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Via E-mail: regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Regulation E; Docket No. R-1343

Dear Ms. Johnson:

This letter is submitted to the Board of Governors of the Federal Reserve System (the "Board") on behalf of Compass Bank, an Alabama banking corporation ("Compass"), in response to the Board's request for comment on the proposed amendments to Regulation E, which implements the Electronic Fund Transfers Act ("EFTA"), and the official staff commentary to Regulation E (collectively referred to herein as the "Proposal")

Compass is a Sunbelt-based, regional commercial financial institution owned by Compass Bancshares, Inc., a bank holding company that is wholly owned by BBVA (NYSE: BBV) (MAD: BBVA). Compass has approximately \$60 billion in assets and, through its operating companies, maintains more than 580 branches in Alabama, Arizona, Colorado, Florida, New Mexico, and Texas. Compass is among the top 25 largest banks in the U.S. based on deposit market share.

Compass appreciates the Board's time and effort in preparing the Proposal and hopes that these comments will be helpful to the Board in its effort to promulgate reasonable and workable standards to inform consumers about overdraft services and the fees associated therewith.

In May, 2008, the Board proposed changes to Regulation AA to regulate certain overdraft services and practices. The Regulation AA proposal identified certain acts and practices that may be unfair or deceptive and prohibited institutions from engaging in those acts or practices. Our comment to the Regulation AA proposal, pointed out significant operational and legal concerns with the proposed regulation of overdraft services and practices under Regulation AA. We are pleased that the Board has chosen to address the overdraft issues in the context of Regulation E as opposed to Regulation AA.

The Proposal limits the ability of a financial institution to assess an overdraft fee for paying automated teller machine ("ATM") withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer is given notice of the right to opt-out of the payment of such overdrafts, and the consumer does not opt-out. As an alternative approach, the Proposal would limit the ability of a financial institution to assess an overdraft fee for paying ATM withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts-in, to the institution's payment of overdrafts for these transactions. In addition, the Proposal would prohibit financial institutions from assessing an overdraft fee if the overdraft would not have occurred but for a debit hold placed on funds in the consumer's account that exceeds the actual amount of the transaction.

Opt-Out vs. Opt-In

As stated above the Proposal sets forth two alternative approaches to providing consumers a choice in connection with overdraft services: (1) the opt-out alternative, which would prohibit a financial institution from assessing overdraft fees or charges on a consumer's account for paying an overdraft on an ATM withdrawal or one-time debit card transaction (whether at Point of Sale, online or by telephone), unless the consumer is given notice and a reasonable opportunity to opt-out of the institution's overdraft service in connection with those transactions; or (2) the opt-in alternative, which would prohibit a financial institution from assessing any fees on a consumer's account for paying an ATM withdrawal or one-time debit card transaction that overdraws the account, unless the consumer opts-in to the institution's overdraft service. For the reasons set forth below, Compass strongly urges that the Board adopt the opt-out alternative.

The opt-in alternative will result in substantial cost to financial institutions and will result in significant consumer inconvenience, with little benefit to the consumer. Under the opt-in alternative, it is estimated that initially, as many as 80-90% of consumers will not opt-in. Consumers who do not opt-in will not have overdraft service on debit transactions. Currently, many debit transactions are approved by being given provisional credit. All of these transactions currently approved through provisional credit will be declined if the consumer does not opt-in. Our experience indicates that many of the debit transactions Compass approves through the use of provisional credit will not be overdrafts by the time items are batch processed in the evening. By way of example, looking at the figures for one month in 2008, of Compass customers that completed ATM transactions and were given provisional credit, only 35% incurred an overdraft fee, the majority of the ATM transactions authorized into overdraft settled into good funds. In our example, if the 65% of the consumers who completed ATM transactions through the use of provisional credit had not opted-in, their transactions would be denied.

Based on these figures, the opt-in alternative would require consumers to take affirmative action to maintain the current functionality of their debit cards. Most likely, consumers

will not realize that they need to opt-in to maintain the current use of their debit card. Because most institutions are unable to process all transactions in "real time," there are many instances where it appears to the institution that there are insufficient funds in an account to cover a transaction but the consumer is aware that there are sufficient funds to cover the transaction. This highlights the fact that the consumer is in the best position to determine his/her balance and to determine whether there are funds in the account to cover a transaction.

The opt-in alternative will also have a negative impact on business and will likely result in tens, if not hundreds, of millions more debit card authorizations being denied than under the opt-out alternative. We believe it safe to assume that when a point of sale transaction is denied, many consumers will not have an alternate means of payment, such as cash or a credit card, resulting in the consumer being unable to complete the transaction. Therefore, the opt-in alternative will not only increase consumer inconvenience, but will also have a negative impact on the economy.

We agree with the Board's recognition that an opt-in approach may not be optimal and could result in greater inefficiency for processing systems due to the number of transactions that would be declined. Based on the reasons set forth above, we urge the Board to adopt the opt-out alternative.

The opt-out structure has been successfully used with other consumer protection regulations. For example, with regard to issues such as telemarketing and information sharing, which affect a much greater number of consumers than overdraft services, an opt-out structure is utilized to allow consumers to opt-out of information sharing or services and programs they do not wish to receive. Consumers are familiar with the opt-out structure and based on the number of consumers placing themselves on the do-not-call list or opting out of information sharing, it seems reasonable to expect that a consumer will opt-out of a service if they do not wish to take part in the service.

Partial vs. Full Opt-Out

The consumer's right to opt-out (or opt-in) of an institution's overdraft service would not apply to all methods of payment. The Proposal provides for an opt-out (or opt-in) opportunity with respect to ATM transactions and one-time debit card transactions (a "partial opt-out"). The Proposal would not apply to other types of electronic transactions, such as recurring debit card transactions or ACH transactions, and it would not apply to check transactions.

A partial opt-out may prove highly confusing to consumers. For example, it could be unclear to consumers which debit transactions would be classified as a one-time debit card transactions for purposes of the opt-out. Additionally, whether or not a debit transaction is considered a one-time transaction or a recurring transaction is dependent on

the transaction code provided by the merchant. It will be impossible for financial institutions to police this matter and ensure that transactions are properly coded. It will be extremely difficult to educate consumers about the types of transactions subject to partial opt-out.

In addition to concerns relating to consumer confusion and education, a partial opt-out will result in high systems costs (which will ultimately be passed on to consumers), with questionable effectiveness. Although it is impossible for an institution, in all instances, to prevent the payment of items into overdraft, an institution's systems generally will allow consumers the ability to opt-out (opt-in) of an overdraft program at the account level. This would help prevent many, but not all, payments into overdraft. Most systems will not, however, allow the inclusion/exclusion of an overdraft program at the product level. For example, Compass' current systems will not allow a consumer to opt-out of an overdraft program with respect to certain types of transactions, such as ATM or one-time debit card transactions. Compass anticipates that the costs and time needed to reprogram our current systems would be material and would not be justifiable from the standpoint of any tenuous benefit to the few consumers we believe would choose to "opt-out." The Board acknowledges that institutions may not have systems capable of paying overdrafts for some but not all channels, but state that the benefits of providing choice to the consumer outweighs programming costs. We respectfully disagree with this contention. The programming cost will be significant and even with reprogramming, it is virtually impossible to prohibit the payment of all overdrafts by ATM or one-time debit card transactions.

The Board also proposes a modified version of proposed Section 205.17(b)(2) that would permit institutions to condition a consumer's ability to opt-out of an institution's overdraft service for ATM withdrawals and one-time debit card transactions on the consumer also opting out of the institution's overdraft service for checks and other transaction types. Under this alternative approach, an institution could decline checks, ACH transactions, and other types of transactions because the consumer has opted out of the service for ATM withdrawals and one-time debit card transactions. This alternative approach would address the potential operational issues associated with implementing a partial opt-out rule and concerns with consumer confusion as to the applicability of the opt-out. Compass requests that the Board either adopt the modified version of Section 205.17(b)(2) that would permit institutions to condition a consumer's ability to opt-out of an institution's overdraft service for ATM withdrawals and one-time debit card transactions on the consumer's also opting out of the institution's overdraft service for checks and other transaction types or give financial institutions the express authority to expand the scope of their opt-out (or opt-in) to cover all transaction types.

The Board has acknowledged the expected operational problems by proposing to minimize the cost impact on institutions allowing substantial lead time for institutions to implement the necessary programming changes. Implementing a partial opt-out will be

extremely costly for institutions at time when institutions are already overwhelmed by new regulatory initiatives. The relatively small number of consumers who would receive little benefit from a partial opt-out does not justify the substantial costs associated with implementing such a system. The Board has previously acknowledged that it is infeasible, if not impossible, for an institution to determine a consumer's "real-time" account balance at any given time. We agree and reiterate that even with additional programming it is impossible to guarantee that the items will not be paid into overdraft. It is the consumer that is in the best position to determine his/her account balance. Only the consumer knows what items he/she may have outstanding. While we appreciate the intent of the proposal to ensure that consumers understand overdraft services and have the choice to avoid the associated costs if the service does not meet their needs, regulation cannot take the place of consumer responsibility. Proper and adequate disclosures concerning the costs and operation of overdrafts ensure that consumers have the information they need to understand the mechanics and consequences of utilizing an overdraft service. Ultimately, only the consumer can avoid the costs associated with an overdraft service through careful and responsible account management.

If the Board deems it necessary to adopt a partial opt-out (opt-in), we respectfully request an implementation period of at least two years from the date of final publication.

Implementation of the Opt-Out (Opt-In)

The Board acknowledges that a financial institution may choose to implement opt-outs differently. Some institutions may choose to implement the opt-out at an account level, while others, due to operational constraints, may choose to implement the opt-out at a product level. The Board is concerned that institutions may attempt to circumvent the opt-out requirement by imposing fees and/or limit account features so as to discourage a consumer from opting-out.

The Proposal includes two alternative approaches to the regulation of transaction account terms. Under the first alternative, if the institution is providing an opt-out account, the account must have the same terms, conditions, and features, including interest rates paid and fees assessed, as an account that permits the payment of such overdrafts. Under the second alternative, a bank could vary such terms, conditions, and features provided the differences are not so substantial that they would discourage a reasonable consumer from exercising the right to opt out. The Board provides examples of variations, indicating that it would be permissible to price some account services differently but it would not be permissible to decline to provide ATM or debit card services altogether if the consumer opts out.

We strongly urge the Board to recognize an institution's ability to vary account terms based on whether the consumer opts out. Institutions must have the flexibility to design

products based on operational and systems restrictions and risks related to the account. These restrictions may result in differing account terms, features and pricing.

We are concerned that the second alternative is insufficient to allow institutions to vary account terms. It will be very difficult for an institution to get comfortable with the standard that a “reasonable consumer” is not discouraged from opting out. For example, the Board indicates that an institution could vary the fees associated with an opt-out account, however, depending on the amount of such fees, such a variation might discourage a reasonable person from opting out. We respectfully request that the Board either remove these provisions from the Proposal altogether or expressly allow institutions to vary product features, terms and pricing based on whether a consumer opts-out and remove the “reasonable consumer” standard.

Requiring institutions to clearly disclose the relevant opt-out rights, the consequences of opting out, and the terms, conditions and fees associated with each account with an opt-out right will allow consumers to decide whether they want to open an account with that institution and whether they want to opt out.

Exceptions

The Proposal sets forth two exceptions that would permit an institution to assess a fee or charge to a consumer’s account for paying an overdraft for an ATM withdrawal or one-time debit card transaction, even if the consumer has opted-out (opted-in) of the institution’s overdraft service. Specifically, an institution may assess an overdraft fee for paying an ATM or one-time debit transaction into overdraft, regardless of the consumer’s opt-out election 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 by the merchant through paper-based means and the institution did not previously authorize the transaction.

We support both of these exceptions and applaud the Board for providing a “reasonable belief” exception. We are also in agreement with the examples of when an institution may have a reasonable belief that a consumer’s account may have sufficient funds as set forth in the Proposal. The Board notes in the Proposal, however, that the exception for a “reasonable belief” does not apply if the transaction is not submitted to the institution for authorization, such as if the transaction is below a floor limit or the institution is relying on “stand in” authorization. Compass asks the Board to reconsider these distinctions.

Institutions should have the ability to assess an overdraft charge in those circumstances in which the institution does not authorize the transaction. In these circumstances, the institution has absolutely no ability to control the risks associated with a transaction that may overdraw an account, while the consumer has control over the risk. As stated above,

regulation cannot take the place of consumer responsibility. Ultimately an institution cannot ensure that a consumer will not overdraw his/her account and a consumer should not expect its financial institution to be responsible for the proper management of his/her accounts. In situations where the institution has no ability to control the risk, it is not appropriate to place the risk on the institution.

Debit Holds

Under the Proposal, an institution must not assess a fee or charge on the consumer's account in connection with an overdraft service if the overdraft is caused solely by a hold placed on funds in the consumer's account that exceeds the actual purchase or transaction amount if the actual transaction amount can be determined by the merchant within a short period of time after the institution authorizes the transaction. The Proposal provides a safe harbor that would allow a financial institution to assess a fee or charge for paying an overdraft that is caused solely by a debit hold in certain cases. Specifically, the Proposal permits an institution to assess an overdraft fee or charge to the consumer's account in connection with a debit hold if the institution has adopted procedures and practices designed to remove the hold within a reasonable period of time. The Proposal goes on to provide that an institution has procedures and practices designed to release the hold within a reasonable period of time if the institution releases debit holds for the transactions covered by the Proposal within two hours of authorization.

Compass appreciates the fact that the Board has limited transactions covered by the debit hold provisions of the Proposal and that the Board has offered a safe harbor for institutions if they have procedures and practices in place designed to release a debit hold within a reasonable period of time. While the safe harbor in the Proposal is technically feasible, it would be costly and would apply only if all merchants and acquirers were under an obligation to clear and settle the specified types of transactions within two hours. We would suggest that the Board provide a longer time frame in which to release a debit hold. For example, Compass suggests that the institution should realistically have at least until completion of transaction processing for the business day following the day of the debit hold.

We would suggest that the Board provide for a safe harbor for institutions that do not hold funds exceeding the authorization request. This would allow institutions to manage the risk and would not require significant operational changes. Institutions would not be required to make systematic changes that would allow for a "look-back" process that would require the actual purchase amount to be presented for settlement before determining whether the purchase or transaction created an overdraft. A safe harbor for institutions that do not place debit holds in excess of the authorized amount will allow institutions to control the risk and not be dependent on the actions of the merchants.

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Conclusion

We thank the Board for considering our comments to the Proposal and appreciate the Board's challenge in promulgating reasonable and workable standards to inform consumers about overdraft services and the fees associated therewith.

If you have any questions concerning this letter or if you would like us to provide any additional information, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Wendi M. Brown", with a long horizontal flourish extending to the right.

Wendi M. Brown
Senior Corporate Counsel
Compass Bank