



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 17, 2001

Interpretive Letter #932
May 2002
12 U.S.C. 24(7)
12 CFR 7.4002(a) & (b)

Subject: [] Non-Relationship Customer Check Cashing Fees

Dear []:

This responds to your letter of July 12, 2001, in which you explain that [] (“the Bank”) proposes to commence charging a non-accountholder (“non-relationship customer”)¹ a convenience fee for using a Bank teller to cash an "on us check," which is a check drawn upon the account of one of the Bank’s customers. The Bank intends to apply this convenience fee with respect to checks drawn on business accounts. 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.

You request the concurrence of this office that the Bank is authorized to charge this fee under section 24(Seventh) of the National Bank Act (12 U.S.C. §24(Seventh)) and 12 C.F.R. § 7.4002(a).² 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).³

¹ The Bank defines “non-relationship customers” as customers that do not have a mortgage, credit card, other loan, checking account, savings account, or certificate of deposit account with the Bank or a loan or other account with an affiliate or subsidiary of the Bank.

² 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.

³ 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

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 banking⁴ 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.⁵

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.⁶

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 7.4002⁷ 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.

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.

⁴ 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)).

⁵ 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. @).

⁶ 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.

⁷ 12 C.F.R. ' 7.4002(b).

(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 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 non-relationship customer 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 § 7.4002(b)(2)(i)-(iv). The materials provided, for which the Bank requests confidential treatment,⁸ include information on various costs incurred by the Bank in cashing checks for non-relationship customers. These include the Bank's current losses attributable to non-relationship customer check-cashing, the number of non-relationship checks cashed annually, and the cost per check to process them. The Bank notes that in many instances, these costs are projected to increase. The Bank has concluded that its proposed non-relationship customer check cashing fee is necessary to help defray these costs.

The Bank also has concluded that the convenience 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-relationship customers to use other payment channels. The Bank has described several programs directed toward non-relationship customers that it offers, or is developing, as alternatives to the use by these customers of tellers to

⁸ 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.

cash checks over the counter. These include electronic accounts for cashing Federal payments and access to direct deposit payments, which reduce the opportunity for check-based fraud. You have represented that the Bank also intends to give written notices to non-relationship customers standing in line to cash payroll checks that they may avoid the proposed fee entirely -- and receive the full face value of a check drawn on the Bank -- by opening an account at the Bank or another institution or by electing to use the alternative payment methods offered by the Bank.

The Bank's submission discusses how charging non-relationship customers this convenience fee relates to its overall business strategy. The Bank has provided analysis of the impact that non-relationship check cashing has on the service that the Bank provides its account holders. The Bank's submission demonstrates that non-relationship check cashing, by increasing costs associated with fraud losses and increasing the waiting time in teller lines, has the potential to affect negatively the quality of service the Bank provides to its accountholders. The Bank's submission shows that deterrence of this potential negative effect was a factor considered by the Bank in proposing its non-relationship check cashing fee.

In discussing how the fees would enhance the competitive position of the Bank, the Bank notes as a threshold matter that superior convenience for its accountholders is a "key competitive ingredient" for the Bank. The Bank then discusses the impact that these fees will have on the Bank's ability to provide superior convenience, through physical and alternative service delivery channels, for both its relationship customers and non-relationship customers. The Bank asserts that the proposed non-relationship check cashing fee will promote greater convenience for its customers by allowing the Bank to reduce delays in customer service and develop and implement advanced fraud protection systems best suited for the risk of check cashing. Moreover, the Bank believes that the fee will enhance its competitive position by creating an incentive for non-accountholders and accountholders to use delivery channels for their banking services that are less costly than the Bank's physical banking centers. The Bank notes that its proposed fee approximates what a non-relationship customer may pay to use an automated teller machine and is less expensive than what many of its competitors charge for cashing a check presented by a non-accountholder.

Finally, the Bank provided analysis on the impact that the fees it charges to access its services have on the Bank's safety and soundness, particularly the Bank's ability to control costs and increasing exposure to fraud losses. 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 convenience fee for cashing on us checks. The Bank also will send a notice to affected customers, 30 days before such a fee goes into effect in a particular state, that the fee will, in fact, be charged.

In addition, as part of its consideration of the safety and soundness implications of initiating a non-relationship customer check cashing convenience fee, the Bank

analyzed whether the proposed fee would constitute a “wrongful dishonor” of a check or impair the check's negotiability under the Uniform Commercial Code ("UCC").

According to the analysis furnished by the Bank, whether a customer could challenge the non-relationship 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). The deposit agreement for the business accounts to which the Bank’s proposed non-relationship check cashing fee would apply provides:

You agree that we may impose additional requirements we deem necessary or desirable on a payee or other holder who presents for cashing an item drawn on your account which is otherwise properly payable, and if that person fails or refuses to satisfy such requirements, our refusal to cash the item will not be considered wrongful. You agree that, subject to applicable law, such requirements may include (but are not necessarily limited to) physical and/or documentary identification, check cashing fees, and requirements that such items may be cashed only at specified locations.

Thus, because the Bank’s deposit agreement clearly provides for check cashing fees, the Bank has concluded that the application of the proposed non-relationship customer check cashing fee would not constitute a wrongful dishonor of a check under the UCC.⁹

The Bank also asserts that the application of the proposed non-relationship customer 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. . . .

⁹ *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).

The Bank asserts that a non-relationship customer 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:¹⁰

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 non-relationship customer 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 a similar 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

¹⁰ 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.

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 341.¹¹

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 non-relationship customer check cashing 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

¹¹ 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 a check cashing convenience 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).