MasterCard Worldwide
Law Department
2000 Purchase Street
Purchase, NY 10577-2509
tel 1-914-249-2000
www.mastercard.com

MasterCard
Worldwide

March 30, 2009

By Electronic Mail

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

RE: Proposed Rule and Official Staff Interpretation of Regulation E
Docket No. R-1343

Dear Ms. Johnson:

MasterCard Worldwide ("MasterCard")[1] submits this comment letter in response to the proposed amendments to Regulation E regarding bank overdraft services ("Proposal") issued by the Board of Governors of the Federal Reserve System ("Board") pursuant to the Board's authority under the Electronic Fund Transfer Act ("EFTA"). MasterCard appreciates the opportunity to provide its comments on the Proposal.

In General

The Proposal supplants proposed rules regarding overdraft services and debit holds that were issued by the Board in May 2008 pursuant to its authority under the Federal Trade Commission Act ("FTC Act") to prescribe regulations regarding unfair or deceptive acts or practices ("FTC Act Proposal"). MasterCard strongly commends the Board for choosing another approach to the regulation of overdrafts as opposed to the FTC Act Proposal. If the Board seeks

[1] MasterCard Worldwide (NYSE: MA) advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. Through the company's roles as a franchisor, processor and advisor, MasterCard develops and markets secure, convenient and rewarding payment solutions, seamlessly processes more than 16 billion payments each year, and provides industry-leading analysis and consulting services that drive business growth for its banking customers and merchants. With more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to 25,000 of the world's leading financial institutions. With more than 24 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard. For more information go to www.mastercard.com.

to address debit card and ATM withdrawal overdraft issues, we believe it should do so pursuant to its authority under the EFTA. As discussed below, however, we ask the Board to consider carefully the scope of its authority under the EFTA when adopting a final rule.

Although we applaud the Board's choice to proceed with the rulemaking under the EFTA, we are concerned that if certain elements proposed by the Board are adopted, the final rule could force many banks to expend considerable resources without corresponding benefit to consumers. For example, any requirement that would necessitate significant system changes for institutions to distinguish between transaction types (*e.g.*, debit card, check, and ACH) in the context of overdraft services would be costly for institutions to implement. Some institutions may find these costs too burdensome, and may therefore not offer overdraft services at all as a result. That would lead to a *reduction* in overall consumer choice. Other institutions may implement the systems changes and pass costs on to all consumers even though the final rule would benefit only a small subset of consumers.[2]

We are also concerned that aspects of the Proposal do not give proper weight to the safety and soundness considerations that have typically accompanied agency guidance in this area.[3] For example, any final rule should preserve the ability of institutions to receive compensation for the risks that flow from a consumer transaction that will result in an overdraft where the institution is not in a position to decline a transaction, such as when systems are down and transactions are approved under a card issuer's standing instructions (*i.e.*, "stand-in" authorization). In this regard, we do not believe that the institution should be forced to absorb the risk associated with a transaction requested by the consumer, especially because the consumer is better positioned to mitigate the risk by not engaging in the transaction. Our more specific comments on the Proposal follow.

Scope of the EFTA

Although we are pleased the Board has chosen to approach the regulation of debit card and ATM overdrafts pursuant to the authority granted to the Board under the EFTA, we caution the Board against attempting to regulate other types of transactions that fall outside the scope of the EFTA. For example, in various portions of the Proposal, the Board proposes to regulate: (i) the terms and pricing of transaction accounts generally; and (ii) a bank's ability to dishonor paper checks and other items that are not subject to the EFTA. We do not believe these issues are directly subject to regulation under the EFTA, and should not be indirectly subject to regulation under EFTA in an effort to curb the payment of EFTs requested by the consumer. We respectfully believe this may be a circumstance of the tail wagging the dog, so to speak. Furthermore, we do not believe that the regulation of these issues is necessary to provide consumers with the choice to avoid overdraft charges associated with debit card transactions or ATM withdrawals. We therefore respectfully urge the Board to consider the scope of the EFTA when adopting a final rule.

---

[2] Not only would the costs be passed on to all consumers, but the consumers who manage their funds responsibly would be subsidizing a system designed specifically to benefit those consumers who do not manage their funds responsibly. We ask the Board to consider whether this is an appropriate policy result.

[3] *See, e.g.*, Interagency Guidance on Overdraft Protection Programs, 70 *Fed. Reg.* 9127, 9129 (Feb. 24, 2005).

Opt-Out Approach Preserves Consumer Choice

The Proposal generally provides for two alternative approaches under which banks could charge fees in connection with certain overdraft services. Under the first alternative, a bank would be required to provide a notice and opportunity to opt out before assessing an overdraft fee on an ATM withdrawal or a one-time debit card transaction ("Opt-Out Approach"). Under the second alternative, the bank would be required to give a notice and obtain the consumer's opt-in before assessing an overdraft fee on an ATM withdrawal or a one-time debit card transaction ("Opt-In Approach"). With respect to deciding which of these two approaches should be adopted under any final rule, MasterCard believes that the overarching goal must be to preserve consumer choice and benefit to the maximum extent possible. Accordingly, and for reasons we outline below, MasterCard strongly urges the Board to adopt the Opt-Out Approach as opposed to the Opt-In Approach under any final rule.

MasterCard approaches this topic with the assumption that each consumer has the tools to manage his or her account balance effectively, and that each consumer engages in transactions with a general knowledge of an account balance. We do *not* believe that consumers are generally irresponsible, and we do not believe that a bank should presume that a consumer does *not* want to engage in a transaction despite the consumer's attempt to do so (*e.g.*, by presenting a debit card at the point of sale). The appropriate presumption underlying any final rule should be that consumers initiate transactions with knowledge of their account balance information and that the decision to initiate the transaction is indicative of a consumer's desire to have the transaction authorized. For these reasons, we believe the Opt-Out Approach is far preferable to the Opt-In Approach in the Proposal. An Opt-Out Approach allows the consumer to determine at the outset whether the consumer would like to permit overdrafts. By not opting out, the consumer can avoid overdrafts without any intervention by the account holding institution by not engaging in transactions that will overdraw the account. If there is a circumstance where the consumer would like the bank to honor an overdraft, the consumer can attempt the transaction and hope the bank will honor it. In this regard, the consumer has maximum flexibility *at all times*. An Opt-In Approach, however, does not provide the consumer with similar levels of flexibility. If the consumer does not opt in (for whatever reason), but subsequently would like the bank to honor an overdraft, the consumer may not have the ability to have the transaction honored when the consumer may truly need the transaction approved. For example, a debit cardholder may need to fill a tank with gas, or make another important purchase, but not be in a position to opt in to overdraft services on short notice.[4]

We recognize that some may claim that consumers should be presumed to disfavor overdraft coverage in connection with debit card and ATM transactions. Again, we believe consumers engage in transactions with an understanding of the funds in their accounts. To the extent that consumers are disappointed with overdraft services, such as after an overdraft fee is imposed, they can always opt out. We believe that this is a far preferable approach than to deny a consumer the ability to make a critical purchase simply because they have failed to opt in. Indeed, to the extent the Board's objective is to preserve consumer choice, that objective is best

[4] Unfortunately, it is simply not accurate to assume that the consumer will have the available cash, credit, or checks to proceed with the transaction.

served under the Opt-Out Approach because the consumer is able to exercise choice both at the point of sale and after any overdraft fee is imposed.[5]

Opt-Out Requirement

With respect to the Opt-Out Approach, the Proposal provides that a bank may not assess overdraft fees or charge a customer's account for ATM withdrawals or debit card transactions unless: (i) the institution provides notice to the consumer explaining that it may pay overdrafts on such transactions and assess a fee or charge on the consumer's account for doing so; (ii) the consumer is given a reasonable opportunity to opt out; and (iii) the consumer does not opt out. Generally speaking, assuming the Board adopts a final rule, MasterCard supports this approach. We believe it is consistent with consumers' general experience with financial products and services.

In terms of providing consumers a reasonable opportunity to opt out, the proposed Official Staff Commentary ("Commentary") states that an opt-out opportunity is reasonable if a financial institution provides such an opportunity by mail, telephone, electronic means, or at account opening, and the consumer is given 30 days to opt out before the institution charges an overdraft fee. MasterCard believes any one of these opt-out methods is reasonable, and each should be expressly permitted by the Board. [6] We also believe the Board should retain the provision in the Commentary stating that an institution may provide an opt-out notice prior to or at account opening and require the consumer to decide whether to opt out as a necessary step to opening the account.

The Board specifically requested comment on whether it should require institutions to provide a toll-free number to facilitate a customer's opt-out. We do not believe this is necessary, so long as an institution provides another reasonable method for consumers to opt out. For example, we are unaware of consumers having difficulty exercising their rights in other circumstances in writing, or electronically. Furthermore, a requirement that a bank provide a dedicated toll-free number may impose significant compliance costs on smaller institutions. These are the very institutions that are likely to have only local customers who are accustomed to interacting with their bank through means other than by telephone. To the extent any final rule specifies how institutions may effect a customer's opt-out by telephone, we ask the Board to clarify that "toll-free" means cost-free if dialed from a land-line telephone in the bank's geographic footprint. This may obviate the need for some small banks to establish specific "1-800" telephone numbers.

---

[5] Our concerns would not be materially addressed by adopting a hybrid approach of opt-out for existing accounts and an opt-in for new accounts, as some have recently proposed. All of our concerns about the Opt-In Approach would remain, and institutions would need to operate two very different overdraft compliance programs. This is not a solution, and *may* be worse than either of the proposed alternatives depending on affected institutions' perspectives.

[6] For those banks that do not use this approach, we believe the Board should specifically clarify that a bank may decline an overdraft transaction during the waiting period for a consumer to exercise the opt-out. A bank should not be forced to honor overdraft transactions during the first 30 days an account is open, a timeframe in which overdraft transactions may present heightened risks.

Conditioning the Opt-Out

Under the Opt-Out Approach, the Proposal sets forth two alternatives with respect to an institution's ability to condition the consumer's opt out of overdraft services for ATM withdrawals and debit card transactions. Under the first alternative, institutions would be prohibited from conditioning the consumer's right to opt out with respect to ATM and debit card transactions on the consumer also opting out of the institution's overdraft service with respect to checks, ACH, or other types of transactions. The first alternative also would prohibit an institution from declining to pay non-opt-out transactions solely because the consumer has opted out of the institution's overdraft service for ATM and debit card transactions. In contrast, the second alternative would specifically allow institutions to condition the consumer's opt-out on the consumer also opting out with respect to checks, ACH, or other types of transactions. The second alternative also would allow institutions to decline to pay other overdraft transactions for which the consumer has not opted out.

We strongly urge the Board to allow institutions to structure their overdraft programs in the most flexible manner possible, so long as, at a minimum, they offer opt-outs relating to debit card and ATM withdrawals. As a practical matter, as the Board notes, a large number of institutions simply do not have the systems capability to distinguish between transaction types in the context of determining whether to assess an overdraft fee. A regulatory requirement to develop such capability would be expensive to many banks, and it is not clear that the costs would outweigh any consumer benefits.[7] As noted in our general comments above, any requirement under a final rule that would necessitate significant system changes may cause institutions to decide not to offer overdraft services altogether, a result that would not be beneficial to consumers, particularly consumers who for good reason may prefer to incur an overdraft fee and proceed with a transaction at an ATM or at point of sale. Furthermore, to the extent that a differentiated opt-out is important to the consumer, we believe that those banks with the capability to offer a limited debit/ATM opt-out will do so if there is consumer demand for the feature.[8]

If the Board adopts the alternative that does not allow an institution to decline an overdraft check solely because the consumer has opted out, we ask the Board to consider exceptions to this prohibition. For example, an institution will rely on a consumer's risk profile when determining whether to honor an overdraft check. Such a risk profile may vary depending on whether the consumer has opted out of overdraft services on debit card transactions, and it is conceivable that consumers who opt out of such services present a greater risk in connection with paper check overdrafts. A bank should not be required to ignore any such increased risk when considering whether to honor an overdraft. We ask the Board to provide appropriate clarification to allow institutions to manage legitimate risk in this way.

---

[7] Indeed, in the Supplementary Information, the Board states only that the benefits "may outweigh" the programming costs.

[8] Any concern that consumers will not take into account a bank's overdraft opt-out offerings when choosing a bank may be an indication that consumers do not value the choice. If consumers do not value the choice, it is difficult to justify the costs associated with a mandate to develop limited overdraft opt-out capability.

Implementing the Opt-Out

With respect to implementing the Opt-Out Approach, the Proposal provides for two alternatives. Under the first alternative, institutions would be required to provide to consumers who have opted out of ATM and debit card overdraft services accounts ("Opt-Out Accounts") on terms that are essentially the same as the accounts that are provided to consumers who do not opt out of such services. Under the second alternative, institutions would be allowed some flexibility with respect to establishing the terms or features of Opt-Out Accounts. As stated in the Proposal, however, the flexibility under the second alternative appears to be extremely limited in that it would allow an institution to vary the terms, conditions, or features of Opt-Out Accounts only to the extent such differences are "not so substantial that they would discourage a reasonable consumer from exercising his or her right to opt out."

We urge the Board to adopt neither of these alternatives in the final rule and to avoid attempts to regulate the terms and pricing of a deposit account. Although the Proposal would regulate an institution's electronic fund transfer product offerings by mandating, at a minimum, that consumers have an opportunity to opt out of debit card and ATM withdrawals, we caution the Board against further managing an institution's product offerings, or further regulating product pricing, based on whether the consumer opts out of overdraft services. Banks routinely offer products, and price such products, based on the consumer agreeing to certain conditions, such as accepting electronic delivery of statements, signing up for direct deposit, or writing only a limited number of checks each month. We are unaware of a reason why a bank should be regulated with respect to how it prices its accounts based on whether the consumer may take advantage of an overdraft service. Indeed, to require a bank to offer "one size fits all" pricing regardless of the revenue impact of the consumer's decision may distort product pricing and development even more than the Proposal otherwise will.

If the Board determines that it is appropriate to regulate the terms of deposit accounts (and that it has the authority to do so under the EFTA), we ask the Board to allow an institution to vary the terms of the account based on a consumer's opt-out. If the Board adopts this approach, we ask that the Board provide more clarity to institutions regarding what would be permissible or impermissible in the Board's view. As drafted, the relevant alternative in the Proposal would prohibit an institution from providing different terms, conditions, or features that are so substantial that they would "discourage" a "reasonable person" from exercising a right to opt out. Although the Supplementary Information suggests an institution could vary its pricing and still comply with the prohibition, we are concerned that the wording of the prohibition would attract significant private litigation.[9] If there are specific concerns the Board has, however, it should limit the prohibition in the final rule to those concerns (*e.g.*, not offering debit cards to consumers who opt out of debit overdraft services).

Exceptions to Notice Requirement

MasterCard commends the Board for recognizing that institutions may adopt policies and procedures that effectively eliminate the need for them to provide consumers with a notice and

[9] If the Board retains this approach in the final rule, we ask that the Board provide several examples in the Commentary of what would be permissible so that institutions may protect themselves from unwarranted liability pursuant to § 915(d) of the EFTA.

opportunity to opt out of overdraft services. Specifically, the Proposal provides for two general exceptions to the notice and opt-out requirements. The first exception would relieve an institution of the notice requirement if the institution has a policy and practice of declining ATM and debit card transactions in circumstances where the institution reasonably believes that the consumer has insufficient funds at authorization. We believe this is entirely appropriate, and we ask the Board to retain this provision in the final rule. We request, however, that the Board indicate that the examples provided on Comment 17(b)(5)-1 relating to an institution's "reasonable belief" also apply for purposes of proposed § 205.17(b)(4). The second exception provides relief from the notice requirement for institutions that require a consumer to consent affirmatively for the payment of any ATM and debit card transaction under an institution's overdraft service. Again, we believe this is appropriate as it would be unusual and unnecessary to require an opt-out notice for a service that is not provided unless the consumer specifically requests the service.

Exceptions to the Fee Prohibition

MasterCard applauds the Board for its appropriate determination that an institution may assess an overdraft fee in certain limited circumstances regardless of whether the consumer has opted out of overdraft services. Specifically, the Proposal would permit an institution to assess an overdraft fee regardless of the consumer's opt-out if: (i) the institution has a reasonable belief that there are sufficient funds available in the consumer's account at the time the institution authorizes the transaction; or (ii) in the case of a debit card transaction, the transaction is presented for payment through paper-based means without prior authorization. The Commentary provides examples of when an institution has a reasonable belief that there are sufficient funds available in the consumer's account.

We believe the exceptions proposed by the Board are appropriate and they should be retained in the final rule. If an institution has a reasonable belief that there are good funds at the time of authorization, it should not be forced to take an uncompensated risk if it must ultimately pay a transaction into overdraft. In these circumstances, there is nothing the institution could have reasonably done to prevent the overdraft from occurring. The institution should not be forced to take an uncompensated risk in such circumstances, especially when the consumer is better situated to avoid the overdraft (and therefore the fee).

For the same reasons the Board should retain the exceptions to the fee prohibition, we urge the Board to include additional exceptions when a transaction is not authorized by the issuer at the time of the transaction. For example, we believe the Proposal should be modified to allow an institution to charge an overdraft fee in those circumstances where systems are down and stand-in processing is used. We also believe an institution should be permitted to assess an overdraft fee in connection with a transaction that the institution does not authorize, regardless of whether it is paper-based or not.[10] In these circumstances, despite the institution's best efforts,

[10] This would pertain to situations in which there is a floor limit and transactions below the floor are not authorized. Generally speaking, MasterCard has a floor limit of $0 except in very limited and rare circumstances involving parking meters, tolls, and car washes. To require institutions to develop a process to comply with a rule in the extremely unlikely circumstance that such a transaction will result in an overdraft appears to us to be unnecessary. Similarly, to require outlets such as parking meters to meet full authorization requirements appears to us to be

the institution is not in a position to decline the transaction and therefore should not be forced to permit an overdraft without compensation. Although we understand that a consumer may not know when a transaction is authorized or not, we do not believe a reasonable consumer would simply assume that funds are available if a card transaction is approved at the point of sale.[11] It is more appropriate for the Board to allow a bank to allocate the cost of the incurred risk to the consumer in these circumstances.

Notice Requirements

Generally speaking, we support the Board's proposed requirements with respect to the timing of initial opt-out notices. MasterCard especially commends the Board for the proposed timing of notices with respect to accounts that are open prior to the effective date. Specifically, an institution would not be required to send initial opt-out notices in connection with each account, but would be required to provide them once an overdraft fee is assessed on such an account. We believe this strikes the correct balance between consumer benefits and regulatory burdens. We also note that many institutions may have already provided consumers with information about overdraft services, and to require new notices in these circumstances would be unnecessarily costly and burdensome. We agree with the position taken in the Proposal, and the view expressed by the Board in the Supplementary Information, that initial opt-out notices should not be required for existing accountholders because the costs to institutions for providing such notices would far exceed any consumer benefit.

With respect to the opt-out notice itself, the Board requested comment on whether institutions should be required to segregate the opt-out notice from other account disclosures. We do not believe this is necessary or warranted. As the Board has continually recognized in other contexts, it is possible (and customary) to provide clear and conspicuous disclosures on documents that contain more than one disclosure. We do not believe that the circumstances pertaining to the opt-out notice are any different. Considering all the terms in, and disclosures associated with, an account agreement, we question whether an opt-out relating to overdraft services is of such significance as to warrant the need, or costs associated with, a separate document. MasterCard does not think the opt-out notice is inherently more important than other required disclosures that it should be segregated from other disclosures. Even if the Board requires a separate document at account opening, we strongly caution against a requirement to provide any subsequent disclosures (*e.g.*, in a periodic statement) as a segregated document.

The Board also asked for comment on whether the final rule should permit institutions to provide the opt-out notice on periodic statements in certain cycles, or on all periodic statements. MasterCard does not believe that it is necessary for the final rule to specifically permit such

---

unnecessary, especially because it may prevent these outlets from being able to accept payment cards. This result would be to the detriment of all consumers.

[11] The Board inherently recognizes this fact, as the Proposal already permits an institution to assess an overdraft fee on various authorized transactions. There are plenty of reasons that an authorized transaction may not settle into good funds, virtually all of which are generally in the control of the consumer. Regardless of any final rule, authorization of a transaction *is not* indicative of whether good funds will be available to settle a transaction and neither the final rule, nor any materials accompanying the final rule, should not suggest to consumers that authorization so indicates. To the extent this point must be further clarified to consumers, the Board should permit a bank to do so as part of its overdraft opt-out notices.

communications with customers. We believe an institution has the ability to communicate with its customers in this manner without express authorization from the Board. On the other hand, we would question the wisdom of attempts to prohibit an institution from communicating with its customers regarding the customers' rights under the account. Financial institutions routinely provide standardized information about customers' rights on periodic statements, such as in connection with billing error rights under Regulation E (for transaction accounts) and Regulation Z (for credit card accounts). We are unaware of evidence to suggest that informing consumers of their rights on a regular basis would result in a deterioration of consumer protection.

Duration of the Opt-Out

With respect to the duration of the opt-out, the Proposal provides that a consumer's opt-out generally would be effective until revoked by the consumer in writing or electronically. MasterCard believes that limiting a consumer's revocation of the opt-out to only these two circumstances significantly constrains consumer choice and artificially limits the ability of institutions to honor customer requests in connection with overdraft services. We think there are circumstances when a consumer may not have another method of payment readily available and may want to revoke the opt-out orally in order to proceed with an ATM or debit card transaction. For example, consumers may wish to revoke the opt-out orally over the phone at the point of sale (*e.g.*, at a restaurant), in an emergency situation (*e.g.*, for car repairs or medical needs), or if the purchase is important at that point in time (*e.g.*, to purchase gasoline). We think consumers in circumstances such as these should have the ability to revoke orally a prior opt-out. Accordingly, we urge the Board to give consumers and institutions the ability to revoke orally an opt-out (or otherwise by telephone) under any final rule.

Opt-In Approach

As we already noted in our more general comments above, MasterCard does not believe that the Opt-In Approach is the better alternative for consumers, and may in fact serve to diminish the choice and protections that consumers already enjoy in connection with overdraft services. Also, many of our comments on the Opt-Out Approach are equally applicable in connection with the Opt-In Approach. We nonetheless offer the following comments should the Board decide to include aspects of the proposed Opt-In Approach under any final rule.

We do not believe that institutions should be required to provide the opt-in notice "segregated from everything else" and be prohibited from including information that is not specified in the Proposal and similar to the proposed Model Form. To the contrary, if the default position is that consumers must opt in, we think institutions should have the flexibility to describe their overdraft services in a manner that is consistent with other optional account features. Moreover, if the Board believes that the optional product of overdraft services is so critical that consumers be specifically and especially aware of the ability to obtain such services, perhaps such services should be considered part of the account with the consumer having the ability to opt out of them.

We also do not believe it is necessary for the Board to regulate how an institution accepts a consumer's request for the optional overdraft services. Again, if the service is of such critical

importance (and we believe it may be), an institution should be permitted to provide the service as part of the account with the consumer having the ability to opt out of it.

We also do not think that consumers would benefit materially under the Opt-In Approach from a requirement that institutions provide a written confirmation of the consumer's election to opt in. Assuming that the consumer has affirmatively opted in, it is not clear what benefit the confirmation provides to the consumer. If the consumer must opt in affirmatively, it is unlikely that such consent will be "accidental" or unknown to the consumer, making the confirmation redundant to the consumer but costly to the institution.

With respect to those aspects of the Proposal relating to conditioning and implementing the opt-in, we reiterate the concerns regarding these issues that we expressed above in the discussion of the Opt-Out Approach. For example, as we noted above, MasterCard believes that any final rule under the Opt-In Approach must enable institutions to condition the consumer's opt-in on the consumer also agreeing to other provisions of the institution's overdraft service.

We also reiterate our views with respect to the exceptions to the fee prohibition. The Board should expand the exceptions to include all circumstances where transactions are not authorized by the issuer at the time of the transaction.

Debit Holds

In General

MasterCard believes the debit hold portion of the Proposal is disproportionately costly and difficult to implement relative to the modest consumer benefits it would provide. We do not believe the Board should adopt a debit hold provision. If the Board does, we believe there is a simpler, more efficient approach that will result in the same level of consumer protection sought by the Board. We discuss this approach in detail below in our discussion of the safe harbor.

Definition of "Hold"

A central issue in the Proposal pertains to overdrafts that occur due to "a hold placed on funds in the consumer's account," but the Proposal does not define a "hold," nor does it indicate whether the "hold" pertains to a card issuer's "hold" or an authorization request from a merchant that may exceed the final transaction amount. We believe these issues are important for the Board to clarify.

MasterCard urges the Board to limit the scope of the final rule to circumstances in which the holder of the consumer's account takes affirmative action(s) to reserve against potential liability in excess of the authorization request in connection with a debit card transaction initiated by the consumer. In this regard, a "hold" would not involve a merchant submitting an authorization request that may exceed the final transaction amount, and the issuer subsequently making funds equal to the authorization amount unavailable for other transactions. Regulation E should not hold the institution holding the consumer's account responsible for the actions of the merchant submitting the authorization. That institution is not in a position to control the actions of the merchant, and should not be expected to incur additional regulatory costs solely for the benefit of the merchant.

We believe that our suggestion does not deviate from the intent of the Proposal. For example, the Supplementary Information and each relevant example in the Commentary describes circumstances in which the true "hold" is a result of the holder of the consumer's account—not the merchant—taking affirmative action to protect against a final settlement amount that may exceed the merchant's authorization request. We believe it is important, however, to make this clarification explicitly as opposed to implicitly through examples.

Definition of "Short Period of Time"

The Proposal's prohibition pertains only to those transactions where the "actual amount of the transaction can be determined by the merchant or other payee within a short period of time." The Commentary provides examples of such transactions, including pay-at-the-pump gasoline purchases and restaurant transactions. The Supplementary Information indicates that "multi-night" hotel stays and rental car transactions are not "short period of time" transactions.

MasterCard agrees that any final rule that addresses this issue should apply only to "short period of time" transactions. MasterCard also appreciates the Board's guidance with respect to the types of transactions that would be subject to the Proposal. We believe it is important, however, for the Board to provide *certainty* with respect to the transactions that are of the type the Board intends to cover as "short term." This is important not only for present compliance programs, but also as debit card transactions may evolve in the future.

We believe the most appropriate approach to this issue would be for the Board to state clearly which transactions it intends to cover by providing a finite list in the final rule itself. Absent such a definition, institutions, networks, merchants, and other affected parties may have difficulty discerning whether certain transactions are subject to the final rule. To the extent the Board adopts a final rule, we agree that purchase transactions an issuer can recognize as pay-at-the-pump purchases should be subject to the requirements. We are unaware at this time of other types of purchases for which an institution may implement a hold where the merchant would necessarily know the final transaction amount within a short period of time.[12] Although the Board specifically suggests that the issue of debit holds arises in connection with restaurant purchases, our research indicates that this is not the case. Generally speaking, institutions tend to hold *less* than the total amount in connection with restaurant purchases, as any tip is generally not added to the authorization request. Of course, many transactions at restaurants (*e.g.*, quick serve) do not involve any tips. If future transactions evolve or develop to create circumstances involving issuer holds, and relatively short settlement timeframes, the Board would have the ability to amend Regulation E in a relatively expeditious manner.

If the Board does not intend to define the transactions that are covered under the final rule, we ask the Board to amend the Commentary to include the examples from the Supplementary Information, with one modification, as the types of transactions that are not "short period of time" transactions. By placing these examples in the Commentary, as the Board has proposed with respect to examples of transactions that are covered, the Board will provide institutions with more clarity than if they are simply in the Supplementary Information. It will

[12] Indeed, we do not believe issuers generally impose holds in connection with restaurant purchases, and it is becoming less common for an issuer to impose a hold over $1 in connection with pay-at-the-pump transactions.

also provide them sufficient protection against liability in the event they rely on these examples for compliance purposes. Additionally, we ask the Board to revise the example pertaining to hotels to avoid an inference that the only type of hotel transaction excluded is one that involves a "multi-night stay." An institution will not know if an authorization request from a hotel involves a single night or multiple nights. Furthermore, the hotel will not necessarily know the transaction amount within a short period of time for a single night stay if the card is authorized at check in, but the transaction is not complete until the next day. Therefore, we believe the Board should refer only to transactions submitted by hotels, without reference to the length or type of stay involved.

Hold Amounts

The Proposal specifically permits overdraft fees in connection with a hold placed on funds for a debit card transaction if the amount of the hold is less than, or equal to, the actual amount of the transaction. MasterCard believes this provision is appropriate and requests that the Board retain it in the final rule.

Safe Harbor

The Proposal provides that, notwithstanding the general prohibition, an institution may assess an overdraft fee if the institution has procedures and practices in place designed to release a debit hold subject to the Proposal within a reasonable period of time. The Proposal further provides that two hours would be deemed to be a reasonable period of time. We applaud the Board for proposing a safe harbor for institutions that adopt policies designed to minimize the likelihood of an overdraft fee. We ask the Board to consider, however, at least one alternative safe harbor instead of the one proposed.

We believe institutions should be given a safe harbor in connection with transactions for which they hold no more than the amount of the authorization request. For example, in an automated fuel dispenser environment, the vast majority of fuel merchants submit a $1 authorization request, and many issuers hold only $1 as a result. This type of behavior should be expressly permitted. An institution that does not place a "hold" connection with a transaction should not be subject to this portion of the Proposal. This does not necessarily mean that we believe the "reasonable period of time" safe harbor should be deleted from the Proposal. It is important for the Board to understand, however, that although the safe harbor appears to be based on a voluntary program initiated by another payment card network, the program has serious operational costs and burdens that would be passed on to all consumers if it were essentially mandated due to debit card issuer demand for networks to implement the safe harbor. These costs stem from the additional processing requirements that would be imposed on all relevant merchants and acquirers (*e.g.*, gas stations), and the increased message traffic for issuers to handle. The Board is correct to note that the proposed safe harbor is technologically feasible, but we do not believe it is optimal or even necessarily beneficial for consumers, merchants, or our financial institution customers. That is why we believe the alternative safe harbor we propose is more appealing.

Clarification on Ability to Assess Overdrafts Despite Opt-Out/Lack of Opt-In

Proposed Comment 19(b)-2 provides an example of the interplay between proposed § 205.17 and proposed § 205.19. We ask the Board to clarify the Comment to recognize that there will be circumstances when an institution is permitted to charge an overdraft fee regardless of whether the consumer opted out (or in) with respect to the overdraft service. In this regard, we believe the Commentary should state that "the institution may not assess any fees or charges to the consumer's account for paying a debit card overdraft *(unless an exception to the prohibition exists under this section)* even if the institution is not otherwise prohibited from doing so by the debit hold provision." This is likely what the Board intended, and we ask that it be made explicit in the final rule.

* * * * *

Again, MasterCard appreciates the opportunity to provide comments on the Proposal. If you have any questions regarding our comments, please do not hesitate to call me at (914) 249-5978 or our counsels at Sidley Austin LLP in this matter, Michael F. McEneney at (202) 736-8368 or Karl F. Kaufmann at (202) 736-8133.

Sincerely,

Jodi Golinsky

Jodi Golinsky
Vice President
Regulatory and Public Policy Counsel

cc: Michael F. McEneney, Esq.
Karl F. Kaufmann, Esq.