



First Hawaiian Bank
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Sent via electronic delivery

August 1, 2008

Jennifer J. Johnson, Secretary
Board of Governors of the Federal
Reserve System
20th St. and Constitution Avenue, NW.
Washington, DC 20551
regs.comments@federalreserve.gov

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-2008-0004;
Unfair or Deceptive Acts or Practices; 73 *Federal Register* 28904;
May 19, 2008 (UDAP Proposal)

Ladies and Gentlemen:

Thank you for allowing us the opportunity to comment on the proposed changes to Regulation AA by the various regulatory agencies (the "Agencies"). Specifically, our comments are directed toward the proposed changes regarding overdraft services, which First Hawaiian Bank provides to its consumer checking account customers. First Hawaiian Bank is a \$13 billion FDIC-regulated institution with 58 branches in Hawaii, 3 in Guam and 2 in the Commonwealth of Northern Mariana Islands. We offer a full line of banking services including numerous deposit, loan and credit card products.

Summary

While we support the Agencies' efforts to make sure that consumers are adequately informed of the costs of overdraft services and to curb abusive practices by some institutions relating to such services, we nevertheless have very serious concerns with the changes and requirements set forth in the Proposed Rule. Most banks such as ours provide overdraft services as an accommodation to our customers and such services provide a significant benefit to consumers. First Hawaiian Bank in particular does not promote or market our overdraft service or encourage our customers to overdraft their accounts in reliance on it. It is a service we make available to our customers in the event of an overdraft to allow such items to be paid rather than returned.

We believe that most banks provide these services responsibly and that most customers are generally able to avoid excessive overdraft fees by prudent account management. Our experience is that most customers who are assessed an overdraft fee nevertheless understand the benefit of the overdraft service and are generally appreciative that the item was paid. While there may be a minority of institutions that provide overdraft services in an abusive manner, we do not believe that the protections suggested by the Proposed Rule justify the substantial burden and capital expense that would be necessary to implement the proposed requirements, including the requirement to provide our customers with the ability to opt out fully or partially from our overdraft services. In addition, some of the requirements in the Proposed Rule such as the "partial" opt-out for automatic teller machine ("ATM") and point-of-sale ("POS") transactions are not technologically feasible.

Should the Agencies nevertheless proceed with the opt-out requirement, we urge them to ensure that appropriate exceptions are added for situations where confirmation of the customer's opt-out is not readily available when payment of an item is authorized. The Agencies should also allow for an implementation period of at least eighteen months.

Overdraft Services Benefit Consumers

Overdraft services such as ours provide an important benefit to consumers. While the provision of such services may result in an overdraft fee, we strongly believe that in a majority of cases the benefit to the customer outweighs the cost of the overdraft fee.

First, most consumers successfully manage their accounts in a responsible manner and rarely overdraft their account, if at all. This includes accountholders with debit cards. In those instances where an overdraft occurs, our experience has been that most customers would prefer to have the item paid even if an overdraft fee is incurred. In its recent comment dated July 18, 2008 to the accompanying proposed changes to Regulation DD, the American Bankers Association referenced their recent survey that found that an overwhelming 85 percent of those who had an overdraft fee in the past year were glad the payment was covered. Similarly, a large majority of customers who call our call center to inquire about an assessed overdraft fee are nevertheless appreciative that the item was paid. We also frequently waive overdraft fees where the assessment of an overdraft fee may seem to be excessive in light of a particular transaction—for example, where the overdraft fee(s) far exceeds amount of the overdraft. This is especially true for those customers who have incurred an overdraft fee for the first time.

On the other hand, customers who repeatedly overdraft their accounts and incur multiple overdraft fees should be well aware of the consequences of their overdrafts since incurring a fee would alert the customer far more effectively than bank disclosures. These customers consciously choose to continue to overdraft their accounts in spite of the fees incurred. Furthermore, most banks such as ours will often attempt to contact the customer to discuss other options to avoid further overdraft fees such as applying for our overdraft line of credit product.

As the Agencies note in the Proposed Rule, overdraft services allow consumers to avoid additional fees that would be charged by the merchant if the item was returned unpaid. Paying the item also prevents other adverse consequences such as the furnishing of negative information to a consumer reporting agency. Many banks such as ours also charge the same fee for returned and overdraft items. The Agencies contend that such benefits are limited to check and ACH transactions and that there are no similar benefits for ATM withdrawals and POS debit card transactions. In an apparent attempt to focus on this particular concern, the Proposed Rule requires institutions to provide consumers with the option of a "partial" opt-out for ATM and POS transactions only. However, as we mention below, a "partial" opt-out is not a reasonable or feasible option.

We acknowledge that some institutions may apply their overdraft services in a predatory manner in an attempt to maximize fee income and that there are certain types of customers that may incur an excessive amount of overdraft fees relative to their transactions. However, we strongly believe that the opt-out requirement is an overly broad and burdensome solution. Customers are provided adequate notice of the consequences of their overdrafts via the required disclosures set forth in Regulation DD and we anticipate that a majority of them would not choose to opt out if they fully understood their options.

In addition, our state law allows consumers to bring claims for unfair practices. We are very concerned that branding what is the current industry practice as an unfair or deceptive act or practice under Regulation AA would expose financial institutions to frivolous litigation—including those institutions like ours that have adopted many of the “best practices” set forth by the previous Interagency Guidance on Overdraft Protection Programs in 2005.

The Opt-Out Notice Will Cause Customer Confusion

We further believe that providing an opt-out notice will cause confusion amongst our customers. We anticipate that many customers will opt out under the impression (despite any explanations in the notice to the contrary) that they are merely avoiding overdraft fees without considering or understanding the negative impact of the non-payment of such items. We expect that many of those who initially opt out of the overdraft services will subsequently call to complain after an important item is returned and will regret their initial decision to opt out. This is especially true since our fee for returned items is the same as our overdraft fee. We also believe that the additional option of a “partial” opt-out will further increase customer confusion as many customers may not fully understand which payment methods they use for specific payments.

We further question the effectiveness of the opt-out notice. Most banks will likely provide the initial opt-out at account opening along with the existing opt-outs for affiliate sharing and affiliate marketing. This is in addition to all of the other necessary account opening disclosures, such as fee schedules and deposit rules. We find it unlikely that consumers will fully understand the consequences of the proposed opt-out when provided with the information already required.

Lastly, we offer our overdraft services as an accommodation and the payment of overdraft items is completely within the bank’s discretion. We believe that the proposed opt-out notice will lead customers to believe that the bank is obligated to pay overdraft items if they do not opt out. We anticipate that the proposed opt-out will result in a significant increase in customer complaints and confusion relating to the non-payment of items.

The Proposed “Partial” Opt-Out Is Not Technologically Feasible

The Proposed Rule appears to be primarily concerned with overdraft fees resulting from ATM and POS transactions. Likewise, we cannot think of any reason why any of our customers would knowingly opt out of the payment of checks and ACH transactions as we charge the same fee for overdrafts and returned items, and payment of these items would usually avoid additional merchant fees and other adverse consequences. However, the required “partial” opt-out focusing on ATM and POS transactions is not a technologically feasible alternative and we vigorously disagree with the Agencies’ assertion that “the benefits of providing consumers a choice regarding the transaction types for which they want to have overdrafts paid outweighs the potential programming costs associated with this requirement.”

Our current technology does not allow us to differentiate between debit card transactions and ACH or check transactions. Reprogramming our payment processing system to address this issue would be an enormous undertaking requiring hundreds, if not thousands, of programming hours. At this time, we cannot even be certain that a feasible solution can be found. We may be unable to provide a “partial” opt-out leaving our customers with only the choice of either paying all items or returning all items. Given this choice, we strongly believe that a large majority of our customers would choose to have all items paid rather than opting out. As we

discussed above, however, we believe that some customers will nevertheless opt out without fully understanding the consequences only to later complain when an important item is not paid.

Similarly, we cannot differentiate between POS debit card transactions and recurring payment transactions using debit cards. Many of our customers use their debit cards to make recurring payments for important items such as utility bills and insurance premium payments. Like payments of checks and ACH transactions, we anticipate that most of our customers would prefer to have all such debit card transactions paid rather than have their recurring payment items returned.

Therefore, as we mention above, we do not believe that the proposed opt-out requirement is an appropriate solution to address the Agencies' concerns regarding overdraft fees. Requiring all banks to isolate ATM and POS transactions as required by the "partial" opt-out requirement is not a reasonable or technologically feasible option. We further believe that if given the choice most consumers would prefer to have all items paid rather than returned, even if an overdraft fee is incurred.

Other Operational Concerns

There are many other material operational concerns that we have regarding the Proposed Rule. There are various scenarios in which a bank may be unable to identify an overdraft during the authorization process or in which a bank is not provided with the opportunity to authorize a transaction at all. In such cases, the bank may be required to pay the overdraft items without being able to confirm whether the customer has opted out from such payments. This would expose the bank to potential losses without the benefit of assessing an overdraft fee. We wish to focus our attention on a couple of these scenarios.

First, when certain types of transactions are authorized, our bank currently places a temporary hold on the account funds for the authorized amounts. However, these holds are released after a specific time--often before the items are presented for payment. In the meantime, other items may be approved as sufficient funds will appear to be available until the initial item is posted to the account. In such cases, the initial item (which has already been authorized) may overdraw the account even though the customer may have opted out of such payments. Because this situation can occur even where the actual purchase amount does not exceed the authorized amount, we did not believe the exception in Section 226.32(a)(3)(i) would apply. Attempting to address this situation would likely require major changes to our payment processing system.

Second, there are various instances where the bank is required to pay certain items overdrawing an account regardless of whether the customer opted out of the payment of such items. For example, where our debit card system is down, MasterCard may automatically authorize certain transactions in accordance with "stand-in" procedures and based on specific limits. In such cases, the transaction would proceed without the bank's authorization and irrespective of a customer's opt-out. As a result, the bank would be required to pay such items but would be unable to charge an appropriate fee. Such a result is unfair to the bank which must bear the risk of payment without any corresponding benefit to the bank.

Similar stand-in limits are also provided to merchants allowing them to authorize payments up to a certain amount if they are unable to reach the bank for authorization. These transactions may overdraw an account, but must be paid. In such cases, the bank may again be required to pay an item without the ability to confirm whether the customer has opted out of such payments. If the Agencies decide to proceed with the opt-out requirement, we recommend that exceptions be added to include these types of situations where a transaction proceeds without the bank's authorization (such that the bank is unable to confirm whether a customer has opted out).

If banks are unable to assess overdraft fees in situations similar to those described above, they may be faced with increasing potential losses with no offsetting benefit. Most banks such as ours presently assess the risk of potential losses in crafting their overdraft policies and determining which items to pay or return for various customers. If banks are increasingly exposed to potential losses from paying items on behalf of customers who have opted out of such payments (and who cannot be assessed an overdraft fee), they will likely need to reassess how they provide such services and may then need to limit the types of services available to their customers. This may result in fewer options for consumers.

Transaction Clearing Processes

The Agencies have solicited comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a consumer's account. We are opposed to the imposition of any uniform requirements regarding payment order. While some banks may adopt payment practices designed to unfairly manipulate and maximize overdraft fees, we do not. First Hawaiian Bank applies a specific payment procedure based first on the type of transaction (e.g., ATM withdrawals, ACH, check, etc.).

Adopting a uniform rule regarding payment order will have a significant impact on all banks, not only those guilty of abusive practices. Changing our payment order would require substantial system and operation changes at a significant expense.

Effective Date

The proposed changes would require substantial programming changes of many bank systems and would impact several areas of the bank. Therefore, if the Agencies insist on imposing these requirements on financial institutions, they should allow for a longer implementation period. We recommend an implementation period of at least eighteen months.

Conclusion

Insured depository institutions such as ours generally hold a prominent and visible position in their respective communities and rely on their goodwill and public trust to attract and keep their customers. Consequently, it is in the best interest of these institutions to avoid abusive practices and the reputation risks that would accompany them. First Hawaiian Bank will be celebrating the bank's 150th year anniversary later this month and is the oldest and largest bank in the State of Hawaii. We rely heavily on our customer relationships and customer satisfaction. We provide our overdraft services in a responsible manner to the benefit of most of our customers. While we do impose a fee for the service, most of our customers nevertheless appreciate our payment of the overdraft items. We also waive overdraft fees in many instances where they may be inappropriate.

While there may be some institutions that utilize abusive practices to maximize overdraft fees and some customers who are negatively impacted by the provision of such services, we do not believe that requiring all banks to adopt the proposed full and partial opt-outs is an appropriate solution or that the stated benefits justify the substantial burden and expense necessary to implement the requirements set forth in the Proposed Rule. In addition, there are many technological and operational issues that should be addressed before imposing such requirements.

We respectfully urge the Agencies to consider our abovementioned concerns and those of the banking industry before finalizing any changes to Regulation AA. The Proposed Rule would have a considerable adverse impact on all financial institutions, regardless of their existing practices. While we fully support the goals of the Agencies to protect consumers from predatory practices, we urge the Agencies to allow financial institutions such as ours that do not engage in such practices the flexibility to maintain compliance without incurring undue costs and expenses. If the proposed changes result in substantial implementation and operational costs, it will become more difficult for financial institutions to continue to provide financial services at an affordable cost to their customers and much of these costs may eventually be passed on to consumers.

Thank you for consideration of our comments. If you have any questions or would like additional information, please feel free to contact the undersigned at 808-844-3663.

Sincerely,

FIRST HAWAIIAN BANK



Joyce W. Borthwick
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