July 17, 2008

To: Board of Governors of the Federal Reserve System and other agencies of the Federal Financial Institutions Examination Council (FFIEC)

By e-mail to: regs.comments@federalreserve.gov

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
10th Street and Constitution Avenue, NW
Washington, DC 20551

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G. Street, NW
Washington, DC 20552

Re: Docket Number: R-1315; Truth in Savings (Federal Reserve Board); and R-1314; UDAP (Federal Reserve Board)

Dear Sir or Madam:

BancorpSouth appreciates the opportunity to comment by this one submission on both the proposed rule amendment to Regulation DD referenced above as well as the UDAP proposal. BancorpSouth operates a system of community banks in eight states, Mississippi, Alabama, Tennessee, Louisiana, Arkansas, Florida, Missouri, and Texas, with approximately 300 deposit-taking locations. BancorpSouth also has a system of ATM's and the availability of electronic banking. I am Vice Chairman of BancorpSouth responsible for supervising the bank's operations division, which includes the deposit functions associated with checking accounts, insufficient funds items, returned items, and overdrafts.

BancorpSouth offers these comments, out of an abundance of caution, in that it firmly believes its system and procedures for managing NSF and OD items is lawful in all respects as a discretionary service, but for which the proposed rule now casts unnecessary doubt, tenor, and unintended consequences. BancorpSouth therefore desires to make several initial points. Specifics tied to the respective proposals are the subject of the separate letters of BancorpSouth personnel.[1]

[1]Letter of Jeff Jaggers, Senior Vice President over the Information and Transaction Services Group; letter of Pat Caldwell, General Counsel. See also, letter of BancorpSouth Senior

Just two and a half years ago, via the InterAgency Guidance on Overdraft Protection, the overdraft focus was concern over *marketing* of overdraft protection programs.

When the Guidance was announced for comment, the opening paragraph of the R-1197 proposal made the clear distinction between the entry into the marketplace of third party vendors by highlighting the key distinguishing characteristic of concern:

> What generally distinguishes the vendor programs from institutions' in-house automated processes is the addition of *marketing plans* that appear designed to *promote* the generation of fee income by setting a dollar amount that consumers would be allowed to overdraw and by *encouraging* consumers to overdraw their accounts and use the service as a line of credit. (Emphasis added).

Even though BancorpSouth had no "program," marketed or otherwise, we still vented our practices with the guidance in mind, including legal counsel review, and easily recognized that we passed complete muster: BancorpSouth, having affirmatively chosen *not* to actively market such a service, had simply taken advantage of modern technology to otherwise replace or supplement a function traditionally addressed manually. BancorpSouth did not have then and does not have now an overdraft protection "program." We now utilize the wonders of technology to assist the former human task of daily approvals of payments versus returns. In other words, BancorpSouth's prior traditional and discretionary service of being "hands on" that now utilizes automation did not then, and does not now make it offend notions different than the traditional service historically offered by banks for years.

Rather than a credit offer or product, BancorpSouth offers a deposit service that we respectfully submit most, if not all, deposit institutions offer via their "signature card" account agreements, supplemented by the Uniform Commercial Code on bank deposits. Simply put, our agreements provide that we may, in our sole discretion, pay *or* return a check or other item that is presented against insufficient funds.

Historically, the decision to pay or not pay an item usually fell on the "who did you know" test between our bank and its customer, a process which might have resulted in otherwise "good" customers, (but less likely known to an individual banker), having their items returned and not paid, when, if "personally known", this discretionary service might have been otherwise extended to them. Enter technology. BancorpSouth now utilizes software which can review account statistics, activity and other factors, and guide BancorpSouth by automated means (not "automatically"). Use of automation by us does not mean final decision or commitment, just access to an automated tool to assist in making the return or pay decision.

Vice President, Kathi Carter, on the credit card proposals.

Even when part of our payment or return process is "automated", our institution always retains the discretion to reject that computer guidance and pay or return an item. And even though "automated", be it collectively, individually, system-wide, regionally, branch-to-branch, account-to-account, day-to-day, month-to-month, or otherwise, we may change (and *do* change) at *any* time *any* of the criteria the software uses to make the discretionary determination of whether to pay or return an item. The software merely assists in analyzing risk tolerance levels, generating reports and making analytical "judgments", all of which rely on ever evolving sources of information, from any number of sources, be it direct, indirect, financial based, history based, or otherwise, to either decline to pay overdrafts or pay them.

BancorpSouth engages in no marketing whatsoever of what is otherwise "behind the scenes" ever changing risk based technology, designed to supplement an occasional and discretionary service. No advertisements are used; no limits are disclosed; the circumstances under which the institution pays or returns an item is not disclosed; all the while, our truth in savings obligations to disclose relevant fees and charges associated with checking accounts, including NSF and OD fees, are met.

Whether the agencies "return to focus" and determine that active and affirmative marketing of an overdraft "product" needs UDAP regulation or not, institutions such as ours who choose to never market periodic customer friendly service should not be left to guess whether a practice we do or service we provide runs afoul of a new rule will apply to it because of the label of "unfairness." Instead, a clear demarcation between the active promoters of such services and those in the category of the BancorpSouths of the world needs to be made. To now propose for fear of being "unfair" that opt-out is *a substantive right* at account opening essentially converts all overdraft accommodation services to *promoted* plans - a boundary that the prior policy guidance we have expressly declined to do. Thus, the BancorpSouth position is rather straight-forward: drop the prospect of using UDAP altogether or alternatively make certain and unequivocal that the "target" of UDAP enforcement remains marketers of aggressive overdraft programs, not those who choose not to market, regardless of whether automation/technology is used or not. Then, under the Reg DD proposal, tailor make it with "bright line" rules to avoid inconsistencies because regulations such as DD can otherwise govern this topic extensively and adequately.

Some fundamentals of regulatory "unintended consequences" warrant mention. Financial institution regulations do indeed become the standard for civil courts, and a potential sword to plaintiffs' lawyers. Thus, extreme caution should be used with the use of UDAP. And, the undersigned has chosen to address both the Reg DD proposed rule and the proposed UDAP rule in one comment letter because, it is respectfully submitted, they cannot be reconciled separately. If at all, Reg DD is indeed the place where such regulation is warranted and the rule can be made to be reasonably targeted and reasonably concise.

P.O. Box 789 • Tupelo, MS 38802-0789 • 662-680-2000

The Uniform Commercial Code does not require our bank to pay a check against insufficient funds. Any commitment on our part to do so comes solely from specifically tailored products, *in writing,* to draw on a line of credit, a credit card, or savings account to "cover" otherwise insufficient items. Further, the UCC allows our bank to pay items in any order and it need not necessarily be pre-determined or disclosed (there could be 20 to 30 different scenarios on any banking day which would determine order of payment, the descriptions of which to a customer would be overwhelming, confusing and of little value). Further, we purposely avoid a variance in the fee we charge for items paid (OD fees) and items returned (NSF fees), both being exactly the same dollar amount in order to avoid any conceivable implication that the fees are for an extension of credit rather than handling of the items in question. We also choose to utilize terminology which we believe is consistent in the industry and for which ask the agencies to also use, namely, "insufficient funds fee" (NSF) for a check which is not paid and returned just as you have properly labeled an "overdraft fee" (OD fee) for a check which is not returned and paid into overdraft.

With this additional background on BancorpSouth, submitted to be quite common in the industry, we simply believe that our system better addresses customers who mistakenly or even knowingly issue a debit against insufficient funds. They have a preference that we pay the item. The proposed rule does not adequately address this expected deposit customer preference. To the contrary, it all but dismisses it. Thus, we believe the proposed rule will have the additional unintended consequence of being consumer unfriendly, rather than promote consumer protection.

Why? When our bank chooses to pay an item against insufficient funds, indeed we charge an OD fee. However, no third party is otherwise aware that the check was written against insufficient funds. There are no other consequences, fees, or expenses to our customer. On the other hand, when we utilize our discretion to return an item, indeed we charge the same dollar fee, in this instance an NSF fee, but our customer may also be charged a return check charge by a merchant, may have negative reporting via one or more of the check services used by the merchant, be subject to one or more civil claims, or face "bad check" civil or criminal provisions. All of which points out differences *to the customer*, but for which our bank has *no difference* nor financial incentive to pay the item versus return it because the same fee is charged in each instance.

Thus, a fundamental key to the proposals, otherwise intended to be customer and consumer friendly, is a "missing of the point" that overdrafts are not the problem. Customers authorizing payments or writing checks when they do not have the money is the problem and where responsibility should remain. Our second major point must therefore be made most strenuously:

A. **Overdraft protection fees are not injuries.** Charging someone the same fee for paying a check (or ACH or recurring debit card charge) as for refusing payment when funds are not sufficient turns the notion of injury on its head.

If this proposal stays,

1. Any fee will be at risk of becoming "injury"

2. It is supposed to be penal - to make you stop

3. Premise that debit card is always POS - i.e., in person, is false. Many customers now use debit cards for recurring charges.

4. Once someone incurs an overdraft fee, are they not on effective notice? What then makes it "unfair" to not constantly remind them of the right to opt-out?

B. Overdraft service fees are reasonably avoidable.

1. People are responsible for managing their financial affairs. Knowing what moneys are in your account has always been the responsibility of the account holder. From the beginning of banking, the movement of funds has always meant that there will be uncertainty about what the account balance is at any precise point in time.

2. Millions of people conduct billions of transactions a day without overdrawing their accounts. Most people go years without incurring an overdraft.

3. Overdraft fees are also reasonably avoidable by selecting other account packages, electing the use of alternative overdraft protections for which one may qualify.

4. The fundamental issue is whether the consumer has reason to know the consequences of one's banking activity. Our account agreements recite the conditions on which fees will be assessed.

5. The rationale for making overdraft service fees not reasonably avoidable - consumers cannot know with certainty their account balance - is essentially a statement that charging a fee for returning an overdrawn item is not reasonably avoidable!

Conclusion

The above-mentioned October 14, 2004 brochure on "Protecting Yourself from Overdraft and Bounced-Check Fees" concludes with an admonition to consumers, "the choice is yours." Then, the six ways to cover overdrafts are mentioned, the last one being "Bounced Check." If BancorpSouth's processes, methods, and services run the risk of heightened scrutiny under UDAP, that choice will change, and the choice will be ours. Regrettably, that choice may be an election of No. 6 only, bounce the checks. That will be an unfortunate result for our customers, the ultimate unintended consequence.

Sincerely yours,

Larry Bateman, Vice Chairman
BancorpSouth