Teche
FEDERAL BANK
We Want To Be Your Banker

July 30, 2008

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
10th St & Constitution Ave, NW.
Washington, DC 20552

Re: Docket No.-1314 (Regulation AA - Unfair or Deceptive Acts or Practices)

Dear Ms. Johnson:

Teche Federal Bank is grateful to have the opportunity to comment regarding the "Regulation AA –Unfair or Deceptive Acts or Practices [R 1314]," as it applies to overdraft services. Below is an outline of problems that occur in the proposed regulation.

I. **These proposed regulations turn reality upside down, claiming that a bank paying (as opposed to bouncing) a customer check is somehow an "injury" under federal law.**
   A. The proposed regulation explicitly states[1] that for a bank to pay an NSF check[2] (instead of bouncing the check) is an "injury"[3] within the trial-lawyer friendly FTC law. The proposal indicates a feeling that the consumer is not "injured" if the bank simply bounces the check, and charges a fee for the bounced check.
   B. The proposal indicates the primary goal is for the customer to have an opportunity to "opt out"[4] of this supposedly injurious act of payment of NSF checks (and charging an NSF fee).
      1. The proposal claims support from ultra-liberal organizations thinly disguised as so-called "Consumer Groups"[5]. Banks would prefer not to be caught in the crossfire between political warring groups. But even more so, banks would prefer that the regulators not take the side of the far left advocates.

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[1] Vol. 73 FR, Monday, May 19, 2008, p. 28929
[2] And charge an NSF fee.
[3] This ignores the fact to write a worthless check is a crime. The regulators admit that there would be no "injury" if the bank simply would not charge a fee for an NSF check. One wonders if the regulators would claim that the bank was "injured" if there was no fee, especially since this act is already a crime. The regulation and accompanying notes are silent on this issue of the bank as victim.
[4] Vol. 73 FR, Monday 19, 2008, p. 28929
[5] For example, Citizens for Responsible Lending, led by leftist crusader Martin Eakes, refers to bank foreclosure as "theft", while those who oppose them are referred to as subprime lenders who use "swift boat style campaigns". Eakes has been a long time opponent of community banks and has been a long time proponent of credit unions. Every other "Consumer Advocacy Group" has a similar far-left pedigree. It should be clear to a disinterested observer that such groups do not represent bank customers or consumers, but rather a particular political agenda.

2. In fact, banks are well aware of many customers and consumers who are very thankful that banks willingly and voluntarily pay NSF fees for customers without any guarantee that the customer will pay back.
3. We have received thank you letters and calls from many customers who appreciate that the bank has paid their NSF check, rather than bouncing it.

C. The turning on the head of the logic of a benefit (paying NSF checks) into an injury has many unintended consequences.
   1. Here is an example: If a bank received an "opt out" from a customer, and then mistakenly paid the NSF & charged the NSF fee, the bank would have then violated the customer's federal right.
   2. This would make a bank vulnerable to lawsuits, in today's litigious world. In many states, such a lawsuit might be brought by the state attorney general, in others, by the U.S. attorney, and in still others, the "injured" bank customer might bring a lawsuit.

D. **Overdraft Protection would have added burdens**.
   1. Burdensome monthly statements disclosure would also apply.
   2. There would be constant questions over when a customer exercises his federally-protected right to opt out because there is no requirement that the "opt out" must be in writing.

II. **Bank Regulators would be required to analyze bank practices under the trial-lawyer friendly FTC law**.

A. In order to find a practice "unfair", under the FTC law, there are three (3) key points: (1) Substantial Consumer Injury, (2) Injury is not reasonably avoidable, and (3) Injury is not outweighed by countervailing benefits. None of these three key findings is warranted in this circumstance.

1. **Substantial Consumer Injury**.
   a. To calculate "substantial" under the FTC law, all consumer "injuries" are added together.[6] Note that the idea of "injury" is not simply the effect on one customer. Please note the parallel to class action lawsuits, in which the plaintiff attorney aggregates the damages and then received his fee based on the supposed damages to untold thousands who do not in fact complain and in fact receive no compensation.
   b. This section erroneously claims that consumers incur substantial monetary "injury" due to the payment of bank NSF fees. Most of the articles cited indicate the fact that aggregate, nationwide NSF fees are a large number, or that 50% to 60% of service charge income is from NSF fees.

[6] Vol. 73 FR, Monday, May 19, 2008, p. 28908

c. This entire analytical framework is completely inappropriate for the fact situation of a bank paying an NSF check. Thus, this proposed Reg. should not in any event be a promulgated pursuant to UDAP.

2. **Injury is not reasonably avoidable**. The proposal makes the untenable suggestion that consumers cannot reasonably avoid this "injury" because they do not have the "opportunity to opt out".

   This analysis ignores several important points: (a) The customer can accept responsibility for the balance of his own account, (b) The customer can choose another bank (c) All fees charged by a bank are the result of a no pressure contract between the customer and the bank, or (d) The consumer can chose to remit payments by means other than a bank.

   a. The customer can accept responsibility for the balance of his own account.

      This is a basic point that the regulators seem to have practically ignored. The very weak example given is that of the crediting of a return item. Of course, no statistics were provided to indicate the prevalence of NSFs when the customer supposedly did not know of the exact date on which his returned retail item was credited. This also ignores the very basic point, that even in this circumstance; it is the responsibility of the customer to know his own balance.

   b. The customer can choose another bank. The proposal ignores this rather obvious possibility. Banks are not a monopoly, or even an oligopoly. There are literally thousands of banks in America.

   c. The fees charged are the result of a no-pressure contract between the bank and the customer. While the FTC might point to other examples in which a contract was involved, other such examples typically involve some sort of duress or pressure on customers to make a contract. There is no duress or pressure involved in opening a checking account. There are no high-pressure salesmen.

      The occasional free gifts some banks offer to new customers are regulated so that they are of modest value, the toaster being the classic example. In fact, many banks are known for their lack of hard sell techniques, often encouraging the customer to take a brochure and consider whether they want to open an account. Still others are required to return with appropriate identification, as banks must all comply with the various regulations to comply with the PATRIOT Act.

   d. The customer can choose to remit payments by methods other than the banking system. The customer can use cash, money orders or other methods to remit various payments.

3. **Injury is not outweighed by countervailing benefits to customers or competition**. As we have shown above, there is no "injury". But even if there is, there are substantial countervailing benefits to consumers. Also, there is a countervailing benefit to competition.

a. Countervailing benefits to consumers. There is a substantial benefit to customers in the payment of overdraft checks by the bank. These correspond generally to items already mentioned: Here are a few benefits to the customer of the payment of NSF checks: (1) Avoidance of the payment of a returned check fee by the retailer, (2) Avoidance of loss of specific credit by the individual retailer (3) Retention of reputation by avoiding a public display of NSF checks (4) Payment of vital payments, such as home mortgage payments and automobile loan payments, (5) Avoidance of mortgage foreclosure, (6) Avoidance of late fees which may exceed the NSF fee, and (7) The ability to receive cash when desperately needed from ATM machines.

i. These are all significant benefits not mentioned by the regulators, as required by Statement for FTC Credit practice rule, cited in footnote 21, of the Supplementary Information, II Statutory Authority Under the Federal Trade Commission Act to Address Unfair or Deceptive Acts of Practices, B. Standards for Unfairness under the FTC Act. "This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence."

ii It would appear that there has been no gathering nor reasonable consideration of the available evidence.

b. Countervailing benefits to competition. There is a substantial benefit to competition in the payment of bank overdrafts. For the past 40 years, community banks have been losing ground to other means of payment, most notably to credit card companies. Ordinary paper checks have waned as a method of payment, while credit card usage increased. Most small community banks do not have large credit card portfolios

On the other hand, the majority of small community banks can and do offer debit cards. Further debit card usage is rising and is projected to exceed credit card usage in the foreseeable future. The effect of these proposed regulations will hamper debit card usage and tend to bring back the decline which community banks experienced in the latter half of the 20th century.

III. The proposal ignores the confusion of a customer not understanding the "opt-out". Consumers will not easily understand the opt-out option. It might seem to the customers that they are "opting-out" of the *fee* that is charged when a bank pays their NSF, they may not understand that the bank will no longer pay their NSFs, therefore, will be subject to the normal NSF fees. Further, the exceptions to the rule are confusing and will cause a lot of problems when a customer who chose to opt-out is charged for an overdraft service.

IV. A partial out-out is both impractical and confusing. Implementing banking programs will be costly and time consuming to banks that do not have systems that allow partial opt-outs. While regulators feel that the "benefits" of partial opt-out outweigh the costs associated with implementing such banking programs[7], they neglect to acknowledge the confusion created by offering such an option. The partial opt-out might lead to consumers misunderstanding what they "opted-out" of and how it will affect them.

Finally, it is worth noting the remarkable success community banks have had with both checking accounts and debit cards over the past 15 to 20 years. Prior to the 1990s, community banks were languishing, with large disintermediation.

Community banks had been caught in the olden days, still practicing "bankers' hours", bouncing practically all NSF checks, and not making much progress with debit cards.

A lot has changed since then. Banks are now open longer hours, most checks are paid rather than bounced, and the checking account, together with the accompanying debit card, is about to overtake credit cards in total dollar volume.

What happened?

Banks became a lot more customer oriented. One of the many aspects of the customer orientation has been the checking account. Two of the most important points of progress with checking accounts have been the payment of NSF checks and the wide distribution of debit cards to checking account customers.

The payment of NSF checks (rather than the old-time banker practice of bouncing most checks) has been one of the most favorably received services provided by small community banks. Most customers no longer need to be concerned about the embarrassment and additional costs of a bounced check.

The other key improvement of the checking account has been the Debit card. The increase of this delivery channel in the 90s, which continues to this day, has been nothing short of phenomenal, and by almost all estimates, is expected to exceed credit card in total volume within a few years.

It is worth considering that all this occurred within the freedom of the marketplace, with intense competition from lots of other sources: credit cards, online bill pay services from various retail outlets, mutual funds, as well as other banks, savings & loans and credit unions.

Remember that proposals based on the FTC law must be based on the FTC law, and the concept of "Unfair or Deceptive Acts or Practices". Thus, any such proposal must claim some sort of "unfairness" or "deception". Well, it is clear that there is no deception of any kind. Customers very well understand what they are getting and greatly appreciate it and are increasing in its use.

Those making this proposal are left with no choice but to find "unfairness". And they find it in the most ridiculous way: to claim that payment of an NSF check, as opposed to bouncing it, is somehow unfair because there was no "opt out".

"Opt out" of what? Payment of the check, instead of bouncing it? This is patently ridiculous, but they have no choice, because the proposal must be included

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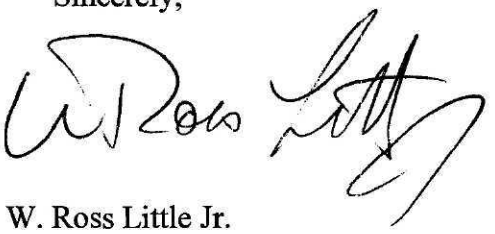
[7] Vol. 73 FR, Monday, May 19, 2008, p. 28930

under the UDAP law. Why? Because there is no legal basis for proposing this under any other law.

It is very dangerous and of great concern to me when regulations are thus promulgated and then have the power of enforcement against banks, under the trial-lawyer friendly UDAP law. This is further exacerbated by the declaration of a "federal right" to this "Opt out".

In conclusion, this is an inappropriate proposal it should be completely withdrawn.

Sincerely,



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Senior Vice President
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