

August 4, 2008

Regulation Comments, Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Ref: OTS-2008-0004

Dear Sir or Madam:

Branch Banking and Trust Company and its affiliated banks and subsidiaries of BB&T Corporation (BB&T) appreciate the opportunity to comment on the Office of Thrift Supervision's (OTS) proposed rules issued pursuant to its authority under the Federal Trade Commission Act.

BB&T, with more than \$136 billion in assets, is the nation's 14th largest financial holding company and operates nearly 1,500 financial centers in the Carolinas, Virginia, Maryland, West Virginia, Kentucky, Tennessee, Georgia, Florida, Alabama, Indiana and Washington, D.C.

BB&T is a strong advocate of thorough, complete and effective disclosures of deposit and credit card account terms, conditions, finance charges and fees that assist consumers in making informed choices about financial products and services. We also believe in providing consumers with convenient access to current account and transaction information that allows them to manage their accounts and finances effectively. Finally, we do not condone or engage in practices that are unfair or deceptive to our clients.

For these reasons, BB&T supports a number of the OTS's proposals prohibiting practices that BB&T does not engage in or requiring certain consumer rights that BB&T has provided to its clients for a number of years. The provisions include:

Credit Cards

- A prohibition on treating a payment as late unless the consumer has been provided a reasonable amount of time to make that payment, with a safe harbor for banks that send periodic statements at least 21 days prior to the due date
- A prohibition on "two-cycle billing", where finance charges are imposed based on balances on days in billing cycles preceding the most recent billing cycle

- A prohibition on banks financing security deposits and fees for credit availability if charges assessed during the first twelve months would exceed 50 percent of the initial credit limit, and a requirement that financed security deposits and fees exceeding 25 percent of the initial credit limit be spread over the first year
- A prohibition on fees assessed when an account's credit limit is exceeded solely because a hold was placed on available credit
- A requirement that banks making firm offers of credit advertising multiple APRs or credit limits disclose the factors that determine whether a consumer will qualify for the lowest APR and highest credit limit advertised, so long as those factors are not considered proprietary information

Overdraft Services

- A prohibition on banks imposing a fee for paying an overdraft unless the bank has provided the consumer with an opportunity to opt out of the payment of overdrafts caused by any type of transaction and the consumer has not done so

BB&T has serious concerns about other provisions of the OTS's proposal for a variety of reasons, including the likely negative impact on consumers of some provisions, implementation costs that would far outweigh any potential benefits, requirements that are not technically or practically feasible, and the categorization of certain longstanding and accepted industry practices as being unfair or deceptive. The specific provisions and our reasons for opposing them are listed below.

Credit Cards

- A requirement, for accounts with multiple APRs applicable to different balances, that banks apply credit card payments amounts in excess of the minimum payment amount using one of the following methods:
 - To the balance with the highest APR
 - Split equally among the balances
 - Split pro rata among the balances
 - Other methods at least as beneficial to the consumer
- A requirement, for accounts with discounted promotional rates or deferred interest balances, that payments amounts in excess of the minimum payment amount be credited first to non-discounted and non-deferred balances
- A prohibition on denying consumers a grace period on purchases (if one is offered) solely because the consumer has not paid off a promotional discounted rate or deferred interest balance

BB&T believes that credit card disclosures should clearly describe the methods in which excess payment amounts are applied to account balances, how the payment application methods will affect interest calculations and how the methods will impact any available grace periods for purchases. We do not believe that specific application methods should be mandated and believe that the proposed rules will have unintended negative consequences for a number of consumers.

For example, card issuers today are able to offer discounted promotional rates, such as for balance transfers and certain types of purchases, because they are able to estimate in advance how long these discounted rates will be in effect. If the proposed rules for grace periods and applying excess payment amounts are adopted, issuers will likely reduce their rate discounts, shorten promotional periods, or discontinue promotional discounts altogether. The end result will be fewer choices and higher rates for consumers.

In addition, many credit card accounting systems do not support the proposed payment allocation methods, and considerable costs will be involved in modifying these systems to incorporate the mandated allocation methods. Card issuers will likely pass these costs on to consumers.

- A prohibition on increasing the APR on outstanding credit card balances except in the following circumstances:
 - Due to a variable rate increase resulting from the operation of an index
 - Due to the expiration or loss of a promotional rate
 - The minimum payment due has not been received within 30 days after the due date

BB&T believes that these proposed restrictions on APR increases will negatively impact the majority of consumers who now hold fixed rate credit cards. Those banks that currently issue fixed rate cards, knowing that future rate increases will be severely restricted, are likely to discontinue their fixed rate products in favor of variable rate cards, or alternately, increase the APRs offered on any new fixed rate card accounts opened. Again, the result is likely to be less consumer choice, and higher rates.

We urge the OTS to undertake a thorough analysis of the proposed changes and their likely impact on the credit card products available to consumers. Given the current economic environment, the impact of rules that might potentially further tighten credit or restrict the credit card products available to consumers should be thoroughly evaluated before they are adopted.

Overdrafts

To help our clients avoid initiating transactions that might result in an overdraft, BB&T provides its depositors with a variety of convenient methods for confirming the current available balance and transaction activity in their accounts. These access methods are available 24 hours a day at no cost and include:

- A toll-free automated telephone inquiry system
- Balance and transaction inquiries via text message from a cell phone or mobile device

- Balance inquiries at BB&T ATMs
- BB&T OnLine® banking
- Automated alerts, via e-mail or text message to a cell phone, that notify the depositor if their account's available balance falls below a dollar amount that they have specified, or provide the available balance on a daily or weekly basis

It should be noted that the available balances reported in these automated systems include only those amounts available for withdrawal and exclude any additional amounts available from associated overdraft lines of credit or potentially available due to the bank's discretionary payment of an overdraft. Also, information on "pending" transactions, such as debit card purchases which have been authorized but not yet posted to the consumer's account, are available through BB&T OnLine® banking and automated telephone inquiry systems.

In addition, BB&T provides a number of alternative services for covering NSF transactions without incurring an overdraft, including automated transfers to cover overdrafts from a designated savings account, credit card account, home equity line of credit, or overdraft line of credit.

With the availability of these services for tracking account balances and handling inadvertent NSF items, more than 70% of BB&T consumer deposit accounts were able to completely avoid overdrafts during the past twelve months.

- **Opt Out and Partial Opt Out**

BB&T has for a number of years provided consumer depositors the ability to opt out of payment of any overdrafts on their account by the bank on a discretionary basis. The opt out service is applicable to all categories of transactions, both electronic and paper. Accordingly, we fully support the OTS's proposed prohibition on banks imposing a fee for paying an overdraft unless the bank has provided the consumer with an opportunity to opt out of the payment of overdrafts caused by any type of transaction and the consumer has not done so.

We are opposed, however, to any requirement to provide a "partial" opt out for just ATM and POS debit card transactions or other selected transactions. We are not certain that the system changes required to support payment of overdrafts for some, but not other, transactions on an account are even technically feasible, and also note that banks are generally not legally or contractually obligated to pay any overdrafts on a depositor's account. Because of the technical and operational difficulties that would be involved in attempting to support partial opt out processing, and the number of exception situations that would result in unintentional overdrafts, many banks would elect to not authorize overdrafts for any type of transaction for partial opt out depositors.

One potential negative outcome of widespread adoption of overdraft opt out rights by consumers would be an increase in the number of checks and other payments returned for insufficient funds. Many banks report returned NSF check data on consumer accounts to check verification and guarantee services, and such negative information in a consumer's file can lead merchants to refuse to accept checks as payment or banks to refuse to open a deposit account, thus limiting consumer choice. A returned NSF check can also create the risk of a consumer being charged under worthless check statutes. Consumers should also understand that a check written to a merchant or business that is returned to the payee for insufficient funds will incur a returned check fee from the bank and frequently an additional return check fee from the payee. Additionally, because of the increased risk that deposited checks would be returned by the paying bank, banks might not be as willing to allow consumers access to uncollected funds in their deposit accounts, and might instead begin to more strictly adhere to Regulation CC rules on funds availability.

Finally, the restrictions on assessing overdraft fees for consumers who have exercised full or partial opt out rights should specifically exclude assessment of fees for consumer accounts that have a negative balance for seven or more consecutive calendar days. We believe that regardless of how a negative balance situation occurs and a depositor's opt out status, a fee for accounts that are not returned to a positive balance in a timely manner are reasonable and should not be prohibited.

- **Debit Holds**

BB&T is strongly opposed to the provisions that would prohibit banks from imposing an overdraft fee if the overdraft would not have occurred but for a hold placed on the account that was in excess of the actual transaction amount.

Debit card merchants, and not banks, determine the amount for debit card authorizations. Banks have no way of knowing the actual debit card transaction amount until the merchant submits the transaction for payment, which can occur several days after the authorization is placed. In the interim, the bank has no way of determining if an overdraft results solely from the hold amount, and if therefore no fee may be assessed. The only apparent viable method of complying with this requirement would be an after the fact matching of debit card transactions to the corresponding authorizations, determining cases in which the transaction was less than the authorization, then determining if the accounts in question had incurred overdrafts since the authorization was placed, recalculating the accounts' daily balances for the period to determine if the actual debit transactions would not have caused the overdrafts, and then processing fee refunds to affected consumers.

BB&T processes more than 30 million debit card transactions each month. An automated process to check for improper overdraft fees for all debit card transactions would be extremely complex, expensive to implement and maintain, and would require extensive computer processing time on a daily basis, likely resulting in extended nightly processing times that would delay the availability of current account information to consumers on a routine, if not daily, basis.

We urge the OTS to take into consideration Visa, Inc.'s recently announced real time clearing initiative for pay at the pump transactions at fuel merchants, which will result in debit card transactions being submitted for payment almost immediately following authorization, rather than at the end of the day. This significantly shortened interval between authorization and transaction submission should dramatically decrease the situations in which an authorization results in an overdraft that the actual transaction amount would not have created.

Visa representatives have advised BB&T that pay at the pump and restaurant transactions account for approximately 95% of situations in which debit authorizations exceed actual transaction amounts. BB&T plans to be ready to support real time clearing when it becomes effective in October, and Visa is offering fuel merchants significant incentives to encourage prompt adoption. Visa rules also now prohibit restaurants from including an estimated tip in debit card authorization amounts. We believe these changes will eliminate the overwhelming majority of situations where overdrafts result solely from authorization holds.

- **Exception Situations for Overdraft Fees**

The OTS also asked for information on other exception situations in which overdrafts and overdraft fees should be permitted for consumers who have opted out of the payment of overdrafts. BB&T has encountered a number of such situations, which are listed below:

- Cases in which deposited items drawn on other banks are subsequently returned unpaid, and in the interim, the depositor has withdrawn all or a portion of the deposited funds, leaving a balance insufficient to cover the returned item. This can occur when the depositor's bank permits access to uncollected deposits, as well as when the bank makes available \$100 of check deposits on the business day following deposit, as required under Regulation CC.
- Instances where a merchant does not submit a previously authorized debit card transaction for payment in a timely manner, and the authorization hold has been dropped, resulting in insufficient funds to cover the transaction, which the bank is obligated to honor under card network rules.

- Instances in which a debit card transaction is submitted by the merchant for payment but does not include the authorization code provided to the merchant when the transaction was authorized by the card issuer; in such instances, the issuer is not able to match the payment to the corresponding authorization hold and is therefore unable to delete the hold, which can result in an overdraft. The card issuer has no means of accurately matching the transaction and authorization hold, and in cases where an overdraft results, the bank should be allowed to refund any overdraft fee after the fact, when is notified or reasonably becomes aware of the situation.
- Encoding and other errors which result in funds being erroneously credited to or available in a deposit account, where there are insufficient funds remaining in the account to make the correction when the error is discovered.

Additionally, the OTS's proposed exception allowing overdraft fees for debit card transactions that are submitted by paper-based means where the bank has not previously authorized the transaction should be expanded to include any debit card transactions not previously authorized by the bank, whether submitted electronically or by paper. This would address the increasing number of recurring payments, such as utility, cell phone, gym membership and other bills charged to debit card accounts that are submitted for payment electronically but not submitted to the bank for authorization in advance of each payment. This would also include transactions authorized by the card network processor during stand-in processing (short periods of time when the network connection to the card issuing bank is disrupted). Of course, in cases where the cardholder subsequently claimed that he or she did not authorize the transaction, any overdraft fees would be reversed and the transaction returned under card network rules.

- **Transaction Clearing Practices**

In its proposal, the OTS requested comment on the impact of requiring institutions to pay smaller dollar items before larger dollar items received on the same day for purposes of assessing overdraft fees on consumer accounts, and how such a rule would impact the ability to process transactions on a real-time basis.

BB&T believes such a rule would make real-time transaction processing unfeasible, as a bank would need to maintain two separate transaction posting records for each account each day – one reflecting the account's transactions in the order they were received and/or authorized, and a second reflecting transactions in ascending dollar amount order without regard to real-time receipt/authorization. It is unclear how debit card transactions would be posted –

at the time authorized or when received for payment, and how this would affect the calculation of overdraft fees.

It is our opinion that banks should clearly disclose their transaction clearing processes to consumers, but that no particular clearing practice should be mandated.

- **Effective Date of Final Rules**

The OTS also solicited comment on when the final rules should become effective and whether a one-year time period is appropriate.

If the rules are adopted as proposed, BB&T anticipates devoting significant time, money and resources to achieve compliance. This effort would include defining requirements for deposit and credit card processing system changes, working with internal and vendor staff to code and test the changes, modifying account disclosures, product brochures and other materials, and communicating the changes to our employees and clients.

Additionally, the proposed rules related to overdrafts and debit card holds could potentially result in changes to card network rules for processing debit card authorization and transactions. Such rule changes could possibly involve changes to merchant, card network, and card issuer processing systems, as well as bank deposit systems, none of which could begin until any card network rule changes were finalized. We also note that we have been unable to identify even theoretically the practical solutions for meeting certain of the proposed requirements.

For these reasons, BB&T urges the OTS to make the final rules effective no sooner than 24 months following their publication.

Finally, BB&T does not believe that rules designating a number of longstanding and generally accepted banking industry practices as unfair and/or deceptive is an appropriate means of achieving the OTS's goals, for a number of reasons. First, it conflicts with the Federal Trade Commission's longstanding approach that deals with alleged unfair or deceptive acts or practices on a case by case basis, rather than through the application of general rules. It should be noted that this case by case approach has been supported in public statements by both the current and previous Chairs of the Federal Reserve Board. Secondly, a number of the acts and practices identified in the proposed rules have been generally accepted financial industry practices for many years, if not decades, during which time they have been sanctioned, either formally or informally, by banking regulators. It can also be argued that a number of the practices that the OTS is

designating as unfair or deceptive are neither, but rather have a beneficial overall impact on consumers.

Finally, by defining these longstanding practices as unfair or deceptive, the rules would unfairly expose the banking industry to significant legal liability, given that many states have laws that permit state enforcement and private claims against companies that engage in unfair and deceptive acts or practices as defined under the Federal Trade Commission Act.

We recommend that the OTS consider achieving its desired changes affecting credit cards and overdrafts by working with the Federal Reserve Board to develop amendments to Regulations E and Z and using the Board's general safety and soundness authority rather than through its authority under the Federal Trade Commission Act.

Thank you for your consideration of our comments, and please feel free to contact me with any questions.

Sincerely,

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