



By electronic delivery

August 1, 2008

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
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Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552
ATTN: OTS 2008-0004

To Whom It May Concern:

Re: FRB Docket No. R-1314; OTS Docket No. OTS-2008-0004
Unfair or Deceptive Acts or Practices – Proposed Rule
73 Federal Register 28904, May 19, 2008

American National Bank and Trust Company (the Bank) respectfully submits its comments to the proposed rule under Unfair or Deceptive Acts or Practices (the Proposal)¹ proposed by the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, the Agencies).

American National is a \$785 million-asset community bank headquartered in Danville, Virginia. It serves Southern and Central Virginia and the northern portion of Central North Carolina with twenty banking offices and a loan production office.

The Bank submits its comments addressing three particular aspects of the Proposal which are associated with overdraft protection services and fees. Specifically, these are 1) the requirement that institutions provide consumers with a notice and an opportunity to opt out of the payment of overdrafts before any overdraft fees or charges are imposed, 2) the proposal for a partial opt-out of ATM and debit card transactions, and 3) the prohibition of overdraft fees under certain conditions as a result of debit holds.

¹ *73 Federal Register* 28904, May 19, 2008

First, it is our belief that overdraft accommodation programs are a customer-friendly practice that is financially sound. Banks have always exercised their own discretion to pay overdrafts for good customers in appropriate circumstances. Today's overdraft protection programs extend that accommodation to a significant majority of bank customers under well-defined risk-based guidelines, but without creating an unsafe and unsound "contract" to pay.

Banks make money under such a program, not because the customer is unhappy, but because they value the bank paying an overdraft, thus standing behind their payment decision. The customer recognizes that the fee is a known price to pay for that accommodation and that it is typically less than the total cost of a returned item—which can include not only a bank NSF fee (often an amount identical to an overdraft fee), but also a merchant's returned check fee, in addition to embarrassment and loss of reputation.

Opt-Out

Overdraft fees can be reasonably avoided today and are not unfair when assessed without a formal advance notice opt-out or repeated periodic opt-out reminders. The significant majority of our customers do this regularly, month after month, by practicing good account management, without incurring a single overdraft. And when they inadvertently fail to do so, they are already aware of the consequences.

Fees for covering overdrafts are provided in our fee schedule as a part of the account agreement which is given at account opening. Any change in that fee is clearly and conspicuously disclosed in advance on periodic account statements or through direct mail notification. Therefore, our customers already know in advance what the rules and costs are for overdrawing an account, without a formal opt-out notice.

Customers who do overdraw periodically are certainly aware of the consequences and are acting in accordance with their preferences given that awareness. The Bank's current notice alerts the customer of the payment of the overdraft and the fee assessed with each occurrence. Adding repeated notices that they can opt out of the convenience they are choosing to accept is not only unnecessary, but, we suspect, will be an ineffective communication. Customers who seek alternatives for managing their transaction activity are better served by individual consultation with bank staff, as is done today.

Paying an overdraft may also save our customers not only from paying merchant fees for returned items, but also from being identified as an unreliable payer, at a minimum, since knowingly writing a bad check is still a crime in the Commonwealth of Virginia.

Ultimately, people are responsible for managing their financial affairs, and it is not unfair to expect that they do so. Today, they have more current information and tools available to do so than ever before, but it is our experience that customers want this service and demonstrate that by using it.

Partial Opt-Out

A partial opt-out covering ATMs and debit cards is neither necessary, nor operationally feasible. Our bank, as do many others, currently chooses to exclude any discretionary overdraft allowance from balances authorized for ATM or debit card transactions. Continuing this practice essentially provides the partial opt-out included in the Proposal, without a regulation that may influence the bank's freedom to offer services that are both competitive and based on what best serves its customer base.

Notwithstanding our current practice, the Bank recognizes that many of our customers use debit cards as their primary payment method, often carrying no other payment means. Additionally, they may schedule recurring payments with their debit card. In fact, statistics indicate a decline in paper checks and an increase in electronic payments, which supports the belief that the customer, in fact, expects the same treatment of debit card transactions as a paper check—including the payment of overdrafts and the assessment of a fee.

Our technology does not allow us to differentiate debit card transactions from ACH during the account posting process. Under the proposed partial opt-out, this would have the effect of not only opting out all electronic transactions, but also nonpayment of a check that is converted to an ACH POP or ARC transaction by the merchant or payment processor, contrary to the customer's choice.

Additionally, the premise that debit card transactions are always point-of-sale, i.e. in person, is false. As stated above, some customers establish recurring payments for utility bills, insurance premiums, etc., using their debit card. A partial opt-out for debit card transactions would be too broad for these customers and could result in the unintentional return of a recurring payment or a converted check.

Debit Holds

The complexity of the payment system and the need to coordinate among different parties requires that holds for intermediate transactions continue to be addressed by VISA and MasterCard rules and merchant practices.

Other Comments

Any notice required must use language that does not confuse customers into thinking that overdraft payment choices create a contractual obligation of the bank to pay overdrafts, rather than an accommodation exercised solely at the bank's discretion.

In response to the request for comments on potentially requiring banks to pay small dollar items before larger ones for the purposes of assessing overdraft fees, while allowing consumers to opt in to an alternative clearing order for the purpose of paying items, it is impossible to give individual customers the right to alter the Bank's clearing process. Any such requirement, even if technologically feasible, would, in our opinion, create mass customer confusion in reconciling paid overdrafts to assessed fees. We believe our current process of posting in check number order provides the fairest approach by replicating the order in which the customer writes checks.

Additionally, under the companion proposal for Reg DD, the restrictions on disclosing a balance in response to a customer inquiry that “solely includes funds that are available for the consumer’s immediate use or withdrawal and may not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the consumer’s account” has potential interpretation problems. Determining “available balance” is notoriously complex and any communication to customers of “available balance” should not suggest that a deposited check could not be returned or that the customer is not responsible for the amount of any returned check.

In conclusion, providing an overdraft accommodation program is not an injury but a benefit, and overdrafts are reasonably avoidable simply by customers exercising normal care in managing their accounts. American National has followed the Interagency guidance on overdraft programs issued in 2005 and believes its program is operated in a responsible and fair manner. The proposed regulatory requirements would simply impose significant system changes with the corresponding expense to the Bank, and create customer confusion with notices and opt-outs that will be difficult to explain in simplified terms all the possibilities associated with either full or partial opt-outs.

Sincerely,

Charles H. Majors
President and Chief Executive Officer

Cc: Comptroller of the Currency (regs.comments@occ.treas.gov)
Senator John Warner
Senator Jim Webb
Congressman Virgil H. Goode, Jr., 5th District