Comerica Bank

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August 1, 2008

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

Re: Docket Nos. R-1314 and R-1315, Comment Letter of Comerica Bank to Proposed Changes to Unfair and Deceptive Trade Practices Rules and Disclosure Rules Relating to Bank Overdraft Courtesies

Dear Ms. Johnson:

We are writing to offer our comments on the proposed change to certain regulations regarding bank overdraft courtesies. Comerica Bank is a full service state member bank, based in Dallas, Texas that operates more than 400 branches in the states of Arizona, California, Florida, Michigan, and Texas, and holds more than $62.5 billion in assets. Comerica Bank offers overdraft services to its customers as a courtesy Those customers will be adversely impacted by the proposed regulatory changes should their payment no longer be honored due to non-sufficient funds. Additionally, Comerica like other financial institutions, assess service fees for the privilege of the overdraft courtesies. If the regulatory proposals are adopted, the Bank suffers a loss in revenue for services rendered. Accordingly, Comerica Bank and its customers are negatively affected by the proposed regulatory changes.

The Federal Reserve Board has published jointly with the Office of Thrift Supervision and the National Credit Union Administration, two proposals affecting overdraft policies: one that amends Regulation AA (Unfair and Deceptive Acts and Practices Act), and a second that amends Regulation DD (Truth in Savings Act) (collectively, the "Proposals"). In this regard, Comerica Bank respectfully files the following comments regarding both Regulation AA and Regulation DD proposals relating to bank overdraft courtesies.

Comerica opposes the Proposals because of the adverse customer impacts and given the revenue reduction and litigation impacts on the Bank.

Overdraft Courtesy Opt-Out and Partial Opt-Out

The Proposals would prohibit banks from imposing fees for the payment of overdrafts (overdraft courtesies) unless the customer is given an opportunity to opt-out of overdraft courtesies and the customer has not done so. This first opt-out right would apply to all transaction types. Banks also would be required to provide customers a partial opt-out for overdraft courtesies resulting from ATM and point-of-sale transactions.

To meet the first opt-out requirement, banks will be required, from a process and operational perspective, to offer the opt-out at account opening. It is likely that most customers will opt-out, as it is the usual intention of customers to not overdraw their account. The result of the customer's opt-out choice in the event of insufficient funds is: (i) customers will be assessed both a NSF fee by the Bank; and (ii) likely be charged a returned check fee by the payee/depositor of the customer's check. In other words, the customer will pay a double fee.[1] Additionally, if overdraft courtesies stop, even on an interim basis during a bank's implementation of the required opt-out process, consumer credit histories will suffer because more customers will have late payments due to more returned mortgage, loan, car, credit card, etc. payments being returned "NSF."[2]

On the operational side of banks, implementation of the Proposals requires the expenditure of time and money to design, implement, and operate an opt-out process. This has been estimated to cost Comerica $2,500,000 during the first year of operation and over $1,000,000 every year thereafter.[3] Additionally, customers increasingly expect and demand overdraft courtesies as part of their banking relationship. The effect of the Proposals, should they be adopted, will be to end or curtail the privilege of overdraft courtesies, increase costs to customers, reduce bank revenue, and lower credit score for customers.

Debit Holds

The Proposals will prohibit banks from imposing a fee when the account is overdrawn solely because a hold was placed on funds in the customer's deposit account. This can occur where the final dollar amount of the transaction was not known in advance (*e.g.*, when a customer purchases fuel at the pump, a hold is placed for the estimated amount of fuel that will be

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1 For customers, a rise in merchant fees will occur. The average Comerica customer who overdraws their account does so 5.8 times per year and has 1.68 items per occurrence (9.75 items per year); approximately 47% of all Comerica customers taking benefit of overdraft courtesies are repeat users. If the bank did not extend these courtesies, it is possible, in addition to the NSF fees that Comerica would assess, each customer would incur additional merchant fees in an amount of $146 per year (assumes an average merchant fee of $25). Simply stated, with an overdraft courtesy program, the average customer being extended overdraft courtesies cost is approximately $380; without such a program that approximate average customer cost is $460.

2 Other potential and unintended impacts could result from the Proposals. For instance, current credit scoring models have been developed on macro-credit data. That credit data is comprised of customer payment patterns. If the Proposals are adopted and they have the unintended effect of triggering more late payments, the credit scoring models employed in commerce today will be impacted. In other words, credit scoring models have not been developed, vetted, or employed in an environment without overdraft courtesies. Stopping or curtailing overdraft courtesies could skew current credit decision models, thus exposing credit granting institutions to a new and unknown risk element.

3 In other sections of the Proposals, the agencies have outlined new disclosure requirements regarding fees charged for overdraft courtesies. To the extent Comerica is not already disclosing such fees in the manner proposed, we have included such estimated disclosure enhancement costs in our estimates.

purchased). In considering the Proposals, it seems that the main driver behind the Proposals is merchant debit hold practices. It is unfair, arbitrary, and capricious to burden banks with new regulatory requirements that do not address the main driver of regulatory concern: debit holds.

Given debit holds are the problem, then the Federal Trade Commission (FTC) or Congress should act to regulate merchant practices in this regard. Although a merchant regulatory proposal has not been put forward, it goes without saying that some debit hold practices of merchants could be modified to shorten the period of the hold.[4] Others (*e.g.*, hotel stays longer than 1 day) may be more problematic and require additional study and review.[5]

Other Comments

As noted above, the Proposals raise important customer impact, revenue, operational, and technical issues with respect to bank overdraft courtesies – courtesies that provide important customer protections, protections that may not be offered by banks if the Proposals are adopted – but other issues are raised by the proposals. The following is a summary of those other issues that we believe should be considered:

1. Legal Authority to Designate Existing and Accepted Practice as Deceptive and Unfair. It is an arbitrary and capricious action to rule that overdraft courtesies and the fees charged for such courtesies are "unfair and deceptive." In exercising their authority in this regard, the agencies have applied the FTC standard that consumers suffer monetary harm by paying a fee for a service that without an opt-out they cannot reasonably avoid and that it is not outweighed by countervailing benefits to consumers or competition. The application of the FTC standard, as described in the Proposals, is not correct.

   In all overdraft courtesy programs, the customer always has an opt-out: don't spend money you don't have; don't overdraw your account. Overdraft courtesy programs provide benefits to customers. As explained in this letter, these benefits range from lower costs resulting from a customer overdrafting their account (e.g., paying the overdraft means the merchant will not assess an NSF fee) to preserving the customer's credit rating. Additionally, Comerica (like all other banks) has to comply with extensive disclosure regulations regarding fees charged on deposit account banking products. Those disclosures fully explain and state the fees for overdraft courtesies. Finally and for the reasons stated above, without overdraft courtesy programs, customers will see costs increase over what they are today.

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4 In the proposed Official Commentary, Subpart D, paragraph (b) Debit Holds, the agencies clearly describe in Item 4 the problem by way of the pay-at-the-pump debit hold example. That problem occurs where a merchant or its processor fails to release a previous hold after the transaction is settled (pump is turned off and the customer's account is debited). A simple solution here is for the FTC to require merchants to release the hold or the amount of the hold over and above the final purchase as soon as the transaction is settled.

5 In this regard, we request the agencies take special note of a new merchant processing method that will reduce overdraft-caused debit holds. That method being deployed later this year by Visa is "Real-Time Clearing," which will process fuel transactions immediately instead of at the end of each day. The change will reduce "hold times" placed on cardholders' credit, checking and prepaid card accounts for purchases at automated fuel pumps.

Under this method, after a customer finishes refueling, a second transaction is immediately executed for the final purchase amount and replaces the initial hold. It takes the former debit hold process that could run one or two full days down to mere minutes.

Accordingly, the Proposal's assertion that an effective method of opting out of overdraft courtesy fees and that no customer benefit exists in relation to the fees charged is simply not accurate.

2. Unintended Effect on State Law. The determination by the agencies that the charging of overdraft courtesy fees absent a notice of opportunity to opt-out as an "unfair and deceptive" practice, will cause banks to be subject to violations of state Unfair and Deceptive Trade Practice Acts. The agencies, by taking the approach set forth in the proposals (current overdraft courtesy programs are unfair and deceptive), have put banks in an uncertain position regarding state laws, which grant private rights of action to consumers. To explain, if the Proposals are adopted, the past practices of banks in extended overdraft courtesies will be viewed as having been deceptive. This false assertion of deceptiveness will result in lawsuits brought by class-action lawyers claiming damages.

3. Burden Allocation. It is most important to recognize that there is one, and only one, party that is in the best position to manage overdraft courtesies and the assessment of fees related to such courtesies: the customer. The customer knows what they spend and when they spend it better than anyone else. Granted, a customer may not know the amount of a debit hold or of such merchant practices, but the fact remains only the customer knows for sure at any point in time what checks they have written and what other debits and deposits they may have made to their account. Thus, the customer, as has been the practice before EFT and ACH debits came into existence, needs to keep an updated check/debit/deposit registry to ensure that they only spend the money they have. To do otherwise runs the risk that they will be spending someone else's money – the bank's money – in the form of an overdraft courtesy.

Comerica prides itself on being a responsible member of the banking community and in the level of customer service it delivers. Overdraft courtesies are an important banking service that customers use and have come to rely upon. To adopt the regulatory proposals without squarely addressing the fundamental issues (merchant debit holds) does a great disservice to both banks and their customers. Moreover, to declare that overdraft courtesies are an unfair and deceptive trade practice creates an uncertainty in the law for a program that saves customers money.

Thank you for this opportunity to comment.

Very truly yours,

DJ Culkar
Senior Vice President and Assistant General Counsel

Cc: Benjamin K. Olsen
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