



Robert W. Hoxworth  
Acting President

August 4, 2008

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal  
Reserve System  
20<sup>th</sup> St. and Constitution Ave, NW  
Washington, DC 20551

Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552  
ATTN: OTS-2008-0004

Re: FRB Docket No. R-1314;OTS Docket No. OTS-2008-004;  
Unfair or Deceptive Acts or Practices; 73 *Federal Register* 28904;  
May 19, 2008

Dear Madam Secretary and Chief Counsel's Office:

On behalf of First National Bank Texas, I appreciate the opportunity to provide comments to the Board of Governors of the Federal Reserve System ("Board") and the Office of Thrift Supervision ("OTS") on the proposed amendments to Regulation AA – Unfair or Deceptive Practices, FRB Docket No. R-1314 and OTS Docket No. OTS-2008-0004 regarding overdraft services.

First National Bank Texas is a federally chartered bank operating over 230 branches throughout the State of Texas with headquarters located in Killeen, Texas. First National Bank Texas provides full service banking products and services throughout the State of Texas.

We offer overdraft services to our customers and, in our experience; a majority of them find value in these services as a desirable alternative to declined transactions. Typically, the ramifications, costs and additional fees incurred from returned items are the least desirable action. We also support a global opt-out covering all transaction types. We currently describe the overdraft program to new customers at account opening and provide the option of opting out of the program. We also allow existing customers to opt out during the banking relationship. Less than 1% of our customers have chosen to opt out of our overdraft services program. Many customers have provided positive feedback about the program as further evidenced by the low opt out rate. In structuring and administering our overdraft program, we also follow the interagency guidance on overdraft programs from February 2005. We also seek to make our customers aware of their use of the overdraft services. We send a notice to a customer the next business day after a customer incurs an overdraft fee. Additionally, we have policies in place to suspend overdraft services in the event these services are used excessively by a customer.

While we support a global opt out, overdraft services in general are more appropriately addressed in other legislation and regulations (for example, the Expedited Funds Availability

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Act, Regulation CC, the Electronic Funds Transfer Act, and Regulation E) that take into account the complexity of payment systems and need for flexibility to allow for innovation in this rapidly evolving area.

We also have concerns with other aspects of the proposed amendments. First, allowing customers to opt out of overdraft services for only ATM and point-of-sale debit card transactions would present significant implementation challenges for us. Second, even when customers have opted out of overdraft services, we should be permitted to assess overdraft fees when overdrafts are unavoidable. Third, the incidence of overdrafts that result when debit holds tie up otherwise available funds because they exceed actual settlement amounts would be better addressed (and minimized) through revisions in payment network rules. Finally, any requirement that we pay smaller transactions before larger transactions for purposes of assessing overdraft fees would have a number of negative unintended consequences. We address each of these concerns in more detail below.

#### I. Partial Opt-Out

We have significant concerns about the feasibility of complying with any requirement that we provide customers the option of opting out of overdraft services for only those overdrafts resulting from ATM transactions and point-of-sale transactions initiated by debit card. Such an approach fails to take into account the complexity of debit card point-of-sale transactions and the lag that sometimes exists between the time of purchase or withdrawal and settlement of the associated funds. Even if the transaction is authorized at the point-of-sale because funds are then available, funds may not be available when the transaction is settled. This settlement period varies widely from merchant to merchant and is more significant with those debit transactions in which the identity of a consumer is verified by the signature method (as opposed to the PIN method). Such signature debit transactions account for more than half of our transactions. During the delay, other transactions as well as returned deposited items may settle, using funds that might have been available at the time the first transaction was authorized. Therefore, it is frequently not feasible to predict at the time an ATM or debit card point-of-sale transaction is initiated, whether it will overdraw the consumer's account.

Even if ATM and point-of-sale transactions did not present the above challenge, our system (which is a commercially available system) is not configured to identify and treat fees for overdrafts resulting from ATM, point-of-sale, ACH or check transactions differently based on the type of transaction. Significant cost would be involved to reconfigure our system to accommodate such a requirement. Based on a preliminary estimate, this would require from 5,000 to possibly more than 10,000 hours of analysts', programmers' and other specialists' time. We estimate this would cost our institution, at a minimum, \$1 million and this figure could easily double. Furthermore, compliance may require modification of the electronic transaction "messaging" systems that communicate with our system to settle a transaction.

We question the consumer benefit in providing a partial opt out as opposed to a blanket opt out considering the costs of overhauling current systems. Account balance information is readily available to consumers when making withdrawals at ATMs. Realizing that many

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customers do not regularly balance their checking accounts, we also make account information available through other sources including automated voice response systems, online banking, telephone call centers, within any of our 230 branches, etc. In regard to debit card transactions, the benefit to consumers is limited given that these transactions are frequently not settled in real time.

## II. Exceptions for Charging Overdraft Fees

Under circumstances when overdrafts are unavoidable we have no recourse and should be permitted to assess fees even if a customer has opted out of our overdraft services. Overdrafts may result, as described above, with point-of-sale debit transactions if funds that were available at the time of transaction are no longer available at the time of settlement. Operating rules intended to preserve the finality of payments and the integrity of the payment networks prohibit us from charging back transactions that have been authorized. With more than half of our customers' transactions authenticated by signature, this is more than an isolated possibility.

Unavoidable overdrafts also may occur with transactions involving small dollar amounts that do not require network authorization at the time of the transaction per MasterCard and Visa rules. MasterCard and Visa set the rules and the dollar limits in this regard —this is outside our control. Nearly 40% of our debit card transactions cannot be returned unpaid to the merchant due to current floor limit rules.

## III. Debit holds

The issue with an overdraft fee imposed solely because a debit hold amount exceeds the amount ultimately required to settle a transaction would be better addressed through changes to payment network rules rather than inappropriately placing this responsibility on banks. In accordance with safe and sound banking practices, we currently place a hold on funds pending settlement for three business days, and we disclose this to our customers. When transactions are submitted to us for payment, we check several fields of information to minimize delays in reconciling authorization amounts with settlement amounts. The majority of these transactions are settled within 24 hours after a hold has been placed on funds. Even if we do not receive a matched transaction, we remove the hold after three business days and we assume the collection risk. To further insure no harm to the customer, we remove pre-authorizations that match on card number and authorization code, regardless of differences in other fields including amount, merchant identifiers, etc. We further believe it is not feasible to construct programming routines to review prior days' transactions to "re-determine" if overdraft fees should apply to current transactions based upon that prior activity for which holds continue that have not yet been settled.

The payment networks do not currently require merchants to communicate if an actual transaction amount is different from the pre-authorized amount immediately when this is known. Also, several of the fields of information that assist us in matching debit holds to transactions are not currently required fields by payment network rules; they are merely recommended fields.

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Practices in these areas could be improved so that debit hold amounts more accurately reflect the amount that will ultimately be required to settle a given transaction and to decrease hold times.

IV. Paying Smaller Transactions Before Larger Transactions

Requiring that we pay smaller transactions before larger transactions for purposes of assessing overdraft fees would cause a number of negative consequences. Such a practice could harm customers who do not have overdraft protection. If, for example, such a customer's transactions for one day included a mortgage payment and purchases at Subway, Starbucks and a clothing store, paying the smaller transactions first could result in a declined mortgage payment.

Our practices for processing and clearing transactions are complex and unique to our institution, as are those of other financial institutions. Our practices address the need to process quickly the transactions that continuously flow through our system with variation based on our priority rules. Altering our approach so that we pay smaller transactions before larger transactions for purposes of assessing overdraft fees would increase the amount of time required to settle some transactions. Transaction payment order is determined not only by amount but also the type of transaction being processed. Paying items based solely upon amount from small to large would expose banks to losses on items that cannot be returned such as those "force pay" transactions that have been mentioned previously in this document.

We do not view using an alternative clearing order as a feasible option given the programming burden and costs that would be required to implement such a drastic change to our current system. As explained, the banks would be assuming the risk of "force pay" transactions, etc., not to mention items that are higher amounts are typically the customer's mortgage check, rent check, tuition check, etc. The complexity of this alternative would make it virtually impossible to disclose transaction cause and effect to the customer.

We appreciate your consideration of our concerns with the proposed rules regarding overdraft services.

Respectfully submitted,



Robert W. Hoxworth

cc: Mr. Randy Fenimore, Office of the Comptroller of the Currency  
Senator John Cornyn  
Senator Kay Bailey Hutchison  
Congressman John Carter  
Congressman Chet Edwards