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August 4, 2008

***By electronic delivery***

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal  
Reserve System  
20th St. and Constitution Avenue, NW.  
Washington, DC 20551  
[regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)

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:

Susquehanna Bancshares, Inc. ("Susquehanna") appreciates the opportunity to comment on the rule proposed by the Federal Reserve Board ("FRB"), the Office of Thrift Supervision ("OTS") and the National Credit Union Administration ("NCUA") pursuant to section 5(a) of the Federal Trade Commission Act ("FTC Act") to prohibit unfair and deceptive practices ("UDAP") with regard to overdraft services for deposit accounts.

Susquehanna is a regional financial services company with approximately \$13.5 billion in assets, providing banking, wealth management, insurance, auto leasing, mortgages and consumer finance products and services to its customers located in Pennsylvania, New Jersey, Maryland and West Virginia. Susquehanna services its retail banking customers through over 230 branch locations and 250 ATM locations in the mid-Atlantic region.

Susquehanna's banking affiliates cover overdrafts on a discretionary basis and would be directly impacted by the proposed rule. For the reasons stated herein, we believe that the proposed rule should be withdrawn for reconsideration of potential impact on consumer depositors as well as the possibility of including any future overdraft regulation within the ambit of existing banking regulations.

**Overdraft Accomodation Benefits Consumers**

It has always been the practice in retail banking for the consumer to be responsible for knowing his/her checking account balance in order to prevent overdrafts. This is because the consumer is the only person who has knowledge, at any given time, of what transactions are outstanding in order to arrive at the true available balance. In fact, the great majority of banking customers manage to access their deposit account funds daily without ever or only rarely incurring an overdraft.

The most effective way to avoid having to pay overdraft fees is to carefully manage one's own account so as to be aware of the available balance prior to writing a check or making an electronic funds transfer. This is the advice given in the Federal Reserve Board's brochure Protecting Yourself from Overdraft and Bounced-Check Fees: *The best way to avoid overdraft and bounced-check fees is to manage your account so you don't overdraw it.* In addition, there are many other options a customer may choose from to avoid inadvertently overdrawing a checking account including linking the account to a savings account or credit card, establishing an overdraft line of credit and checking balances either online or by telephone.

Susquehanna pays consumer overdrafts on a discretionary basis and allows the consumer to opt out after an overdraft fee has been assessed to the account. We believe that this practice works a decided advantage for the consumer as covering an overdraft prevents the assessment of merchant fees and avoids the embarrassment caused by a returned item. In addition, overdrafts may affect the consumer's credit score resulting in significantly higher borrowing costs. Those who support the opportunity of a consumer to opt out of discretionary overdraft payments usually explain their reasoning along the lines that banks are overreaching unwitting consumers who would not overdraft if given a choice. This is specious reasoning as the truth is that consumers want their banks to pay overdrafts, but preferably without a fee for the service. However, the fee is clearly addressed in new account disclosures given at account opening pursuant to the Truth in Savings Act, and it is a necessary control in promoting the integrity of the check processing and clearing systems.

There is no evidence to support the claim that providing an opt out to overdraft payments will save the average consumer money. In reality consumers may end up paying more as they will pay both merchant fees for a returned item and an overdraft fee to the bank. Presumably this is the reason why the proposed rule only allows a partial opt out for the payment of overdrafts at automated teller machines and for point-of-sale transactions. In defense of opting out of overdraft payments for debit card transactions, the argument is usually given that it is a great injustice to the consumer to pay a \$35 overdraft fee when the transaction covered was a nominal item such as a purchase of French fries. While it may be true that the average consumer would not want a discretionary purchase covered if the result would be an overdraft fee, that is far from the whole story. What about recurring payments that are with increasing frequency being placed against the customer's debit card? Wouldn't the typical consumer want a utilities bill or mortgage payment covered even if it meant an overdraft fee might be assessed? There could also be emergency situations such as a consumer traveling on the interstate late at night who is low on fuel and has only a \$3 debit card account balance. Would an opt out be in that person's best interests? The banking industry simply does not have the current technology to distinguish between a discretionary point-of-sale item, a recurring payment or an emergency transaction.

We recommend that you take another look at the proposed rule from the perspective of whether it will really help the consumer. It is our belief that many people will opt out of all overdraft coverage to their detriment in the mistaken belief that they will be saving money. In addition, we fear that those who choose a partial opt out of only debit card and ATM payments will assume that they are also opting in to check overdraft coverage. This will cause customer confusion in that overdraft coverage has always been in the bank's discretion and will continue to be so. We believe that the best course would be to drop the overdraft opt out requirement entirely and instead amend Regulation DD, Truth in Savings, to provide for an additional new account disclosure along the lines of the FRB's brochure Protecting Yourself from Overdraft and Bounced Check Fees. At present the customer does not have a clearly written disclosure that explains in transparent language the process of account maintenance and options for avoiding overdraft fees. This disclosure requirement would meet the customer's need for understanding how to avoid overdraft fees while maintaining the traditional banking industry understanding that the deposit agreement places responsibility on the consumer to assure that items drawn against a demand deposit account are based on sufficient funds.

## **UDAP is Inapplicable**

We believe it is anomalous to suggest that bank overdraft payments equate to unfair and deceptive acts and practices within the intent of the FTC Act. Pursuant to 15 U.S.C. 45(n), the FTC may not declare an act or practice to be unfair unless the act or practice:

- (1) Causes or is likely to cause substantial injury to consumers;
- (2) The injury is not reasonably avoidable by consumers; and
- (3) The injury is not outweighed by countervailing benefits to consumers or to competition.

For the reasons already stated herein, we believe that paying consumer overdrafts on a discretionary basis is an advantage to consumers rather than the source of substantial injury. In addition, we believe the overdraft fee is one that is reasonably avoidable by the consumer's taking time to calculate the account balance. In fact the 2004 Interagency Guidance on Unfair or Deceptive Acts or Practices specifically quoted 15 U.S.C. 45(n) in providing that "An act or practice may be found to be *unfair* where it 'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not weighed by countervailing benefits to consumers or to competition.' "

While FTC Act section 18(f) provides that the banking agencies are to be responsible for determining whether specific banking activities are unfair or deceptive, 18(f)(1) also states: "*Whenever the Commission prescribes a rule under (a)(1)(B) of this section, then within 60 days after such rule takes effect each such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks or savings and loan institutions.*" (Emphasis added) Clearly, the intent of 18(f) is that the agencies shall give cognizance of the particular structure and requirements of the banking payment system while enacting "substantially similar" regulations to prohibit unfair or deceptive banking practices. Susquehanna believes that "substantially similar" means that in determining whether an activity is unfair or deceptive the banking agencies should follow the same standards that the FTC would in reviewing a commercial practice, taking due consideration of the innate differences of the banking industry.

In a May 2007 speech to the California State Bar, FTC Commissioner J. Thomas Rosch acknowledged that over the past thirty years, the Commission has had an evolving standard of what business practices would be determined as deceptive or unfair. From a position that proof of actual deception was not necessary if the act or practice had a mere "tendency or capacity" to deceive, the Commission has evolved to its current view that a business practice is deceptive if it is "likely" to mislead a consumer acting reasonably in the circumstances. With regard to what acts or practices are unfair, the Commission has moved from an amorphous standard of whether public policy has been affected; whether it is immoral, unethical, oppressive or unscrupulous; and whether it causes substantial injury to consumers; to one of causing "substantial injury to consumers which is not reasonably avoidable by consumers themselves."<sup>1</sup> The proposed rule apparently follows the Commission's earlier standards of "tendency or capacity to deceive" and "causes substantial injury to consumers" rather than the FTC's current view that proof is needed that a consumer acting reasonably in the circumstances actually was deceived, and that substantial injury alone is not indicative of "unfairness" if the consumer could reasonably avoid the injury. We submit that the proposed rule should be withdrawn for reconsideration of whether its UDAP standards are "substantially similar" to those the FTC would apply to a commercial case. It is our strong preference that any regulation pertaining to overdraft payments be incorporated into current Federal deposit account regulations.

## **Technology Considerations**

The proposed rule would require a partial opt out allowing the consumer to opt out of overdraft payments caused by ATM and debit card transactions while continuing to pay check and ACH overdrafts on a discretionary basis. However, our technology will not presently allow us to distinguish at the customer

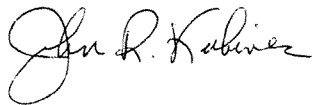
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<sup>1</sup> *Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence*, J. Thomas Rosch, Commissioner, Federal Trade Commission, speech to the California State Bar, May 18, 2007.

account level between transactions initiated by debit card and those initiated by check or ACH. In addition, we do not have the ability to discern between recurring electronic payments and point-of-sale transactions with the consequence that a partial opt out would not allow us to cover recurring payments for important expenditures such as public utility payments. Also, the proposed rule's requirement that a consumer's account not be charged for an overdraft caused by a merchant's hold can not be addressed by our current operating systems without significant programming expense and system changes. Furthermore, such overdrafts are created by two parties that are not covered by the rule – card systems and merchants. To fix the responsibility for debit hold overdrafts on the banking industry is to overlook the fact that the answer would be far better addressed on the card system level.

Susquehanna is appreciative of the opportunity to comment on this critical rule and is prepared to provide further information explaining our views set forth in this letter. If you have further questions, please contact the undersigned.

Very truly yours,

A handwritten signature in cursive script that reads "John R. Kubinec".

John R. Kubinec  
Vice President and Director of Compliance