



## Colonial BancGroup<sup>SM</sup>

August 1, 2008

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Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
1700 G. Street, NW  
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Attn: OTS-2008-0004

Re: 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:

In accordance with the request for comments, Colonial Bank urges the regulators to reconsider the proposal for the reasons set forth herein and the arguments propounded by the American Bankers Association. The Proposed Rule fails to consider the value of the service and includes methods that may impact the customer by increasing the cost of banking services and merchant charges he may incur for bad checks. The agencies' imposed blanket declaration of an unfair or deceptive trade practice raises the likelihood of litigation regardless of the banking customer's ultimate accountability for their own financial affairs.

I. Customers are in the best position to manage their accounts.

Customers regularly and routinely manage their bank accounts and financial matters without the necessity of new regulatory requirements. Customers have the means and capability of managing the amount of funds in their accounts and the items that are presented for collection. Overdraft accommodation is a customer friendly practice that allows banks to accommodate the needs of good customers in assuring that items presented, which should be noted are those drawn by the customer, are timely paid. This allows the customer to stay in good stead with merchants and creditors.

Banks have long exercised the discretion to cover overdrafts for their customers. This practice is based upon safe and sound practices that allow the bank to extend the accommodation to a large number of customers. There is no requirement that the bank pay these items. Rather, it is an accommodation based upon a decision by the bank based on the risk associated therewith.

We believe that the additional regulation of overdraft accommodation to protect customers is unnecessary because:

1. Customers understand their responsibility to balance their accounts.
2. Fees for covering overdrafts are disclosed to the customer through account agreements and fee schedules. Customers know in advance that there will be fees associated with overdrawing the account.
3. Customers understand that their actions and banking practice dictate the application of an overdraft fee and that they can avoid any such fees through account management.
4. Payment of overdraft items provides a service to the customer in saving them merchant fees for returned items, the embarrassment attributed to a returned item, merchant identification as an unreliable customer, and potentially criminal charges for writing a bad check.

Most customers manage their accounts in an acceptable manner and do not incur significant overdraft or NSF charges. The Proposed Rule creates additional burdens on the banks and likely more confusion for the customer, while appearing to add no significant value.

#### II. The Proposed Rule Will Lead to Confusion for the Customer.

The Proposed Rule purports to provide the customer with two options regarding overdraft accommodation. First, the customer may opt-out of all such accommodation. Second, there is a partial opt-out. Offering a "partial opt-out" election will likely cause confusion for the customers as they attempt to relate the partial opt-out elections to actual transactions conducted every day. With numerous types of transactions available to customers it could be confusing for them to recall the various types included in a partial opt-out and the impact of their decision to the transaction that is about to be conducted. In addition, allowing a partial opt-out may give customers the false impression that the bank will automatically pay items not included in the partial opt-out although overdraft accommodation is only made at the bank's discretion.

The proposal will likely be misleading to the customer in other ways. First, the notice suggests that if the customer opts-out no payments will be made that are overdrafts. However, the Proposed Rules specifically contemplates situations in which overdrafts may still be paid despite the customer's opt-out. There is limited information suggested for these exceptions in the proposed model disclosure. Second, by opting-out, the customer will likely have the sense that his account will not be placed into overdraft status for any reason. Overdrafts may occur for a number of reasons outside of payment of items.

Chargebacks, proof corrections, fees, and reversal of unauthorized ACH credits are but a few of these reasons.

In addition, we believe that the customer may be confused by the practical impact of the opting-out. The customer may anticipate that opting-out of overdraft accommodation will save the customer fees. In reality the customer will likely be exposed to more fees. While the customer will not have an overdraft fee, the customer will still be subject to a fee for nonsufficient funds. For most banks, the amount of these fees is one and the same. In addition to the NSF fee, the customer may incur a fee from the merchant for the return of the item. Also, if the merchant seeks civil or criminal action there will be the expense of those matters as well.

Moreover, there will be an impact on a customer's daily transactions. It is not uncommon for a customer to make a deposit and perform transactions in the same day knowing that when all processing is complete that night that an overdraft will not occur. If a customer opted out of debit card transactions, the bank would need to reject any debit card transaction during the day if funds were not available, although the deposit made during the day would have covered the debit card transactions. It appears that customers will be embarrassed and inconvenienced based on the Proposed Rule.

Finally, the Rule has no room for the accommodation of customer requests. A long-standing customer may request an accommodation in a specific instance in spite of the opt-out election. The Proposed Rule would limit the bank's discretion to accommodate the customer's needs unless the opt-out election was changed. It seems impractical and inefficient to allow repetitive opt-out election changes for the purpose of handling specific requests to pay into an overdraft status.

The complexity of the Proposed Rule will likely create dissatisfied customers and increase the work effort of banks to educate their customers.

### III. The Proposed Rules Creates Additional Cost and Risk for Banks.

Given the complexity and the impact of the Proposed Rule on banks and their current practices and procedures, it is difficult to quantify the impact the proposal will have on the operations of the banks. The additional opt-out elections will require substantial system modification. Programming will have to be created to record and track any opt-out elections and the processing of transactions based upon the type of election. In addition, training and work flows will have to be altered.

Moreover, most banks operate on a "pay all" basis for evaluating daily pay and return decisions for items presented against nonsufficient funds. By using this method, the customer can view each

transaction presented against the account and clearly see the basis for any fees. The Proposed Rule would force banks to change their processing to a "pay none" basis. This would create additional time and expense in the processing and daily manual review of items. In addition, the customer's statement would not show the items that were returned. They would simply see the nonsufficient funds fee.

It should be noted that the proposal on the treatment of holds creates a significant risk to banks and thus becomes a concern from a safety, soundness, and regulatory perspective. When holds are placed on funds by a merchant under a debit card transaction these funds are authorized by the bank through its card network. Because the funds have been authorized, the bank is required to pay the transaction. It can not be returned for insufficient funds. The restriction of when banks can charge fees for overdrafts caused by such debit card authorizations changes the nature of the risk management decision by the bank. The proposed regulation shifts the risk calculation and impacts whether the banks will be properly compensated for intermediate transactions that settle while the authorized transaction is in transit for settlement. The Proposed Rule is problematic for a number of other reasons. First, our system, like most, does not distinguish between types of holds. A Regulation CC hold will read the same as a hold placed by a merchant on a card. In addition, the prohibition on the assessment of the fees would require that banks go back and analyze transactions days after the fact to determine whether or not a fee was appropriate given the hold status and ultimate settlement of the holds which can take up to three days.

#### IV. Impact On Banking Industry


In our view we have made a diligent effort to comply with the Interagency Guidelines for Overdraft Programs issued in 2005. We have acted in good faith in relying upon the Guidelines in managing our overdraft process. To characterize these approved practices as unfair and deceptive practices after such reliance would seem inequitable at best. In addition, the banking industry has long been the target of private parties seeking to challenge every industry practice. We are concerned that the Proposed Rule creates a basis to claim that prevailing industry practice approved through Interagency Guidelines is an unfair practice and will open the door for lawsuits against banks requiring enormous time and money to defend.

#### V. Conclusion

A successful bank is one that knows and meets the needs of its customers. A one size fits all regulation cannot accommodate all of those needs. The overdraft accommodation program allows a bank to meet these needs while being mindful of its risk tolerance. These programs provide a benefit to customers by allowing the customer's items to be paid without jeopardizing the reputation of our customer. The customer is well equipped to manage his affairs and can avoid any associated fees

through sound financial management of his account. Based upon our existing process, we are not sure that the Proposed Rule provides additional consumer protection and feel that it injects confusion. The cost to implement the Proposed Rule will be significant to the bank. Colonial Bank respectfully requests that the Proposed Rule be withdrawn.

Sincerely,



David B. Byrne, Jr.  
Executive Vice President &  
General Counsel  
Colonial Bank