



*By Electronic Delivery*

July 30, 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](mailto: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

The North Dakota Bankers Association ("NDBA") appreciates this opportunity to comment upon the overdraft fee practices which the Board of Governors and Office of Thrift Supervision are proposing to classify as unfair and deceptive ("the proposed UDAP rules"). NDBA is a state trade association for commercial banks and federal savings banks. With only a handful of exceptions, NDBA members are "small" institutions. NDBA members operate more than 300 offices throughout the state of North Dakota. NDBA is deeply concerned that the adoption of the proposed UDAP rules will have unintended, unfavorable consequences for our member banks and North Dakota consumers as well.

*Charging Overdraft Accommodation Fees Is Not Unfair And Deceptive Conduct*

Frankly, we do not see accommodations by banks to cover customer overdrafts as being unfair or deceptive and strongly object to any regulatory classification to that effect. We see discretionary overdraft accommodation as benefitting customers and believe our customers feel the same way. In North Dakota, writing a checks or making an electronic funds transfer when "there are not sufficient funds in or credit with the bank, banker, or depository to meet the check, draft, electronic funds transfer, or order in full upon its authorized presentation" is a crime. N.D.C.C. 6-08-16. A bank which covers its customer's overdraft is following the payment order of its customer and saving the customer from potentially serious adverse consequences that attach to the dishonor or rejection of a transaction that overdraws the customer's account.

Customers are not naïve. Each customer knows s/he, not the bank, is responsible for managing accounts so balances cover the payment orders the customer has made. Presently, customers understand that the bank may dishonor or reject a transaction which overdraws the customer's account. Customers also know that a bank will charge a fee when there is an overdraft and have, by their embrace of overdraft accommodation service programs, evidenced their strong preference for paying a fee when an overdraft is accommodated, than for paying a fee (and more likely, multiple fees) and suffering the consequences that occur when a check is dishonored or a debit transaction is rejected.

The proposed rules appear to be heavily influenced by suggestions that overdraft accommodation programs must be unfair to overdrawn consumers because they are profitable for banks and must be founded on deception because rational consumers wouldn't overdraw their accounts if they realized the expense of that conduct. We hold a contrasting view. We think bank programs to accommodate customers who have overdrawn their accounts is a service that has value as demonstrated by customer usage and that labeling overdraft accommodation fees as being unfair and deceptive (unless they are assessed only after a formal opt out notice as provided by a maze of complex regulations) will make many North Dakota banks conclude accommodating a customer causes more trouble than it is worth. With the adoption of the proposed rules, we anticipate that many of our members will forgo discretionary accommodation in favor of dishonoring items and rejecting transactions that overdraw accounts. Frankly, we wonder what the regulatory response will be to customers' resulting frustrations and complaints that they are being "discriminated" against because the bank no longer accommodates their overdrafts.

*Formal Opt Out Provisions Are Not Necessary And Will Confuse Customers*

We are also deeply concerned that the formalized "opt out" approach (and related notice requirements and safe harbor provisions in the proposed amendments to Regulation DD) will confuse customers about the discretionary nature of bank overdraft accommodation programs and instead cause those customers who do not choose to opt out to conclude that the bank is contractually obligated to accommodate overdrafts, when that is not the case. Under current practice, banks advise customers about account terms and fees, including overdraft fees, when an account is opened. Customers know that all that is required to avoid overdraft fees is not to make payment orders that exceed the balance in the account. In North Dakota the great majority of customers decline overdraft accommodation and overdraft fees because they don't overdraw their accounts either by checks or debit transactions. The idea that a formal opt out notice is required to advise customers about overdraft fees is simply misguided.

Customers are and must remain responsible for the management of their own accounts. Customers know that overdrawing an account, even unintentionally, is conduct that results in the assessment of fees, whether the transaction is accommodated or rejected. A customer who regularly overdraws an account has chosen to pay those fees; they do not require repeated notice that they can "opt out" by not engaging in the transaction that will overdraw the account. A customer who chooses not to participate in an overdraft accommodation programs or to pay the associated fees makes that choice by tracking their account balances and not overdrawing an account, either by checks or debit transactions.

*Proposals for Partial Opt Out Are Not Workable*

The proposals to allow customers to direct a bank to pay certain types of transactions, but to reject others are not workable. A system of "partial opt outs" will also be highly confusing to customers.

It is quite clear that one factor underlying the partial opt out proposal is the hypotheses that it debit cards and vendor use of ACH as payment mechanisms have made it “too” easy for customers to make spur of the moment, unnecessary purchases and that customers can be made to be more responsible consumers by having them elect to have POS transactions or ACH transactions rejected if the purchase transaction will overdraw the customer’s account. Shifting responsibility for a customer’s behavior from the customer to the banks under the guise of UDAP regulations is not an appropriate bank regulatory purpose, no matter how well intended.

It appears that the proposals for partial opt out assume a level of technological capability that may not exist for many North Dakota banks. Frankly, we are not certain that all banks will have the ability to identify and distinguish between and among POS debit transactions, ACH transactions and transactions in which a customer has used a debit card to make recurring payment arrangements for such things as utility bills. Even if banks are able to make these distinctions and even with the use of the prescribed notice, there is a substantial risk that a bank’s customer will not recognize that a partial opt out covers all debit card transactions, not merely those that are POS transactions with the consequence that important recurring obligations could go unpaid. It might be argued that bankers can explain these details to their customers and help them to make an appropriate opt out choice. However, the safe harbors apply only if banks use the prescribed notices. Accordingly, banks would be unwise and exposing themselves to legal liability if they go beyond the notices in order to try to give more extensive explanations to customers.

The partial opt out provisions are also very likely to confuse the customer regarding the nature of the entire overdraft accommodation process because it suggests that the customer has contractual rights when the customer, in fact, does not have those rights. The likelihood of customer confusion over the opt out rights is something that must be tested before the opt out proposals are adopted.

Notwithstanding the pressure for the Board and OTS to adopt UDAP rules as the “credit crisis” has unfolded, overdraft accommodation practices that are industry standard, comply with regulatory guidance, and have been well received by customers were not and are not unfair or deceptive. Banks have not injured their customers by accommodating and paying overdrafts, customers are neither tricked nor forced to participate in accommodation programs and may avoid participation entirely by exercising normal care as described in Federal Reserve consumer publications.

As the Board and OTS evaluate the proposed rules, we strongly urge restraint and consideration of the millions and millions of consumers who have benefitted because their banks have accommodated their overdrafts and shielded them from consequences ranging from embarrassment to criminal prosecution. The proposed rules for overdraft accommodation programs are overly complex, operationally impractical and too heavy handed. We urge their withdrawal.

FRB Docket No. R-1314; OTS Docket No. OTS-2008-0004;  
July 30, 2008  
Page Four

That notwithstanding, we do believe bank customers should be fully aware of their rights and responsibilities regarding funds availability and all aspects of their various banking transactions; however, rather than casting financial institutions as “villians” and overdraft accommodation as “unfair and deceptive” the better approach to use existing agency authority under the Expedited Funds Availability Act, Regulation CC, the Electronic Funds Transfer Act and Regulation E to improve customer awareness of the transaction clearing process.

Thank you very much for your consideration of our comments.

Sincerely Yours,

NORTH DAKOTA BANKERS ASSOCIATION



Rick Clayburgh  
President and CEO



Marilyn Foss  
General Counsel