

July 25, 2008

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Secretary  
Board of Governors of the Federal  
Reserve System  
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Washington, DC 20551  
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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

Dear Ms. Johnson and Chief Counsel's Office of the OTS:

OmniAmerican Bank appreciates the opportunity to comment on the proposed rule on Unfair or Deceptive Acts or Practices as it pertains to Overdraft Programs.

The proposed rule is designed to address concerns by the bank regulatory agencies and consumer advocates that certain aspects in marketing, disclosing, and implementing overdraft services may be unfair and may not provide the consumer with the opportunity to opt out and avoid associated costs. In addressing these concerns, the proposed rule would impose substantial new requirements that are of concern to OmniAmerican Bank. These include:

- Prohibiting a bank from assessing an overdraft fee on a consumer account without first providing the consumer with the opportunity to opt out.
- Providing the consumer with the opportunity for a partial opt-out that would result in declining point-of-sale (POS) and ATM transactions, but allowing other transactions (such as checks and ACH) to be paid and a fee imposed.
- Prohibiting banks from assessing overdraft fees if the overdraft is caused solely by a hold placed on funds in an account that does not have sufficient available funds to cover the actual purchase amount of the transaction.

Additionally, the agencies have asked for comment on whether banks should be required to pay smaller dollar items before larger dollar items for the purpose of assessing overdraft fees if the consumer opted in to an alternative clearing process.

The objective of this comment letter is to ask the agencies to consider: (1) our belief that additional regulation of overdraft practices is unnecessary, and (2) our analysis of the impacts that each of the proposed requirements, as well as the transaction clearing alternative, would have on our operations.

## **Current Overdraft Practices**

In 2005, the agencies issued Guidance on Overdraft Protection Programs that included a number of best practices. In 2006, Regulation DD was revised to include additional disclosures regarding overdraft protection at account opening, in periodic statements, and in promotional materials. Speaking for our bank, we have adhered to the Guidance and the Regulation DD revisions.

Our program is discretionary, and customers must generally maintain a deposit account in good standing for 30 days. Customers are provided with the opportunity to opt out in a disclosure that clearly states the discretionary nature of the program, the fees that can be assessed, and alternatives that are available. Fees associated with paying overdrafts are clearly disclosed at account opening, and fees assessed are clearly disclosed on periodic statements. We do not charge an overdraft fee in addition to the fee that is charged for a returned item; there is no additional daily fee for each day the account remains overdrawn. NSF notices that include reminders of the expenses the customer incurs when insufficient funds are paid as well as of alternatives that are available are generated for each NSF item. We promptly close accounts for those who abuse the service. The available balance provided at the ATM does not include an overdraft limit, and the customer cannot overdraw their account through a typical ATM transaction. It is difficult to comprehend how, with the disclosures and information already provided, paying overdrafts and imposing a fee is an unfair act or practice or how injury is not reasonably avoidable.

We have not been criticized by auditors or examiners for our overdraft practices, nor have we experienced any customer complaints. To the contrary, customers have generally expressed appreciation for a service that pays their larger mortgage, car, or credit card payment rather than returning it.

Consider that the alternative to not paying an overdraft item is, in most cases, to return the item and assess a fee. It is unlikely that this alternative is a benefit to the consumer. In many cases, the consumer may also incur merchant fees for the returned item, and merchants may start requiring cashier's checks or money orders. Paying the item is no greater cost, and it saves the customer embarrassment. Granted, ATM withdrawals and POS transactions are the exception to this argument; however, the customer has been adequately informed before the transaction as well as afterward and has received sufficient information to make informed choices concerning account management.

## **Proposal to Require an Opportunity to Opt Out Prior to Assessing a Fee**

A best practice under the current Guidance on Overdraft Protection Programs is to disclose an opt-out option wherever overdraft protection is automatically provided. This is a best practice that we already follow. The proposal would require us to provide the opt-out option and allow the consumer a reasonable time to opt out before a fee is assessed. The difficulty with this is the subjective interpretation that may be given to a "reasonable" time to opt out among regulators and among banks, leaving everyone in a

guessing game. If this requirement is retained in the final rule, we encourage additional guidance or examples as to what the agencies consider reasonable. Clarification should also be provided as to whether this initial notice will apply only to new accounts opened after the mandatory compliance date, and whether the opt-out of one consumer on a joint account is to be considered an opt-out for all consumers.

We would also ask the agencies to consider that the fee for both overdrawn and returned items is disclosed in the Truth and Savings fee disclosure that the consumer receives at account opening. Additionally, while a bank is waiting a reasonable time for the consumer to opt out, if an item is presented that would overdraw an account, a bank will return rather than pay the item, and the same fee will generally be assessed.

### **Proposal to Allow a Partial Opt-Out**

Providing the consumer with the opportunity for a partial opt-out that would result in declining POS and ATM transactions while allowing other transactions (such as checks and ACH) to be paid is not something our system can currently manage. The necessary system development would involve considerable cost for our institution and probably most institutions.

An additional problem with the proposal is the absence of a clear definition of POS. Are online purchases, recurring bill payments, and phone transactions by debit card considered POS? What about ATM transactions, such as loan payments as opposed to cash withdrawals? Depending on the definition, banks will not only need to separate debit card from other transactions for purposes of overdraft protection, but also potentially distinguish between debit card transactions made at POS or an ATM and those made by phone or online transfer. Current systems only distinguish debit card transactions, not the type of debit card transaction.

Finally, consider the negative impact to the consumer. Consider the inconvenience and embarrassment to the consumer when a recurring payment or a debit card payment at the grocery store is rejected. Consider the difficulty in understanding which types of transactions will be covered by overdraft protection and which ones will not. Consider that an unintended byproduct may be increased cost to the customer for services, such as overdraft protection, that a bank provides where it has incurred expensive programming costs. Consider that at some point, it may not be cost effective for some small and mid-sized community banks to offer an overdraft program at all.

### **Debit Holds**

As we understand it, the proposed rule would prohibit banks from assessing overdraft fees if the overdraft is caused solely by a hold placed on funds in an account that does not have sufficient available funds to cover the actual purchase amount of the transaction. In other words, a bank may charge a fee only if the amount of the transaction ultimately presented for payment would have caused an overdraft. In reality, this is impossible for current processing systems to determine.

Our practice is to place a hold for the shorter of 48 hours or the date that the charge is presented for payment. Many banks place a longer hold of 72 hours or longer. Adoption of this proposal may result in refusing payment of any subsequent debit transactions that may cause the account to become overdrawn based on the pre-authorization amount. Is this a good experience for consumers?

### **Transaction Clearing Order**

The agencies requested comment on the impact of requiring banks to pay smaller dollar items before larger dollar items for the purpose of assessing overdraft fees if the consumer opted in to an alternative clearing process.

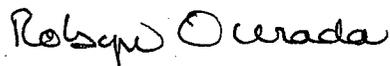
We seriously doubt that any bank has the system capabilities for alternate item processing for overdrafts. Our only option would be to change our item clearing process across the board. If large dollar items are paid last to satisfy requirements for assessing overdraft fees, the impact to consumers will be negative rather than positive as their mortgage, rent, utility, and credit card payments (payments of greatest concern that customers routinely call to check on) are returned.

### **In Conclusion**

As stated earlier, an additional regulatory burden such as this may very well cause many banks, particularly small or mid-sized community banks such as ours, to reconsider whether it is feasible to continue to offer an overdraft program. The costs associated with pursuing technological solutions and the necessary monitoring may outweigh the benefit. The result will be the loss of a service that a majority of consumers consider beneficial, as well as providing a competitive edge to the large banks that can afford to invest in the technology. Alternatively, if technological solutions are pursued, the result may be increased costs to the consumer for the services that banks provide.

Once again, OmniAmerican Bank appreciates the opportunity to review and comment on proposed rules and the consideration that is given to the comments submitted.

Sincerely,



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