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***By electronic delivery***

August 4, 2008

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

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

Re: FRB 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:

First National Bank (FNB) provides these comments on the rule proposed by the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration covering Unfair or Deceptive Acts or Practices (UDAP) involving overdraft protection service fees. Specifically, the proposal:

- Provides that it is an unfair act or practice for an institution to assess a fee or charge on a consumer's account for paying an overdraft unless the institution provides the consumer with the right to opt out of the institution's payment of overdrafts and a reasonable opportunity to exercise the opt out, and the consumer does not opt out.
- Requires notice of the opt-out to be provided both before the institution's assessment of any fee or charge for paying an overdraft, and subsequently at least once during or for each periodic statement cycle in which any overdraft fee or charge is assessed to the consumer's account.
- Requires the consumer's right to opt out to encompass all methods of payment, including check, ACH and other electronic payment methods such as ATM withdrawals and POS debit card transactions.
- Requires consumers be given another option of opting out only of overdrafts at ATMs and for POS debit card transactions rather than all methods of payment.
- Prohibits certain acts or practices associated with assessing overdraft fees in connection with debit holds.
- Requests comments on transaction clearing practices.

## **I. Summary of FNB's Position**

FNB is concerned about the UDAP proposal and its potential to remove our ability to provide a risk based discretionary service to our customers. Overdraft accommodation is a customer friendly practice which we offer that is financially sound. We have incorporated the 2005 Interagency Guidance into our program including fully disclosing our overdraft program and alternatives in a separate policy given and explained to customers at account opening, clearly disclosing program fees and when they are charged, and prominently providing an opt-out of this service at account opening and again once the account holder becomes eligible for the service.

We strongly believe in the customer's ability to manage their personal finances and otherwise avoid overdrafts when they choose to do so. The customers are certainly in the best position to know what checks they have written or debit card purchases they have transacted and what their actual checking account balance is at any time. Should they choose not to record and account for each transaction they make, we offer convenient access to their account balance via phone, ATM, online banking and of course, at the teller line.

We attest that overdraft protection is an accommodation service which our customers appreciate. We believe that the cost of rejecting the transaction and returning the check, in addition to the embarrassment and fees charged by the merchant for having the item returned all add up to even greater cost to our customers. Again, this is a service our customers understand, elect, value and even expect.

## **II. Consumer Right to Opt Out of the Payment of Overdrafts**

### **A. Overdraft fees can be reasonably avoided and are not unfair when assessed without a formal advance opt-out notice.**

Fees for covering overdrafts are presented to customers in the deposit account agreement package, in the Overdraft Privilege Service Policy and in our Schedule of Fees; new customers are made aware of these fees as well as any maintenance fees and NSF fees at account opening. Additionally, eligible checking account holders receive an Overdraft Privilege welcome letter and full service description which includes both tips for using the service responsibly as well as an opt-out and offer of alternative products.

Customers understand that it is their responsibility to balance their accounts; the fees provide both an incentive to do so and a user charge when they inadvertently fail to do so. These fees are not unfair but rather the price paid for bank accommodation in fulfilling a payment choice rather than denying the transaction. Customers know that overdrafts are avoidable through sound account management; most of our customers avoid overdrafts on a continual basis, including our debit card users. In fact, only 4.3% of eligible checking account holders utilize this service.

Customers who overdraw periodically are aware of the consequences of their conduct and are acting in accordance with their preferences given that awareness. They view this as a beneficial service, and have commented to us on numerous occasions that it is appreciated. In many instances, our customers are saved from paying merchant fees for refused items and avoid being identified as unreliable payors by community merchants when we provide them this accommodation. While our customers elect to utilize this service for many different reasons, the feedback we receive is consistently positive. They do not need repeated notice that they can opt-out of the convenience they are choosing to accept – assessment of the fee gets their attention. Overdraft and NSF notices are sent daily if fees are incurred; monthly statements then show these fees once again, including monthly and year to date aggregate totals of fees paid. We proactively work with customers who would benefit from alternatives for managing their transaction activity. An additional monthly notice to opt out would merely represent unnecessary cost to produce yet another piece of mail to be unopened or disregarded.

B. A “partial opt-out” covering ATMs and debit cards is not necessary or practical.

Many of our customers use debit cards as their primary payment method, often carrying no other means of payment. They schedule recurring payments with their debit cards as well. These customers appreciate that we accommodate overdrafts on debit card transactions and understand they will incur fees when they do overdraw. Our current technology does allow us to differentiate debit card transactions from ACH or check by transaction code. Our vendor would, however, have to make major core processing system changes to adapt payment decisioning for opt outs with ATM and debit cards, likely at a significant expense which would then be passed on to the bank and ultimately the consumer.

Our current technology will not allow us, again without our vendor making significant programming changes to our core processing system, to differentiate debit card POS transactions from debit card recurring payment (or card-not-present) transactions covering items such as cell phone bills, other utility obligations, insurance premium payments and others. This suggests that the partial opt-out for debit cards will be too broad for many customers because an inadvertent overdraft caused by a recurring debit card payment would not be paid for someone who exercised a partial opt-out.

Offering a “partial opt-out” for ATM and debit card transactions may confuse customers that they are otherwise entitled to have check and ACH overdrafts paid even though each of our program documents clearly state that the payment of any overdraft is always at the bank’s discretion without any contractual obligation to do so.

Additionally, we disagree with the premise under which this proposal is made. Customers easily have the option of writing checks of minimal amounts and multiple small-dollar checks in a single day just as they do with debit card transactions. Once again, the issue should not be that multiple fees may be assessed in a single day, but that the responsibility for financial management should be one of personal accountability rather than the banks’.

C. Notices required under Regulation DD must clearly convey to customers that overdraft accommodation is the Bank’s exercise of its discretion. This program is not a contractual obligation of the Bank which we must provide.

### **III. Payment Clearance Practices**

A. The proposal covering overdraft fees in connection with debit holds is too complicated to be implemented or to expect customers to understand. Banks are acting in a safe and sound manner to assure funds are available for authorized transactions, while merchants and card networks are more directly involved in this problem. The practices are currently in a state of flux. Many hospitality industry merchants alert customers that holds may be put on accounts if they use a debit card at check in; card system rules are evolving to address authorizations for gas purchases at the pump to make them virtually real-time, but we are not there yet.

Restricting when banks can charge fees for overdrafts caused by debit card authorizations changes the nature of the risk management decision for us because it impacts whether we will be properly compensated for intermediate transactions that settle “out of funds” while the authorized transaction is in transit. This is a significant countervailing safety and soundness benefit to the assertion that overdrafts caused by holds are unfair. It is not possible for us to automatically refund overdraft fees in these situations using our current system, but we do often refund fees manually at the customer’s request. Once again, we attest the customers would better be served by a market solution of improved processing options enabling holds to be cleared in faster turnaround times rather than misplacing the onus on the banks.

B. Establishing a separate payment processing order solely for the purpose of calculating fees seems incredibly inefficient and burdensome. It would be next to impossible to give individual customers the right to alter the bank’s clearance process on a case by case basis, and many of these clearance processes are too complex to explain in a disclosure in language understandable to

the consumer. We process all transactions whether submitted by check or electronic means in the same way. Deposits and other credits always post first, followed by items prioritized largest to smallest. This allows for larger items like mortgage, rent, car payment or other high-dollar important items to be paid first. The consistency in which we post items reduces customer confusion as compared to alternative methods of grouping electronic items together and paying one way with checks grouped together and paid in different fashion. We contend there is nothing to warrant the treatment of electronic items to differ from that of checks; they both represent payment instructions but with varying delivery channels.

#### **IV. Conclusion**

We have followed the Interagency Guidance on overdraft programs from 2005, have endured several examinations by the OCC, and have received absolutely no criticism for how we continue to conduct our program. It is unclear at this time how this can now be considered an unfair or deceptive practice. We are concerned that the prevailing industry practice we followed previously is now suggested to be unfair and, as a consequence, could possibly expose us to frivolous litigation.

We strongly believe providing overdraft accommodation is not unfair but rather beneficial to our customers; we believe this because they tell us so. We believe that associated fees are indeed reasonable, and that both overdrafts and fees are avoidable when consumers exercise personal care and attention like that described in many federal publications. Our goal is to provide our customers with desirable products and services designed to meet their credit and banking needs. These products and services should and do cover operating costs, increase profits, and provide a return to our shareholders, but never at the expense of causing injury to our customers. We attest that the benefits outweigh the disadvantages and that our program is sustainable because customers want the bank to recognize that when they overdraw their account, they do so willingly and can be trusted to make it right.

First National Bank appreciates the opportunity to comment on this significant proposal. Thank you for your consideration.

Sincerely,



Logan Dale  
President and CEO

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Representative Jo Ann Emerson, *by fax: (202) 226-0326*  
Senator Kit Bond, *by fax: (202) 224-8149*  
Senator Claire McCaskill, *by fax: (202) 228-6326*