



August 4, 2008

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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

Ladies and Gentlemen;

The Ohio Bankers League ["OBL"] is a non-profit trade association that represents the interests of Ohio's commercial banks, savings banks, savings associations and their holding companies. The OBL has nearly 230 members that include the full spectrum of the financial services industry, from small mutual thrifts or locally owned and operated banks up to large multistate holding companies that have several affiliates and do business from coast to coast. One of the services virtually all of our members provide however is some form of overdraft protection. This service is offered because it is a convenience that is requested by customers. For this reason the OBL and its member institutions have a vital interest in this proposal and how it will impact the ability of Ohio financial institutions to offer this service to our customers.

*For as long as there have been banks, financial institutions have retained the discretion to honor overdraft payments. The Federal Reserve and the OTS should not undermine that discretion.*

Underpinning our financial system is the requirement that consumers need to be responsible for their own account management. Consumers are in the best position to know their balances and control their finances, thereby avoiding NSF charges or overdraft fees.<sup>1</sup> Unfortunately, this proposal is based on the assumption that consumers can no longer be expected to keep track of their own finances.

Before the regulatory agencies create a new layer of expensive requirements at a cost that will have to be covered by all consumers, they should carefully consider all of the tools a

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<sup>1</sup> For this comment, we refer to NSF charges as the fees that banks have traditionally charged when a check is not honored and returned due to insufficient funds. Overdraft fees refer to the fee that is charged when a check drawn on an account is honored, even though it creates an overdraft in the account.

consumer already has to avoid overdrafts and overdraft fees. All of these tools are in addition to simply monitoring his or her spending and account balances.

For example, many consumers simply maintain a cushion in their account to protect against the occasional overdraft. Other consumers arrange for automatic transfers from other bank accounts to prevent overdrafts. Another, similar approach is to tie a consumer checking account to a credit card, so that an advance is made if the account is overdrawn. One of the most widely used protections is to arrange for a line of credit to prevent overdrafts. A common thread among all of these protections is that the bank has agreed to become legally obligated to pay the overdraft. Finally, a decidedly high-tech way a consumer can obtain protection against overdrafts is to arrange for their bank to send electronic alerts if balances fall below a pre-determined amount.

Just because a customer has not taken advantage of any of these options however does not mean they want the bank leave them unprotected: far from it. Surveys show that consumers still want banks to honor overdrafts, and expect to pay a fee for that privilege.<sup>2</sup> When banks pay overdrafts even when they are not legally obligated to do so, they save their customers additional fees from merchants, the hassle of returning to the store to arrange a second payment for an item and the risk of having adverse information reported to a credit bureau. This doesn't even include the embarrassment of being unable to pay for the groceries already bagged or the gas already pumped into the family automobile or being identified as unreliable by local merchants.

In short, overdraft payment is a service customers value. In addition, as outlined above, there are several options already in the marketplace that will permit consumers to avoid NSF charges or overdraft fees by entering into a contract where the bank will become legally obligated to honor overdrafts. There is no need for further federal regulation that will only serve to make the service less available, more cumbersome and more expensive.

*Given the longstanding practice of honoring consumer overdrafts, this is not an appropriate issue to be addressed under the UDAP authority.*

The authority delegated from the Federal Trade Commission to the banking agencies to define unfair and deceptive practices has been used only rarely. In fact, this sweeping authority has been exercised only once, and has not been utilized in over 30 years. Reaching out and using that authority now is therefore setting a new precedent which should be undertaken very carefully.

The OBL contends that this action is inappropriate for a well-established practice that has been conducted within Federal guidelines.

To be declared unfair a practice must meet the following tests under federal law:

- (1) The act must cause or be likely to cause substantial injury to consumers;
- (2) The injury could not reasonably be avoided by the consumer; and

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<sup>2</sup> According to the *Center for Responsible Lending* 92% of consumers surveyed said that they would like banks to honor discretionary overdrafts, and were willing to pay for the service.

(3) The injury is not outweighed by countervailing benefits to consumers or to competition.

First, the banking agencies should recognize that if an item that overdraws an account is rejected that the customer will pay an NSF charge that is at least equal to an overdraft fee when the bank exercises its discretion and pays an item. This will be *in addition to* the fees levied by the merchant. Thus, the first test cannot be met because the consumer is not being harmed, but instead is receiving a benefit under most overdraft programs. Offering a consumer a better deal than is offered to customers that overdraw their accounts and have their checks returned for insufficient funds should never be considered an injury.

Second, it is well documented in the first segment of this letter that consumers have multiple high tech or low tech tools to avoid the overdraft fee, so any harm or injury could very easily be avoided by the consumer.

Third, any potential harm (and we would argue there is none) of overdraft fees is outweighed by the potential benefit to the consumer. Paying an item that will overdraw an account and taking a fee for this service is better than returning an item and levying an NSF charge since the consumer avoids additional fees and other adverse consequences discussed above.

#### Conclusion

The Ohio Bankers League believes that the discretionary practice of paying customer overdrafts is not an appropriate issue to be regulated through the delegated authority to define unfair and deceptive practices. The consumer has too many other options for protecting against NSF and overdraft fees, not the least of which is monitoring and managing their own accounts responsibly. It is particularly concerning that the Federal Reserve Board and the Office of Thrift Supervision are setting a dangerous precedent by exercising this little-used discretion on overdraft services, which is so widespread that it could be considered a mainstream banking product.

If it is still the judgment of the regulators that discretionary payment of overdrafts needs additional oversight, we respectfully recommend that it would be a better option to propose regulations within the established framework for electronic transactions and account disclosures.

Sincerely;

/s/ Jeffrey D. Quayle

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Senior Vice President & General Counsel