

March 23, 2008

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

Subject: Docket No. R-1343

Dear Ms. Johnson:

We are writing to comment on the Board's proposal to amend its Regulation E that would limit the ability of a bank to assess an overdraft fee for paying ATM withdrawals and debit card transactions that overdraw a consumer's account unless the consumer is given notice of a right to opt out of the payment of such overdrafts and does not do so. Comerica Bank is a Texas-chartered member bank with total assets at December 31, 2008, of \$62.5 billion with branch offices in Michigan, California, Texas, Florida, and Arizona. The bank regularly, on a discretionary basis, provides overdraft courtesies to its consumer depositors and assesses overdraft fees for their doing so. Thus, in that the proposal would limit the bank's ability to offer such courtesies and assess such fees, the bank and its consumer customers would be directly and adversely affected by adoption of the proposal.

**Lack of Need for the Restriction**

We question whether there is sufficient public harm that is caused by the current practice to justify imposing the costs of this proposal on the banking industry. The underlying premise of many state laws criminalizing "uttering and publishing" (the intentional writing of checks on accounts with insufficient funds to pay such checks) is that a depositor is responsible for knowing the amount of funds in his or her account. The underlying premise of the Board's proposal is that depositors are not responsible for tracking amounts of withdrawals from and balances in their deposit accounts, which is directly contrary to the premise underlying state criminal laws in this area.

Jennifer J. Johnson, Secretary  
March 6, 2009  
Page 2

The very consultant that the Board has used to consider the need for this proposal found that, while virtually all consumers it interviewed would not opt out of overdraft services if their checks would be returned unpaid, only half of such consumers said they would even "consider" opting out if the choice were limited to overdrafts caused by ATM and POS transactions. If only half would "consider" opting out, we suspect it would be a small minority that would actually do so.

Opting out would impose on consumers the potential embarrassment of being turned away in retail shopping lines, like those at grocery stores, in front of their families, friends, and others, and we believe that thoughtful consumers would wish to avoid that embarrassment even if it means paying a fee for the overdraft service. For these reasons, we believe that the number of consumers who would opt out would be minimal.

Before imposing costs on the banking industry, the Board might wish to consider how many consumers would actually benefit from the opt out and imposition of those related costs and then weigh that benefit against the cost.

### **Costs**

Each bank will face considerable costs to establish the systems proposed by the Board. Establishing such a system is a large costly undertaking, consuming, we estimate, 7,000-8,000 hours of programmer time worth approximately \$1 million. In addition, once such a system is built, running the system will incur substantial ongoing operational costs that we estimate to be \$500,000 annually. If there are 6,000 banks subject to this requirement, this proposal would impose a \$6 billion start-up cost and a \$3 billion ongoing operational cost on the banking industry at a time when the industry cannot really afford "nice to haves."

Again, if there were overwhelming consumer outcry over this problem, the cost might arguably be justified. In the absence of any such outcry, it is not clear that the benefits outweigh the costs.

### **Systems Constraints**

The Board seems to recognize that it would be mandating something with which no bank has the systems today to comply. Thus, the Board expects to provide a substantial lead time before the proposed requirement becomes effective. That would be very much appreciated although how much of a lead time would be necessary before the necessary systems are constructed, tested, and become widely available is uncertain at this time.

The Board recognizes that most systems today can either pay overdrafts for all transaction types or none, but cannot distinguish between overdrafts created by different types of transactions, i.e. checks as opposed to ATM

Jennifer J. Johnson, Secretary  
March 6, 2009  
Page 2

transactions. It would be helpful for the Board to clarify whether a bank might comply with the proposed requirement by treating an opt-out request under the revised regulation as a request to opt out totally from any overdraft services, including overdrafts created by checks.

### **Costs of Permitting Opt-outs and Subsequent Opt-ins**

If we understand the proposal correctly, a consumer would be able to opt out and then later opt back in at his or her convenience. That means that the bank would need to track carefully the timing of transactions to avoid rejecting ATM and POS transactions of someone who had opted out and then later opted back in. Again, such close tracking will have costs, and the benefit is not readily apparent to us.

### **Special Problems with Joint Accounts**

The costs and problems are compounded in the case of joint accounts in which one holder may opt out and the other not, or, worse, both opt out and one later opts back in. If one joint accountholder opts out and the other does not, it would seem that the bank would have a serious customer relations issue on its hands as, by honoring either's wishes, the other accountholder may be expected to be angry with the bank. The Board should clarify what a bank is to do in such cases.

### **Opt-out is Preferable to Opt-in**

The proposal offers two alternatives the Board is considering: (1) offering consumers the right to opt out and prohibiting fees if they opt out or (2) offering consumers a right to opt in and prohibiting fees if they do not opt in. Our experience with privacy opt-outs is that, important as these issues may be to some consumers, the vast majority is simply not interested in them and tends to disregard notices about them. Given that experience, if the Board were to adopt an opt-in regime, the vast majority of indifferent consumers would be harmed as they likely would disregard the opt-in notice, fail to opt-in, and likely be excluded from overdraft coverage they expect to receive.

### **"Overdraft Opt-out Accounts"**

It has been suggested that banks might offer a separate overdraft opt-out account that would not permit payment of overdrafts on ATM and POS transactions. Those who make this suggestion, we believe, underestimate all that goes into designing a new banking product. We believe that the effort and cost to do so would not be justified.

Jennifer J. Johnson, Secretary  
March 6, 2009  
Page 2

Further, offering new types of accounts runs counter to the efforts many banks have been making to bring down their costs by streamlining account offerings by eliminating unnecessary products and services.

**Model Consent Forms**

The model consent forms proposed by the Board do not provide a signature line for the consumer. In order to reduce the likelihood of subsequent disputes whether a consumer has opted in or out, the form should provide for the customer's consent to be evidenced by a signature.

Thank you very much for providing us this opportunity to express our views.

A handwritten signature in blue ink, appearing to read 'DJ Culkar', with a long, sweeping horizontal stroke extending to the right.

DJ Culkar  
Senior Vice President and  
Assistant General Counsel