

March 30, 2009

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



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

Dear Ms. Johnson:

Fidelity Bank, a federal savings association headquartered in Wichita, Kansas with over \$1.8 billion in assets, offers an overdraft privilege service to all personal and small business checking customers. Before commenting on this proposal I think it is important to share with you some background on Fidelity's overdraft program in order to gain a sense of how in-depth and informative our program is.

For years, like other financial institutions, Fidelity has made case-by-case decisions regarding the payment of overdraft items. In 2001 the bank automated its payment of overdrafts and introduced a Personal Overdraft Program (POP) and in 2004 introduced a Business Overdraft Program (BOP) to our consumer and small business customers. As you can see we have over eight years experience running an automated program such as this and our program is quite popular with our customers.

Since its inception, we have taken the approach that "more is better" when talking about our overdraft program. In fact, we take disclosure of our program very seriously. We believe that consumers are intelligent and with the appropriate information *can* and *do* make informed decision.

Full disclosure begins at the time the account is opened; customers currently receive disclosures outlining the bank's overdraft program, which includes *all fees* associated with the payment of overdrafts, the discretionary nature of the program, the customers obligations to continue to participate in the program, and the assigned limit the customer can expect when the account becomes eligible. Customers also receive a complete list of all banking fees, including the fee for the payment or return of overdraft items, a notice stating the order in which items are paid including a list of what items may cause an overdraft, and an opportunity to Opt-Out as required by the Overdraft Protection Guidance issued in February 2005. We do all this up-front before any items are paid or returned.

Ongoing, we follow the best practices outlined in the Overdraft Protection Guidance. We issue a notice each time an overdraft occurs, we disclose a summary section on each periodic statement that includes a year-to-date accounting for overdraft fees and other fees associated with the payment of overdrafts. In addition to disclosures,

we clearly post the customer's ledger balance at every inquiry point including the ATM, the Voice Response System, and Online Banking, notifying them of the balance from which we agree to authorize payment. This has eliminated confusion and our customers view this as a straightforward approach to managing their account balance.

Never in any of these disclosures do we "promote" the use of this service, the intent is to provide a service that is meaningful in the event someone should miscalculate their balance and spend more than their available funds. Our customers are well informed on how our service works and have 24-hour access to their ledger balance which shows them their own funds. Customers are in full control as to whether they ever access their overdraft limit or not. We pride ourselves in taking an upfront and honest approach when dealing with our customers and we provide a toll-free number for anyone to "decline" our service at any time, no questions asked!

As for the Debit Holds, it is unfair to assume all banks automatically increase the amount of a hold when a merchant conducts a \$1 "status check" authorization for fuel pump charges. At Fidelity Bank we simply process the amount the merchant sends through for authorization. In other words, if a merchant is allowed by the Visa Operating Regulations to only send through a \$1 authorization then that is all we hold until the final purchase settlement. We do not increase this amount to \$75 as indicated in the proposal. Since separate rules exist for merchants and banks, I do think that banks should have the right to hold whatever amount is sent through for authorization.

I understand there are banks that are not as "up-front" in disclosing their overdraft program as we are, however, it appears that "full disclosure" with a meaningful opportunity to fully Opt-Out may be more of a solution than trying to programmatically stop or deny ATM/POS transactions that consumers may want paid.

### **Consumer Right to Opt Out/in**

We agree that consumers are entitled to receive a meaningful opportunity to opt out of services they do not want and we believe this was sufficiently addressed in the OTS Overdraft Protection Guidance issued in February 2005. However, we believe a partial opt-out option would not only increase our operating cost but it would also be confusing to our customers and make it impossible to clearly explain all the conditions under which an ATM/POS item might get paid or denied depending upon whether or not the consumer chose to opt-out.

A partial opt-out should not be considered as it would make it much more difficult to explain and even more confusing to consumers than a general opt-out option. It would be extremely difficult to try and explain all the conditions of when an ATM/POS item may be paid, paid and charged, denied, or even denied and charge some type of denied transaction fee. With the partial opt-out, we believe consumers would falsely believe they are opting out of only the "overdraft fee" and not the payment of the item **and** the overdraft fee.

In addition, should a partial opt-out become standard and consumers no longer have to manage their account balances before deciding to make a purchase, banks will see an increase in ATM/POS authorization volumes which will result in increased expenses. Banks are charged a fee each time an authorization is presented regardless of whether or not it is approved. If the final proposal includes language that prohibits banks from passing this fee to only the customers that choose a partial opt-out option then in order to recover this expense, these fees would ultimately be spread to all customers even those that never have an overdraft or an overdraft fee. For these reasons, we strongly support a full opt-out option and are opposed to a partial opt-out option.

### **Debit Holds**

It is the card associations operating regulations and not the financial institution that dictates which merchants are allowed to receive authorization for amounts other than the final purchase amount. Please be assured, I am not suggesting this is wrong, I am simply pointing out the fact that we have no control over the rules in which merchants may present transactions. However, we do have a responsibility to reduce losses and make sound management decisions.

Today we use a “hold-match-release” process for all non-PIN transactions to limit our risk exposure and to insure that funds already used for purchase by a customer don’t get applied to other transactions. Fidelity Bank does not increase the hold amount to \$75 as suggested in the proposal; we simply hold the amount that the merchant sends through. A hold is placed at the time the customer completes the transaction, and the “match and release” happens when that transaction is settled by the merchant. If not settled by the merchant within 72 hours of the initial authorization, the hold is released automatically. We find that most merchants settle within three days after the initial authorization. Even though the funds may not actually be transferred from the consumer's account on the day of the pre-authorization, from that day forward they are unavailable to pay other debits on the account.

Should we lose the right to use the “hold-match-release” process, we believe the financial risk to the bank would be great and alternative programs would be very expensive. We do not think this should be changed.

### **Additional Comments**

*“Comment is requested on whether there are other, more effective means of ensuring that consumers are not discouraged from opting out of an institution’s overdraft service for ATM withdrawals and one-time debit card transactions.”*

As I have state above, we believe that “full disclosure” with a meaningful opportunity to fully Opt-Out may be more of a solution than trying to programmatically stop or deny ATM/POS transactions that would end up increasing expenses and would ultimately be passed onto all customers.

For years regulators have relied on regulations like Truth-in-Saving as a formal mechanism to communicate specific details to consumers. It goes as far as specifically dictating what should go into an account disclosure. Banks follow these rules and provide disclosures to relay important facts to consumer regarding their accounts which, in turn, allows consumer's to make informed decisions. We have found this disclosure to be both useful and easy to manage from a banks perspective. It gives banks a standard document to communicate with consumers and consumers have a consistent document to refer to for important changes. I realize Truth-in-Saving is not up for discussion here, my point is that there is already a formal process in place to communicate regulatory information to consumers. However, in staying true to the intent, we believe it would be overwhelming to consumers if banks began listing all of the exceptions to the rules rather than a straightforward approach in stating a consumer has the option of opting out of this service.

## **Conclusion**

Furthermore; we believe all of this was sufficiently covered in the OTS Guidance on Overdraft Protection Programs implemented on February 18, 2005 which requires banks to "obtain affirmative consent of consumers to receive overdraft protection or alternatively, where overdraft protection is automatically provided, permit consumers to "opt-out" of the overdraft program and provide a clear consumer disclosure of this option." The guidance also went to great lengths to provide consumers clarity to overdrafts and clearly directs banks through the list of Best Practices on how to accomplish this. Even though only one is specific to the opt-out issue, it is very clear, and, there are nine others that clearly relate to whether the consumers are informed and can control their decisions. These are already required.

## Program Features and Operation

1. Provide election or opt-out of service. Obtain affirmative consent of consumers to receive overdraft protection. Alternatively, where overdraft protection is automatically provided, permit consumers to "opt-out" of the overdraft program and provide a clear consumer disclosure of this option.

## Marketing and Communication with Consumers

2. Fairly represent overdraft protection programs and alternatives.
3. Train staff to explain program features and other choices.
4. Clearly explain the discretionary nature of program.
5. Clearly disclose program fees.
6. Clarify that fees count against the disclosed overdraft protection limit.
7. Demonstrate when multiple fees will be charged, (If promoting the service)
8. Explain the impact of transaction-clearing policies.
9. Illustrate the type of transactions covered. Clearly disclose the overdraft protection fees may be imposed on transactions such as ATM withdrawals, debit card

transactions, preauthorized automatic debits, telephone-initiated transfers, or other electronic transfers, if applicable.

10. Promptly notify consumers of overdraft protection program usage each time used.

Thank you for the opportunity to respond to this Proposal. We hope you find our comments both informative and useful.

Sincerely,

A handwritten signature in black ink that reads "Carol Urban-Deal". The signature is written in a cursive style with a large initial 'C'.

Carol Urban-Deal, SVP  
Operations Manager  
Fidelity Bank