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July 17, 2008

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
10th Street and Constitution Avenue, NW
Washington, DC 20551

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G. Street, NW
Washington, DC 20552

Re: Unfair or Deceptive Acts or Practices; Docket No. R-1314 (Federal Reserve Board); OTS-2008-0004 (Office of Thrift Supervision); RIN 3133-AD47 (National Credit Union Administration)

Truth in Savings; Docket No. R-1315 (Federal Reserve Board)

Regulation Z; Docket No. R-1286; (Federal Reserve Board)

Dear Sir or Madam:

Please accept this comment letter on the above three matters combined. This letter is written in my capacity as General Counsel for BancorpSouth, a $13 billion retail community bank with a mid-south and southeastern U.S. footprint from St. Louis, to Dallas, to Atlanta, in eight southern states. In addition to this letter from a legal perspective, please view same contemporaneous with the letters being submitted by Larry Bateman, Vice Chairman of BancorpSouth; Jeff Jaggers, Senior Vice President of BancorpSouth, manager of BancorpSouth's Transaction Services Group; and Kathi Carter, head of BancorpSouth's Credit Card Division and Senior Vice President of BancorpSouth, all of even date herewith.

Introduction

Not so long ago, the Federal Reserve Board and other agencies of the FFIEC determined by its consumer resource brochure, "Protecting Yourself from Overdraft and Bounced-Check Fees," via the press release for same that "the *best way* to avoid overdraft and bounced-check fees is to manage accounts wisely. That means keeping an up-to-date check register, recording *all electronic* transactions and automatic bill payments, and monitoring account balances carefully." The brochure itself went forward to describe *nine* different ways to avoid such fees, the second bullet point of paying special attention to electronic transactions being emphasized in bold print. This brochure was intended to be consumer friendly, available free on the agencies' websites for downloading so organizations could add their logo for distribution to clients and customers. Now, just two and a half years later, these same agencies say that there is *no way* to avoid these fees and instead these fees constitute a "substantial injury" that consumers *cannot* reasonably avoid.

Also, not long ago, via the InterAgency Guidance on Overdraft Protection, the focus was concern over *marketing* of overdraft protection programs. Now, not only do the marketed programs get a free pass and all but sanctioned and vindicated, but suddenly, just two and a half years later, BancorpSouth's discretionary service of being "hands on" that also utilizes automation and that did not previously offend notions different from the traditional service historically offered by banks for years, overnight comes under the scrutiny of unfair and deceptive labeling.

Likewise not long ago, the federal banking agencies specifically sanctioned use of risk-based pricing via the Federal Reserve Board's proposed Reg Z revision of May 23, 2007, typically rejecting calls for prohibition on risk-based pricing; and, via the OCC Advisory Letter of September 14, 2004, announcing that re-pricing of credit card interest rates due to various credit ratings and other credit factors may be an appropriate measure for managing credit risk for credit card issuers. Now, these specifically sanctioned practices are suddenly branded with the label of "unfair and deceptive."

These drastic shifts beg the immediate question of what possibly could have happened in these intervening short years to lead regulators to consideration of Unfair and Deceptive Trade Practices Act rule-making over matters which have traditionally been addressed through disclosure and customer responsibility. Suddenly, what could and should be met and has historically been met under existing regulations via disclosure, now prohibits institutions from engaging in these suddenly mis-characterized borderline egregious acts and practices.

Indeed, case by case approaches of UDAP enforcement to the true outliers who may have misused certain practices are available, but good companies with good practices should not be "caught up in the web" of such broad-sweeping, less than "bright line" requirements with vastly unintended consequences looming. There simply has been no change in facts or circumstances that can justify, with the utmost respect, why the Board is changing course so drastically and abandoning the concept of targeted enforcement of the FTC Act on a case-by-case basis for truly offending practices. As such, the agencies should pursue instead, any of several non-UDAP alternative approaches.

Inappropriate Use of UDAP

In its current breadth and reach of proposed rule-making, utilizing UDAP runs the risk of establishing the founding principles of an unfairness analysis for banking practices that otherwise should be approached with extreme caution. To do otherwise risks serious adverse unintended consequences for industry operations, customer service value, and market innovation, not only with the particular circumstances covered by the current proposal, but beyond. Stated differently, once "let out of the bag," UDAP cannot be tamed by prescriptive forms of regulation.

In essence, in both legal and practical terms, the Federal Reserve and OTS are writing on a blank slate since the standards for unfairness contained in the Federal Trade Commission Act are expressly imposed only on the FTC. The 1994 amendments to the Act were to address perceived abuses by the FTC, not the banking agencies, in applying a potentially unfettered, unfairness power.

Now, despite recent experience and announcements from the Fed to the contrary, long-standing and pre-existing lawful practices suddenly get elevated to such unfettered power status. Until this proposal, the Board took a case by case approach to enforcement of Section 5 of the FTCA. See, for example, March 21, 2006 letter to the Honorable Barney Frank from Federal Reserve Board Chairman Ben S. Bernanke that provided in part, "broad rules covering a wide range of possible circumstances could unintentionally prohibit legitimate practices . . ." Yet an overly broad stroke of the pen is exactly what is before us with the current UDAP proposal.

A return to case by case enforcement, then utilize existing regulatory power to do "bright line rules" [and then, and only then] consider UDAP for violations of those bright line rules that are practiced in an otherwise unfair or deceptive manner should be contemplated. Otherwise, the current proposals will cast a broad net and encompass practices that may be entirely appropriate for one consumer when, if otherwise inappropriately abused, might indeed be a practice which is unfair with respect to a certain consumer or specific event.

The notion is therefore supported that the means and necessity for targeted, case by case enforcement, as opposed to broad, less than bright line rules should carry the day. With limited exceptions, the Federal Trade Commission enforces Section 5 of FTCA on a case by case basis, and the FTC has even advocated that approach to the agencies making this proposal. See, for example, letter to John E. Bowman from Lydia P. Parnes, Director, Bureau of Consumer Protection, Federal Trade Commission, December 12, 2007. As a further example, the FDIC has been targeted in its use of UDAP on a case by case basis. See, for example, FDIC's targeted enforcement for ATM balance disclosures that deceptively showed the "not real" balance.[1]

The FTC has established a three-part test for determining whether a practice is "unfair." Of particular note is the part of the standard requiring the agencies to weigh the particular practice against the ability of the consumer to avoid the harm against wider consumer benefits otherwise associated with the particular act or service. As detailed by the specifics below, under no stretch of the imagination can in this day and age, well-informed consumers suddenly be incapable of avoiding the results of overuse of their credit card or failing to simply balance their checkbook. A return to acknowledging consumer responsibility for their own actions *must* occur.

A Slippery Slope: Unintended Consequences

Utilizing less than "bright line" regulatory structures such as that offered by use of Regulation DD or Regulation E, but instead invoking UDAP, does not create "uniform" standards. To the contrary, with various agencies having power to enforce same, and in turn, individualized interpretation of same, a banking agency could develop independent theories of liability that owes no deference to the actual rules. And, with the banking agencies having no exclusive right of enforcement for UDAP, state attorneys general or private litigants will endeavor to raise the litigation bar for banks for a multitude of previously legitimate services and practices, now suddenly deemed or forecasted to be "unfair," or interpreted or merely alleged to be such (the latter alone being an equal fright and expense to financial institutions, regardless of the otherwise lack of legitimacy of the argument or claim). Even passing regulatory muster with your primary regulator at the federal level, that is, abiding by the "rule," will not provide a safe harbor for banks from other agencies or private litigants who will at least argue the otherwise unfounded determination broached by the proposal that overdraft protection fees are now amazingly "not avoidable" and constitute "substantial" injury.

Transaction accounts are at-will arrangements. Thus, providing an opt-out of a discretionary overdraft service is tantamount to an oxymoron. Failure to opt-out suggests an entitlement that does not exist, since the underlying service is at all times a discretionary accommodation. A partial opt-out cannot be enforced either because the exercise of partial opt-out is only an election of this

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[1]This *is* an example of a practice that illustrates the point wherein UDAP may be appropriate (albeit more from deceptive rather than unfairness), but still an example of targeted enforcement (yet still a matter which can just as easily be addressed by Reg DD as opposed to UDAP).

discretionary service and is not a contractual promise to pay overdrawn checks or electronic transactions. Thus, consumers should not be able to effectively say "do not pay my POS, but pay my checks," because they have no right under the law to write bad checks and compel the bank to pay them.

Application of FTC UDAP unfairness standards to the proposed banking services of credit cards and payments linked to same, as well as overdrafts and the payment system associated with same ignores an important component of the act, Section 18(f). The payment system has evolved to an industry-friendly and consumer-friendly franchise. To meet the needs of both institutions, consumers, and merchants, the payment system is already heavily regulated in a fashion so that the various component parts can work together in an integrated fashion. To depart from such, and suddenly interject UDAP's broad "unfairness" concept, runs the risk of impairing, putting into question, if not all but torpedoing this operational efficiency, vast consumer convenience and resultant financial soundness of the payment system. As such, there is a reason that Section 18(f) acknowledges that the banking sector has unique circumstances by expressly providing that the Board's power may diverge from FTC UDAP rule-making on the basis that applying regulatory standards developed in the commercial marketplace to banks "would seriously conflict with essential monetary and payment systems policies of such Board." As such, the Board should not exercise its UDAP rule-making authority under Section 18(f) as proposed, as to do would undermine existing monetary or payment systems policies.

Wherein the proposal under UDAP reaches the shocking premise from financial service company regulators that our customers "are unlikely to read" something or that marketing materials somehow become themselves, or at the least the impetus for "unfair" or "deceptive" regulation because the material may merely *minimize* that there are fees associated with a service crosses the line of loose and unnecessary regulatory preamble by ignoring that banks have worked very hard to craft their disclosures, brochures, marketing materials, and contracts to not only meet existing regulatory requirements, but to mean what they say. If a financial institution cannot rely on its loan documents, credit card agreements, or "signature card"/deposit account agreements, it risks not only its agreements being found unenforceable, but risks liability for "we didn't see it" or having to fight off "wouldn't read it" defenses. The regulators have therefore well spilled over into uncharted territory fraught with unlimited consequences by use of this unfortunate preamble justification for UDAP.

Solutions/Alternatives

Is it not incongruent to urge that there is a need to create a "*substantive* right" to an opt-out under UDAP, but use Reg DD as the means to implement and provide the details of the opt-out? The answer certainly begs the question as cannot (and should not) Reg DD indeed be the sole means by which regulators impose any required opt-out? Doing so will return the focus to more traditional means of consumer-friendly regulation, the concept of disclosure.

The following Reg DD preamble statement should be authority enough to show that Reg DD is legally adequate for purposes of addressing the Board's concerns:

> 1. *Statement of the need for, and objectives of, the proposed rule.* TISA was enacted, in part, for the purpose of requiring clear and uniform disclosures regarding deposit account terms and fees assessable against these account. Such disclosure allow consumers to make meaningful comparisons between different accounts and also allow consumers to make informed judgments about the use of their accounts. 12 U.S.C. 4301. TISA requires the Board to prescribe regulations to carry out the purpose and provisions of the statute. 12 U.S.C. 4308(a)(1).

[Thereafter, the preamble continues and specifically indicates that the Truth in Savings proposal "would ensure that consumers are not *misled* about the funds they have available for a transaction by requiring institutions to provide balance information . . ."]

And while a legal argument could be made that the agencies have inappropriately exercised their rule-making authority by not adopting the least restrictive means of preventing an unfair or deceptive act or practice, for these perceived abuses by certain others in the marketplace, the agencies do need solutions. The good news is that alternatives do in fact exist:

A. If a regulatory required disclosure or opt-out notice as should be mandated by Reg DD were abused, be it via false terminology or purposeful lack of the required frequency; that is, if the more bright line Reg DD requirements were obviated, obscured, or truly deceptive, then indeed case by case UDAP enforcement may be appropriate. The final rule can so provide. Yet Reg DD itself, without resort to UDAP, can impose any necessary notice requirements with respect to account conditions and fees.

B. Revise the proposal and use UDAP rule-making to target the more egregious practices of recent years that were "under the microscope": *marketed* overdraft programs. Add a targeted, specific, standard-oriented provision via UDAP that expressly pertains to egregious or deceptive *marketing* of "bounce protection" type programs.

C. Debit card and point of sale (POS) transactions have existing regulatory sources for rule-making, standards and enforcements: Regulation E, the Electronic Funds Transfer Act (EFTA), and Truth in Savings/Regulation DD.

1. EFTA and Reg E heavily regulate the process by which electronic payments are executed, funds made available, *and* consumer rights are protected.

2. EFAA and Reg CC are intended to assure that depositors have the information they need to determine when funds will be available for withdrawal.

3. Reg E provides sufficient authority to establish the rules for conducting electronic transactions, and has the added benefit of being able to reach merchants who are a pivotal part of the payment process that results in holds.

D. Related to extending credit limits caused by credit holds under the credit card proposal, even the preamble to the Rule recognizes that it is merchants, not banking institutions, that typically place these holds.

1. The answer is thus not UDAP related to over-limit fees; the answer is to make such rule part of the Board's Regulation E, which applies to *all users* of electronic funds transfers, thus would impose the duty where it is most appropriately, on the merchants who impose the credit holds.

2. In like manner related to overdraft services, it is merchants who invoke credit holds and potentially trigger overdrafts and resultant fees. Thus, Reg E can be invoked, as once again, it likewise applies to all users of electronic funds transfers, therefore restrictions on the use of merchant credit holds can be incorporated into Reg E accordingly.

E. Apparently, the threatened use of UDAP has at least had the result of showing that the industry, through appropriate and recognized means, can address concerns, making such rule-making unnecessary, be it under UDAP, Reg E, or otherwise. Thus the alternative above of Reg E regulated merchant holds may be unnecessary in light of recent Visa and MasterCard rule changes getting at these concerns pursuant to their mandatory rules. Keeping in mind the complexity of the payment system, to meet the perceived consumer need for coordination among the different parties, those who can in fact address problems are those who govern private rule-making over debit hold situations. In short, Visa and MasterCard are indeed addressing the debit hold at gas stations. This has therefore become a vanishing problem that does not merit otherwise dangerous use of UDAP.[2]

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[2]As to Visa's expanded gas plan and changing the rules for PIN debit transactions, Visa acknowledged in a July 2 American Banker article that the technology it is adopting to reduce

F. While the otherwise appropriate 5:00 p.m. cut off time for receipt of payments appears to be just a Reg Z proposal, in that the Board has already via guidance pronounced that compliance with Reg Z and other regs might not be enough to escape UDAP scrutiny, not only should the 5:00 p.m. cut off requirement be totally eliminated, but from a legal perspective, other regulations do not so dictate cut off times for purposes of bank operations. Reg CC, for example, related to crediting of certain deposits, depends on the well-established concept of "banking day," namely, that established by the institution itself, with the Board not dictating actual deposit cut off times. See also UCC Section 4-108.

G. The Expedited Funds Availability Act (EFAA) and Regulation CC likewise heavily regulate the process by which checks are handled, funds are made available, *and* consumers are advised thereof. EFAA and Reg CC have been the federal baseline for funds availability, and the cornerstone for both bank and consumer expectations and should remain so or be used to address the current concerns.

H. Providing a partial opt-out is not only all but impossible, but upon putting not only a legal but practical analysis thereto, makes one scratch his head. If opt-out is a necessary component of an unfairness analysis, then is not that unfairness totally eliminated by a full opt-out? A partial opt-out covering just ATM and Point of Sales therefore should not be considered compelled by UDAP and partial opt-out should be totally eliminated. Alternately, make it optional with the institution, not a consumer UDAP "right."

I. For credit card concerns, let us not forget that the acronym TILA stands for "*Truth In* Lending," thus the agencies can address the credit card-related risk-based pricing and other consumer protection concerns with enhanced disclosures and/or more understandable disclosures pursuant to Reg Z. It simply would be more appropriate for the Fed to finalize the enhanced disclosures (subject to specific tweaking as urged by industry and trade group comment letters) via the proposed 2007 Reg Z amendments rather than suddenly switch course and find the need to invoke, and unnecessarily invoke, UDAP. Note that one of the stated purposes of Reg Z is "to protect the consumer against inaccurate and *unfair* credit billing and credit card practices," 15 U.S.C. § 1601.

J. Acknowledge in a revised preamble, thus negating the right for invoking otherwise dangerous UDAP principles, that the rights of parties involved in the process of conducting transactions currently under the microscope via these proposals are governed by the Uniform

authorization hold times for gas purchases could be applied eventually to other types of merchants.

Commercial Code in each respective state dealing with negotiable items and bank deposits. That is, the UCC is, and will continue to be, the basis for payment processing in the United States commercial world.

K. Revise the preamble to clearly and unambiguously affirm that the Board and other agencies are not making *per se* unfair determinations of the practices, acts, and services described, but to the contrary, and as a matter of public policy and force of rule-making law, that no such past activity has been so determined or even hinted; that individual fact-specific case by case examinations must come first.

Transaction Payment Order

The Board additionally invites comment on whether transactional payment order should be addressed. First, at no stretch should this even be contemplated under UDAP, for the same flaws as espoused elsewhere herein. Existing laws address payment order, therefore UDAP, or *any* regulation of payment order, is unnecessary. Uniform Commercial Code Section 4-303(b), provides that "items may be accepted, paid, certified, or charged to the indicated account of its customer in any order." The Official Comments to Section 4-303(b) are particularly instructive:

> As between one item and another no priority rule is stated. This is justified because of *the impossibility of stating a rule that would be fair in all cases*, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other variables. Further, the *drawer* has drawn *all the checks*, the drawer should have funds available to meet *all of them* and has *no basis* for urging one should be paid before another . . .

At BancorpSouth, there are numerous scenarios of payment order which could be presented on a customer's account on any one day. Since a checking account is basically a "debtor-creditor relationship," if required to pay small to high, or any other payment order, or differentiate just for fees for same, would increase the chance that higher dollar payments will not get paid at all and would be "bounced." While indeed the fee for a smaller dollar item incurs the same overdraft or NSF fee as for a larger item, chances of the larger item not getting paid, if it exceeds the discretionary authority granted by the institution, would have much greater adverse consequences than the fee for the smaller item. An ice cream cone paid for is one thing; bouncing your car payment, rent check, or fire insurance premium is another. Thus, at best, the issue of order of payment should be a matter of contract and/or non-UDAP, but Reg DD disclosure.

Conclusion

Today, people have more tools to find and have more financial information available to them than ever before. Thus, the onus on personal responsibility *must* remain. People know the transactions they have conducted - not the bank that can only find out *after the fact*. In a Reg CC/Check 21 substitute check world, indeed, the concept of float has evolved. Yet these laws and regulations have been with us long enough that regardless of level of sophistication, socio-economic levels, or otherwise, any customer of BancorpSouth who chooses to play the float game today should be regarded as quite savvy indeed. If, however, they miss on occasion, they *want* BancorpSouth to consider its discretionary overdraft payment option.

Yet if to continue on with this totally reasonable and necessary service, the fees for same must be substantiated by appropriate monthly statements and opt-out disclosures, use a Reg DD bright line approach, not UDAP vagueness. With an opt-out notice via Reg DD and fees disclosure on statements via a bright line rule, the float managers will quickly relearn those lessons fully, and if not, then appropriately be candidates for indeed an overdraft or NSF fee being lawfully and reasonably charged.

The fundamental issue is whether our customers have reason to know the consequences of their banking activity. Our account agreements, annual account disclosures, fee statements and brochures recite the conditions on which fees will be assessed and any and all other actions and rights affiliated with their accounts. Candidly, we believe this constitutes adequate notice without opt-out and provides the requisite level of consumer knowledge, but if opt-out under Reg DD is added, so be it. We will comply, but let that rule suffice. Otherwise, if UDAP rule-making as suggested by the current proposal stays, it will put our primary regulator on the path of forcing us into product feature micro-management and will chill industry, and BancorpSouth specifically for that matter, from banking innovation at the expense of customer choice and convenience.

Sincerely yours,

Pat Caldwell,
General Counsel
BancorpSouth