



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 20, 2001

Interpretive Letter #934
May 2002
12 U.S.C. 24(7)
12 CFR 7.4002(a) & (b)

Subject: Request for Concurrence that [] is Authorized to
Charge Fees to Cash Checks Drawn on the Bank for Non-Accountholders

Dear []:

This responds to your letter of August 16, 2001, in which you request the concurrence of this Office that [] (“the Bank”) is authorized, pursuant to 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 7.4002, to charge non-accountholders fees to cash checks drawn on the Bank (“On Us Checks”).¹ The Bank’s deposit agreements reserve the right to charge a convenience fee with respect to checks drawn on all deposit accounts at the Bank. This convenience fee is essentially compensating the bank for making cash immediately available to the payee. Otherwise, the payee would have to wait for the check to clear through the payment system. Based on our review of your letter and supporting materials submitted and the relevant procedural considerations set forth in 12 C.F.R. § 7.4002(b), we agree that the Bank is authorized to charge this convenience fee, in its discretion, pursuant to section 24(Seventh) and section 7.4002(a).²

¹ We note that the authority of the Bank and other national banks to charge particular fees is not conditioned on obtaining an individual confirming opinion, since national banks are authorized to charge non-interest fees and charges as an inherent element of their authority to conduct the business of banking.

² We note that the State of Texas has recently enacted legislation that takes effect on September 1, 2001, and that would require banks located in Texas to cash checks drawn on one of the institution’s accounts without charging any fee. You have not requested our opinion, and we accordingly express no view, about whether the Texas law you describe or any similar state law would apply to national banks.

National Bank Charges and Fees Are Authorized Under 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 7.4002

Section 24(Seventh) authorizes a national bank to engage in activities that are part of, or incidental to, the business of banking³ as well as to engage in certain specified activities listed in the statute. “[N]egotiating . . . drafts” is one of the activities specified in section 24(Seventh). A bank’s authority to provide products or services to its customers necessarily encompasses the ability to charge a fee for the product or service.⁴

This ability to charge a fee for the bank’s services is expressly reaffirmed in 12 C.F.R. § 7.4002(a), which provides:

(a) *Authority to impose charges and fees.* A national bank may charge its customers non-interest charges and fees, including deposit account service charges.⁵

The bank’s authority in this, as in all other, areas must be exercised in a manner that is consistent with safe and sound banking practices. Paragraph (b) of section 7.4002⁶ sets out the factors that the bank should consider to ensure that its process for setting its fees and charges is consistent with safety and soundness:

(b) *Considerations.* (1) All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

(2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking

³ The powers clause of section 24(Seventh) provides that a national bank may exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking. . . . 12 U.S.C. § 24(Seventh). See *NationsBank v. Variable Annuity Life Ins. Corp.*, 513 U.S. 251 (1995) (the business of banking is not limited to the list of powers enumerated in section 24(Seventh)).

⁴ Cf. *Franklin National Bank v. New York*, 347 U.S. 373, 377 (1954) (stating, in the context of bank advertising, “We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business.”).

⁵ 12 C.F.R. § 7.4002(a). As used in section 7.4002(a), a customer simply means any party that obtains a product or service from the bank. The OCC recently adopted amendments to section 7.4002 to eliminate certain ambiguities in the text of the regulation. See 66 Fed. Reg. 34784 (July 2, 2001). As indicated in the preamble to the final rule, however, these amendments do not affect the substance of the regulation or the way it operates. *Id.* at 34787. Citations to section 7.4002 in this letter are to the regulation as revised. The revisions took effect on August 1, 2001.

⁶ 12 C.F.R. § 7.4002(b).

principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others:

- (i) The cost incurred by the bank in providing the service;
- (ii) The deterrence of misuse by customers of banking services;
- (iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and
- (iv) The maintenance of the safety and soundness of the institution.

If a bank uses a decisionmaking process that takes these factors into consideration, then there is no supervisory impediment to the bank exercising its discretionary authority to charge non-interest fees and charges -- such as the On Us Check cashing fees at issue here -- pursuant to section 7.4002(a).

The Bank's Consideration of the Section 7.4002(b) Factors

The Bank has provided analysis and supporting documentation demonstrating that it has considered each of the four factors listed in section 7.4002(b)(2)(i)-(iv). The Bank's submission, for which the Bank requests confidential treatment,⁷ explains that prior to implementing the fee program, it formed a task force, including a marketing representative and various levels of management from those areas that would be affected by the fee (*e.g.*, community banking presidents, a district manager, and a business banking manager). As part of its evaluation, the task force considered the various costs incurred by the Bank in cashing On Us Checks.

The Bank's submission states that the task force considered teller services in evaluating the costs incurred in cashing On Us Checks. On paydays, the teller lines in many of the Bank's branches are heavily impacted by the employees of the Bank's commercial customers who want to cash their payroll checks. According to the Bank's submission, the task force believes that this activity negatively affects the ability of those offices to serve their deposit customers expeditiously. The task force therefore concluded that the Bank's convenience fee is necessary to offset the negative effects on its services for accountholders that result from On Us Check cashing.

The Bank's submission also explains that its task force concluded that the fee will help deter misuse because it will serve as an incentive for non-accountholders to deposit checks in

⁷ The Bank's submission includes information that the Bank believes to be exempt from disclosure under the Freedom of Information Act (FOIA). 12 U.S.C. ' 552(b). The FOIA exempts matters constituting Trade secrets and commercial or financial information obtained from a person and privileged and confidential.@

their bank accounts or, if they do not have bank accounts, to open one either at the Bank or elsewhere. The Bank provides notices to non-accountholders, through brochures and lobby posters printed in English and Spanish, that they may avoid the fee by opening an account with the Bank.

The Bank also states that the task force discussed how charging convenience fees relates to its overall business strategy. The task force considered the practices of other financial institutions regarding the imposition of this type of fee and reviewed the fees charged by persons primarily engaged in the check cashing business. The task force concluded that the Bank should establish its fees at the low end of that market in order to remain competitive.

Finally, the task force evaluated the impact that the fees have on the Bank's safety and soundness. In order to assess possible reputational and litigation risks, the task force considered both the results of internal focus groups (conducted to help gauge the likely reactions of the persons impacted by the fee and the appropriate responses to those risks) and the experiences of an affiliate that had previously implemented a similar fee. The Bank has attempted to avoid misunderstandings with its customers (which could present, among other things, reputation risk to the Bank) by disclosing in its deposit agreement that the Bank "may charge a fee to the person presenting the check" The Bank also sends letters to affected customers in advance of implementing the fee program.

In addition, the Bank has analyzed the legal risks (which could raise safety and soundness concerns) arising from whether the proposed fee would constitute a "wrongful dishonor" of a check or impair its negotiability under the Uniform Commercial Code ("UCC").

According to the analysis furnished by the Bank, whether a customer could challenge the convenience fee as a wrongful dishonor depends on the terms of the deposit agreement between the Bank and the customer. *Menicocci v. Archer National Bank of Chicago*, 67 Ill. App.3d 388, 391 (1st Dist. 1978) (the terms of a bank's relationship with its customer is governed by the terms of the deposit contract). The deposit agreement for the accounts to which the Bank's fee applies includes a provision that "[i]f a check drawn against your account is presented over-the-counter for payment by a person who is not a deposit customer of the Bank, the Bank may charge a fee to the person presenting the check as a condition for payment for the check." Thus, because the Bank's deposit agreement clearly provides for check-cashing fees, the Bank concluded that the application of the fee would not constitute a wrongful dishonor of a check under the UCC.⁸

The Bank asserts that a convenience fee does not alter a check's negotiability because the check does not contain on its face an express condition to payment and the fee is not assessed for negotiation of the check. A check is an unconditional promise to pay unless an express condition

⁸ Cf. *Your Style Publication, Inc. v. Mid Town Bank & Trust Co.*, 501 N.E.2d 805, 810 (Ill. Ct. App. 1986) (defendant banks exceeded their contractual authority because depositor agreements did not clearly provide for check cashing fees and banks' customers would have no reason to believe that their own checks would be subjected to this fee).

to payment appears on the face of the check:⁹

One of the essentials of a negotiable check is that it be payable without condition. This means that a statement must not appear on the check that it is subject to any other order, promise, or condition. There must be no additional order or promise on the check itself; it must merely be an order on a bank for the payment of a sum of money.

Henry J. Bailey and Richard B. Hagedorn, *Brady on Bank Checks*, ¶2.04 (2000).

As explained in the Bank's submission, when a bank charges a fee for cashing an On Us Check, there is no reference to the fee on the face of the check. The fee only applies to over-the-counter check cashings by a non-customer, and is not assessed when the check is deposited or negotiated to another holder. The holder of the check has many choices about how to negotiate the check, and over-the-counter cashing is the only choice under which the fee is assessed. Therefore, the Bank concludes that the fee is not assessed for negotiation and does not affect the unconditional nature of the promise to pay.

The Bank's conclusion is supported by *Sexton v. PNC Bank, N.A.*, 43 UCC Rep.2d 341 (Pa. Ct. Com. Pl. 2000), in which the court found that a convenience fee for cashing an On Us Check does not affect the negotiability of checks. In that case, the court found that the fee --

is not assessed upon the negotiation of a check; it is merely a charge collected by the Bank in exchange for the service of turning a check into cash. A non-customer who deposits a check drawn on PNC into his or her account at another financial institution will receive the full face amount of the check. The same non-customer may also (assuming an agreeable recipient) endorse the check over to another person, who will then receive its full face value upon depositing the check into his (or her) own account, whether at PNC or elsewhere.

Id. at 341. The court went on to conclude:

Section 3-104 further provides that an order that is payable on demand and drawn on a bank, and that complies with provisions (2) and (3) [thereof] is both a check and a negotiable instrument. Because PNC's \$3.00 fee neither alters the payable-on-demand character of checks presented for cashing, nor constitutes an undertaking or instruction by the drawer over and above the promise to pay, the fee does not impair the negotiability of those checks, and its imposition does not violate the law.

Id. at 341.¹⁰

⁹ Section 3-106 of the UCC provides that:

... a promise or order is unconditional unless it states

(i) an express condition to payment,

(ii) that the promise or order is subject to or governed by another writing, or

(iii) that rights or obligations with respect to the promise or order are stated in another writing.

¹⁰ See also *Hayes v. First Commerce Corp.*, 763 S.2d 733, 43 UCC Rep.2d 335 (La. Ct. App. 2000), in which the

Conclusion

We therefore conclude that the Bank is authorized, under 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 7.4002(a), to charge the convenience fee and that the Bank's process for considering the establishment of the fee is consistent with the considerations required by section 7.4002(b).

Sincerely,

-signed-

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

court rejected a claim that an on us check cashing fee constituted misappropriation, finding that the payee had voluntarily chosen to do business with the payor bank, and that there is nothing illegal about charging a check cashing fee. In discussing the *Hayes* and *Sexton*, Barkley Clark, a leading commentator on negotiable instruments and bank deposits, stated, "We think both the Louisiana and Pennsylvania decisions hit the target in the middle." Barkley Clark, *Clark's Bank Deposits and Payments Monthly*, Vol. 9, No. 8 (Feb. 2001).