



August 4, 2008

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.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-2008-004; Unfair or Deceptive Acts or Practices; 73 *Federal Register* 28904; May 19, 2008 (UDAP Proposal)

Ladies and Gentlemen:

The Texas Bankers Association (TBA) 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. The Texas Bankers Association is a trade association representing 607 commercial and savings banks of all sizes and charter types operating in the State of Texas.

TBA members are concerned about the UDAP proposal as it relates to overdraft protection services for a number of reasons. First, we believe that any proposed regulation of overdraft fee practices should be pursued under Regulations E, CC and DD, which serve as the foundation of existing payment system policy. Because the Agencies promulgated the above-mentioned rules within the context of the safety and soundness obligations imposed on banks, we strongly believe that these same safety and soundness obligations must be taken into account in any proposed regulation covering overdraft protection service fees. We fear that the Agencies' extraordinary use of Section 18(f) of

Jennifer J. Johnson, Secretary
August 4, 2008
Page 2 of 3

the Federal Trade Commission Act to introduce the application of federal unfair and deceptive acts requirements on banks in the context of overdraft protection service fees fails to take these imperatives into account.

Our member banks agree in part with the legal analysis contained in the proposed rule that consumers must be provided with notice and a reasonable opportunity to opt out of an institution's overdraft service before being enrolled therein. In fact, our member banks provide this notice because they are required to do so under existing federal law. Specifically, Regulation DD mandates that all fees covering overdrafts, as well as any maintenance fees and non-sufficient funds fees, be disclosed in the account agreements all consumers sign at account opening.

However, we do not believe additional regulation in this area is needed, again because it is already covered by federal law. Furthermore, our second point of concern regarding the rule relates to the conclusion reached that "assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt out of the institution's overdraft service appears to be an unfair act or practice under 15 U.S.C. 45(n)". Under our reading of the Federal Trade Commission's Unfairness Standard codified in 15 U.S.C. 45(n), the FTC may not declare an act unfair unless: 1) it causes or is likely to cause substantial injury to consumers; 2) the injury is not reasonably avoidable by consumers themselves; and 3) the injury is not outweighed by countervailing benefits to consumers or competition.

We do not agree with the Agencies' assertion that "consumers incur substantial monetary injury due to the fees assessed in connection with the payment of overdrafts." The fees charged in connection with the payment of overdraft, which as outlined above are required to be disclosed under existing federal law, serve as both an incentive to consumers to balance their accounts and as a user charge when they fail to do so. And, as the Agencies' rightly pointed out, the payment of overdraft fees allows consumers to avoid merchant fees for a returned check or ACH transaction. We believe that the fees institutions assess when consumers overdraw their accounts in violation not only of their depository agreements but also state "hot check" laws provide consumers with benefits that substantially outweigh the costs associated therewith.

Even assuming for argument's sake that the fees charged in connection with the payment of overdrafts are injurious, we believe they are reasonably avoidable by the consumers themselves. Consumers are in the best positions to know whether they have funds in their accounts, and if, knowing that sufficient funds to cover particular purchases are not available, they continue with the transactions, they solely are at fault. To hold the bank responsible for the avoidable actions of consumers, over whom they have no control, incorrectly places institutions in the role of financial big brother.

Jennifer J. Johnson, Secretary
August 4, 2008
Page 3 of 3

Finally, we believe overdraft protection services provide countervailing benefits to consumers. These services and the programs designed to provide them are popular with our members' customers because the benefits they provide outweigh the disadvantages. Customers who do not want the benefit of the services have the option of changing account-type at their institutions or changing institutions all together. Again, the customer, not the bank, is in charge of his own financial destiny.

Meeting the needs of their customers is top priority for the Texas Bankers Association's 607 member banks and thrifts. We feel that the overdraft protection service programs our members offer provide customers taking advantage of them a valuable benefit and any fees associated with the programs are reasonably avoidable by customers exercising normal care. Additionally, we feel that the Agencies' first exercise of their rule-making authority under Section 18(f) of the FTCA for the establishment of fairness rules over an area of banking law that is already well covered by federal law and regulations is duplicative and unnecessary.

The Texas Bankers Association appreciates the opportunity to provide our comments on this significant proposal and is prepared to provide additional information for your consideration upon request.

Sincerely,



Fredrick M. (Rick) Smith
President and CEO