



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 17, 2001

Interpretive Letter #933
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 July 31, 2001, in which you request the concurrence of this Office that [], a national banking association with its main office in [*City, State*], and with branch offices in [*State 1, State 2,*] and [*State 3*] (“the Bank”), is authorized, pursuant to 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 7.4002, to charge non-accountholders convenience fees to cash checks drawn on the Bank (“On Us Checks”).¹ The Bank's deposit agreements reserve the right to charge this convenience fee with respect to checks drawn on any deposit accounts. This 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 Your letter noted 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 Abusiness 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, AWe 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), Acustomer@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 materials provided, for which the Bank has claimed confidential treatment,⁷ include information on various costs incurred by the Bank in cashing On Us Checks. These include personnel, processing, auditing, and overhead expenses as well as losses attributable to On Us Check cashing. The Bank notes that it can charge accountholders monthly service fees to cover their use of the Bank's check cashing services but the only way to charge non-accountholders for their use of such services is to charge a transaction fee at the teller window. The Bank states that the only alternatives would be to provide non-accountholders such services at a loss or to increase the service fees paid by accountholders and thereby require them to subsidize non-accountholders.

The Bank demonstrates that it faces significantly greater risks -- through the practices of drawing checks on insufficient funds and check fraud -- in cashing On Us Checks for non-accountholders than in accepting such checks for deposit or in paying them upon presentation through the payment system. As the United States District Court for the Northern District of Illinois recently explained (in dismissing a claim that the Bank's On Us Check cashing fee violated the anti-tying provisions of the Bank Holding Company Act):

When a non-customer presents a check to be cashed by the drawee bank, the non-customer expects immediate payment in cash. Cash payments are final in the strictest

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.@

sense. These final transactions pose substantial risk to banks, such as the possibility of overdraft, forgery or fraud. Should one of these occur, the bank is left with no recourse after a final cash transaction.⁸

In contrast, when holders of On Us Checks deposit the checks in their bank accounts and the checks are cleared and paid through the payment system, the banks have protections against these risks and can delay or revoke payment.⁹ When a bank cashes an On Us Check over the counter for a non-acountholder, these protections do not apply. The Bank has concluded that its convenience fee is necessary to defray the costs and offset the risks associated with On Us Check cashing.¹⁰

The Bank has also concluded that the fee will help deter misuse because it will reduce check-based fraud. In particular, the Bank expects that the fee will serve as an incentive for non-acountholders to deposit checks in their bank accounts or, if they do not have bank accounts, to open one either at the Bank or elsewhere. The Bank's tellers frequently inform people who are cashing payroll checks that they may avoid the proposed fee entirely by opening an account at the Bank. We encourage the Bank to continue this practice as widely as is practicable.

The Bank's submission discusses how charging the fees relates to its overall business strategy. By charging these fees, the Bank hopes to shorten teller lines and thereby provide acountholders better service and ensure that its acountholders are not required to subsidize check cashing services for non-acountholders. By doing so, the Bank believes its competitive position will be enhanced.

Finally, the Bank has provided analysis on the impact that the fees have on the Bank's safety and soundness, particularly the Bank's ability to recover its costs and cover its risks in providing non-acountholders this service. The fee also serves as an incentive to non-acountholders to present checks for payment through the payment system, which, as discussed above, helps protect the Bank from forgery, fraud and overdrafts. 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 person who cashes your check a fee if that person is not a deposit or loan (excluding credit cards) customer of the Bank or another [] company."

⁸ *Batten v. Bank One, N.A.*, 2000 WL 1364408 (N.D. Ill. Sept. 15, 2000).

⁹ When a check is presented through the payment system, a bank has the right under the Uniform Commercial Code ("UCC") to defer deciding whether to make final payment, or to return the item unpaid, until the banking day following the day of presentment. See UCC §§ 4-104(a)(10), 4-301(a), 4-301(b), and 4-402(c). Under Regulation CC, a bank need not make funds deposited by means of an On Us Check available for withdrawal until the following banking day. 12 C.F.R. § 229.10(c)(vi).

¹⁰ See also *Batten v. Bank One, N.A.*, 2000 WL at --- ("Bank One's practice [of charging non-acountholders a fee for this service] offsets these risks . . . [by generating] funds to cover any losses due to forgery or fraud.").

In addition, as part of its consideration of the safety and soundness implications of initiating an On Us Check cashing convenience fee, the Bank analyzed 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 On Us Check cashing 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). As noted above, the deposit agreement for the accounts to which the Bank’s On Us Check cashing fee applies includes a provision that the Bank “may charge a person who cashes your check a fee if that person is not a deposit or loan (excluding credit cards) customer of the Bank or another [] company.” Thus, because the Bank’s deposit agreement clearly provides for check-cashing fees, the Bank has concluded that the application of the On Us Check cashing fee would not constitute a wrongful dishonor of a check under the UCC.¹¹

The Bank also asserts that the application of the On Us Check cashing fee would not impair the negotiability of a check presented for payment. Section 3-104 of the Uniform Commercial Code defines a negotiable instrument as:

... an unconditional promise to pay or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

- (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) is payable on demand or at a definite time; and
- (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment on money. . . .

The Bank asserts that an On-Us Check cashing 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 to payment appears on the face of the check.¹²

¹¹ *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).

¹² 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.

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 an On-Us Check cashing fee, 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 an On Us Check cashing fee 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 341.¹³

¹³ See also *Hayes v. First Commerce Corp.*, 763 S.2d 733, 43 UCC Rep.2d 335 (La. Ct. App. 2000), in which the 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).

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