



August 4, 2008

By Email and Overnight Delivery

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street 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: BOARD Docket No. R-1314; OTS Docket No. OTS-2008-0004; Unfair or Deceptive Practices; 73 Federal Register 28904; May 19, 2008

Dear Ladies and Gentlemen:

The National Bankers Association ("NBA") was founded in 1927 to, among other roles, serve as an advocate for the nation's minority banks on legislative and regulatory matters concerning and affecting our members and the communities they serve. The NBA represents African-American, Hispanic, Asian, Native American and women-owned depository institutions across the country and in two territories. These approximately 200 depository institutions, in the aggregate, have assets in excess of \$200 billion and service over 100 million depositors. Our institutions generally serve distressed communities plagued by many social and economic problems and are deeply committed to financing and supporting community and economic development activities in neighborhoods that often have little or no access to alternative financial services.

NBA members are concerned about the rule proposed by the Federal Reserve Board (the "FRB"), the Office of Thrift Supervision (the "OTS") and the National Credit Union Administration (the "NCUA") covering Unfair or Deceptive Acts or Practices (the "UDAP Proposal") involving overdraft protection service fees. The NBA appreciates the opportunity to provide input on the UDAP Proposal. Section I of this letter provides context for the concerns of NBA members. The remaining sections address some of the more specific issues arising out of the UDAP Proposal.

I. GENERAL COMMENTS

The FRB, the OTS, and the NCUA are proposing to exercise their authority under section 5(a) of the Federal Trade Commission Act to prohibit unfair or deceptive acts or practices. The UDAP Proposal would prohibit institutions from engaging in certain acts or practices in connection with consumer credit card accounts and overdraft services for deposit accounts. The UDAP Proposal evolved from the FRB's June 2007 Notice of Proposed Rule under the Truth in Lending Act and the OTS's August 2007 Advance Notice of Proposed Rulemaking under the Federal Trade Commission Act. Although the UDAP Proposal covers credit card practices and overdraft service fees, these comments are specific to the concern of NBA member banks, which is overdraft practices.

Minority banks are critical financial intermediaries that serve as a beacon of hope to underserved minority and socially and economically disadvantaged residents. The NBA's members serve communities that are quite unique and different than those served by non-minority institutions in terms of their social and economic makeup. Persons in these communities are often low-to-moderate income, possibly with irregular income streams, and little access to mainstream sources of credit, making them particularly vulnerable to inadvertent overdrafts of their accounts. Without access to flexible overdraft accommodations, many of customers of minority banks would become unbanked or forced to turn to predatory groups, such as payday lenders or check cashers. Given these circumstances, it is critical, particularly in today's uncertain economic time, that any proposed rulemaking be considered in light of the vital role that minority banks play in distressed communities and the impact of the UDAP Proposal on the ability of minority banks to fulfill their missions of serving the financial needs of their communities.

II. THE BANKING INDUSTRY HAS ACTED IN THE BEST INTERESTS OF ITS CUSTOMERS BY MAKING OVERDRAFT ACCOMMODATIONS AVAILABLE

Bank overdraft accommodation programs are generally successful because they provide a desirable back-up for customer payment decisions. In particular, NBA member customers value and expect overdraft accommodations. They value the ability to avoid the embarrassment, hassle and cost of having a check bounce or a transaction denied.

Covering overdrafts is less costly to customers than the alternative of refusing payment and returning items. The return of a payment usually means that the customer pays additional fees charged by the person receiving the payment. If checks are returned, payment recipients may be less willing to accept checks from those customers in the future. In addition, customers face potential criminal action in some states for hot check writing or risk having adverse information reported to a credit bureau or a "bad check" database. Indeed, many unbanked persons don't qualify for conventional bank accounts because of past "problems" that these persons have had with the banking system. Often these individuals are unfairly denied access to bank accounts because of occasional inadvertent overdrafts. Records of such incidences may be kept on an individual's record for years, during which time these individuals are unable to open a conventional bank account at most banks, thrifts and credit unions. While some individuals

undoubtedly do pose significant risks as account owners, many could readily and responsibly use bank accounts had they had access to overdraft accommodations.

In most cases, the customer initiating a payment transaction wants to complete it and appreciates the bank paying it, even if there are insufficient funds. A recent survey by the American Bankers Association found that of the 20 percent of consumers who had paid an overdraft fee in the last year, 85 percent were glad their bank did so.¹ The Center For Responsible Lending in its January 2007 survey showed a similar attitude among consumers: Over 92 percent, when asked, said they would like the bank to pay it and were willing to pay something for it. It is also typically the case that even with the bank's fee, the costs of rejecting the transaction and returning the check – including the inconvenience, embarrassment, and fees charged by the merchant or payment recipient – is greater.

Overdraft accommodation programs also permit most banks to bundle a wide array of services and provide them at no charge to customers. Most significantly, the free checking account product has allowed banks to bring traditional banking services to individuals who are previously unbanked or underbanked. In turn, this allows those new bank customers to avoid the extremely high fees of check cashers and pay-day lenders.

III. OVERDRAFT ACCOMMODATION FEES ARE NOT UNFAIR TO CONSUMERS

The UDAP Proposal is based upon the inaccurate premise that overdraft accommodation fees are unfair to customers. The UDAP Proposal asserts that customers are not provided with sufficient notice of overdraft accommodation fees or a reasonable opportunity to opt-out. The NBA respectfully contends that the opposite is true.

Overdraft accommodation fees can be reasonably avoided by the depositor simply through responsible account management. Customers always have the option of keeping track of their account transactions and not overdrawing their accounts. Recognizing this fact, the Federal Financial Institutions Examination Council reiterated the importance of personal financial management in the Interagency consumer resource brochure "Protecting Yourself from Overdraft and Bounced-Check Fees." In fact, the brochure describes nine different ways to avoid such fees.

Most troubling is the analytical underpinnings of the UDAP Proposal's assertion that customers cannot be expected to know with perfect certainty their precise account balance at all times and consequently should be absolved from responsibility for managing their accounts or conducting their transactions. Virtually all banks now offer at least some level of on-line banking and voice response systems. Thus, customers have easy access to several methods for checking their statements and their balances on a regular basis. Paper statements have forms on the reverse of the statement to facilitate and make easy the reconciliation of the statement for the customer.

¹ See ABA Overdraft Fee Study, Ipsos U.S. Express Telephone Omnibus, (July 11-13, 2008).

Customers who find it challenging to consistently manage their accounts and avoid overdrafts have a variety of other options available to them such as maintaining a cushion in the account to cover transactions they may not have properly recorded or arranging for automatic transfers from a linked savings account or credit card. Customers may also request that customized balance alerts be sent to them electronically to warn them when their balances fall below a certain level. In short, there are many aids provided to customers to help them keep up with their account balances and thus avoid an overdraft situation, but it is clear that a customer must exercise a certain level of personal responsibility to manage a bank account.

When overdrafts do occur, the fees themselves are not unreasonable. As part of their mission to promote economic growth and stability in distressed communities, minority banks strive to keep all fees low for their customers. However, it would be unsafe and unsound for any bank to assume the risks of overdraft accommodations without appropriate compensation. Moreover, customers know in advance what the costs are of overdrawing an account. They are made fully aware of the fees they will incur in the event of an overdraft. Fees for overdraft accommodations are in account agreements and new customers are informed of such fees along with any maintenance and insufficient funds fees at account opening as mandated by Regulation DD (Truth-In-Savings Act).

Minority banks, along with the banking industry as a whole, have developed programs that allow them to provide overdraft accommodation programs to customers on safe and sound terms. Regulation DD and regulatory guidance already requires that banks follow responsible overdraft protection practices. In 2005, federal banking agencies adopted the "Overdraft Protection Program Guidance" that addresses the legal and safety and soundness issues of and best practices for overdraft accommodation programs. Thus, banks have established overdraft protection practices that ensure that such programs are beneficial to customers and safe for the bank. For example, banks only offer overdraft accommodations on a discretionary basis, based on the historical activity of the account and the likelihood that the accountholder will cover the overdraft. In addition, banks monitor for misuse and notify customers of other available options for managing their accounts.

IV. UDAP AND PROPOSAL ON CONSUMER'S RIGHT TO OPT-OUT

The UDAP Proposal would prohibit banks from imposing a fee for paying an overdraft unless the bank has provided the consumer with an advanced or continuing opportunity to opt-out of the payment of overdrafts and the consumer has not done so. The opt-out right would apply to all transaction types. Banks also would be required to provide consumers a partial opt-out for overdrafts resulting from ATM and point-of-sale transactions. The NBA does not believe that any changes to the current opt-out rights are needed.

In the February 2005 overdraft guidance, the Federal Deposit Insurance Corporation, the FRB, the Office of the Comptroller of the Currency, the OTS and the NCUA recommended as a best practice that institutions should obtain a consumer's affirmative consent to receive overdraft protection. Alternatively, where the consumer is automatically enrolled in overdraft protection,

these agencies stated that institutions should provide consumers the opportunity to opt-out of the overdraft program and provide a clear consumer disclosure of this option. Based upon this guidance, it is clear that the opt-out disclosure should be given either at the time the account is opened or at the time the overdraft courtesy is extended to the customer, whichever is later. The opt-out notice should not be required on periodic statements or at any other time in the life of the bank/customer relationship. This would be very costly to the institutions and could result in perverse selection. The consumer who has just been charged an NSF fee may erroneously believe that by opting out he or she will no longer be assessed this charge. In fact, that same fee will be assessed but the item will not be paid. Thus, the opt-out notice at that time is likely to lead the consumer to a decision that is not in their best interest.

The NBA also asserts that banks should not be required to provide consumers a partial opt-out for overdrafts resulting from ATM and point-of-sale transactions. Neither hardware nor software solutions are readily available or feasible to permit consumers to “opt-out” of transactions at certain ATMs or at point-of-sale when using debit cards. Banks that allow customers to opt-out of having overdrafts paid are only able to provide an opt-out on an all-or-nothing basis. Within the limits of their systems, overdrafts from all payment channels are returned or denied. Mandating partial opt-outs for debit card transactions, including ATM cards, or requiring institutions to implement expensive (and currently unavailable) technology to permit consumers to opt-out of individual transactions at point-of-sale will be another regulatory cost that will increase in relative terms for smaller institutions like minority banks. The cost differential could be so significant that minority banks and other small institutions will be forced to decline to offer customers overdraft accommodations rather than carry the costs of an expensive multi-option program. This will undermine the mission of minority banks who use overdraft programs to help service the needs of low-to-moderate income communities.

It is apparent that that UDAP Proposal concerns really revolve around debit card transactions—a purely electronic payment systems issue. Regulation E affords the ability to address all of the relevant debit card concerns and to reach beyond the banks themselves to the merchants that are a necessary part of any effective process. Using the UDAP Proposal instead of Regulation E undermines the continuity of electronic transactions law and needlessly divides the law that governs such payments into more dispersed authorities that complicate achieving coordinated policy, uniform rules and consistent enforcement.

V. UDAP AND PROPOSAL ON DEBIT HOLDS

The UDAP Proposal would prohibit banks from imposing a fee when the account is overdrawn solely because a hold was placed on funds in the consumer’s deposit account. This can occur where the final dollar amount of the transaction was not known in advance (for example, when a consumer purchases fuel at the pump, a hold is placed for the estimated amount of fuel that will be purchased). Federal banking agencies are concerned that consumers unfamiliar with debit hold practices may inadvertently incur considerable overdraft fees on the assumption that the available funds in their account will only be reduced by the actual purchase amount. However, the key players in the debit hold story, card systems and merchants, are not encompassed by the

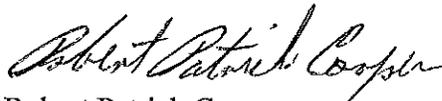
current reach of the proposal. Thus, the UDAP Proposal will not effectively address these concerns. In addition, such concerns may soon be moot. Recent changes by Visa to processing options for fuel merchants will reduce the time between authorization and clearance. This process will allow any holds to be cleared within two hours. This fast turnaround will enable many banks to decide not to place a hold on automated fuel dispenser transactions in view of the fact that a final transaction message will be transmitted in a known short time frame thereby minimizing risk exposure.

VI. CONCLUSIONS

NBA member banks exist because they are sensitive to the unique needs of consumers, especially those in low-to-moderate income neighborhoods whose financial acumen is minimal. Therefore, we strongly believe in the need to protect such consumers, a mission that is fully aligned with that of the FRB, the OTS and the NCUA. However, the NBA must caution that in an attempt to provide more protection to consumers, adoption of the UDAP Proposal would in fact bind the hands of minority banks. By burdening a useful and popular bank service with increased compliance costs, unnecessary new controls, forms and procedures, the UDAP Proposal will only serve to raise the costs of or eliminate such services without improving the consumer's welfare.

We appreciate the opportunity to provide comments on the UDAP Proposal. If you have any questions, please feel free to contact me at 617-457-4415 or Evonne Holliday, Special Assistant to the NBA at (202) 588-5432.

Very truly yours,



Robert Patrick Cooper
Chairman-Elect
National Bankers Association