

# GuarantyBank

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**VIA FEDERAL EXPRESS**

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

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

BOARD OF GOVERNORS  
OF THE  
FEDERAL RESERVE SYSTEM  
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RECEIVED  
OFFICE OF THE SECRETARY

RE: Unfair or Deceptive Acts or Practices Proposal (the "Proposal"); Docket No. R-1314  
(Federal Reserve Board); and OTS-2008-0004 (Office of Thrift Supervision)

Dear Sir or Madam:

Please accept this comment letter on behalf of Guaranty Bank, headquartered in Milwaukee, Wisconsin ("Guaranty"). Guaranty is a \$1.7 billion bank with retail branches in 5 states (Wisconsin, Illinois, Michigan, Minnesota and Georgia).

Customers have historically managed their own accounts. Since customers have full control over depositing and withdrawing funds from these accounts, they are in the best position to know what their account balance is. Guaranty offers many alternatives for customers to know what their balance is, such as on-line account access, teller phone, ATM's and of course at our network of over 170 branches open seven days a week and conveniently located in many supermarkets throughout our markets.

Overdraft fees can be easily avoided by consumers without requiring a specific advance notice and opt-out followed by repeated periodic opt out reminders as required by the Proposal. Guaranty offers overdraft opt-out options today without a formal one-size-fits-all opt-out requirement, and it fully discloses all fees to its customers.

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CORPORATE OFFICE

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Part of the Proposal includes the provision that institutions may not charge an overdraft fee if the overdraft situation is caused solely by a hold on funds in excess of the settled debit card transactions. This is a troublesome suggestion because a financial institution typically does not have any way to know when, for example, a hotel or merchant holds funds in excess to insure payment as opposed to when a purchase in that amount is actually made. Although consumers may not understand that this excess hold reduces their available funds, the Proposal's solution to frame the issue as an unfair or deceptive practice ("UDAP") by banks is totally inappropriate as it is not even something the bank causes or controls. Financial institutions do not hold these excess funds, and current systems are not able to detect when a merchant is holding funds to insure payment.

The solution offered will cause financial institutions to incur expenses to try and resolve this which will result in higher costs for all consumers. A better solution would be to work with merchants to advise the customers of these holds, which could be accomplished thru Regulation E, as it regulates electronic payments. Regulation E appears to be a much more direct regulatory standard to address this issue than by trying to "wag the dog" by declaring overdrafts based on the holds to be UDAP. By using Regulation E not only will banks be subject to the same regulation, but, more importantly, merchants will also, which will be necessary to effectively educate consumers on these issues. .

Although the Proposal is not addressing transaction clearing practices, the agencies have asked for comments on requiring financial institutions to pay smaller transactions before larger transactions, and allowing a consumer to elect a different payment processing order. Currently, Guaranty makes its processing decisions to serve all account holders. Allowing consumers to choose different orders is not operationally feasible as a result of the normal check clearing process.

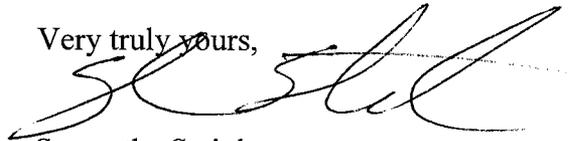
Checks arrive in massive batches and it is not possible to sort all incoming checks based on a customer preference. One sorting method must be used for all checks. Guaranty has a neutral process for clearing checks, whereby checks received on a given day are processed in numerical order by the check number. There is nothing unfair and deceptive about clearing checks in the order since it should most closely approximate the order in which the customer issued the checks, and it is not something that Guaranty can manipulate to increase fees. Guaranty believes it has developed a fair clearing process for all of its customers, and ultimately, the customers have initiated these transactions, so they should have responsibility to ensure funds are available. Perhaps a more appropriate use of the UDAP definition would be in a situation where a financial institution manipulated its clearing process with the sole purpose being to maximize fee income.

Another concern of applying UDAP to these issues is that many practices that were previously permitted and sometimes even encouraged by regulatory agencies would now be determined to be unfair and deceptive. Applying the UDAP moniker to a practice will not merely result in the discontinuance of the practice, it may very well also have probative effect on class action type claims consumers might bring for past practices that were permitted at the time. Regulators should be reluctant to declare a practice as "unfair

and deceptive” when it is merely something they do not want to permit further. Use of UDAP would open up financial institutions to the risk of class actions for practices that were permissible at the time.

Feel free to contact me if you have any questions regarding this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'S. Steinle', with a long horizontal flourish extending to the right.

Samantha Steinle

Assistant Vice President and Associate Counsel