible to implement and would work an undue burden on small- and mid-sized financial institutions.*

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Many institutions lack the technology to implement a partial opt-out regime and may find overdraft programs feasible only if they are able to offer them as an all-or-nothing service. If an institution cannot offer overdraft services in a way that is technologically (and economically) feasible, that institution may be compelled to cease its overdraft program, and it may lose customers to other institutions offering overdraft services. In most cases, such customers would gravitate toward larger institutions capable of gaining a competitive advantage in this area through technological economies of scale. *Allowing financial institutions to offer overdraft protection services on an all-or-nothing basis would be more practical for consumers and financial institutions, especially small- and mid-sized institutions.* Even if the requisite technology became available to small- and mid-sized financial institutions, the ban on "conditioning the opt out" would prevent such institutions from recovering the costs of implementing a partial opt-out regime by sharing its costs with the customers who allegedly "benefit" from it. Again, this part of the Proposal favors larger financial institutions because they would not incur the same level of per-customer overhead costs to purchase, program and monitor their overdraft programs. *If nothing else, the prohibition on conditioning demonstrates the need for a lead time of at least two years from the Proposal's final publication date.*

5. *The Proposal provides exceptions to the partial opt-out rule and contains detailed guidance on the interaction between the partial opt-out rules and debit holds placed by merchants on a consumer's account.* The principal exception is the "reasonable belief" exception, which would allow a financial institution to assess an overdraft fee even if a consumer had opted out, provided that at the time of the transaction, the institution reasonably believed the consumer's account contained sufficient funds to cover the transaction. Although we agree completely with this exception, we are skeptical about the ability of any but the largest financial institutions to successfully develop and implement the requisite compliance technology. Similarly, while the rules governing when a fee can be assessed in connection with a debit-hold transaction overdraft appear reasonable when explained in the Proposal's text, the ability of a financial institution that lacks the technology to process consumer transactions in real time will struggle to avail itself of the carve outs and safe harbors set forth in the discussion of debit holds. *Like our discussion on "conditioning" in preceding paragraph, the Proposal's exceptions and debit holds provisions further demonstrate the need for a substantial amount of lead time between publication of the final rule and the date by which institutions must comply. We believe that a lead time of at least two years would be required to develop, test and implement the requisite technology.*

6. *Our final concern with the Proposal relates to its philosophic rationale.* Nowhere in the Proposal are overdraft programs treated as services that add real value for consumers (with the exception of checks and ACH transfers) and that actually save them money. Our experience and the survey research accompanying the Proposal refute this view. Overdraft protection programs that are fully disclosed and cover all types of transactions have proven wildly successful in the marketplace. Consumers appreciate the consideration and the convenience offered by such overdraft protection programs. <u>We strongly recommend that the final version of the Proposal reflect not only the costs of overdraft service programs, but also their value</u>.

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SPECIFIC CONCERNS

A Complete Opt-Out Approach Serves Consumers Best

The Proposal restricts the ability of a financial institution to assess an overdraft fee for paying ATM and one-time debit card transactions that overdraw a consumer's account, unless the financial institution has previously given the consumer notice and a reasonable opportunity to partially opt out of only these transaction types, and the consumer does not opt out.[3] The Proposal presents an alternative to the "partial opt-out" approach that would forbid a financial institution from assessing an overdraft fee for paying ATM withdrawals or one-time debit card transactions unless the consumer has affirmatively consented (or "partially opted in") to the institution's overdraft services program for only these two types of transactions. As we explain in greater detail below, *the superiority of a complete opt-out approach is undeniable in light of survey research and our experience.*

The proposed amendments to Regulation E represent an ongoing debate between consumer advocates who insist that only an opt-in choice is best for consumers, and financial institutions who know from experience that an opt-out approach is much better and who, unlike consumer advocates, are motivated by practical, real world consumer service considerations to offer products and services that consumers *understand, value and are willing to pay for.*

The natural starting point for a discussion on opt-in verses opt-out is the recent amendment to Regulation DD, published concurrently with the Proposal. Amended Regulation DD will require all financial institutions to disclose aggregate overdraft fees on consumers' periodic statements, regardless of whether those institutions "promote" the payment of overdrafts. The upshot of new Regulation DD is that many financial institutions, including most of the country's largest financial institutions and service providers ("vendors"), will no longer have an incentive to conceal their "discretionary" overdraft payment programs, but will instead be motivated to disclose (i.e. "promote") their overdraft practices to all consumers, an approach Strunk & Associates has always supported and has incorporated into its "best practices" guidelines. As a result, consumers will be more fully informed about the true costs of overdraft services - an approach we endorse and advocate.

The expected uptick in "large" institution disclosure ("promotion") and education of overdraft services relates directly to Board's consideration of whether to implement a partial opt-in or a partial opt-out rule. *A key finding in the recent and highly-publicized FDIC study of overdraft programs revealed that only 9 percent of financial institutions that promoted their overdraft services have received complaints about such programs.*[4] Stated differently, according to the FDIC Study, almost 91 percent of institutions that implement Strunk & Associates' best practices have not received complaints about their overdraft service programs.[5]

[3] 74 Fed. Reg. at 5218.
[4] FDIC STUDY OF BANK OVERDRAFT PROGRAMS 49 at tbl. VI-6 (Nov. 2008) (hereinafter, the "FDIC Study"). ***Financial institutions that did not "promote" their overdraft programs had a much higher complaint rate of 25 percent.***
[5] *Id.*

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Similarly, a study[6] commissioned by the Board for the specific purpose of drafting regulations for overdraft programs reported that "[e]ight of the nine [study] participants indicated that they would keep [their] overdraft coverage [despite the opportunity to opt-out], because they wanted to ensure that important transactions went through."[7] In light of such findings, it appears that there is very little consumer demand for any kind of opt-in approach. ***Much of the "demand" for an opt-in overdraft requirement seems more like a manufactured product of consumer advocates than actual consumer experience or demand.***

In addition to the lack of consumer demand for an opt-in requirement, we believe an opt-in alternative is based on unrealistic and short-sighted assumptions. As noted in the Proposal, when consumers open an account they may not fully appreciate the possibility of overdrawing their account at some point in the future.[8] To require a consumer to make a final determination about whether to opt-in (let alone "partially" opt-in) to an overdraft service upon opening an account not only requires the consumer to make an unreliable forecast, it ignores the broad impact that a partial opt-in approach will have as more consumers move away from check payments and toward payments though electronic channels.

We also disagree with the idea that an opt-in default rule benefits consumers. More specifically, we disagree with the Proposal's use of social science research suggesting that consumers will adhere to "default rules" even if those default rules work against their best interests.[9] *The research cited does not address overdraft services.* (Meanwhile, the research conducted for the Board for this Proposal indicates strongly that consumers do not want a blanket opt-in regime). *Moreover, the subjects addressed in those studies (e.g. 401(k) accounts) involve subject matters outside the expertise of the average consumer, rendering the studies' finding that consumers tend to stick with default rules both unsurprising and unconvincing.* In our experience, consumers are well aware of the consequences of overdrawing their accounts. Despite their awareness, almost none respond to the assessment of an overdraft fee with an opt-out request. We note, however, that the Board's reliance on such studies illuminates a recurring flaw in the arguments posed by consumer advocates: overdraft services are always treated in terms of costs, and no attention is given to consumer value.

Given the recent survey research that confirms what our experience has always suggested—that there is no demand for an opt-in approach and that consumers place a high value on overdraft protection services—the recent amendments to Regulation DD appear sufficient to protect consumers from overdraft abuses without unduly burdening the implementation of a product with such a low complaint rate. *An opt-in requirement would, in all probability, be nothing more than an unnecessary administrative burden and a source of constant customer confusion.*

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[6] Review and Testing of Overdraft Notices, Submitted to the Board of Governors of the Federal Reserve System (Dec. 8, 2008) (hereinafter, the "Board Study").
[7] Board Study at 8.
[8] 74 Fed. Reg. at 5216.
[9] *Id.* at 5225 n.35.

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Lingering Concerns about the Proposal's Partial Opt Out Regime.

In essence, the opt-out approach in the Proposal is a revised version of the partial opt-out right proposed by the Board in May 2008.[10] As many commenters noted, a partial opt-out right is one of the least desirable approaches to overdraft practices rules. We understand that ruling in favor of a complete opt-out right over a partial opt-out right might require additional rulemaking. However, the unworkable nature of a partial opt-out regime would make any additional rulemaking worthwhile.

In this section, we set forth the conceptual and economic arguments against any partial opt-out regime. The concept of a partial opt-out neglects the dynamic nature of payment systems in the United States. Consider how a partial opt-out regime would undermine one of the regime's stated justifications. The Board states that consumers are less likely to object to an overdraft fee if the underlying transaction represents a payment of rent or some other significant household expense.[11] Because most such expenses are paid by check, recurring ACH transactions or preauthorized debit transactions, the Board reasons that consumers may not want to opt out of such services. In fact, the Proposal does not give any opt-right at all for such transactions. Not only does this approach reduce consumer choice by failing to grant an opt-out right, it also ignores trends in consumer payment methods.

While many consumers continue to use checks to pay significant household expenses, that trend is declining.[12] A growing number of service providers allow consumers to use their debit cards to make *one-time payments* (which are distinct from both *one-time purchases* and *automated recurring payments*). Consider a consumer who needs to pay a utility bill, an internet provider bill, a cellular service provider bill, or almost any other bill payment. Most service providers readily accept, and even encourage, one-time debit card payments. In many cases overdraft protection can ensure that these transactions are honored, unless, of course, the consumer has opted out of overdraft coverage for debit transactions (or worse, did not opt-in at account opening). Or, as discussed in greater detail below, he or she may not understand the scope of a "partial" opt-out and may be shocked when bill payments are denied for insufficient funds. *Most consumers fully understand that they can set up automated recurring payments but many consumers prefer to make one-time payments instead of having the payee debit their accounts automatically.*

The example in the preceding paragraph also highlights a critical flaw in the partial overdraft approach: the conceptual framework for the partial opt-out regime assumes that all debit card transactions are created equal, but experience and common sense prove they are not. For example, the Board Study cites the near unanimous agreement among the study's participants that they would rather have a POS debit card bookstore purchase declined if the only way for the purchase to be approved would involve paying an overdraft fee in addition to the purchase price.[13] That may be true.

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[10] 73 Fed. Reg. 28,904 *et seq.*
[11] 74 Fed. Reg. at 5218.
[12] Geoffrey Gerdes, "Recent Payment Trends in the United States," *Fed. Reserve Bull.* (Oct. 2008).
[13] Board Study at 8.

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But consider a working mother who spends two hours in a grocery store, struggling to retrieve all the items on her list while keeping her small children inside of her shopping cart. After she finishes gathering her groceries and wrangling with her children, she enters the check-out line, the clerk scans her groceries and she swipes her debit card only to have her payment authorization denied due to insufficient funds. Without an overdraft protection program, she will be forced to either return some of the merchandise, attempt to pay with a check (which may be returned unpaid) or pay with a credit card, piling additional charges onto what might already be a large outstanding balance. In this situation, the working mother's perspective on overdraft fees will likely be much different from that of the bookstore browser. We know this mother places a high value on the convenience, time savings and avoidance of embarrassment offered by her financial institution's overdraft payment service. If her choice is between incurring an overdraft fee or adding a large grocery bill to an outstanding credit card balance, it may be much cheaper in the long-run for her to incur the overdraft service fee.

Consumer advocates have castigated financial institutions for charging overdraft fees to cover relatively "small" purchases. These purchases are typically described as "one-time" debit purchase transactions at fast food restaurants and coffee shops. The typical example involves a small overdraft, say ($2.00) that results in an overdraft fee of $25.00. As a result of the transaction, the consumer's account now has an overdrawn (negative) balance of ($27.00). *If, and only if, the consumer has additional debits with no offsetting credits* (deposits), the institution may charge additional overdraft fees such that the consumer's account may be overdrawn by ($52.00), ($77.00), ($102.00) or more, depending on the number of additional non-sufficient funds debit transactions. Using these rare examples as a baseline for their argument, consumer advocates assert that all consumers would opt out of overdraft coverage if they only knew how a "small" purchase that creates a "small" overdraft can lead to multiple and "outrageous" overdraft fees. In industry parlance, this has come to be known as "the $35.00 cup of coffee," and it is cited frequently as justification for the need for additional consumer protections. *It is a given that consumers would rather not pay overdraft fees, or any other fees for that matter.*

When asked if they would rather not pay these fees we think it's safe to say all consumers would answer they would not. Very few would answer verbally that they would like to pay more fees. However, experience tells us that their decision-making sees *real value* in certain convenience fees, whether it be at a convenient foreign ATM location or when writing an overdraft check on Friday when their payroll is due next Tuesday. **But t**he fundamental issue is not that consumers would rather not pay more in fees. The issue is whether, in the specific context and under the specific circumstances present when an overdraft occurs, there is value in the overdraft program.

Again, in the "$35 dollar cup of coffee," example - a relatively small transaction with potential to cause additional overdraft fees - the "outrageous" indignation loses its supposed moral force unless all of the underlying transactions involve small dollar amounts, and not just the "small" purchase of a cup of coffee. *In our experience it is almost never the case that all of the underlying transactions involve small dollar amounts; and that the underlying transactions, if any, causing additional overdraft fees, are important to consumers.*

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Consider a more common point of sale experience, a father with small children is in a fast food check out line. His total purchase amount is $36.00. He is apparently not aware that he only has $34.00 in his account. Given the choice to pay with an overdraft and overdraft fee or to not pay with an overdraft and use an alternative form of payment (or to not pay at all and leave without his order), our experience is that this father will almost always prefer to have the transaction paid with an overdraft and without the "public" embarrassment of a denial in the check out line. **In fact, the Board Study itself found that "[w]hether or not participants wanted their overdrafts covered by their institution depended on the specific transaction in question."**[14] It should not be surprising that if asked later (i.e., not in the check out line with his hungry children) which choice he would prefer, he will almost always say "deny the transaction or ask for an alternate form of payment." *Yet, that is not what he asked for, or really wanted, at the point of sale. He wanted the transaction completed.* Financial education could change his thought processes and we support such financial education efforts. *However, experience shows that consumers are willing to pay for the "value" of an overdraft service and are not deterred by its "cost."* Our experience also indicates that responsible financial institutions are already waiving all of the fees associated with "small dollar" overdrafts when they are made aware of these circumstances. This is not surprising, because to do otherwise invites customers to take their business elsewhere.

We are puzzled over why the conceptual framework supporting the Proposal's partial opt-out regime pays no attention whatsoever to such benefits.[15] We strongly encourage the Board to consider the practical, real world and obvious solution—to *keep in place the current all-or-nothing opt-out requirements*.

The Final Rule Should Allow Conditioning of Consumer Opt Out

In addition to the imposition of a partial opt-out regime, the Proposal includes measures to address the concern that "institutions may circumvent the proposed opt-out requirement and discourage consumers from opting out by . . . imposing higher fees, paying lower interest rates or limiting [account] features."[16] These measures forbid conditioning "a consumer's right to opt out of the institution's payment of ATM withdrawals and one-time debit card transactions . . . on the consumer's also opting out of the institution's overdraft service with respect to checks, ACH transactions and other types of transactions (such as preauthorized EFTs)."[17] We understand the Board's concern and agree that consumers should not face unreasonable hurdles to exercising their opt-out rights, but the implementation of a partial opt-out regime will be costly.

We believe that financial institutions should be able to vary account terms in a manner that allows them to recover some of those implementation costs from their source. After all, the initial programming expenses that an institution will incur in order to offer partial opt-out accounts are directly attributable to the partial opt-out requirement.

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[14] Board Study at 9.

[15] ***We would also like to note that fees from debit transactions do not affect lower-income individuals disproportionately. In fact, the FDIC Study notes that upper-income individuals were more likely to overdraw their account in a debit transaction than were lower-income individuals. See FDIC Study at 78.***

[16] 74 Fed. Reg. at 5219.

[17] *Id.* at 5218.

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The problems associated with the proposed prohibition against "conditioning the opt-out" are not limited to implementation costs. Although most overdraft services are automated, they remain discretionary. *It is difficult to understand how additional restrictions on overdraft services, such as partial opt-out and a ban on conditioning the opt-out decision, will not be viewed by consumers as a contract right.* Even though the Proposal stipulates that these additional restrictions are not intended to create a contractual right in the accountholder,[18] each additional restriction adds legally enforceable obligations to the service-provider and invites litigation or enforcement action. In such a scenario, even if the financial institution prevails on the merits of an underlying action, it will be required to pay attorney's fees and discovery costs to defending its actions.

Even if the Board is able to implement a final rule that does not invite litigation or spur unwarranted regulatory scrutiny, the implementation of a partial opt-out regime would undoubtedly require most financial institutions to incur substantial costs to install information technology systems with the capacity to discriminate among the distinct types of payment channels. Even those institutions that already have such technology would incur reprogramming costs to implement a partial opt-out program. These costs will have a disproportionate impact on small- and mid-sized institutions, because such institutions typically have limited technological resources. *The increased costs may force some institutions to discontinue their overdraft programs altogether, denying consumers access to a service they clearly value,[19] and putting the institution at a competitive disadvantage. Furthermore, it is a near-certainty that consumers will not understand how the partial opt-out will function.* As the Board's own study illustrates, it is virtually impossible to explain to a lay consumer which transactions are eligible for overdraft coverage and which ones are not. For example, one portion of the Board Study found that "[w]hen [interviewees were] asked what would happen if they set up recurring payments for a utility bill and subsequently did not have sufficient funds to cover the payment, about half of participants believed that even if they opted out of overdraft coverage, the depository institution would pay the bill and charge them an overdraft fee."[20]

On the other hand, *adoption of a partial opt-in approach would only exacerbate the confusion,* leaving consumers to attempt to understand why they must still pay overdraft fees - on check, recurring debit card transactions, and one-time debit card payments (but not purchases?) - despite their decision not to opt-in (even though they might be thankful that such transactions were covered).

Finally, assuming the scope of the opt-out could be adequately explained, there is no evidence to suggest that consumers would remember the explanation for any significant period of time. ***The best solution is to scrap the partial opt-out approach altogether.*** But if the Board is determined to use the partial opt-out approach, it is only fair to allow financial institutions to vary account terms in a manner that would allow the account to represent the true costs of implementation, potential enforcement actions and angry consumer departures.

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[18] *Id.* at 5218-19.
[19] Board Study at 8.
[20] *Id.*

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We believe that a "complete" or "all-or-nothing" opt-out requirement is best suited to balance the Board's legitimate concern with consumer protection against the need to allow financial institutions to continue providing useful, convenient and wildly popular overdraft payment services.

Additional Comments on the Implementation of Partial Opt-Out Regime

If the Board determines to implement a partial opt-out regime, faults notwithstanding, we have several suggestions that we believe would improve its implementation. First, we recommend providing at least two years for financial institutions to implement the appropriate technology. Any shorter time period would harm small- and medium-sized institutions that lack the technology infrastructure of larger institutions.

Second, the final version of the Proposal should clarify whether certain ATM transactions are subject to partial opt-out, as the Proposal does not distinguish cash withdrawals at an ATM from other ATM transactions, such as loan payments, inter-account funds transfers, or "purchases", such as postage stamps, initiated by a consumer at an ATM. Any ambiguity will generate confusion among consumers and financial institutions.

Third, the final rule would also be more useful if it included a more specific definition of "one-time debit card transaction." The term seemingly refers to transactions in which consumer uses a debit card to make a POS purchase or a one-time purchase over the telephone or online. It does not appear to include recurring, prescheduled monthly transactions. But the Proposal's text is ambiguous, and additional guidance is needed.[21]

Fourth, we enthusiastically endorse the Board's conclusion that the costs of mailing opt-out notices to existing customers would greatly exceed any perceived consumer benefit[22] and agree that the final rule should reflect this assessment. For new accounts opened after the final rule becomes final, we believe no safe harbor period is needed. Our experience suggests that consumers rarely, if ever, opt out of their overdraft protection services after the account is open but before an overdraft fee is assessed. Thus, we see no reason why a new accountholder would need additional time to opt-out if he or she is presented with the option when the account is opened.

Fifth, the proposal contains a lengthy discussion about the appropriate medium by which a consumer should be able to opt-out. We believe a postcard or other written communication would be the most effective method. Although a toll-free number or internet site may provide the quickest method of opting out, a signed paper document would protect financial institutions against litigation brought by consumers who have an important transaction denied because they forget or otherwise deny opting out of overdraft coverage. Putting aside any litigation risks, the final rule should nevertheless consider how many smaller institutions still do not offer interactive websites and would incur a substantial additional cost to implement a partial opt out regime.

[21] 74 Fed. Reg. at 5217.
[22] *Id.* at 5222.

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We recognize, however, that "home banking" transactions or interactive internet websites could also be effective in allowing consumers to exercise an opt-out right, and might be an appropriate additional mechanism for providing opt-out notification, provided that the final rule allows financial institutions to implement appropriate security measures.

Exceptions

The Proposal creates several exceptions to the general rule that financial institutions cannot impose a charge for paying an overdraft created by a customer who has opted out of the institution's overdraft payment program. While we support these exceptions and agree that they should be adopted, we also feel that their complexity and the lack of the technological resources to fully implement them argues in favor of a two-year implementation period for the final rule.

The broadest of the exceptions is the "reasonable belief exception."[23] Under this exception, financial institutions will be able to charge an overdraft fee for approving a transaction that it reasonably believed would not overdraw the customer's account. Some common examples listed in the Proposal include: (1) POS debit card transactions where the purchase amount presented for settlement by a merchant exceeds the amount that was originally requested for pre-authorization; (2) transactions paid on accounts where the balances are not updated in real time; (3) transactions paid from an account showing a positive balance that is later determined to have been negative due to a previously deposited check turns out to be deposited on insufficient funds; (4) and transactions the institution is required to honor, such as force-post or debit-pay transactions. The second exception applies to situations in which a merchant, without first obtaining authorization from a card issuer, presents a debit card transaction for payment by paper-based means, and the amount of that transaction creates an overdraft.

We support both exceptions, as there is no effective method for a financial institution to decline to pay such transactions. We are especially gratified by the Board's inclusion of "force post" and "debit pay" transactions. The Proposal acknowledges the reality that even though the funds at issue in such transactions may not actually be transferred from the consumer's account on the day of the pre-authorization, they are, from that day forward, unavailable to pay other debits on the account. *For purposes of honoring a customer's withdrawal transactions, there is no meaningful distinction between funds subject to a hold and funds that have been paid out from the account*. Not allowing an exception for such transactions would add to the unworkable nature of a partial opt-out regime.

Content and Format

The Proposal contains several items relating to the manner in which opt-out and fee information is presented to consumers.

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[23] *Id.* at 5220.

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For the most part, our experience indicates that the "Content and Format" proposals found in the Proposal would help consumers understand the cost of their overdraft services and the process by which they could opt-out of overdraft coverage.[24] *We strongly support use of the short-form notice described in the Proposal versus a requirement to use a longer form, such as the one currently proposed to be used at account opening, for opt-out notices that accompany periodic statements.*[25] We further agree with the Proposal that financial institutions should be able to reiterate on all opt-out notices that their overdraft services are discretionary and to explain the consequences of opting out.

We disagree, however, that a lengthy opt-out notice, such as the one accompanying the Proposal, should be provided on a stand-alone basis at account opening. All material terms of the account relationship in listed in the account agreement. *Including an opt-out notice similar in content and length to the short-form notice for periodic statements in the consumer's account agreement would allow financial institutions to convey the material terms of the account's overdraft program clearly and concisely and would keep such information in the same document that governs other important account provisions.* This format would protect financial institutions against allegations that consumers were charged an overdraft fee despite opting out of overdraft coverage, because this format would allow the financial institution to preserve important account terms in the account agreement. With a lengthy stand alone document, the possibility exists that the document was lost or inadvertently destroyed, leaving the consumer with no option but to prove that the misplacement or destruction of the document was done in bad faith.

We further believe that less frequent opt-out notices would be as effective as notices sent on every statement containing an overdraft fee, especially in the context of the new fee total disclosures required under Regulation DD. As with consumer privacy notices, these notices would probably have a greater effect if sent once every year. Even a bi-annual or quarterly requirement would serve the dual purpose of highlighting the notice for the consumer while saving transaction costs for the financial institution—no small concern in these times of economic distress.

Debit Holds

The Proposal would prohibit a financial institution from assessing an overdraft fee if (1) the overdraft is caused solely by a hold placed on funds as the result of a debit card transaction, (2) such hold exceeds the actual purchase amount of the transaction, and (3) the actual purchase amount would not have caused the overdraft.[26] The Proposal would not prohibit institutions from assessing an overdraft fee if the consumer's account has insufficient funds to cover the actual purchase amount when the transaction is presented for settlement (and the consumer has not opted out) or if the amount of the debit hold is equal to or less than the amount of the transaction that prompted the hold.[27]

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[24] *Id.* at 5223.
[25] *Id.* at 5223-24.
[26] *Id.* at 5229.
[27] *Id.*

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The debit-hold rule would apply only to "debit card transactions in which the actual transaction amount generally can be determined by the merchant . . . within a short period of time after the institution authorizes the transaction."[28] This language indicates that the rule would apply to various transactions, such as gas and restaurant purchases, where the merchants have the capacity to calculate the correct purchase amount and submit that amount for settlement in a brief time period, but will not apply to transactions involving longer hold periods, such as car rentals and hotel stays. While this version of the rule improves substantially on the May 2008 proposal, we continue to believe that an institution should be able to avoid violating the rule if, upon receiving a consumer complaint about an overdraft fee assessed because of a short-term debit hold, the institution promptly waives the overdraft fee(s).

We also support the Board's inclusion of a two-hour safe harbor during which time an overdraft fee may be charged for overdrafts that result from debit holds.[29] Although it will carry substantial compliance burdens, the safe harbor demonstrates the Board's responsiveness to industry concerns about the overwhelming compliance burden that would have accompanied the rule as proposed in May 2008.

Similar to our observation under the heading of "exceptions," we believe that the complexity underlying the rules and exceptions for debit holds, as well as the technological adaptations that will be required to implement them, argue in favor of an implementation period for the final rule that lasts at least two years.

CONCLUSIONS

Strunk & Associates recognizes that there is no simple solution the Board could implement that would produce a sound regulation agreeable to all parties. However, in its current form the Proposal—especially its partial opt-out regime—ignores or discounts several relevant facts about overdraft services.

1. Our experience demonstrates that *consumers overwhelmingly appreciate overdraft services and are willing to pay for those services*, provided that such services are properly disclosed and consumers are allowed to opt-out. *Both the FDIC Study and the Board Study concur with our experience on this point.*

2. In many places the Proposal ignores the notion that overdraft services are just that: services. While traditional credit agreements are driven by interest rate calculations and repayment terms, we believe that analyzing those two factors without placing them in the broader context of overdraft services ignores and minimizes their true value to consumers.

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[28] *Id.*
[29] *Id.* at 5230.

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Our client experiences consistently reinforce the fact that consumers value the convenience offered by overdraft protection services, and that they are willing to pay a fee for that convenience, no one enjoys paying it, but given the alternatives, it is the best and most convenient option. While the Board analyzes overdraft services in terms of costs, consumers view overdraft services in terms of value.

3. *Financial institutions' overdraft payment services are better for consumers than other alternatives.* Unlike short-term loan providers, overdraft service providers do not require a car title or other valuable consumer goods as collateral. And unlike deferred presentment programs (which might rely on a bad check as collateral anyway), overdrafts cannot be "rolled over" for weeks on end because it would be an unsafe and unsound banking practice.

4. We agree that the notices used to inform consumers of their right to opt out should carry a certain degree of uniformity. However, we believe the benefits offered by other provisions in the Proposal, such as the partial opt-out provision, and any opt-in provision, are outweighed by their compliance costs and the reduction of consumer understanding (and service) that will undoubtedly follow. *Therefore, we request that the Agencies adopt the provisions of the proposed amendments that would create a substantive right for consumers to completely opt out of their financial institution's discretionary overdraft payment service.*

5. Finally, with respect to the timing of the effective date of the final rules - and unless the Board substantively agrees with Strunk & Associates' recommendations - substantial technical changes will be required, and financial institutions must undertake a massive consumer education campaign. *We believe financial institutions and their service providers will need at least the same amount of time (18 months) the Board allowed for the recent changes to credit card rules under Regulation A. However, in this case, we believe that up to 24 months will be needed; especially for small- to mid-sized institutions.*

If the board or any of the agencies would like clarification of any of our comments, or has any questions, or would like additional information, please do not hesitate to contact me directly. Thank you for your consideration of our comments.

Very Truly Yours,

Sam Davis

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