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July 19, 2004

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

Re: Reg. DD, Docket No. R-1197, and Overdraft Protection Guidance, Docket OP-1198

Dear Jennifer J. Johnson:

Bankers Systems, Inc., is a leading provider of compliance products, services, and support for the financial services industry. Our products are available in both software and preprinted formats.

The purpose of this letter is to provide comments concerning the proposed Reg. DD changes and Overdraft Protection Guidance (Guidance) released May 28, 2004. We appreciate your efforts and those of the other agencies in advancing these important proposals. We also appreciate the opportunity to share our perspectives and concerns.

We are concerned that the proposed Reg. DD changes may create confusion, uncertainty, and unintended consequences in the area of disclosure of the “circumstances under which the institution would not pay an overdraft”. (Reg. DD changes at page17.) The proposals make clear that bounced check and courtesy overdraft protection programs (Overdraft Programs) are not generally intended to be subject to Reg. Z, and their fees are not generally intended to be finance charges, by virtue of 12 CFR 226.4(c)(3), which excludes from finance charge “Charges imposed by financial institutions for paying items that overdraw an account, *unless the payment of such items and the imposition of the charge were previously agreed in writing*” (emphasis added). However, the proposed Reg. DD requirement of disclosure of the “circumstances under which the institution would not pay an overdraft” arguably would result in a previous written agreement causing the Overdraft Program to be subject to Reg. Z and its fees to be finance charges. This is because the required disclosure of the “circumstances under which the institution would not pay an overdraft” arguably would by implication become a written agreement to pay overdrafts *in all other circumstances*.

The Guidance is similarly confusing and uncertain in its requirement as follows: “**Clearly explain the discretionary nature of program.** If the overdraft program is discretionary, describe the circumstances in which the institution would refuse to pay an overdraft”. (Guidance at page14.) The confusion and uncertainty here lies in the fact that a

discretionary program and one describing the “circumstances in which the institution would refuse to pay” are inherently contradictory. The definition of “discretionary” is “regulated by one’s own choice” (Webster’s New World College Dictionary, 4th Ed.), whereas describing the “circumstances in which the institution would refuse to pay” suggests an absence of discretion, fixing the circumstances in which the institution would refuse to pay and suggesting by implication that in all other circumstances the institution would pay.

Perhaps what is intended is (a) a disclosure that the institution has complete discretion not to pay overdrafts regardless of the circumstances, and (b) a nonexclusive listing of examples of circumstances in which the institution is likely to refuse to pay overdrafts. If this is what is intended, however, we respectfully suggest that Reg. DD and the Guidance should simply so state, rather than using the confusing and uncertain language proposed.

We are also concerned that the proposed Reg. DD changes may create confusion and uncertainty in the area of disclosure of the “time period by which the consumer must repay or cover an overdraft”. (Reg. DD changes at page 17.) Apparently, “cover” means something other than “repay”. However, the term “cover” is not defined and has no clear, established meaning in this context. We believe a definition of this term is necessary.

We are further concerned over the absence of a definition of “automated overdraft services” in the proposed Reg. DD changes. The proposed changes require “Additional disclosures in connection with *automated overdraft services*” (Reg. DD changes at page 17, emphasis added), but don’t include a definition of this phrase. Depending upon the definition, the additional disclosures could apply to almost all Overdraft Programs, or to only a limited number. It is also unclear why the proposed changes would distinguish between “automated overdraft services” and other Overdraft Programs in this regard.

Finally, we are concerned that the statement in the Guidance “When overdrafts are paid, credit is extended” (Guidance at page 11) conflicts with the Reg. Z and B definitions of “credit” if this statement applies to all Overdraft Programs. The Reg. Z definition of “credit” is “the right to defer payment of debt or to incur debt and defer its payment”. The Reg. B definition of “credit” is “the right...to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefore”. The *right to defer payment* is required by each of these definitions, and the existence of debt alone is not sufficient for the existence of credit. In light of this *right to defer payment* requirement, the payment of an overdraft pursuant to an Overdraft Program which makes the resulting debt *immediately due and payable* would not seem to result in the existence of credit under the Reg. Z and B definitions. We believe some clarification is necessary in this regard.

Thank you for considering these concerns. If you have any questions, please give us a call.

Very truly yours,

Arthur L. Doten
Attorney

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August 6, 2004

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

Re: Reg. DD, Docket No. R-1197, and Overdraft Protection Guidance, Docket OP-1198

Dear Jennifer J. Johnson:

Our previously submitted July 19, 2004 comment letter includes the following statement:

“Finally, we are concerned that the statement in the Guidance “When overdrafts are paid, credit is extended” (Guidance at page 11) conflicts with the Reg. Z and B definitions of “credit” if this statement applies to all Overdraft Programs. The Reg. Z definition of “credit” is “the right to defer payment of debt or to incur debt and defer its payment”. The Reg. B definition of “credit” is “the right...to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefore”. The *right to defer payment* is required by each of these definitions, and the existence of debt alone is not sufficient for the existence of credit. In light of this *right to defer payment* requirement, the payment of an overdraft pursuant to an Overdraft Program which makes the resulting debt *immediately due and payable* would not seem to result in the existence of credit under the Reg. Z and B definitions. We believe some clarification is necessary in this regard.”

Upon further reflection with respect to this statement, it occurs to us that the proposed Reg. DD changes and Guidance may be intended to apply only to Overdraft Programs that include the *right to defer payment*, and not to Overdraft Programs under which the resulting debt is *immediately due and payable*. Such an intention would be consistent with both the above quoted Guidance statement “When overdrafts are paid, credit is extended” and the above quoted Reg. Z and B definitions of “credit”. Moreover, it would be consistent with the proposed Reg. DD requirement that any advertisement for automated overdraft services include “The time period by which the consumer must repay or cover any overdraft.” (Reg. DD changes at page 17.) If this is the intention of the proposed Reg. DD changes and Guidance, however, we respectfully submit that they should expressly so state.

Very truly yours,

Arthur L. Doten
Attorney