

Rabobank, N.A.



Rabobank

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August 4, 2008

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(By electronic delivery)

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th St. and Constitution Avenue, NW.
Washington, DC 20551
regs.comments@federalreserve.gov¹

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

Ladies and Gentlemen:

Rabobank, N.A. provides these comments on the rule proposed by the Federal Reserve Board (Board), the Office of Thrift Supervision (OTS) and the National Credit Union Administration (NCUA) covering Unfair or Deceptive Acts or Practices (UDAP) involving overdraft protection service fees.

Rabobank, N.A. (the Bank or RNA) is located in the state of California. It has over 80 offices located throughout the southern, central, and northern portions of the state. RNA's assets as of 12/31/07 totaled in excess of 8 billion dollars. Our customer base is comprised of primarily small-to-medium size businesses. We also provide standard retail banking services to consumers. The Bank has a total of approximately 1736 employees. We do not actively market a 'bounce protection' or overdraft service.

In our opinion the Banks' mainstream overdraft accommodation practices should not be targeted by the federal banking agencies' proposed rule intended to define unfair or deceptive acts or practices under the Federal Trade Commission Act.

We believe that our overdraft accommodation practices do not trip the standards that should be applied for determining when banking behavior is unfair under the FTCA, and for that reason alone the proposal should be withdrawn, or certainly not pursued within the UDAP context.



Additionally, what is most troubling is the proposal's assertion that customers cannot be expected to know with perfect certainty their precise account balance at all times, and therefore they should be absolved from responsibility for managing their accounts or conducting their transactions. If this expectation becomes the general basis for future rulemaking then it threatens to impact adversely virtually all banking fees and payment obligations dependent on customer behavior.

We have further outlined other key points below for your consideration.

Overdraft accommodation is a customer friendly practice for banks to offer that is financially sound.

- Banks have always exercised discretion to cover overdrafts for responsible customers—today we have developed safe and sound risk-based programs that extend that accommodation to virtually all our customers. But neither customers nor regulators should lose sight of the fact that our technology-based program is an accommodation based on the bank's exercise of risk-based discretion—there is not a contract to pay overdrafts.
- The reason our bank makes money on this program is not because people go away unhappy, but because our customers see real value when the bank stands behind their payment decision. They recognize that the fee is the known price to pay for that accommodation.

Overdraft fees can be reasonably avoided and are not unfair when assessed without a formal advance notice opt-out.

- Fees for covering overdrafts are in the account agreement and new customers are made aware of these fees as well as any maintenance fees and NSF fees at account opening. In other words, they know in advance what the rules and the costs are for overdrawing an account—all without a formal opt-out notice.
- Customers understand that it is their responsibility to balance their accounts—and the fees provide both an incentive to do so and a user charge when they inadvertently fail to do so. Overdraft fees are not injurious—they are the price for bank accommodation in fulfilling a payment choice, rather than denying a transaction.
- In many instances, our customers are saved from paying merchant fees for refused items and avoid being identified as unreliable



- payors by community merchants because we provide them this accommodation. Writing bad checks is still a crime in our state.
- Customers know that by good account management overdraft is avoidable—and they demonstrate month after month that they can do so and most of our customers make it through the year without a single overdraft. This is true for debit card users too.
 - Customers who overdraw periodically are aware of the consequences of their conduct and are acting in accordance with their preferences given that awareness. They do not need repeated notice that they can opt-out of the convenience they are choosing to accept—assessment of the fee is what gets their attention. We are always available (and make a point of reaching out) to work with customers who would benefit from alternatives for managing their transaction activity.

In any notice required (or provided as a safe harbor) under Regulation DD (Truth-In-Savings), the language used must not confuse customers into thinking that overdraft accommodation is a contractual obligation of the bank to provide, rather than being the exercise of bank discretion.

Payment clearance practices—whether for debit holds or payment items generally—are complex and vary widely across the industry, but are driven by system efficiency and sound risk management and do not constitute unfairness to customers.

- Merchant and bank practices on debit holds are in flux. Many merchants in the hospitality industry alert customers that holds may be put on accounts if they use a debit card at check in. Card system rules are evolving to address authorizations for gasoline purchases at the pump to make them virtually real-time.
- Restricting when banks can charge fees for overdrafts caused by debit card authorizations changes the nature of the risk management decision for banks because it impacts whether banks will be properly compensated for intermediate transactions that settle “out of funds” while the authorized transaction is in transit. This is a significant countervailing safety and soundness benefit to the assertion that overdrafts caused by holds are unfair.
- Overdraft fees are calculated based on following clearance systems designed to provide payment processing efficiencies that reflect technical capabilities and the varied risks banks face for handling different payment channels. These systems, and the clearance



order they generate, change as technological advances occur, as payment channel mix alters to capture customer usage trends and as legal liabilities evolve. They are not manipulated to generate overdraft fees. It would be impossible to give individual customers the right to alter the bank's clearance process. In addition, many of these clearance processes are too complex to explain in understandable terms in any consumer disclosure.

In summary, the Bank believes that the Board, the OTS, and the NCUA should proceed cautiously in establishing unfairness rules under their UDAP rule-making authority. UDAP situations are often characterized by case specific facts that defy industry-wide generalization. In exercising their FTCA Section 18(f)(1) rule-making authority, the agencies must be mindful to apply standards that properly consider the unique attributes of the banking sector and take extra care in performing their analysis, because it will have precedent setting application far beyond the particular practices at issue.

Ultimately providing overdraft accommodation is not an injury but a benefit and any associated fees are reasonably avoidable by customers exercising normal care—the kind described in Federal Reserve and Interagency consumer publications. Our customers see real value when the bank stands behind their payment decisions, and they understand that the fee is a source of compensation to the bank for that accommodation. Customers have the tools to manage their accounts and the responsibility to track their transactions. Bank overdraft accommodation is a convenience that customers who use it value and one that they can avoid if they choose by exercising common care as the vast majority of customers do every day.

In closing we ask the agencies to conclude that the banking industry's mainstream overdraft practices are not unfair to customers. We therefore recommend that any new regulatory mandates for consumer protection for debit card transactions be evaluated within the established regulatory framework for electronic transactions, funds availability, and account disclosures.

Rabobank, N.A. appreciates the opportunity to provide our comments on this significant proposal. Should there be questions regarding our comment letter, please contact me directly at (760) 337-7070.

Kind regards,



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