

From: "Penny Powlas" <ppowlas@tnbankers.org> on 08/04/2008 10:30:05 AM

Subject: Regulation AA

Tennessee Bankers Association

August 4, 2008

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave, NW
Washington, DC 20551

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

RE: Board Docket No. R-1314; OTS Docket No. OTS-2008-0004; Unfair or Deceptive Acts or Practices (UDAP Proposal)

Ladies and Gentlemen:

On behalf of the 235 commercial and savings banks in the State of Tennessee, the Tennessee Bankers Association appreciates the opportunity to provide comments on the rule proposed by the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration covering unfair or deceptive acts or practices (UDAP) involving overdraft protection services fees. We would urge the board and OTS to withdraw the current overdraft protection proposal from consideration under UDAP and to revise the proposal to provide simple but adequate disclosures under Reg DD.

Since adoption of the Uniform Commercial Code beginning in 1962, states have always allocated responsibilities for checks and other payments between banks and their customers. This allocation stems from a longstanding historical basis that it is an individual's responsibility to make payments with knowledge of whether or not funds are available. In fact, Tennessee, like many other states, makes writing a check without adequate funds a crime. For amounts over \$500, writing a check without sufficient funds is a felony (TCA 39-14-121). Fraudulent use of a debit or credit card is similarly prohibited (TCA 39-14-118 and 119).

The Uniform Commercial Code and banks' historical practices have also always allowed a bank discretion to make payments on checks that would otherwise be treated as crimes as an accommodation to the customer. Overdraft protection programs are a more formalized evolution of this historic and commonly accepted practice in a way that is designed to assure that the program is not based on discrimination; or would potentially violate anti-discrimination laws while at the same time avoid requiring every customer to go through a loan underwriting process which many customers may not meet.

Overdraft protection programs in essence are an attempt to balance the competing desire of a bank to accommodate its customer in a non-discriminatory and efficient manner that helps the customer avoid other more severe consequences, including criminal prosecution, additional expense for recovering or making restitution, or embarrassment for denied transactions. For this service and the additional risk a bank incurs by making payments when funds are not otherwise available, the bank is and should be entitled to collect a reasonable fee.

Making certain aspects of an overdraft protection program an unfair and deceptive act fundamentally shifts the balance in a bank/customer relationship by permitting customers to avoid their inherent responsibility and creating significant operational and technical hurdles that are unmanageable and unworkable.

The Interagency Guidelines adopted in 2005 on overdraft protection programs provide an adequate and sufficient baseline for banks to provide this service with reasonable protection to their customers. There has been little evidence that banks are not already complying with these guidelines and consumer disclosures. Additional regulation and specific requirements are not needed in this area.

Most banks adhere to the industry practice of allowing their customers to opt out of the program. Adopting a more simplified rule of allowing a customer to opt out is less objectionable but may not be necessary. Allowing customers to opt out of some or all portions of the program, such as debit and ACH transactions, or to allow customer discretion in the types of items that should or should not be included is both unworkable and unreasonable. While a bank is an agent of the customer in making payments, the customer has ultimate responsibility to assure that adequate funds are in the account at the time the transaction is initiated. The bank is not in the position to accommodate individual decisions by every customer regarding when and what types of transactions should or should not be included in an overdraft program. Allowing customers to opt out of a program regarding debit hold or ACH transactions is particularly problematic since these are not currently distinguishable from an operational standpoint.

Debit holds are a needed practice to ensure that a bank can maintain its own safety and soundness. These holds are used when a customer initiates a transaction, mostly at gasoline stations, and for their own convenience when the actual transaction amount is not known. Customers that are concerned with debit holds can alternatively wait until a

sale is completed before making final payment or withdraw funds from an ATM for a much smaller or no fee to pay in cash. In addition, Tennessee, like many other states has enacted state legislation which requires the merchant who initiates the debit hold (not the bank) to provide notice to the customer that holds will be in place (TCA 47-18-128). Attempting to separate debit from other transactions is simply unworkable.

Transaction Clearing Practices. The agencies have not proposed regulations but have requested comments on the order of payments. Tennessee's Uniform Commercial Code, like many in other states, authorizes banks to make payment in any order convenient to the bank (TCA 47-4-303). This section allows banks to operate with different systems and to make payments based upon timing of receipt of transactions during a day rather than having a set formula such as suggested in the proposal of "requiring institutions to pay smaller dollar items before large dollar items when received on the same day." Requiring such an order has the perception that it would be a consumer benefit by potentially reducing the number of overdraft fees. At the same time, this would mean that larger dollar transactions would be rejected. This would result in payments such as mortgages or other large dollar items not being made. Customers would potentially incur more significant penalties for such a default including defaulting on a mortgage. As noted above, a payment in excess of \$500 which is made without sufficient funds is a felony. The simple question is would a customer rather commit a series of relatively minor misdemeanors or a felony for payment defaults.

Requiring a customer to affirmatively opt into an alternative payment system is simply unworkable. Providing a meaningful disclosure for the customer to accept an alternative or multiple alternatives and understand the potential consequences is an effort in futility.

Disclosure of terms and conditions of financial transactions is an essential and meaningful part of the banking business. However, it is unfortunate that the detail of such disclosures has become so overburdening to the banking business that it has become incomprehensible to most customers. Adding to this disclosure burden in the very complex and detailed ways proposed by the agencies needs a top to bottom review. Providing a system for more simplified disclosures that are accessible to customers who desire them would be a more effective approach and should be considered by the agencies.

Sincerely,

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Senior Vice President and General Counsel

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