



## First Citizens Bank

Via Facsimile

30 July 2008

Ms. Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal  
Reserve System  
20<sup>th</sup> St. and Constitution Avenue, NW  
Washington, D.C. 20051

Re: FRB Docket No. R-1334 Unfair or Deceptive Acts or Practices; *73 Federal Register 28904*; May 19, 2008

First Citizens Bank is pleased to submit to the Federal Reserve Board (Board) its comments to the proposed amendments to Regulation AA which amends the Unfair or Deceptive Acts or Practices as published in *73 Federal Register 28904* of May 19, 2008.

First Citizens Bank is a \$14 billion state non-member bank headquartered in Raleigh, N.C. with over 340 branches in five states. Our overdraft accommodation policy has evolved over the past nine years as technology has changed, but places safety and soundness issues as paramount.

We would like to comment on three areas that are disconcerting.

### Partial Opt Out

Requiring banks to offer a partial opt out will be confusing for the consumer. In the Board's proposal of a partial opt-out, only ATM and point-of-sale transactions initiated by a consumer are included. This could be confounding for the consumer for the following reasons:

- Consumers can ask a merchant to handle the debit card transaction as a credit. When the transaction is subsequently processed through an imprinter, we cannot recognize the transaction as a point-of-sale debit card transaction.
- Banks can assess an overdraft fee if the actual purchase amount for a transaction exceeds the amount that had been authorized, thus preventing a consumer from opting out of all point-of-sale transactions.
- Recurring debit card transactions are not included; we cannot distinguish between recurring debit card transactions and debit card point-of-sale transactions.
- Debit card transactions via online banking are not included; we cannot distinguish between online debit card transactions and debit card point-of-sale transactions.

- Online bill pay using a debit card is sometimes converted to a substitute check by the process; these transactions are processed as paper items and cannot be recognized as debit card transactions.

Explaining to consumers who had opted out as to why they were charged an overdraft fee for some transactions initiated with a debit card and not other transactions would be both time consuming and perplexing to the consumers. Bank systems would need to be reprogrammed to permit real time balances and not just the balance as of the end of the daily processing period. Unless systems of processors are reprogrammed, the challenge is not abated, only acerbated.

From time to time, our ATMs are unable to access the deposit account from which the consumer is attempting to withdraw funds. Under these circumstances, we currently permit up to a \$200 withdrawal. Offering this service to those consumers who have opted out would be futile and we would be forced to reevaluate this accommodating service.

#### Debit Holds

The proposal covering debit holds is a problem that involves merchants and the card networks. Requiring banks to bear the full extent of the solution places requirements on the incorrect entity.

Sometimes, this onus places the bank in an untenable situation. For example, a consumer with \$100 in his deposit account uses his debit card to purchase fuel. The merchant places a hold on an account for \$75 and the consumer only purchases \$50 of fuel. When the merchant presents the \$50 transaction for settlement, it sometimes uses a different transaction code to identify the transaction than it had used for the preauthorization, causing both the \$75 hold and the \$50 purchase amount to be temporarily posted to the consumer's account at the same time, and the consumer's account to be overdrawn.

Refunding an overdraft fee under such circumstances and explaining it to the consumer will be both confounding and time consuming. The situation is compounded if the refund occurs days later when the bank realizes that a fee was charged due to a hold placed on a consumer's account that is in excess of the actual purchase or transaction amount, especially when the refund was a day in a different statement cycle period.

Explaining such charges and fees on a consumer's statement would be a challenge that would result in a lengthy explanation, increasing the length of the consumer's periodic statement, and possibly requiring the next postage fee tier. However, preventing the bank from holding these funds will compromise safety and soundness practices.

Refunding overdraft fees due to any of the exceptions listed in the proposal would be just as challenging.

#### Transaction Clearing Practices

First Citizens Bank currently uses a transaction clearing practice that protects the bank by grouping transactions according to type. Cash-related transactions, for which the bank has generally already approved and "paid" the items, are posted first, and paper transactions received as in-clearings, primarily comprised of checks, are posted last. Most types of transactions are paid in amount order, with large dollar items paid before small dollar items, as our experience suggests that our customers prefer for us to pay high dollar items first, even if by doing so a higher number of smaller checks become insufficient items.

For example, we process certain transactions, such as some electronic items, real time to protect the bank since the funds are immediately transferred from the consumer's account to the payee's account. We pay higher dollar amounts first on other items as these payments tend to represent mortgage payments, rent, and other obligations rather than miscellaneous purchases of an incidental nature. Items such as teller cashed checks and debit memos are paid before other third party checks.

We cannot process transactions twice, once for posting order and again for fee assessment determination. Furthermore, we cannot accommodate multiple variations of posting order by accounts. Consumers cannot be allowed the option of choosing a posting order; it must be uniform for all customers. Time limitations and the excessive costs make any of these options too burdensome to be practical today.

Honoring smaller dollar items first may create a hardship for the consumer, favoring transactions of lesser importance.

Conclusion

First Citizens Bank appreciates the opportunity to comment. We emphasize customer service and value the customer experience. Trying to explain some of the transactions in the proposal would be most challenging to us.

Sincerely,



Francis P. King, Jr., CRCM