LouisianaBankers
ASSOCIATION

August 4, 2008

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Secretary
Board of Governors of the Federal
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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-2008-0004; Unfair or Deceptive Acts or Practices; 73 Federal Register 28904; May 19, 2008 (UDAP Proposal)

Ladies and Gentlemen:

The Louisiana Bankers Association ("LBA") is pleased to submit comments on the joint rule proposal of the Federal Reserve, Office of Thrift Supervision (OTS), and National Credit Union Administration (NCUA), (collectively "the agencies") dealing with unfair or deceptive acts or practices (UDAP). If adopted the proposal would prohibit banks and credit unions from certain acts or practices involving overdraft services.

This proposal is based on the premise that assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt-out of the financial institution's overdraft services program is an unfair act or practice under prevailing law and the standards of the Federal Trade Commission ("FTC"). Specifically, the agencies apply standards from the Federal Trade Commission Act to conclude that consumers suffer monetary harm by paying a fee for a service that, without an opt-out, they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition. We strongly disagree with this assertion and oppose the proposal for the reasons detailed below.

Under prevailing law, 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 to competition.

The LBA believes that none of the above criteria are satisfied. Therefore, we believe that the current overdraft protection services offered, and procedures followed, by financial institutions do not constitute unfair or deceptive acts or practices under prevailing laws and regulations.

Substantial Consumer Injury

In the case of overdraft protection services offered by financial institutions, charging someone the same (or lower) fee for honoring a check, debit, or ACH transaction as for refusing payment when funds are not sufficient, cannot be classified as an injury to the customer. Typically, the monetary impact of an overdraft fee assessed by a financial institution is less than the combined charge of an NSF charge for refusing payment and the likely additional merchant charge for writing a bad check. It is illogical to conclude there is an "injury" when the bank's response to the consumer's action results in less total money being assessed to the customer than would be assessed in the absence of the practice. In sum, overdraft services are a benefit, not an injury.

It is worth pointing out that to calculate a "substantial injury" under the FTC law, all consumer injuries are added together. The idea of an injury is not simply the effect on one customer. Previous interagency guidance on Unfair and Deceptive Acts or Practices (UDAP) has stated that "In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction. Unwarranted health and safety risks may also support a finding of unfairness."

The LBA strongly disagrees with the assertion that current overdraft protection services and procedures implemented by financial institutions cause "substantial injury" as described above. Applicable overdraft fees are stated in the account agreement and customers are informed of these fees, along with all other applicable fees, including NSF fees, at account opening. In addition to clear disclosure of all applicable fees, customers are not coerced into opening an account or accepting overdraft protection services.

The illogical summation that paying an overdraft item is a "substantial injury" may also have the unintended consequence of creating a federal right to payment of overdrafts. For example, if a bank receives and opt-out from a customer, and then mistakenly pays the overdrafted item and charges the resulting fee, the bank may be considered to have violated the customer's federal right. This would make financial institutions vulnerable to lawsuits. We believe that such an outcome would be completely unjustified under prevailing law and practice and is not what is intended by the proposing agencies.

Injury is not reasonably avoidable

The proposal makes the untenable suggestion that consumers cannot reasonably avoid this "injury" because they do not have the "opportunity to opt out". This analysis ignores several important points:

(a) The customer can accept responsibility for knowing the balance of his own account. The entire banking system relies upon the acknowledgment that customers are responsible for managing their own banks accounts and financial affairs. Customers are in the best position to know their account balances as only they know what transactions they have recently made, including those that have not yet reached the bank or been processed.

(b) The customer can choose another bank. A specific bank does not have a monopoly or even an oligopoly on the market. There are literally thousands of banks in America that offer varying financial services. If a customer is dissatisfied with the overdraft protection policies of a particular financial institution, they have the ability to choose a financial institution that offers different overdraft protection services or an institution that does not offer overdraft protection services.

(c) As previously state, all fees charged by a bank are the result of a no pressure contract between the customer and the bank. There is no duress or pressure involved in opening a checking account. There are no high-pressure salesmen. Many banks are known for their lack of hard sell techniques, often encouraging the customer to take a brochure and consider whether they want to open an account.

(d) The consumer can chose to remit payments by means other than a bank. The customer can use cash, money orders or other methods to remit various payments.

(e) As previously mentioned, customers already have an opportunity to opt-out of overdrafts protection services when opening their account.

Injury is not outweighed by countervailing benefits to customers or competition

As stated above, no "injury" is sustained by customers through receiving overdraft protection services. However, even when assuming an "injury" occurs, there are substantial countervailing benefits to consumers when financial institutions pay overdraft transactions including:

(1) Avoiding the payment of NSF fees when an item is returned unpaid.
(2) Avoiding loss of specific credit by an individual retailer and avoiding damage to the customer's overall credit worthiness.
(3) Retention of reputation by avoiding a public display of NSF checks and avoiding the embarrassment and negative consequences of not being able to pay for certain transactions.
(4) Payment of vital payments, such as home mortgage payments and automobile loan payments.
(5) Avoiding mortgage foreclosure.
(6) Avoiding late fees that may be associated with missed payments.
(7) The ability to receive cash when desperately needed from ATM machines.

As previously mentioned, covering overdrafts is less costly to customers than the alternative of refusing payment and returning items. Paying items rather than returning those items helps customers avoid adverse credit issues and fees imposed by payment recipients.

As discussed above, overdraft programs of financial institutions should not be considered unfair under the prevailing laws and standards of the FTC. Accordingly, we believe this rule proposal should be withdrawn based on such a finding. However, assuming the agencies move forward with this proposal, we have the following comments on the substantive provisions of the proposal.

Opt-Out Provisions:

The proposal requires financial institutions to provide consumers with advance notice of their opportunity to opt-out of payment of overdrafts before the bank may assess a fee. Additionally, periodic follow up reminders of the customer's right to opt-out must be sent to the customer for each statement period in which a fee is imposed.

The proposal also requires financial institutions to allow customers to either: (1) completely opt-out of overdraft protection services so that no overdrafts are paid, or (2) partially opt out, so that the bank may pay non-debit card transactions such as ACH and checks and impose an overdraft fee, but arrange for the bank to decline POS and ATM debit card transactions that overdraw the account. Again, the stated theory for this requirement is that customers may only want overdraft protection on major payments such as mortgage or car payments, but not for small dollar debit transactions.

We are opposed to the proposed mandatory requirement that a separate opt-out notice be given every time a consumer overdrafts their account. Requiring constant notification will be overly burdensome and costly for banks, will likely cause information overload for customers, and will likely be disregarded by customers. Therefore, we don't believe requiring notice of the right to opt-out every time there is an overdraft will provide a tangible net benefit to the consumer that justifies the burden and cost on banks of continually providing such notice.

We believe the partial opt-out provisions present numerous technical and operational problems. For instance, we are hearing from many banks that it is not feasible with their current processing systems to automatically pay overdrafts for customers on certain types of transactions but not on others. Additionally, the costs associated with having this type of system capability are thought to be excessive and greatly outweigh any potential benefits of such a rule. It is also worth noting that the costs of implementing such an expensive multi-option system could force smaller institutions to stop offering overdraft protection services.

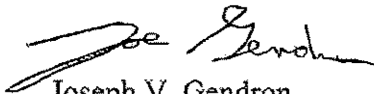
Debit Hold Provisions:

The proposal would prohibit banks from assessing overdraft fees if the overdraft is caused solely due to a hold placed on funds in an account that does not leave enough "available funds" to cover the actual purchase amount of the transaction. Overdraft fees would be permitted (assuming the customer has not otherwise opted-out) if the amount of the transaction exceeds actual funds in the account regardless of holds.

This proposal poses numerous operational challenges for banks and the compliance costs far outweigh the benefits of implementing these changes. Additionally, this part of the proposal does not consider the significant role that merchants and card networks play in debit hold transactions. Any perceived problems with the current practice of debit holds cannot simply be solved by putting the onus only on banks who are acting in a safe and sound manner.

Again, the LBA appreciates the opportunity to provide our comments on this significant proposal.

Sincerely,



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