JMFA

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& ASSOCIATES

July 26,2004

Via Electronic Mail

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

Re: Regulation DD; Docket No. R-1197

Dear Ms. Johnson:

This comment letter is submitted on behalf of John M. Floyd & Associates in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment by the Federal Reserve Board ("FRB"), published in the Federal Register on June 7, 2004. The Proposed Rule would amend Regulation DD (Truth in Savings) to require depository institutions to provide additional information about overdraft protection programs. The Proposed Rule also would address issues regarding the marketing of such programs. John M. Floyd & Associates appreciates the opportunity to comment on this important matter.

In general, we applaud the FRB's plan to treat overdraft programs as a deposit service, covered by Regulation DD, rather than as a credit product. We believe this approach is fully consistent with the purposes of the Truth in Savings Act and the Truth in Lending Act, and reflects a sound public policy decision. Nonetheless, there are several troublesome issues raised by the FRB's proposed amendments to Regulation DD.

Account-Opening Disclosures

As part of the account-opening disclosures, institutions would be required to specify the types of transactions for which an overdraft fee may be imposed. For example, an institution would have to describe if an overdraft fee applies to overdrafts created by check, ATM withdrawal, or other electronic transfers. A statement that a fee is imposed for "overdraft items" would be inadequate.

In general, we support the proposed requirement to provide additional information to account holders about the types of transactions for which overdraft fees may be imposed. However, we urge the FRB to clarify this provision. In particular, we believe the official staff commentary to Regulation DD ("Commentary") should clarify that an institution is not required to describe every type of transaction in which an overdraft fee may be imposed. Rather, an illustrative list that accurately and clearly discloses to the consumer that a fee may be imposed for overdrafts should

meet the requirements of this provision. For example, an institution should be able to disclose that an overdraft "created by check, or by ATM withdrawal, or other means" would inform the consumer that overdrafts will apply in multiple circumstances. This illustrative list would avoid the need for institutions to determine whether an additional notice is needed if an institution, at a later point in time, adds another channel in which overdrafts can be created, such as by telephone transfer. Alternatively, if the FRB does not provide this flexibility, we believe it is important for the FRB to clarify that the addition of another channel for which overdrafts could occur does not require a "change-in-terms" notice, because such an addition should not be deemed a "change" in a term required to be disclosed.

In addition, we believe it is important for the FRB to clarify how this provision affects depository institutions that currently offer and disclose fees for overdraft services. In particular, we believe is it essential for the FRB to clarify in the final rule that this provision does not require institutions that offer overdrafts to re-disclose or provide additional information to existing customers for those overdraft services. It is important for the FRB to clarify that this provision does not affect previous disclosure practices because any statement or inference that existing disclosures do not comply with Regulation DD could pose significant risks for institutions.

Periodic Statement Disclosures

Currently, on periodic statements provided to consumers, institutions have the choice of itemizing each fee imposed by the institution or grouping together the same fees and providing a total dollar amount for all fees of that type. Under the Proposed Rule, institutions would be required to provide on periodic statements a total dollar amount for all returned-item fees incurred for the statement period and for the calendar year to-date. In addition, institutions would have to provide a total dollar amount for all overdraft fees incurred for the statement period and for the calendar year to-date. The overdraft fee total would include all overdrafts, whether created by check, ATM withdrawal, or other means.

We strongly disagree with the proposed provision to require a monthly and year-to-date total for returned item and overdraft fees, for the reasons stated below. First, the existing disclosures clearly inform consumers about the amount of and specific type of fee incurred by the consumer. For example, a consumer must be informed on a periodic statement that a returned check fee of $X was assessed against the account, or if multiple checks were returned, that a total of returned check fees of $Y were assessed against the account. This approach ensures that consumers will understand the amount of the fees assessed for an NSF or overdraft item. Second, the FRB has provided no evidence for why overdraft fees should be treated different from other fees assessed in connection with account services provided to consumers, and why it is necessary to provide a monthly and year-to-date total for these fees. The only rationale offered by the FRB for requiring this approach is "to highlight the overall cost to consumers" and to "better inform consumers about the cumulative effect of using an overdraft service on a regular basis." In fact, it is likely that consumers are *more aware* of these fees than other fees because, in addition to disclosing these fees at the time an account is opened and on periodic statements, institutions notify consumers, in writing, if a check or other item overdraws an account. Third, there is no evidence or any suggestion provided by the

FRB that account-opening disclosures or periodic statement disclosures do not clearly inform consumers about the amount of the fee assessed in the event of an overdraft, or that consumers do not understand a statement such as "Charge for returned check -- $X." If the FRB believes consumers are unable to add an itemized list of, for example, three overdraft fees of $X each, or to review prior periodic statements to determine the aggregate amount of such fees, this issue should be addressed through the use of consumer educational materials. Fourth, we believe that the costs associated with modifying systems to implement these changes, particularly the proposed requirement to create a "running" total of fees for the calendar year, would be significant, with little if any benefit resulting from the change. Fifth, this approach would be contrary to the approach used for "other charges" in connection with credit transactions under Regulation Z, which permits institutions to itemize or provide a total for each type of "other charge," and also would be contrary to the approach used in Regulation E, with regard to fees imposed for electronic fund transfers. In addition, the use of different approaches for credit accounts and deposit accounts is likely to confuse consumers when they review the fees imposed on their credit and their deposit accounts, particularly, if a consumer exceeds the limit for his/her credit account and also overdraws his/her checking account.

We also are concerned that by singling out overdraft fees for "special treatment," the FRB proposal has the potential to detract from information given to consumers about other services and to confuse consumers about other account costs. For example, fees may be charged for other account services, such as for ATM withdrawals, balance inquiries, stop payment requests, etc. These fees can be equally or more important to many consumers. By selecting overdraft fees for special treatment, the FRB has created a regulatory scheme that highlights these fees over other fees with the result that consumers may be confused about the total fees paid for a periodic statement cycle or for a calendar year. As a result, we respectfully urge the FRB to withdraw this proposed change.

Advertising Provisions

The advertising rules would be changed to cover overdraft information provided in connection with existing accounts. That is, the Proposed Rule treats overdraft information given to consumers about existing accounts as advertisements. (Previously, such information was not covered by the advertising rules.)

Several disclosures would have to be provided for any advertisement that "promotes" an overdraft service. In particular, if an advertisement promotes automated overdraft services, the ad also would have to state: (1) the fee for payment of an overdraft; (2) the types of transactions for which a fee for overdrawing an account may be imposed; *(3)* the time period for repaying an overdraft; and (4) the circumstances in which an institution would not pay an overdraft.

In addition, several examples would be added to Regulation DD illustrating advertisements that would be misleading or inaccurate. For example, an institution could not represent that an overdraft service is a "line of credit" unless it is subject to Regulation Z. Furthermore, a service could not be described solely as protection against bounced checks if the institution allows consumers to overdraw their accounts by other means, such as for ATM withdrawals.

We strongly support the existing rule in Regulation DD that prohibits the use of misleading or inaccurate advertisements, and that provides that an advertisement shall not misrepresent an institution's deposit contract. However, we are concerned about the breadth of the proposed changes to the advertising rules and believe they may discourage the provision of factual information to consumers due to the costs and burdens imposed in connection with such advertisements. We also believe the scope of the rules is unclear, and should be clarified by the FRB.

We believe the application of the new advertising rules to information provided to customers about existing accounts is overly broad. Proposed comment 230.2(b)-2 provides that an advertisement does not include solely the provision of disclosures required by federal or other law at account opening, on a periodic statement, or on an electronic terminal receipt. We believe this provision is too narrow, and would trigger the duty to provide additional information in circumstances when it is inappropriate and unnecessary, and should be modified in three ways. First, the reference to "disclosure" should be deleted and a broader phrase should be used, such as the provision of information. For example, if a consumer overdraws an account, an institution will provide a written and/or other notice to the consumer about the overdraft. This specific notice may not be deemed a "disclosure." However, a notice informing the consumer about the need to promptly repay an overdraft should not be deemed an advertisement and trigger the duty to provide the advertising disclosures set forth in the Proposed Rule. Thus, we believe the FRB should delete the word "disclosure" and should expand this provision to provide that such a notice is not covered by the proposed advertising rules if an institution is, for example, providing information relating to a consumer's specific overdraft on an account. There is no reason to trigger the duty to provide the proposed disclosures in such circumstances.

Second, the reference to the provision of information required by law should be expanded. In particular, an institution may provide a notice to a consumer about a specific overdraft to remind the consumer about the need to promptly repay the overdraft. This type of notice should not be deemed an advertisement, whether or not this notice is required by law. Third, the reference to the provision of information solely at account opening and at other specified times is too narrow and should be expanded to include the provision of information as described above, regardless of *when* the information is provided. For example, if information is provided about a specific overdraft at a time other than account opening, that information should not fall within the advertising rules.

The proposed rules would require the inclusion of information about overdraft fees and other details for any "announcement, solicitation, or advertisement promoting an automated overdraft service." It is not clear what information would constitute "promoting" an overdraft service, and we believe the FRB should more specifically, and narrowly, clarify what types of advertising information should trigger the need to provide additional information. In particular, the FRB should make clear that not all information provided about an overdraft service "promotes" the service. For example, if a consumers calls or otherwise contacts an institution and asks about an institution's policies regarding overdrawing an account, a response to such a request, whether provided orally or in another form by an institution, should not be deemed an advertisement.

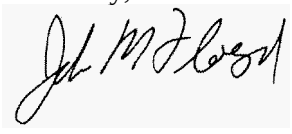
Furthermore, a significant amount of information would have to be provided under the Proposed Rule, and requiring such detailed information could have the effect of limiting the willingness of institutions to discuss their policies with consumers. Thus, the Proposed Rule could result in consumers receiving less information about their accounts. Regulation DD was never intended to create such a result. In addition, for many years FRB regulations have been based on the policy that only the inclusion of specific information should "trigger" the obligation to provide additional disclosures, such as fee information, in advertisements. (See, for example, the rules in Regulation Z, at 12 C.F.R. § 226.24(c).)

In addition, the Proposed Rule refers to an "automated" overdraft service. It is not clear what this is intended to include and the FRB should clarify what types of services this refers to. Furthermore, we believe that the amount of information required to be included in advertisements exceeds what is necessary. For example, we do not believe it is necessary to specifically describe in advertisements the types of transactions for which an overdraft fee may be imposed if an institution "triggers" the duty to provide additional information.

Filially, we recommend the FRB change one of the examples of misleading or inaccurate advertisements. In particular, one example provides that an advertisement would ordinarily be misleading if an institution represents that it will honor all checks, within a specified dollar amount, if the institution retains discretion "at any time" not to honor such checks. While an institution may generally honor checks, there likely always will be some circumstances in which the institution will retain the discretion to not honor checks, such as to prevent fraud. An institution should be able to advertise an overdraft program when it has retained this or similar discretion.

John M. Floyd & Associates appreciates the opportunity to comment on this important matter. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact Cheryl Lawson, at (800) 409-8253.

Sincerely,



John M. Floyd
Chairman and CEO