

CENTER FOR CAPITAL MARKETS COMPETITIVENESS

OF THE

UNITED STATES CHAMBER OF COMMERCE

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August 4, 2008

Ms Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1314

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2008-0004

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
Attention: RIN 3133-AD47

Dear Federal Financial Institution Regulators:

The U.S. Chamber of Commerce is the largest business federation in the world representing more than 3 million businesses of every size, sector and region. We are pleased to have the opportunity to submit comments on the proposals by the Board of Governors of the Federal Reserve System ("Board"), the Office of Thrift Supervision and the National Credit Union Administration ("Agencies") to address unfair or deceptive acts or practices with respect to consumer credit card accounts and overdraft services for deposit accounts ("Proposals").

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The Chamber supports the Agencies' goal of preventing unfair or deceptive acts or practices with respect to credit card and deposit accounts. Nevertheless, the Chamber is concerned that aspects of the Proposals are likely to generate unnecessary litigation, increase costs to consumers who handle their accounts responsibly, and/or reduce the availability of credit to consumers, particularly consumers who are trying to enter the mainstream of the economy.

Use of Federal Trade Commission Act Authority

As an initial matter, we believe that the legal vehicle the Agencies have chosen for the Proposals will expose financial institutions to an unnecessary risk of litigation under state laws. The Proposals cite as their authority Section 18(f)(1) of the Federal Trade Commission Act, which empowers the Agencies to prescribe regulations to prevent unfair or deceptive acts or practices. The characterization of acts or practices as unfair or deceptive, and perhaps more significantly the reasoning used to arrive at that characterization, exposes financial institutions to litigation under some state laws that provide for private rights of action with respect to unfair or deceptive acts or practices. The reasoning used to find the practices covered by the Proposals unfair or deceptive may be used to support claims that other, even unrelated, practices are unfair or deceptive. Further, in a number of cases, including the Proposal on overdraft services, we do not believe that the reasoning supports finding the practices unfair. For example, consumers typically can reasonably avoid overdrafts by keeping track of their account balances. We believe that, ordinarily, regulatory requirements should be adopted under the statutory framework designed to address the particular subject matter of the regulations. For example, under this standard, for most of the practices addressed in the Proposals, we believe that the appropriate legal vehicle would be the Truth in Lending Act, which provides the Board with the authority to regulate unfair credit billing and credit card practices.

Overdraft Services

With respect to the specific Proposals, we believe that the Proposal requiring financial institutions to offer their customers the ability to opt out of overdraft services and the prohibition against imposing a charge for an overdraft that would not have occurred but for a hold placed on an account that exceeds the amount of the actual transaction, will affect by far the largest number of financial institutions.

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In recent years, financial institutions have made strides in bringing the unbanked into the banking system, in large part by offering low-cost deposit accounts. These accounts enable consumers who are climbing the economic ladder to gain experience with the banking system and, in many cases, to reduce their costs for obtaining financial services.

At the same time, a sound financial system depends on sound financial institutions and financial institutions must be able to recover costs and a reasonable return on equity. The ability to offer low-cost banking services depends on the ability to charge for individual services that are used by some customers but not others. The Agencies have singled out overdraft services for special treatment by requiring financial institutions to give individual consumers an ability to opt out of having these services be a part of the account package, apparently on the view that consumers have recently become less able to manage their deposit accounts. Regardless of the merits of this view, the likely result of curtailing financial institutions from providing overdraft services will be to increase other costs for maintaining accounts— costs which will fall on all account holders. In addition, the rejection or return of transactions is likely to increase, leading to increased costs for merchants, as well as for financial institutions.

With respect to the Proposal for the treatment of overdrafts due to holds, we understand that this Proposal is based on the concern that holds placed on deposit accounts for debit card transactions, such as the purchase of gasoline from an automated fuel dispenser, can result in holds well in excess of the amount of the actual transaction and can lead to overdrafts that would not have occurred if the actual amount of the transaction had been posted to the account. We understand that the practical problems and costs associated with reconstructing past account activity based on information on the amounts of actual transactions that is obtained at a later time are enormous. Although we recognize that so called “debit holds” can lead to inconvenience in certain cases, we also understand that the financial services industry is already taking steps to address this issue. For example, innovations, such as real time clearing for automated fuel dispenser transactions, as recently announced by Visa, have the potential to virtually eliminate holds based on these transactions, thereby radically changing the cost-benefit analysis of the debit hold Proposal.

Real-time clearing would reduce the likelihood of an overdraft due to a hold to a small fraction of the current potential, without, however, a commensurate reduction in the costs to develop systems to deal with those overdrafts due holds that do occur.

Credit Cards

Repricing

With respect to credit cards, we are concerned that the prohibition against applying increases in rates to existing balances will result in fundamental changes in the way that credit card accounts are priced. Currently, credit card accounts can be offered to classes of consumers that include a higher than usual percentage of consumers who will ultimately not be able to repay their balances, but at rates that do not fully reflect the loss rate for the class. As these cardholders begin to exhibit characteristics that evidence a higher level of risk, they can be repriced, either because the higher-risk behavior constitutes a default under the agreement or by means of a change in terms, to cover the potential that the consumer's account balance will not be paid. The Proposals would limit these price changes to circumstances where an account is at least 30 days past due. This limited exception would only allow repricing in circumstances where the rate required to recover the increased likelihood of loss on that class of accounts would be prohibitive. Put another way, there is no benefit in repricing the accounts of cardholders who do not pay their obligations. Without the ability to reprice these accounts, credit card issuers will be required to charge higher rates or fees or to restrict the availability of credit or both.

Payment Allocation

We are also concerned that the Proposals that would require allocating payments to balances on accounts that are subject to different rates of interest pursuant to specified formulae that artificially avoid allocating payments to promotional balances will lead to a reduction in the availability of low-rate promotional offers. These offers provide opportunities for cardholders to enjoy significant savings and, in practice, provide significant savings to many cardholders. The Proposals are likely to result in more rigid pricing of credit card accounts that takes choices out of the hands of cardholders to the detriment of cardholders who manage their accounts effectively.

Time to Pay

The Proposals would, in effect, require credit card issuers to provide statements to their cardholders 21 days before the date on which the account will be treated as late for any purpose other than for grace period purposes. The Proposals are inconsistent with the current statutory requirement for grace periods that requires that statements be provided at least 14 days prior to the date specified in the statement in order to avoid a finance charge. The creation of two separate due dates is likely to confuse consumers and be costly to implement. At the same time, we are not aware of any evidence that the mail service and consumers' decision-making processes have changed materially since the 14-day provision was adopted in 1974. To the contrary, new payment methods and electronic statements allow many consumers to avoid the use of the mails either to receive statements or to make payments or both.

Credit Account Fees

Finally, the Proposals would prohibit financial institutions from posting to a consumer credit card account security deposits and fees if the charges assessed to the account during the first 12 months exceed 50 percent of the credit limit for the account. Charges in excess of 25 percent of the credit limit must be spread over the first year that the account is open. From a practical standpoint, the Agencies are proposing to prohibit higher-cost credit card transactions primarily, if not solely, because they are higher-cost. Although higher-cost, comparatively small-dollar consumer credit has often been characterized as taking advantage of consumers, it has persisted despite strong legislative and regulatory scrutiny because it performs a vital function of providing funds to consumers who need those funds to meet life's emergencies.

Where legitimate access to this credit is restricted, credit is often obtained from illegitimate sources. In addition, providing credit to these borrowers in need of funds by means of credit cards helps educate these borrowers as to the operation of an important financial tool and enables them to develop credit histories that help them graduate to lower-cost financial products.

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For the reasons stated above, we urge the Agencies to reconsider these Proposals and to formulate less prescriptive means of addressing their concerns through the legal channels specifically established to address these issues. Thank you for your consideration of our views. Do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "DAVID HIRSCHMANN". The signature is written in a cursive, slightly stylized font.

David T. Hirschmann
President and Chief Executive Officer
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce