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SECURIAN™

March 30, 2009

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: **Overdraft Practices**
Docket No. R-1343 (Regulation E)

Dear Ms. Johnson:

This letter is submitted in response to proposed the rule regarding Overdraft Services under Regulation E. Securian Financial Group is a provider of credit insurance programs to the bank and credit union industry, and administers debt cancellation contracts and debt suspension agreements to our clients. We are also a lending and deposit forms provider to our credit union clients, and as such, provide closed-end and open-end consumer and home equity loan forms and deposit forms to approximately 300 credit unions nationwide. It is with this background and knowledge that this letter is submitted. We appreciate the opportunity to provide this information.

The following will provide our comments regarding the proposed revisions.

GENERAL CONCERNS REGARDING THE PROPOSED RULE

Before we address the specifics of the proposed rule, we respectfully submit several concerns regarding this rulemaking generally.

Financial and Operational Concerns Regarding Financial Institution Resources. First, we note that overdrafts are very well-understood by consumers. Most consumers understand that, if they overdraw their account, they will be charged an overdraft fee. They understand that this will occur regardless of the type of item – check, ATM withdrawal, POS debit transaction, etc. Additionally, the vast majority of financial institutions provide overdraft services; that is, they will pay the item even if it overdraws the account. This well-established practice has become common knowledge in households across America. This consumer knowledge has been verified by the Board's own consumer research.

Overdraft services are also an important benefit to consumers. If a financial institution refuses to pay an item, the consequences to consumers could be severe. It could impact their ability to write checks to their grocery store or to pay for gasoline. It's a source of embarrassment to consumers to have their payment rejected. And bounced checks and other items may be reportable to the consumer reporting agencies as a negative item. Paying overdrafts is an important safeguard to consumers' ability to maintain their credit standing and to pay for necessities.

The importance to consumers of having overdraft protection is also borne out in the Board's consumer research. Only about half of the consumers surveyed would opt-out of overdraft services, and that was only for a segment of the items that could bounce (i.e., ATM withdrawals and one-time debit card transactions). This shows that overdraft services are not a huge concern of consumers generally.

In light of the luke-warm concern shown by consumers, we believe imposing more regulation in this regard on financial institutions would be placing an unreasonable and disproportionate strain on the financial institutions' resources and financial stability, at a time where financial institutions can ill afford to take on any additional expense.

As the Board is well aware, financial institutions are currently facing an unprecedented economic environment. Even well-managed institutions are experiencing reduced deposits, reduced loan income, and increased expense. Credit unions are particularly concerned in 2009 and 2010 with the NCUA's insurance fund assessment that may be imposed on them in order to stabilize the corporate credit unions and the Share Insurance Fund. This assessment would have significant impact on credit unions' earnings and financial health. No financial institution is exempt from this environment. Add to this the required regulatory changes that financial institutions are currently working to implement, such as the new 2009 Reg Z and RESPA requirements regarding Early TILs, Good Faith Estimates, and Settlement Statements, and the Reg Z open-end credit rules effective in 2010, and financial institutions are already taxed beyond their limits. Imposing the expense and operational impact of new regulation, in an area that is not even of overwhelming concern to the consumers themselves, is unreasonable. We believe that financial institution resources should be concentrated on the most pressing consumer concerns, and we believe that is already being done - the mortgage and credit card changes are clearly of more concern to consumers; overdraft protection pales in comparison. We would respectfully request the Board to withdraw this rulemaking or suspend it indefinitely. This will allow financial institutions to catch their breath, both operationally and financially, and to concentrate on the consumer reforms currently underway. It would also help them get back to the business of lending and accepting deposits, which is crucial to any economic recovery that we may see in the near future.

Overdraft Protection is reasonably-priced. We also have concerns that the Board believes that overdraft protection is the most expensive alternative. This is not necessarily the case. It is true that if an overdraft is paid, an overdraft fee will be charged. It is equally, true, however, that if a transaction is declined, a Non-Sufficient Funds fee may be charged. These fees are usually the same amount, and are designed to cover the administrative costs and inherent risk to the financial institution of having depositors with negative balances in their accounts. So, in the vast majority of cases, paying the overdraft and assessing the fee is a better deal for consumers, because it cost them the same, but spares them the negative consequences of a declined transaction that could lead to negative information being reported to the credit bureaus and the inconvenience and embarrassment of a declined transaction. Overdraft lines of credit may also be expensive for the consumer. While the LOC would allow the transaction to be processed, interest will accrue on the amounts advanced. As an unsecured line, the interest rate tends to be expensive to cover the additional risk. Depending on how many items are overdrawn and thus advanced onto the LOC, and how quickly the consumer pays the line off, this can be expensive for the consumer. And if the consumer fails to stay current on the required monthly payments, negative information will be reported to credit bureaus. While an overdraft line of credit can be of benefit to the consumer, to say that it is cheaper than overdraft protection is a generality, and could be misleading.

Consumers' Concerns of Disproportionate Fee. The Board's research shows that the biggest complaint that financial institutions receive from consumers regarding overdrafts is that a relatively large overdraft fee was charged when the overdraft amount was relatively small. It is true that a $30 fee may be charged for accounts that are overdrawn only by $2.00, for example. However, such a negative balance in a depositor's account still poses risks to the financial institution and triggers administrative costs. And the fact remains that the consumer made transactions without enough money in the account. The $30 fee is not meant to be a quid-pro-quo of making things "even". The fee is designed to cover the costs and risks when a financial institution advances money that the consumer does not have. The fee is also used as a disincentive to discourage consumers from overdrawing their accounts. At some point consumers must be held responsible to know how much money they have in their accounts, and how much they can withdraw. Charging an overdraft fee is not inherently evil, nor can it be said to be "disproportional" just because the consumer only overdrew the account by a small amount. This simply does not warrant added consumer "protections" or additional regulatory burden.

Proposed Congressional Action. We would also ask the Board to withdraw or suspend this rule while overdraft bills are being proposed in Congress. As we're sure the Board is aware, there are currently several bills circulating in both Houses, including a reprise of H.B. 946. House Financial Services Chairman Barney Frank, D-Mass., has said the panel will complete action on the bill this year. Alternatively, we would ask the Board to work with Congress to conform any bill that may be passed to the Board's currently proposed rule. Concurrent and contradictory laws and rulemakings would result in financial institutions having to implement multiple rules changes right on top of each other. The expense would be devastating, and compliance and litigation concerns would increase with multiple, confusing rules. Consumers would also not be served by changing the rules mid-game. It would only lead to confusion as to the consumers' rights and obligations regarding overdrafts.

For all of the above reasons, we find an overdraft protection rule generally unnecessary, and imprudent at this time. We respectfully request that the Board suspend or withdraw this proposed rule.

THE PROPOSED RULE SPECIFICALLY

We respectfully submit the following comments regarding the specifics of the proposed rule.

1. OPT-IN VERSUS OPT-OUT

The vast majority of our clients clearly would prefer an opt-out requirement, rather than an opt-in or affirmative consent requirement. This is for several reasons.

First, as noted above, overdraft protection is a benefit to consumers. An opt-out procedure would provide maximum protection for the most consumers. Affirmative consent procedures are often times problematic for financial institutions and consumers alike. For example, consumers may fully intend to opt-in, but for whatever reason, fail to do so. It might slip their mind, or they may have questions they mean to ask but never get to, or they could lose the opt-in form. For whatever reason, consumers just don't seem to sign and return things. However, that doesn't necessarily mean that the consumer did not want overdraft protection. But under the proposed rule, the financial institution would have to cancel the consumer's overdraft protection. The consumer will not understand why a valuable service that he had in the past has suddenly gone away.

Also, an opt-out procedure is the most reasonable in light of the fact that most consumers already understand, and desire, overdraft protection. To require a consumer to affirmatively consent to something they already have, and have always wanted, does not make much sense. It simply becomes an inconvenience to the consumer. It could also spark confusion, as the consumer may think that a new product is being offered or something about her current protection is changing.

An opt-out procedure is also more feasible from both an operational and compliance standpoint for financial institutions. It is easier to program, track, and flag the exception rather than the rule. With an opt-out procedure, financial institutions can "assume" that the consumer has overdraft protection, unless it is noted otherwise. With an opt-in procedure, the institution would have to check each and every consumer each and every time, and would require follow-up with consumers who have failed to opt-in. And if the consumer fails to opt-in, the institution is required to cease the service. This does not benefit the consumer.

Finally, opting-in provides an increased risk of litigation or complaints from consumers. If a consumer does not opt-in, the consumer could complain later, after items have been refused and the damage done. The consumer could claim he did not understand it, didn't remember getting a choice, and believed he had overdraft protection. This is especially so in this instance, as most consumer would have indeed had protection prior to the effective date of this new rule. Any confusion on the consumer's part would be reasonable. The opt-in procedure would essentially take away an important protection that the consumer once had. This is not a desirable outcome for the consumer or the financial institution.

Providing an opt-out procedure is simply "cleaner" and more straightforward for the financial institution and the consumer. It would help preserve a beneficial service that most consumers already have today, and would better allow consumers to make an informed decision regarding overdraft services.

2. CONDITIONING OPT-OUT OF ATM WITHDRAWALS AND DEBIT TRANSACTIONS ON OPTING OUT OF OVERDRAFT PROTECTION FOR OTHER ITEMS

If we are understanding the Board's proposal correctly, it is asking whether financial institutions would prefer a rule that (a) allows them to condition the opt-out of ATM withdrawals and one-time debit transactions on the consumer also opting out of overdraft protection for other items, such as checks and ACH; or (b) prohibits them from applying such a condition.

Our clients overwhelmingly prefer a rule that allows them to impose such a condition, for a number of reasons. First, this would avoid the operational, technology, and compliance concerns of trying to implement a partial opt-out rule. The Board has already received much comment on this issue and seems to understand this concern. Being able to impose such a condition would allow institutions to administer the rules consistently for all payment types and all consumers.

Next, many institutions' technology systems simply do not have the capability to track and implement overdraft protection by item type. For those institutions, requiring overdraft protection on some, but not all, item types would require a core re-write of their technology systems, which could cost six figures easily, and would have a devastating impact on the institution. An "all-or-nothing" approach is also easier for consumers to understand, and is what they are already used to. With such an approach, the consumer does not have to remember which items they have overdraft protection on, and which they do not.

Additionally, as the Board is aware, one-time debit card transactions can be done in one of two ways –PIN-based (which includes ATM transactions), and signature-based. Many financial institutions treat these transactions differently for overdraft purposes: PIN-based transactions are not included in overdraft protection, and are therefore declined if there are insufficient funds in the account; signature-based transactions would be covered by overdraft protection (in some cases, financial institutions' programs may first search for an available overdraft line of credit before utilizing the overdraft protection program and charging a fee). In this way, signature-based debit transactions are almost identical to checks. Additionally, PIN-based and signature-based debit card transactions are generally treated differently by financial institutions, merchants, and processing systems. And transactions are not necessarily processed through the PIN or signature network that consumers might expect. Consumers may have no way of knowing which of their card-based transactions may actually be paid into overdraft, and it would be very difficult for financial institutions to explain the different rules. Moreover, the Board's proposal does not distinguish which type of debit card transactions would be covered by the rule - PIN-based or signature-based, or both, which would cause confusion to financial institutions as well as operational and compliance concerns.

Finally, allowing an "all-or-nothing approach" also allows financial institutions to offer their accounts with differing terms, rates, and fees, based on market conditions and consumer demand, rather than based on whether an account does or does not have overdraft protection. Financial institutions must have the ability to base the terms of their account offerings on market conditions, rather than artificially-imposed regulatory requirements that have no bearing on underwriting risks and guidelines. This is also beneficial to consumers, who will have a broad array of financial products to better suit their financial needs.

3. THE OPT-OUT DISCLOSURE FORMS

Initial Notice. While the content of the Opt-Out initial notice is relatively straight-forward, we believe it can be improved for both financial institutions and consumers. We are respectfully providing a revised sample form below, and our explanation of our suggested changes follows.

First, we believe the form can be shortened and made more concise. Also, we would suggest a form for financial institutions who would condition the opt-out of ATM withdrawals and debit transactions on also opting-out of overdraft protection for the other items. This will eliminate the need to distinguish by type of item, and thus make the language more straight-forward and less wordy.

We also believe that the statement regarding lines of credit to be "less expensive" is a generality that could be misleading, as noted earlier in this letter. We would suggest deleting this reference. Next, we are not sure that consumers would understand the terminology of "linking" one account to the other, and we suggest alternative language.

We also think that, if overdraft fees are going to be disclosed, then a statement that NSF fees may be charged should be disclosed as well (as applicable). By only discussing and disclosing overdraft fees, this form misleads the consumer into believing that there are no costs associated with declining overdraft protection. Financial institutions will receive many complaints if the consumer declines overdraft protection, only to be charged an NSF fee instead.

Next, we would like clarification that the "How to Opt-Out or Get More Information" section is optional when the form is used at an in-person account opening.

The Board has requested comment as to whether financial institutions should be required to segregate the opt-out notice from other account disclosures to help ensure that the notice can be seen by the consumer. We would assert that the Model Form by its format would segregate the opt-out notice from other account disclosures. We have no objection to this. We would, however, assert that the notice does not need to be a separate form, and would like the Board's confirmation. We would like the option of incorporating the notice into an account application or signature card at the time the account is opened.

Finally, we believe that the ending language regarding the consumer's election is somewhat ambiguous and could be clarified. This will eliminate confusion as to what the consumer has agreed to.

We respectfully suggest the following Model Form:

YOUR RIGHT TO OPT-OUT OF OVERDRAFT COVERAGE

How Overdraft Coverage Works
We currently provide overdraft coverage for your account. This means that if you spend or withdraw more money than you have in your account, we may pay the overdrawn amount and charge you a fee. Having overdraft coverage does not guarantee that we will pay your overdrafts.

Your Right to Opt Out of Overdraft Coverage
You may tell us <u>not</u> to pay overdrafts. If you do, we will decline your transactions if you do not have enough money in your account, and you will not be charged an overdraft fee. You may, however, be charged a Non-sufficient Funds fee.

Other Ways We Can Cover Your Overdrafts
We offer other ways of covering your overdrafts, such as transferring funds from another account with us or applying for an overdraft line of credit. Contact us to learn more about these options.

Overdraft Fees
We will charge you a fee of [up to] [$__] each time that we pay an overdraft.
We will also charge you a fee of [$__] for each day your account remains overdrawn.
[There is no limit on the daily fees we can charge you for overdrawing your account.]

[How to Opt Out or Get More Information
To opt out of our overdraft coverage, or for information about alternatives we offer for covering overdrafts, please: [include as applicable]
Contact us at 1-8xx-xxx-xxxx.
Contact us at [insert Internet address].
Complete the form below and mail it to [insert address].]

- -

___ Yes, please pay my overdrafts. I understand an overdraft fee will be imposed.
___ No, don't pay my overdrafts. I understand my transaction will be declined and an NSF Fee may be imposed.

Printed Name: ________________________
Date: _________________________

Account Number: ________________________

The Subsequent Notice. We appreciate the Board keeping this form short. We would first note that our clients would place this notice on the Notice of Overdraft form used to inform the consumer that an overdraft has occurred, rather than on the periodic statement. Financial institutions have much more flexibility with the overdraft form, and it is much less expensive to revise or alter than the periodic statement.

For consistency, we would revise the subsequent notice in accordance with our changes suggested above regarding the initial notice, as follows:

Your Right to Opt-Out of Overdraft Coverage

You have the right to tell us <u>not</u> to pay overdrafts. If you do, we will decline your transactions if you do not have enough money in your account, and you will not be charged an overdraft fee. You may, however, be charged a Non-sufficient Funds fee.
To opt out, or for information about alternatives to overdraft protection, contact us at 1-8xx-xxx-xxxx or [insert Internet address].

4. <u>OTHER COMMENTS REGARDING OPT-OUT</u>

Reasonable Opportunity to Opt-Out. The Board has requested comment as to whether the stated 30-day safe harbor timeframe is reasonable, or whether a shorter time frame, such as 15 or 20 days, may be more appropriate. We believe a shorter timeframe is more appropriate. Fifteen days would be an appropriate timeframe, especially for notification by telephone or electronically. Even if the U.S. mail is used, the generally recognized reasonable delivery time is 3 days for the mailing to arrive at the consumer, and another 3 days for the consumer's notification to arrive at the financial institution. That would leave 9 days for the consumer to read the notice and determine whether he wanted to opt-out or not. Fifteen days is more than enough time for consumers to act.

Methods of Opting-Out. The Board has also requested comment as to whether financial institutions should be required to provide a toll-free telephone number to ensure that consumers can easily opt out. Participants in the Board's consumer testing indicated that even if the institution provided a form with a check-off box for the consumer's convenience, participants would still prefer to call their institution to opt out. While most financial institutions have toll-free numbers, some do not. It would not be reasonable to require an institution to incur the expense of obtaining a toll-free number when the consumer already has convenient ways to opt-out. Moreover, allowing an exclusively verbal opt-out poses risk of consumer complaint with no safeguard to the institution. For example, a consumer may call and opt-out, but later when transactions are declined, he may complain that he never opted out or doesn't remember opting out. The institution must have a way of documenting and evidencing the opt-out. The form with the checkboxes provides such a safeguard. Alternatively, the institution should be allowed to require a written confirmation of the verbal opt-out.

The Board has also requested comment regarding whether it should add examples of methods of opting out that would not satisfy the requirement to provide a reasonable opportunity to opt out, such as requiring the consumer to write a letter to opt out. We do not believe this is necessary. The Commentary's examples of reasonable methods are sufficient.

Institution Complying with Opt-Out Request, "as soon as reasonably practicable". The Board has requested comment regarding the need for additional guidance on the ''as soon as reasonably practicable'' standard. We do not believe this is necessary. This is a reasonable standard that can be used by all institutions, big and small. If the institution has procedures in place to process the opt-out requests in the normal course of business, this standard will take care of itself.

Revocation of Opt-Outs. Comment has been requested on whether consumers should be permitted to revoke prior opt-out elections orally, whether by telephone or in-person. We do not believe they should be permitted to do so. As noted above, institutions must be able to protect against confusion or miscommunication by requiring documentation for consumer requests. Verbally revoking the opt-out, especially if the original opt-out was given in writing, poses the risk of confusion and consumer complaints afterwards. Additionally, with the advent of e-mail, it is very convenient for a consumer to make a request "in writing". Finally, if the consumer is in the branch, it is of no inconvenience whatsoever if the institution requires him to sign a short form revoking the opt-out.

DEBIT HOLDS

The General Rule. The Board is proposing a rule that would prohibit financial institutions from assessing an overdraft fee if the overdraft occurs only because of a debit hold in an amount that exceeds the actual transaction amount. This rule would only apply to transactions in which the actual transaction amount can generally be determined by the merchant in a short period of time after authorization.

Our clients are strongly opposed to this rule. Debit hold rules are already very complex, and financial institutions have very little control over holds generated by merchants. They cannot know whether the hold amount is correct, understated, or overstated until the transaction is presented for final payment. Now the Board would ask financial institutions to first determine which transactions the settlement amounts may be determined "quickly" and which would not. It may be generally true that gasoline purchases and restaurant purchases can be determined "quickly", in comparison to hotel stays and rental car leases. However, as mentioned earlier in this letter, many financial institutions' technology systems do not track overdrafts by item type, let alone sub-categories of item type and even sub-components of transaction amounts and hold amounts. Even if the institutions could track this, the Board is not giving them a clear rule to follow. Yet it would impose penalties and risk of consumer complaints and potential litigation on a rule that is outlined in only the vaguest of terms, based on circumstances that are not under the institutions' control. Quite frankly, it would be impossible for institutions to comply with the Board's proposed rule.

The 2-hour Safe Harbor. Financial institutions have no control over how quickly merchants submit transactions. Often times, a transaction can take 24 hours to post (it does not, generally, take 3 days as the Board states in its proposal). Yet the Board would implement a 2-hour safe harbor because one card processor has "encouraged" its merchants to submit transactions within 2 hours. That 2-hour timeframe is really no safe harbor at all, if the merchant does not in fact submit the transaction within 2 hours. And as the Board itself acknowledges in the proposal, many institutions only receive authorization and settlement information periodically during the day. The Board is also asking financial institutions to loosen their safety and soundness standards. That is never a wise choice, and in today's tough economic times, that would be nothing short of irresponsible. The system of debit holds was created for a reason – to manage risk. The Board's proposal is doubly risky – it encourages consumers to overdraw their accounts, while at the same time handcuffing financial institutions from being able to guard against, and manage, the associated risk.

We certainly think that, for this rule to be workable at all, the Board would have to require merchants to submit transactions within 2 hours. But that would not solve all the issues. While we do not know if all merchants and processors could comply with the 2 hour rule (we suspect not), even if they did, many financial institutions could not, for the reasons stated above. And if the merchant does not comply with the 2-hour rule, would the financial institution be prohibited from charging an overdraft fee indefinitely? Would the financial institution be liable? There are too many open questions with this proposal.

We respectfully request that the Board withdraw this portion of the rule. In today's complex environment, and in light of the legitimate and important purpose that debit holds serve, it is simply impossible for the Board to legislate this issue under Reg E. This issue, even if workable, would be better served to be addressed through the card networks and their rules and regulations governing the procedures and processes used by merchants.

EFFECTIVE DATE

Under normal circumstances, we believe a 12-month compliance timeframe would be reasonable. However, financial institutions, their compliance and technology departments, and their data processors and card processors will be taxed throughout 2009 and the first half of 2010 in preparation of the Reg Z open-end consumer credit rules, and the mortgage rule changes under Reg Z and RESPA. We would ask that an effective date be imposed that is 18 months from the publication of the final rule.

CONCLUSION

While we believe consumer choice and conspicuous disclosures are crucial for consumers when utilizing their financial product choices, we remain unconvinced that consumers are concerned enough about this issue to warrant such sweeping changes to overdraft procedures. We respectfully request that the Board suspend or withdraw this proposed rule. Alternatively, we would ask that it be suspended until Congressional action on this issue is more clear, and postponed to such time as will allow financial institutions to "catch their breath" while implementing the various Reg Z and RESPA changes.

If this rule is to be finalized, we would ask that an opt-out rule be adopted, along with the ability to condition the opt-out of ATM withdrawals and one-time debit transactions on also opting out of overdraft protection for other items. This will allow financial institutions to implement the procedures uniformly and allow them to set rates and terms of products based on market conditions and consumer demand (rather than based on whether overdraft protection is available or not). It is also the only solution for institutions who cannot track overdrafts by item type. Additionally, it will be easier for the consumer to understand, and it is the system with which they are already familiar.

Thank you for your consideration.

Sincerely,

/s/

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