

August 2nd, 2008

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

**Re: Docket No. R-1314, Unfair or Deceptive Acts or Practices**

Dear Ms. Johnson:

On behalf of Fidelity National Information Services, Inc. (“FNIS”), I appreciate the opportunity to provide comments to proposed amendments to Regulation AA, prohibiting Unfair or Deceptive Act or Practices, Docket No. R-1314 recommended by the Board of Governors of the Federal Reserve System (“Board”), Office of Thrift Supervision (“OTS”) and National Credit Union Administration (“NCUA”) (collectively, “the Agencies”).

FNIS is a leading provider of core processing for financial institutions; card issuer and transaction processing services; mortgage loan processing and mortgage-related information products; and outsourcing services to financial institutions, retailers, mortgage lenders and real estate professionals. FNIS has processing and technology relationships with 35 of the top 50 global banks, including nine of the top 10. Headquartered in Jacksonville, Fla., FNIS maintains a strong global presence, serving more than 13,000 financial institutions in more than 80 countries worldwide.

**I. Summary**

On May 19, 2008, the Agencies proposed a series of amendments to Regulation AA that currently prohibit unfair and deceptive acts or practices on certain consumer accounts, specifically credit cards and overdraft services.

The Federal Trade Commission Act (“FTC Act”) grants authority to the Agencies to issue regulations defining unfair or deceptive acts or practices and establishing requirements for preventing such acts or practices.<sup>1</sup> In general, for an act or practice to be considered “unfair” under the FTC Act, the following conditions must be met: (1) the act or practice must cause, or be likely to cause, substantial injury to consumers; (2) the injury must not be reasonably avoidable by the consumer; and (3) the detrimental effects of the injury must not be outweighed by the benefits to consumers or to competition. As indicated by the Agencies in their proposal, the FTC considers an act or practice to be

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<sup>1</sup> 15 U.S.C. 57a(f)(1)

deceptive where there is a representation or omission of information material to the consumer that would likely mislead a reasonable consumer.<sup>2</sup>

Under the guidelines for unfair or deceptive acts or practices, the Agencies have proposed changes to, or have outright prohibited, certain activities with respect to consumer credit card accounts and overdraft services. Specifically, the Agencies propose to give banks and credit unions a safe harbor if the mailing of periodic statements occurs at least 21 days prior to the due date of the payment; to provide allocation options for payments made to an account with multiple annual percentage rates (“APRs”); to prohibit increases in the APR in certain circumstances; to address certain concerns raised by consumers about credit and debit card holds; to eliminate “double cycle billing”; and to provide additional information regarding firm offers of credit. In addition, the Agencies propose new requirements regarding overdraft services, including requiring banks and credit unions to give customers an opportunity to opt out of overdraft services and to address concerns raised by consumers regarding the impact of debit card holds on overdraft services.

Several aspects of the Agencies’ proposal have merit and would be positive changes, both for the industry and for consumers. However, some proposals, though well-intentioned, could lead to a reduction in certain services offered by banks and credit unions, and the financial risk to the institutions would outweigh the benefits of offering the particular service. More specific comments on these concerns are provided below.

## **II. Consumer Credit Accounts**

### **A. Safe Harbor for Mailing Periodic Statements**

Under the proposal, banks and credit unions would be prohibited from treating a customer’s payment as late unless the customer was given a “reasonable” time to make the payment. Rather than define “reasonable,” the Agencies provide for a safe harbor if the bank or credit union implements policies or procedures to ensure that the periodic statements are mailed or delivered at least 21 days prior to the due date of the payment. In the opinion of the Agencies, this provides for 7 days for the mailed statement to reach the customer, 7 days for the customer to review the statement, and 7 days for the customer’s payment to be mailed back to the financial institution.

In general, we agree with the Agencies’ approach on this issue. Although it is highly unlikely that a payment would actually take 7 days to reach its destination, the 21-day period would also cover situations where a customer was out of town or otherwise not able to review the statement in a timely fashion. Given the vagueness and speculative nature of the term “reasonable,” we are encouraged by the Agencies’ proposal to provide the safe harbor, to financial institutions so that they can adjust their billing cycles to

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<sup>2</sup> Proposed Rule, 73 Fed. Reg. 28908 (May 19, 2008)

ensure that they meet the reasonableness test. This proposal, coupled with a proposal under Regulation Z to consider payments timely if they are received the day after a holiday or other day when mail is not delivered, will provide consumers with a sufficient amount of time to review statements and make required payments. Additionally, it will provide certainty for financial institutions that billing cycles are not unfair or deceptive. We note, however, that it will take both time and resources for banks and credit unions to adjust their billing cycles, and we respectfully request that, if adopted, the Agencies provide for an implementation period of at least 24 months to ensure that smaller institutions are able to spread the costs associated with the required reprogramming and other administrative requirements over a longer period of time.

### **B. Payment Allocation**

The Agencies' proposal provides that where different APRs apply to different balances on the same card (i.e., as one rate for balance transfers, another rate for cash advances, etc.), the financial institution would have three different options for allocating payments made by the customer in excess of the minimum payment. Financial institutions would expressly be prohibited from applying the additional funds to the lowest rate balance. The three options are: applying the entire amount first to the balance with the highest APR; splitting the amount equally among the balances; or splitting the amount *pro rata* among the balances. Financial institutions could allocate payments in some other manner, provided that it is done in a manner no less favorable to the customer than the three specified options.

Additionally, if an account has a discounted rate due to a promotional rate or a deferred interest offer, financial institutions would be required to allocate amounts in excess of the minimum payment first to balances on which the rate is not discounted or where the interest is not deferred. Finally, the Agencies propose to prohibit financial institutions from denying consumers a grace period (or "interest free" period) on purchases solely based on the fact that the consumer has not paid off a balance at a promotional rate or for which interest is deferred. This particular proposal would ensure that consumers can take advantage of deferred interest or promotional rates as well as grace periods; previously, these were mutually exclusive.

We believe that the approach taken by the Agencies with respect to the payment allocation requirements is reasonable, and will be much more understandable to consumers. We note, however, that the operational considerations for financial institutions having to implement new payment allocation procedures, including upgrading and reprogramming software programs, will take a significant amount of time and resources. We therefore respectfully request that the Agencies provide for an implementation period of at least 24 months to allow financial institutions, particularly smaller institutions, sufficient opportunity to make the necessary changes and to spread the associated costs over a longer period of time.

### **C. Increasing the Interest Rate on Existing Balances**

The Agencies' proposal would prohibit banks and credit unions from increasing the applicable interest rate on outstanding balances except where the increase is due to: the operation of an index (e.g., a variable rate); the expiration or loss of a promotional rate; or the minimum payment not being received within 30 days of the due date. The purpose of this proposal is to limit the extent to which customers are charged higher interest rates on pre-existing balances except in limited circumstances where either the fluctuation was known to the customer or where the customer triggered the higher rate by his or her own failure to pay. The proposal would thus make it unlawful to increase the interest rate on existing balances for any other purpose, including where the customer's creditworthiness changes.

We are concerned about the impact of this proposal on the ability of financial institutions to effectively assess and price risk. The creditworthiness of a particular customer is determined by the financial institution based on a large set of criteria. For each customer to whom a financial institution loans funds, either through a traditional loan or through a credit card, the financial institution takes on a certain element of risk that the borrower will not repay the funds. Thus, the pricing of the particular credit product reflects the financial institution's evaluation as to the likelihood that the monies will be repaid. Customers with less credit history, or with spotty credit, will necessarily carry higher-cost credit as the financial institution must attempt to cover the risk of providing the credit. Financial institutions take into account many factors, including but not limited to, the customer's credit score and the extent to which the customer has a history of making timely payments.

Financial institutions know and understand that one of the best predictors in determining whether a particular customer is likely to repay a debt is whether that person continues to make required payments on other accounts in a timely manner. This payment history is reflected in the customer's credit score, such that if the consumer stops making payments in a timely manner, the credit score will decline. The Agencies' proposal would eliminate the ability of financial institutions to re-price credit for consumers who, for whatever reason, became riskier borrowers. This will ultimately increase the cost of credit to other consumers.

Furthermore, the Agencies' proposal seeks to eliminate "universal default," where a financial institution raises the interest rate to the "default rate" upon learning that a customer has defaulted on a loan or account, even if not a loan or account held by the financial institution. However, the approach by the Agencies is not a proportionate response to the concerns raised by consumers about universal default. In effect, the Agencies would force financial institutions to keep a lower interest rate on outstanding balances owed by a consumer, even if that consumer demonstrates a sharp decline in creditworthiness. Such a situation puts the financial institution at risk of potentially significant losses, and limits the ability of the financial institution to adequately respond

to potential default by the consumer, and requires other borrowers to make up for the potential losses through higher fees and less favorable rates. The less creditworthy borrower thus maintains essentially preferential treatment and is ultimately in a more favorable interest rate situation than a borrower with a better credit score and borrowing history.

We strongly urge the Agencies to review this proposal carefully, and find a more targeted method of curbing universal default. Institutions must be able to re-price risk according to demonstrated factors and predictors. The proposal in its current form is one that we believe would be detrimental to financial institutions and not serve the Agencies' intended purposes.

#### **D. Debit and Credit Card Holds**

Under the proposal, financial institutions would be prohibited from assessing a fee if a consumer exceeds the credit limit on an account where the limit is exceeded solely because of a hold placed on available credit. The Agencies propose, however, that if the actual amount of the transaction would have exceeded the credit limit even without the hold, then a fee may be assessed.

We have significant concerns about the operational aspects of this proposal. As a practical matter, the financial institution does not control the amount of any hold placed on available funds by a merchant, and thus has limited ability to know the extent to which subsequent transactions would or would not exceed the consumer's available credit. Often, different codes are used for the initial hold and the actual transaction, and thus it can take time for the financial institution to ensure that holds are matched to the actual transaction accurately. If the financial institution releases a hold too early, the customer may believe that he or she has more funds available than in actuality; similarly, if the transaction codes do not match, it is possible that a hold may result in a balance showing less money than is actually available.

The proposal to prohibit financial institutions from charging a fee if the available credit is exceeded solely due to a hold on the account seems based on the notion that the financial institution has some control over the amount of the hold, or has some knowledge of the amount of the hold. However, the financial institution does not have this information, as it does not request or initiate the hold. To be able to determine whether or not a fee could be charged, a financial institution would need to know the actual, final amount of the hold, and would thus need to receive some confirmation from the merchant as to the total amount. As a practical matter, this is not possible or realistic. In the alternative, the financial institution could simply choose to decline to authorize transactions that may bring the consumer close to the limit, which could mean that legitimate transactions are not authorized. Requiring financial institution to speculate as to the accuracy of a particular hold is unfair and we strongly oppose this proposal.

### **E. Double-Cycle Billing**

The Agencies propose to prohibit banks and credit unions from imposing finance charges that are based on balances in existence on days in the billing cycle that proceed the most recent billing cycle. This practice of so-called “double cycle” or “two cycle” billing has long been the subject of criticism by consumers, consumer interest groups, and federal legislators. We are not certain how prevalent this practice is at this time, as many institutions that used to incorporate this practice no longer do so. In general, we believe the Agencies’ approach here is reasonable.

### **F. Financing Security Deposits or Fees**

The Agencies proposed prohibiting financial institutions from financing fees or security deposits on a credit account (including account-opening fees or membership fees) if the amount of fees utilizes a majority of the amount of credit available under the account. In addition, if fees or deposits constitute more than 25 percent of the available credit, the costs would have to be allocated over the first year, and not charged as an up-front lump sum.

We do not know how widespread the practice of offering such an account is, although we suspect that not many institutions offer these particular accounts. We also appreciate the goal of the Agencies in attempting to curb certain practices that could be unfair to consumers. It is unclear from the Agencies’ proposal, however, whether the consumer would still be obligated to pay the fees that are required to be spread out over the first year of the account if the consumer chooses to cancel the account prior to the end of that year. If a portion of the fees are not charged until later in the year, the consumer could have the benefit of the card for a few months, and pay only a portion of the required fees, but then could choose to cancel the card before paying all fees due. We suggest that the Agencies clarify that the financial institution can recover such fees, despite the requirement that they be spread out over the first year.

### **G. Firm Offers of Credit**

The Agencies propose to require banks and credit unions making firm offers of credit to disclose the factors that will be used to determine whether a consumer will qualify for the lowest APR and highest credit limit advertised. The Agencies provide a safe harbor disclosure that states, “If you are approved for credit, your annual percentage rate and/or credit limit will depend on your credit history, income, and debts.”

We appreciate the Agencies’ providing a statement that can be used and that will ensure adequacy of consumer disclosure and the certainty of regulatory compliance. We are aware that certain consumer groups have called for financial institutions to identify the highest possible APR and lowest possible credit limit, as the extreme example, but we agree with the Agencies that it is appropriate to list the particular factors that will

determine which rate will apply. This information is most useful to consumers, most accurately reflects the pricing of the risk of credit, and provides sufficient information for the consumer to make a decision about seeking credit.

### **III. Overdraft Services**

#### **A. Notice and Opt-Out**

The Agencies propose prohibiting banks and credit unions from imposing a fee for overdraft services unless the consumer has been given an opportunity to opt out of the payment of overdrafts and has not chosen to do so. Consumers could choose to opt out of overdraft services, and thus avoid any fees for the financial institution paying an overdraft. The consumer would still be subject to bounced check or insufficient funds fees if the consumer wrote a check or made a purchase in excess of the available funds. Additionally, the Agencies propose requiring financial institutions to offer a partial opt-out for overdrafts that occur due to ATM or point-of-sale transactions.

While we appreciate the Agencies' interest in giving consumers the opportunity to decline overdraft services, we note that the proposal, as drafted, does not indicate how long such a decision shall remain in effect. We are concerned that some consumers might attempt to circumvent insufficient funds fees, by "turning on and turning off" the overdraft service. For example, if a customer declines overdraft services and then later determines that a check might cause an overdraft, the consumer may request the overdraft service be activated. However, the consumer might then opt out of the overdraft service immediately thereafter, essentially trying to "game" the system. The consumer will have avoided the bounced check fee from the financial institution and the merchant, but will have put the financial institution in the position of stopping and starting the overdraft service at the consumer's whim. We think that reasonable limits should be placed on a consumer's ability to stop and start overdraft services, and that it would be unreasonable to require financial institutions to provide consumers with the ability to stop and start such service at a moment's notice.

We are extremely concerned that the partial opt-out, where a consumer could choose to opt out of the overdraft service with respect to ATM or point-of-sale transactions, would create significant problems from an operational standpoint. There would likely be significant confusion regarding which types of transactions get paid first, and thus which transaction actually caused the overdraft. If a consumer chooses a partial opt-out, and two transactions clear on the same day such that one of them creates an overdraft, there is not a clear standard by which the financial institution would be able to determine which transaction "caused" the overdraft. Also, with some electronic funds transfer transactions, once they are authorized they must be paid, regardless of whether the customer has opted out or not. If the financial institution has a choice between authorizing these transactions and being exposed to increased risk of nonpayment, or simply not authorizing the transaction, the financial institution is much more likely to opt

not to authorized the transaction. Thus, the issue becomes not whether the financial institution pays the charge, but rather whether the financial institution even authorizes the charge in the first instance. We respectfully request that the Agencies reject the proposal to create a partial opt out. We believe this proposal would be too burdensome and costly to implement, and would lead to significant consumer confusion regarding which transactions would be covered by the overdraft service and which would not.

### **B. Debit Card Holds**

The proposal would prohibit financial institutions from charging an overdraft fee if the account is overdrawn due solely to a debit hold. However, there are certain transactions that financial institutions preauthorize but that do not create holds; for example, smaller dollar transactions that banks and credit unions agree to pay but that do not create a hold on the account. Once preauthorized, the financial institution is obligated to pay the funds to the merchant. However, a consumer could initiate numerous small dollar transactions, essentially overdrawing the account each time, but no fees can be charged because the consumer opted out of the overdraft and the financial institution is obligated to pay. This creates a significant loophole through which criminals could carry out significant, coordinate fraud that could have a dramatic and negative impact on financial institutions, particularly community banks and credit unions.

We are also concerned about so-called “stand in” transactions, which are transactions occurring when the system is brought down for routine maintenance. In these situations, the processor is told that if the account is open and valid, charges or withdrawals up to a certain amount can be authorized without any other additional information. Essentially, the financial institution is allowing consumers to complete transactions and obligate funds without any knowledge of the actual funds available. If a consumer has opted out of overdraft and then overdraws his or her account during one of these periods of routine maintenance, the financial institution would not be able to charge the overdraft fee. However, the financial institution would still be obligated to pay the transactions, as the financial institution authorized the transactions. Since there is no practical way to ascertain the available balance during these times of routine maintenance, financial institutions will likely stop allowing any of these transactions to be authorized, rather than be left giving a free “loan” to the consumer. We respectfully request that the Agencies reject this proposal, as it increases the costs to financial institutions, increases the likelihood of fraud, and can be addressed more efficiently by permitting the financial institution to simply refund any overdraft fee that is charged due to a debit hold.

### **III. Conclusion**

FNIS appreciates the hard work that the Agencies have undertaken with respect to this proposal and we share the Agencies’ interest in making sure that consumers are protected from truly unfair or deceptive acts or practices. However, FNIS urges the

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Agencies to consider the foregoing comments and the extent to which some aspects of the proposal could lead to significant regulatory burden on financial institutions and increased consumer confusion.

Should you have any additional questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Michael Weathers  
SVP of Governance & CISO  
Fidelity National Information Services