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TCF FINANCIAL CORPORATION

August 4, 2008

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551
regs.comments@federalreserve.gov

Re: OVERDRAFT SERVICES SUBPART;
Regulation AA; Proposed Rule on Unfair or Deceptive Acts or Practices
Federal Reserve System [Regulation AA; Docket No. R-1314]

Dear Ms. Johnson:

This letter is submitted on behalf of TCF Financial Corporation and its affiliates ("TCF") in response to the joint proposed rule regarding Unfair or Deceptive Acts or Practices, published in the Federal Register on May 19, 2008 at 73 FR 28903 (the "Proposed Rule"). TCF is a $16.5 billion Minnesota-based financial holding company with 454 banking offices in Arizona, Minnesota, Illinois, Michigan, Wisconsin, Colorado and Indiana. TCF also conducts leasing and equipment finance in all 50 states. This letter will address the Overdraft Services Rule set forth in Subpart D of the Proposed Rule. TCF appreciates the opportunity to comment and respectfully requests that the members of the Board of Governors of the Federal Reserve System ("Board"), consider the suggestions set forth herein.

The Board is proposing a requirement that institutions allow consumers to opt-out of "Overdraft Services," which would extend to the discretionary payment of customer transactions into overdraft. This proposal seriously undermines a fundamental premise that the consumer – not the bank – is in the best position to know what checks they have written or what debit transactions they have authorized that affect their account balance. The vast majority of our customers successfully manage their account balances to avoid overdraft fees. Current deposit processing systems, including the payment of some transactions into overdraft, benefit consumers.

While we applaud the Boards' goal of providing consumers choice, we have serious concerns with the approach taken by the Board in the Proposed Rule (and the corollary changes in Regulation DD). We believe that ultimately the proposals will have unintended consequences that will not be beneficial to consumers, merchants or the financial institution industry. Allowing consumers to opt-out of discretionary overdrafts will have significant unintended consequences, including increased costs to both consumers and merchants. In addition, the proposed regulations may result in significant numbers of lawsuits that will require significant

resources to defend. These suits, although meritless, could result in significant expenses for banks.

This letter provides general comments regarding: (A) concerns with the proposed consumer opt-out rights and debit holds; (B) unintended consequences; (C) UDAP concerns; (D) TCF's recommendations; and (E) specific comments on certain proposed sections. In our UDAP analysis, we will discuss why it is improper to classify the acts and practices in the Proposed Rule as "unfair" or "deceptive" when they do not meet the standards set forth in the Federal Trade Commission's three prong test for making such a designation.

A. Consumer Opt-Out Rights and Debit Holds

Consumers are likely to be confused as to what is subject to opt-out. They may not understand that they are still subject to fees that will occur because items will be returned instead of paid into overdraft. Consumers will not understand that they may actually incur more fees than if the item was paid into overdraft because returned items that are not paid may be re-presented multiple times, resulting in multiple returned item fees. The sample notice provided in the Regulation DD proposal is heavily slanted towards encouraging opt-out and does not include sufficient information about the disadvantages of opt-out. The sample notice also does not include a description of the exceptions identified in the Proposed Rule that could result in overdraft fees. Consumers will not understand that overdrafts may still occur even if they opt out, and overdraft fees may still be charged for the permitted exceptions.

Fee exceptions to opt-out are not comprehensive and will lead to customer confusion. The Board acknowledges that there are circumstances where an institution may not be able to avoid paying a debit card transaction that overdraws an account. The Proposed Rule describes two exceptions: (1) where there were sufficient funds at the time of authorization but the debit card transaction amount presented at settlement by a merchant exceeds the pre-authorized amount; and (2) where the debit card transaction is presented as a paper-based item and the bank had not previously authorized the transaction.

The fee exceptions offered in the proposal are impractical and fail to adequately address the bank's exposure to loss in the event that transactions authorized against sufficient funds are then settled against insufficient funds. Specifically, the fee exceptions in the proposal fail to recognize the impracticality of systematically revisiting fees days after original assessment based on differences between hold amount and settlement amount. There is also no clear fee exception offered in cases where a customer has made a deposit that is subsequently returned unpaid and charged back against insufficient funds;[1] for late settling debit card transactions which come in for settlement after the 3 day hold has dropped; or many other routine scenarios. The specified

[1] If a customer makes a deposit into their account, which is returned from the maker's financial institution, the bank will charge-back or reverse this amount from the depositor's account. These funds may have been used to authorize a debit card transaction. When the debit card transaction is later submitted for payment, there may be insufficient funds remaining in the account, but the bank must still pay the debit card transaction even though it creates an overdraft and even if the customer has opted out. It is not clear if the bank may assess an overdraft fee on items submitted against negative available funds in such a situation and we request clarification that this be added as an additional exception to consumer opt-out.

fee exceptions are not sufficiently comprehensive to cover all the possible scenarios, so in many situations the bank will no longer be able to assess fees to compensate for bank risk, or to encourage the customer to manage their available funds. To minimize bank risk, the bank will be more inclined to return transactions based on "notice of presentment" (pending authorized debit card transactions), effectively resulting in a "full" opt-out.

Outlining specific exceptions in a final rule is problematic because it is nearly impossible to specify and predict all the potential scenarios that should be considered as exceptions, and to reflect processing changes and enhancements that may occur in the future. Moreover, when a bank imposes an overdraft fee under one of the specified exceptions, a customer who has opted-out is likely to be confused.

Debit Card Holds for Excess Amounts. The Debit Card Holds proposal prohibits an institution from charging overdraft fees if the overdraft would not have occurred but for a hold that is in excess of the actual settlement amount. This proposal will create significant processing challenges since, during the debit hold period, an institution must make timely decisions on whether to pay or return intervening items. An institution would have to make the payment decisions at the time items are posted to the account, and then look back over three days of transactions across multiple payment streams in order to isolate and determine which overdrafts were caused by an "excess hold" with respect to a particular debit card transaction, in order to back out the relevant overdraft charges.

It is not feasible for a bank to track a transaction back to the original authorization to determine if an overdraft fee is disallowed. First – when a bank authorizes transactions for some merchant types – the final settlement amount is unknown. In fact, the final settlement transaction may be submitted up to 30 days later. VISA rules allow for a hold to be retained on an account for no more than three business days. When the bank processes transactions that night, pay and/or return decisions must be made on transactions submitted for settlement. It is infeasible that the bank can track a transaction back to original authorization (which may or may not be retained), recalculate the amount of an excess hold relative to final settlement amount, and then determine if an overdraft fee was assessed based SOLELY on the amount of excessive hold. In the intervening days, other transactions may be submitted against insufficient funds and fees assessed would also impact the following day's pay/return decisions.

Only the customer has actual knowledge of the final settlement amount and his account balance. If the customer does not have sufficient funds when the transaction is ultimately submitted for payment an overdraft fee may be assessed. It is important to note that even if a customer has insufficient funds when the transaction is authorized, the customer can make a subsequent deposit or transfer on the same day before the transaction is submitted for settlement and avoid any overdraft fees.

In the current environment, an institution may take risks for customer convenience and assess an overdraft fee to help compensate for the risk, to deter bad customer behavior, and for other valid business reasons. However, institutions may be forced to revisit the risk/reward model if overdraft fees cannot be assessed under the proposal.

Clarifications requested:
We request that the Board consider revisions to the Proposed Rules so as not to unfairly burden institutions with a prohibition regarding excess debit holds that may be caused by merchant behavior or network system limitations that are beyond our control.

- According to VISA rules, automated fuel dispensers should submit an authorization for $1 (and is protected for transactions up to $75). However, we cannot ensure that merchants always comply with the Visa network rules and we should not be held responsible if the merchants are not submitting transactions accurately (*e.g.*, submit an authorization for $150, which may be higher than final settlement transaction).
- If a merchant submits a transaction for authorization and the transaction is never submitted for payment (e.g., merchant did not cancel/reverse accurately), does this constitute an "excess hold" and is the bank required to recalculate previous fees assessed due to this hold that resulted from incomplete merchant transactions? We request that the Board not penalize the banks for excess holds that are caused by the merchant.
- One example in the Proposed Rules recognizes that some holds remain on a customer's account for up to three days because the bank was unable to accurately "match" it to a transaction that has already posted. It is not feasible to assume that if the bank could not reconcile the transactions (due to merchant and payment system limitations) – that the bank could determine the "matching error" at a later date and the bank could determine that this "excess hold" resulted in fees.

B. Severe Unintended Consequences

Opt-out for all overdraft services (not just bounce protection programs) means that that there may be a significant shift from overdrafts to more returned items. Financial institutions will return and decline more checks, automated payments and debit card transactions, including important payments such as those for mortgages, utilities, insurance and credit cards. The Board does not appear to give sufficient weight to the consequences that will result if the consumer's check is dishonored as a result of an opt-out.

1. **Consumers may be subject to more fees – not less.** The consumer will save the overdraft fee from the bank, but replace it with a returned item fee. As a result, the original bank fees incurred by the consumer would likely be similar regardless of the opt-out. However, many items today are presented for payment by the merchant multiple times when initially returned unpaid, so rather than having a single fee associated with the payment of a transaction into overdraft, a transaction could be returned NSF and result in multiple fees. Consequently, a single transaction for which there are insufficient funds can result in multiple returned item fees.
   In addition, if the check is dishonored, the consumer could face significant additional consequences, including criminal. For example, the payee may assess a returned check fee, report the consumer to a bad check database or other consumer reporting agency, and possibly impose additional penalties.[2] Of course, criminal laws and penalties could also

[2] For example, if the check was for a mortgage payment, the payee could also assess a late payment fee and report the consumer delinquent to a consumer reporting agency. If the check were for a delinquent utility bill, the payee could cut off that utility service.

come into play. The Board acknowledged the fee consequences of returned checks or ACH items, but failed to acknowledge that debit cards are also used for recurring bill payments and that fees and other negative consequences can also result if debit card transactions are denied.

2. **More items may be returned rather than being paid**. Under the proposal, banks may not assess a fee for an overdraft service if a consumer's overdraft would not have occurred but for a POS authorization hold on funds in excess of the actual amount of a purchase. This harms consumers who have opted-out. Consider the following scenario:

   > The consumer has $100 on deposit with a bank. The consumer uses his POS card to purchase gas. The gas station obtains an authorization for $75. The consumer's actual purchase is for $20. The bank reduces the customer's available balance by $75 (in effect, an authorization hold), as it has no way of knowing the actual transaction amount until approximately 3 days later when the transaction settles. In the meantime, a $60 transaction is presented for payment against the account.
   >
   > At the time the transaction is presented for payment, the bank has no way of knowing whether the POS authorization hold exceeds the POS transaction amount, and the consumer may not know his account balance has been reduced by $75 rather than $20. If the customer has opted out, the bank will dishonor the $60 transaction (and assess a fee for the dishonor) rather than honoring the check and potentially creating an overdraft.

3. **Merchant willingness to accept checks** – This proposal may reduce merchants' willingness to accept checks from customers due to a higher likelihood of returned checks. A merchant cannot have insight into a consumer's opt-out preference, and therefore may choose to accept only debit cards for payment (since these transactions, once authorized, can not be returned unpaid). This may disproportionately impact the elderly who are more inclined to use non-electronic payment methods.

4. **More Holds on Deposits -** It is likely that deposit holds will increase on accounts of both opt-out and non-opt-out customers. Since more checks are likely to be returned unpaid (rather than paid into overdraft) due to consumers opting-out, banks are more likely to place holds on checks for the maximum permissible time authorized by Regulation CC. This will affect all customers – not just those that elect to opt-out. For example, the individual depositing these items will not only be subject to a hold, but may also incur returned deposited item fees if the deposited check is returned unpaid from the maker's bank.

5. **Higher costs to consumers** – The increased likelihood of returned check/ACH transactions (including multiple resubmissions) and returned deposits will result in potentially higher costs to both opt-out and non-opt-out customers. The payment system is complex. Merchants have come to rely on the fact that the vast majority of the checks they receive are paid when submitted to banks. The cost of returned checks, and

subsequent merchant loss, are likely to be distributed to all consumers in the form of higher prices for goods and services.

6. **Increased litigation costs to financial institutions** –, We are concerned that this proposal may subject institutions to an increased risk of meritless challenges to past practices, regardless of how the regulators attempt to frame their determination as applying only prospectively. At a minimum, the Board should reconfirm and emphasize the statement in the preamble to the Proposed Rule: "These proposals should not be construed as a definitive conclusion by the Board that a particular act or practice is unfair or deceptive."[3] Given the lack of prior regulatory or judicial criticism of these practices, TCF believes it is inappropriate for the Board to subject financial institutions to this new UDAP risk for past practices.

C. UDAP Concerns

The Proposal is not a proper application of the Boards' UDAP authority. The Board states that (a) assessment of overdraft fees without an opt-out right and (b) assessment of fees for overdrafts caused by debit card holds in excess of the transaction amount, in each case "appears to be an unfair act or practice" under the standards articulated by the FTC. The acts and practices described above do not meet all three prongs of the FTC's test for determining whether an act is "unfair" under Section 5 of the Federal Trade Commission Act; and therefore, it would be improper to label them as such. Moreover, inappropriately declaring these acts or practices as "unfair" will result in serious unintended consequences.

Under the standards articulated by the FTC, the Board may not determine an act to be "unfair" unless: (1) It causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. In addition, public policy may be considered, but may not serve as the primary basis for the determination that an act or practice is unfair. The practices identified in the Overdraft proposal do not meet the requirements for a determination of what is an "unfair" act under the FTC standards. Following are some of the reasons the practices fail the test. First, overdraft fees for these services are not injuries when properly disclosed.[4] Second, overdraft fees for these services are reasonably avoidable.[5]

[3] 73 Fed. Reg. 28928

[4] See "Testimony of John C. Dugan Comptroller of the Currency Before the Committee on Financial Services of the U.S. House of Representatives" (June 13, 2007) (Practices that rise to the level of "unfairness" under the FTC Act standards require a combination of "both an inordinate degree of risk or harm . . . and deficiencies in the information provided . . ." so that fees or interest rates that are adequately disclosed are not likely to be treated as unfair under existing FTC Act precedents.)

[5] See, *e.g.*, Saunders v. Michigan Ave. Nat. Bank, 662 N.E.2d 602 (Ill. Ct. App. 1996) which held that the bank's practices of charging an overdraft fee was not "unfair" under the Illinois Consumer Fraud Act. The court applied the FTC Act analysis and determined that there was no lack of meaningful choice regarding overdrafts. The court noted that the plaintiff had control over whether she would be assessed an overdraft fee and was also free to select another bank. The court concluded that the bank provided the plaintiff "with all of the information necessary to make a meaningful choice in selecting banks."

Finally, overdraft services provide countervailing benefits to consumers that outweigh the costs in fees.[6]

1. Substantial injury

An overdraft fee is no more of an "injury" than is any other properly disclosed service fee that may be imposed in connection with an account. Characterizing a properly disclosed service fee as an "injury" simply because the customer did not have the right to opt out of that particular service fee in connection with his or her account is wrong. Just as an overdraft fee is not an injury to consumers, neither is an overdraft service an injury. In the analysis of consumer injury in the Preamble, the Board concedes that the payment of overdrafts may allow consumers to avoid merchant fees for returned check or ACH transactions, but asserted that there were no similar consumer benefits for ATM withdrawals and POS debit card transactions. We respectfully disagree with this assertion. There is a consumer benefit to payment of overdrafts for such transactions since it helps the consumer avoid the embarrassment of having a transaction declined at the point-of-sale; or avoid the inconvenience of not being able to withdraw funds at an ATM.

In addition, the Board failed to give proper consideration to the fact that debit card transactions are not limited to one-time point-of-sale transactions when analyzing the potential benefits of overdraft services. Debit cards are also used in connection with a wide variety of recurring bill payments, e.g. payments to utilities or mortgage payments, and insurance payments. Virtually any recurring payment that could be made using a check or automatic debit could also be made using a debit card. Consequently, the very benefits that the Board conceded as arising from the payment of overdrafts in connection with check and ACH transactions can also arise in connection with debit card transactions. Like payment of checks and ACH items, payment of overdrafts for debit card transactions may allow the consumer to avoid late charges or other penalties for non-payment, as well as other adverse consequences. As a result, these are not an injury.

2. Reasonable ability to avoid the injury

Consumers can easily avoid overdrafts and overdraft fees since they are in the best position to know what checks they have signed, what transactions they have authorized, and what withdrawals and deposits have been or will be made. They simply need to record the transactions and make the appropriate additions and

[6] Overdraft services allow consumers to avoid returned item fees, late fees or penalties, negative credit ratings and other adverse consequences when payments are not made. Payment of debit card or ATM transactions into overdraft allows consumers to avoid the embarrassment of having a transaction declined at the point-of-sale; or avoid the inconvenience of not being able to withdraw funds at any ATM. Additionally, debit cards are increasingly used for recurring bill payments, and payment of these transactions into overdraft provide similar benefits to payment of checks or ACH (e.g., avoidance of late fees or termination of service).

subtractions to their account balance. For customers who have difficulty keeping track of transactions, there are other options.[7]

The Board expressed concern that a consumer lacks sufficient information and cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available. Consumers have some responsibility to know what the available balances are in their account. In fact, the Expedited Funds Availability Act (the "EFAA") and Regulation CC are intended, in part, to ensure that depositors have the information they need to be able to determine when a deposit to a transaction account will be available for withdrawal. To the best of our knowledge, the EFAA and Regulation CC have successfully accomplished this purpose. Banks inform customers that they are responsible for recording their transactions and caution them that the balance communicated by the bank may not reflect all of the customer's outstanding transactions. We believe that institutions complying with Regulation CC provide sufficient information for a consumer to determine with reasonable certainty whether they have sufficient available funds in an account to cover the payments they authorized.

The Board expressed particular concerns that consumers are generally unaware of the practice of debit holds and therefore could not reasonably avoid overdrafts and overdraft fees arising from the practice of debit holds. However, these concerns can be adequately addressed by better merchant disclosures at the point of sale and better consumer education. A compelling case for consumer education is not the same as a compelling case for labeling bank behavior as "unfair."

To the extent that any uncertainty arises from the fact that a merchant requested authorization for a transaction amount different than the actual amount of the transaction concerns a practice of the merchant, not the financial institution. It is inappropriate to use the behavior of a merchant as a basis for finding that the financial institution has engaged in an "unfair" practice.

At least one court has found in connection with a traditional overdraft service that there was not the lack of meaningful choice needed to establish unfairness.[8] In Saunders v. Michigan Ave. Nat. Bank, the court held that the bank's practice of charging an overdraft fee was not "unfair" under Illinois Consumer Fraud Act. The court applied the FTC Act analysis and determined that there was no lack of meaningful choice regarding overdrafts. The court noted that the plaintiff had control over whether she would be assessed an overdraft fee and was also free to select another bank. The court concluded that the bank provided the plaintiff "with all of the information necessary to make a meaningful choice in selecting banks."

[7] For example, the customer could keep extra money in the account as a cushion; or if offered by its bank, arrange with the bank to receive alerts notifying them when their balance drops below a certain amount or link a line of credit to their checking account.

[8] Saunders v. Michigan Ave. Nat. Bank, 662 N.E.2d 602 (Ill. Ct. App. 1996)

3. Countervailing benefits

There are significant countervailing benefits to having overdraft services for payment of checks, ACH transactions, ATM and debit card transactions (including important payments such as mortgages, credit cards, and bill payments). The overdraft service allows the consumers to avoid returned item fees, multiple fees for re-presented items, and merchant fees on returned items, as well as additional late fees or penalties which may be imposed by a creditor. The customer also avoids other adverse consequences, such as having negative information entered into credit reporting bureau databases and negative check databases, having services terminated, and potential criminal penalties.

The Board states that if debit card transactions were denied, this would give the consumer the opportunity to provide other forms of payment without incurring any fees. However, some consumers may not have other payment alternatives and may not have access to credit cards or cash. In fact, it is feasible that a merchant will elect not to accept a check from a consumer whose debit card was just declined, perhaps leaving the customer without means to complete the purchase. As we mentioned above, payment of debit cards into overdraft also helps consumers avoid the embarrassment of having transactions declined.

4. Public Policy

In the Joint Guidance on Overdraft Protection Programs (by the Board, the OCC, the FDIC and NCUA)[9] and the OTS Guidance on Overdraft Protection Programs,[10] the five agencies identified certain misleading marketing practices with respect to "some overdraft protection programs" that were of concern, such as:

- The marketing and disclosure of overdraft protection programs that promote overdraft services in a manner that leads consumers to believe that the program is a line of credit.
- The use of marketing programs that appear to encourage consumers to overdraw their accounts.
- The failure of financial institutions to disclose that the promoted program may include overdrafts by means other than checks.
- The disclosure of account balances information that include overdraft protection amounts rather than the amount actually available for withdrawal.[11]

These concerns are all with respect to programs with misleading promotions or practices, particularly those that encourage irresponsible consumer financial behavior that potentially increases risk for the institution.[12] These concerns do not apply to traditional, discretionary overdraft services that are not marketed to consumers and

[9] 70 Fed. Reg. 9127 (Feb. 24, 2005)
[10] 70 Fed. Reg. 8428 (Feb. 18, 2005)
[11] 70 Fed. Reg. 9129 and 70 Fed. Reg. 8429-30
[12] The Board identified and discussed similar concerns in the Supplementary Information accompanying its amendments to Regulation DD effective July 1, 2006 (70 Fed. Reg. 29582-29583 (May 24, 2005)), but these concerns do not apply to traditional discretionary overdraft services which are not marketed to consumers.

are provided as an accommodation by responsible financial institutions with appropriate disclosures. The five agencies indicated that historically non-promoted accommodations have not raised significant supervisory concerns.[13] Many banks current practices with regard to discretionary overdraft services are designed to help consumers manage their accounts and address the major concerns raised by the Board with respect to Overdraft Services.

The Board had previously expressed concerns about institutions that promote discretionary overdraft programs and encourage the use of overdrafts. The required opt-out notice will create an awareness of, and thereby promote, discretionary overdraft services and implicitly encourage consumers to freely avail themselves of these services. Requiring all institutions to notify consumers that they provide overdraft services from which consumers may opt out effectively mandates that all institutions participate to some degree in promoting overdraft services (*i.e.,* bounce protection programs). Even those institutions that have made a conscious decision to refrain from offering bounce protection programs will be forced to participate at some level in a program about which the Board has expressed serious concerns.

D. Summary of TCF's Recommendations

1. For the reasons explained above, TCF believes that the Board is required to limit any exercise of their UDAP authority under Regulation AA, and the corollary disclosure requirements in the Regulation DD proposal, to only those acts and practices that have been the subject of previous regulatory concern and for which there is a legal basis under the FTC Act, such as "bounce protection" programs that actively promote overdraft services.

2. To the extent that the Board still feels that programs other than "bounce protection" programs need to be addressed (e.g., to formally encourage institutions to adopt some of the recommendations previously identified as "best practices"), they must address them under other authorities (*e.g.*, Safety and Soundness Regulations, Regulation DD or Regulation E); and before proceeding any further, the Board needs to grasp fully the magnitude of the untenable operational problems and risk-management concerns as well as the unintended consequences this proposal presents to consumers and payment systems.

   Within the framework of such other authorities, we recommend further discussions within the financial community to consider the following:

   - Consider requiring merchants (under Regulation E) to notify their customers if they are submitting an authorization that may differ from the settlement amount. For example, a hotel seeking an authorization at check-in should notify the customer that with this authorization their bank may hold $x against their account. This appropriately places the communication of "excess holds" on the merchants, not the bank**.**

[13] 70 Fed. Reg. 9128, 70 Fed. Reg. 8429

- Customers who elect to opt out present unique risk-management challenges that could result in critical safety and soundness concerns for financial institutions, unless an institution can implement the appropriate risk management policies for such customers. Assuming that the Proposed Rule is adopted, financial institutions must be allowed to retain the right to manage the customers' accounts and adjust features in a manner that balances the banking needs of the consumer with sound banking practices.
- The Proposed Rule may be premature. Financial institutions are actively working to improve the customer's experience and minimize adverse impacts caused by gaps in the payment systems (e.g., difference between authorization and settlement). For example, Visa is partnering with financial institutions and fuel companies that provide Automated Fuel Dispensers to have their payment processing systems updated to send a message back to banks at the end of transaction, so that the bank has knowledge of the final transaction amount within a few hours (where today settlement may take up to three days). This will significantly reduce under/over holds. In addition, many banks are investing significant resources into the development of new account management tools. By forcing a "one-size fits all" opt-out requirement on the industry, the Board will stifle more creative and practical solutions that better meet consumer needs.

E. Specific Comments in Response to Boards' Request for Comment

Section __.31 – Definitions

The definition of "Overdraft Services" excludes a "service that transfers funds from another account of the consumer" to cover an overdraft. We request that this exclusion drop "of the consumer." The definition of overdraft service should exclude any service that covers overdrafts from any deposit account, even if the account is owned by another person (e.g. a family member).

Section __.32 – Unfair acts or practices regarding overdraft services
Section __.32(a) Consumer Right to Opt Out

The Board requested comment on whether the scope of the consumer's opt-out right under §__.32(a)(1) should be limited to ATM transactions and debit card transactions at the point-of-sale. *[Under this alternative approach, institutions would be permitted, but not required, to provide consumers the option of opting out of the payment of overdrafts for check and ACH transactions.]*

- We wish to point out that "Point-of-Sale" (POS) debit card transactions are not clearly defined and consumers may be confused about the scope of their opt-out preferences. The focus on "POS debit card transactions" does not take into consideration the fact that consumers increasingly use their debit card transactions for recurring bill payments, such as utility payments, or for online purchases. Not all debit card transactions are submitted for authorization. Accordingly, even if the consumer has opted-out, debit card payments

not submitted for authorization may come in through the normal processing channels and still get paid into overdraft. The proposed exceptions do not cover this situation. The second exception in the Proposed Rule is focused only on transactions not previously authorized, presented by paper-based means. We request that the exception not just be limited to paper-based transactions, but to all transactions not previously authorized.

The Board requested comment on whether there are other circumstances in which an exception may be appropriate to allow an institution to impose a fee or charge for paying an overdraft even if the consumer has opted out of the institution's overdraft service, and if so how to narrowly craft such an exception so as not to undermine protections provided by a consumer's opt-out election.

As discussed in Section A of this letter, the fee exceptions noted in the proposal are not clear or comprehensive and will be extremely difficult to implement – especially given the multitude of transactions that typically post to a consumer's accounts. It is unclear if the intent of a fee exception applies only to a specific transaction.

If the Board proceeds as proposed, the following explicit exceptions/clarifications need to be considered:

- The Board proposed an exception for debit card transactions presented "by paper- based means" that were not previously authorized. We request that the exception not be limited to "paper-based" transactions, but apply broadly to all transactions that were not previously authorized.
- If a merchant submits a transaction more than 3 days after it was authorized, the bank can no longer "hold" funds. This item can not be returned for insufficient funds. If the customer does not have sufficient available funds in their account, overdraft fees can be assessed on this transaction and on other transactions posting that day. The customer benefited from the authorization of the purchase; and retains the responsibility for ensuring that he does not initiate additional transactions in excess of available funds.
- A new exception should be added to deal with situations in which the overdraft is a result of subsequent adjustment to the consumer's account balance due to a deposited or cashed check that is subsequently returned to the bank. (Deposited checks that are later returned are mentioned at 73 Fed.Reg. 28956 (May 19, 2008) of the proposal, but the issue should be more generally applied to overdrafts by adding it to the list of exceptions discussed above.)
- If a bank posts bank fees[14] to an account at the start of batch processing and these fees use available balance, debit/ATM transactions may post into negative available funds. We request that the Board clarify that a bank may assess an overdraft fee for these debit/ATM transactions.

Clarification Requested:

[14] These fees are typically assessed for services provided and may include: account monthly service fee, purchase of cashier's checks, or requests for stop payments.

Opt-out Timeframes. The proposal requires that the bank provide the consumer with the right to opt-out and a "reasonable period to exercise that opt-out." We request clarification on what is a "reasonable period" for opt-out before a transaction can be paid in overdraft. We suggest a safe harbor for new customers of no more than 14 days in which to communicate their opt-out preference. If the customer has not expressed their preference within that timeframe, the transactions can be paid into overdraft and overdraft fees charged. In addition, the rule should allow an institution to use the prior preferences of an existing customer, and allow for shorter timeframes to be deemed reasonable depending on the particular facts and circumstances of the way the bank allows the customer to opt-out.

The proposal also provides that institutions must comply with a consumer's opt-out request "as soon as reasonably practicable" after the institution receives it. We request that the Board allow an institution to determine what is a reasonable period to effectuate a request.

Section __.32(b) Debit Holds

The Board requested comment on the operational issues and costs of implementing the proposed prohibition on the imposition of overdraft fees if the overdraft occurs solely because of the existence of a hold.

As discussed in more detail in Section A of this letter, this proposal will create significant processing challenges since, during the three day debit hold period, an institution must make timely decisions on whether to pay or return items received in the interim. An institution would have to make the payment decisions at the time items are presented, and then look back over three days of transactions across multiple payment streams in order to isolate and determine which overdrafts were caused by an "excess hold" with respect to a particular debit card transaction, in order to back out the relevant overdraft charges. This is unworkable.

Other Overdraft Practices

Transaction Clearing Practices

The Board requested comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a consumer's account. Under such an approach, institutions could use an alternative clearing order, provided that it discloses this option to the consumer and the consumer affirmatively opts in. The Board request comment on how such a rule would impact an institution's ability to process transactions on a real-time basis.

We oppose this proposal. The commentary to Section 4-303 of the Uniform Commercial Code cites two reasons why the drafters have never established a posting order for the payment of items. First, it is impossible to state a rule that would be fair in all circumstances. Second, since the drawer should have enough money on deposit to cover all items, the drawer has no basis for urging that one item be paid before another. In addition, other law allows institutions flexibility in determining the best method of posting transactions.

We also have operational concerns. Banks process millions of items a day within a tight timeframe in order to accurately reflect current account balances in a timely manner. Regulations dictate that the bank must make pay or return decisions according to specified timelines, which has a significant impact on both customer experience and bank risk. The breadth of payment methods available to consumers (checks, ACH, transfers, debit card, ATM, etc.) has provided significant complexity to the posting process. This is magnified by operational issues in the merchant payment systems that result in gaps between authorization and settlement of debit card transactions. In today's environment there is no perfect solution. There are pros and cons associated with both high-to-low and low-to-high processing.

Additionally, the Board requested comment on a proposal that if the bank seeks an alternative posting order – the customer must affirmatively opt-in. First, a regulation that dictates a posting order would adversely impact innovation. Second, if a bank is proposing an alternative posting order (e.g., sorting electronic transactions by date initiated, which may be more intuitive and reflective of the customer's purchasing behavior), it is infeasible to ask customers to opt-in. A posting order requires significant programming and system complexity – there is no way to treat the transactions of a subset of customers differently in connection with the process of posting transactions. This also implies that any future modification to posting order is designed to impact fees, rather than innovation designed to minimize the payment system gaps between authorization and settlement and the varied methods a customer may use to conduct transactions.

State Exemptions from the Proposed Rule

The Board requested comment on whether states should be permitted to seek exemption from the Proposed Rule if state law affords greater or substantially similar level of protection. TCF strongly urges the Board not to permit states to seek exemption from the Proposed Rule. Compliance with state law would impose an undue burden on institutions in having to comply with applicable state law and is not necessary to achieve the Boards' goals. National banks like TCF, which operate in multiple States are able to offer a high level of efficiency and customer service by adopting and integrating operating systems and procedures designed to comply with a single uniform national standard. Eroding this uniform system by permitting a patchwork assortment of state regulations – many of which would likely be inconsistent with one another – would severely undermine the bank's ability to offer customers the advantages deriving from this integrated system, with its attendant efficiencies.

Effective Date

The Board requested comment on when any final rules should be effective and whether a one-year time period is appropriate or whether the period should be longer or shorter.

TCF asks that the Board be mindful of the cumulative effect of the Proposed Rule in conjunction with the Regulation Z proposals from June 2007 and May 2008, the proposed rules for Regulation DD, and various regulations recently issued in accordance with the FACT Act. The Regulation Z proposals from June 2007 ***by themselves*** already would require substantial

system changes. Based on the extent of the system and procedural changes that will be required and the complexity of the changes, as well as extensive testing requirements, TCF requests that the effective date be at least two years from the date any final regulation is published in the Federal Register.

Prospective Application of Final Rule.

We also request that, if the Board proceeds with the Proposed Rule, the Board make clear that, under state and federal law, the rules apply prospectively only. Such language should make it clear that any institution that engaged in any of the acts or practices specified in Subpart C or Subpart D prior to the effective date of the final rule, but otherwise complied with applicable law, will not be deemed to have been engaged in any unfair or deceptive acts or practices. Even with the addition of such specific language, however, we are concerned that institutions will be inundated with meritless claims and forced to expend enormous amounts of resources defending allegations that past acts and practices amount to unfair or deceptive conduct. This risk cannot be minimized or ignored, and is a further example of the very real unintended consequences that will result from implementation of the Proposed Rule. More importantly, this demonstrates another reason why these acts or practices should (and can) be addressed through other consumer regulations without the unnecessary and extraordinary step of designating all of them as "unfair" or "deceptive."

If you have any questions or would like to discuss any of the issues raised in this letter, please contact me at (952) 475-5197 or dhiatt@tcfbank.com.

Sincerely yours,

Douglass B. Hiatt