



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

February 27, 2008

Interpretive Letter #1094
March 2008
12 USC 24(7)
12 CFR 7.4002

Subject: Request for Confirmation that [] is Authorized to Charge a
Non-Accountholder a Fee to Cash an Official Check

Dear []:

This responds to your letter of February 26, 2008, in which you request the confirmation of the Office of the Comptroller of the Currency (OCC) that [] (Bank) is authorized pursuant to 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 7.4002 to establish and charge a fee to a non-accountholder customer for the service of cashing an official check (official check cashing fee). Based on our review of your letter and supporting materials and the relevant considerations set forth in our regulations, we confirm that the Bank may establish and charge an official check cashing fee to a non-accountholder customer pursuant to section 24(Seventh) and section 7.4002.¹

I. BACKGROUND

Your letter uses the term “official check” to refer to a check drawn either on the issuing bank or on another institution in an amount paid to the issuing bank by the purchaser of the check. As explained in your letter, the Bank provides official checks to its customers who wish to provide payment to creditors with a check that is not drawn on the credit of those customers. In the Bank’s experience, these official checks are most often issued in large dollar amounts for important transactions, such as the sale of a house or a car, when the purchaser and seller may otherwise have bank accounts but prefer to use an official check because it is drawn on the credit of the drawee bank rather than the credit of the purchaser. Although the customers receiving official checks may have bank accounts into which these checks could be deposited, and funds subsequently withdrawn, some customers seek immediate cash and it is in that situation where a check cashing fee could arise.

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

Depending on the jurisdiction, the Bank charges a fee between \$5 and \$8 to a non-accountholder customer who presents an official check to branch personnel for payment in cash. The Bank's standard practice is to disclose the fee and obtain the non-accountholder's consent to it before completing the process of cashing the check. No fee is assessed when the check is deposited into the non-accountholder's account at another institution and the check clears through the payments system.

The Uniform Commercial Code (UCC) distinguishes between the two types of official checks discussed in your letter depending on whether the check is drawn on the issuing bank or on another institution. The official checks typically used by the Bank are considered to be "teller's checks" under the UCC because they are drawn on another institution.² The Bank's teller's checks provide on their face that the drawer of the check is the Bank, that they are issued by [] (), and that they are drawn on []'s account with [] (*Bank2*). In some states, the Bank may also provide official checks in the form of "cashier's checks," which are drawn on the Bank, instead of teller's checks.³ This letter addresses both cashier's checks and teller's checks.⁴

II. DISCUSSION

A. National Bank Charges and Fees are Authorized by 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 banking 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).⁵ A

² A "teller's check" is "a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank." UCC § 3-104(h).

³ A "cashier's check" is "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank." UCC § 3-104(g).

⁴ As described in your letter [] a putative class action was filed against the Bank, as well as other banks [] by payees of teller's checks who seek damages and injunctive relief. []. A single plaintiff, who is not an accountholder at the Bank, claims that she was charged a fee to cash a teller's check at a [] branch of the Bank. The plaintiff claims that the Bank's official check cashing fee violates several provisions of the UCC [].

⁵ 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 of North Carolina, N.A. 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)).

bank's authority to provide products or services to its customers necessarily encompasses the ability to charge a fee for the product or service.⁶

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.⁷

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 7.4002 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 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 decision-making process that takes these factors into consideration, then there is no supervisory impediment to the bank exercising its discretionary authority to charge

⁶ See *Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002), *cert. denied*, 538 U.S. 1069 (2003); *Metrobank v. Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002). See also *Bank One v. Guttau*, 190 F.3d 844 (8th Cir. 1999).

⁷ In *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488, 495 (5th Cir. 2003), the U.S. Court of Appeals for the Fifth Circuit upheld the OCC's interpretation of the term "customer" in section 7.4002 to mean any party that obtains a product or service from a national bank, which would include both accountholders and non-accountholders.

non-interest fees and charges -- such as the official check cashing fees at issue here -- pursuant to section 7.4002(a).

B. The Bank's Consideration of the Section 7.4002(b) Factors in Establishing and Charging the Official Check Cashing Fee

The Bank has provided analysis and supporting documentation⁸ demonstrating that it has considered each of the four factors listed in section 7.4002(b)(2)(i)-(iv) in establishing its official check cashing fee.

The materials provided include information on the costs incurred by the Bank in cashing official checks for non-accountholder customers. These costs result from the increased demands on branch personnel, including the additional staff time necessary to ensure compliance with the federal laws and regulations that apply when the Bank cashes official checks, and from the risks incurred by the Bank in cashing official checks. With regard to the risks incurred by the Bank, in particular, the Bank's submission demonstrates that the risk of fraud, forgery, and theft associated with non-accountholders' cashing of official checks is significantly higher than with accepting checks for deposit or in paying them upon presentation through the payments system.⁹ A bank that cashes a fraudulent or forged official check generally has no recourse, as the non-accountholder is unlikely to be located after cashing the check. As we have noted in a prior interpretive letter in the similar context of a bank cashing a check presented by a non-accountholder but drawn on the account of one of the bank's accountholders:

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 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.¹⁰

⁸ Your letter is accompanied by a separate submission, prepared by the Bank, documenting how it has considered each of the four factors listed in section 7.4002 in establishing its official check cashing fee. The Bank requests confidential treatment of this separate submission. The Bank believes that its submission includes information exempt from disclosure under the Freedom of Information Act (FOIA). 5 U.S.C. § 552. The FOIA exempts matters constituting "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

⁹ In recent years, the OCC has recognized an increasing risk to consumers and banks involving fraudulent check cashing schemes. In 2007 alone, the OCC issued dozens of alerts concerning scams involving fraudulent cashier's checks and other official checks. <http://www.occ.treas.gov/Altlst07.htm>. In addition, we issued guidance to national banks and consumers concerning fraudulent cashier's checks. OCC Bulletin 2007-2 (January 8, 2007) discusses factual and legal issues related to fraudulent cashier's checks, including associated risks for depository banks, and provides recommendations to national banks for managing these risks and protecting their customers; and OCC Consumer Advisory on Avoiding Cashier's Check Fraud, CA 2007-1 (January 16, 2007) provides consumers information on common cashier's check scams and steps consumers can take to avoid becoming victims of these scams.

¹⁰ OCC Interpretive Letter 933 (May 2002) at 3-4 (quoting *Batten v. Bank One, N.A.*, 2000 WL 1364408 (N.D. Ill. Sept. 15, 2000)), available on the OCC's website at www.occ.treas.gov/interp/monthly.htm.

These risks are the same whether the check presented by a non-accountholder is drawn on the Bank or another institution. In either case, the Bank provides immediate cash to a non-accountholder and has little or no recourse in the event of fraud, forgery, or theft.

In contrast, when holders of official checks deposit the checks in their bank accounts and the checks are cleared and paid through the payments system, the risk of fraud falls on the bank where the check is deposited. That bank has the ability to reverse the deposit and the additional protection of being able to wait at least one business day before making funds available from that deposit.¹¹ When the Bank cashes an official check over the counter for a non-accountholder, these protections do not apply. The Bank has therefore concluded that its official check cashing fee is necessary to defray the costs and offset the risks associated with official check cashing.

In addition, the Bank has concluded that the official check cashing fee will help deter misuse of its services because it will provide an incentive for non-accountholder customers to deposit their official checks in their banking accounts, which would lessen the Bank's costs in providing teller personnel and the risks to the Bank due to fraud, forgery and theft associated with the cashing of official checks.

In discussing how the official check cashing fee enhances the competitive position of the Bank, the Bank states that the fee is also intended to allocate the costs of services equitably between accountholder and non-accountholder customers, so that accountholder customers do not subsidize the costs and risks incurred by the Bank with respect to the check cashing service provided to non-accountholder customers. This is expected to improve the customer experience for accountholders and, in turn, enhance the Bank's ability to compete with the other depository institutions in its markets.

Finally, the Bank has provided analysis on the impact that the fees it charges to access its services have on the Bank's safety and soundness. The official check cashing fee is intended to reduce the Bank's costs, generate a reasonable return to support the Bank's earnings and capital, to allocate the costs and risks equitably between accountholders and non-accountholders, and to encourage non-accountholders to engage in the practice less risky for the Bank of depositing official checks in an account and allowing such checks to clear through the payments system.

In addition, as part of its consideration of the safety and soundness implications of establishing and charging an official check cashing fee, the Bank analyzed whether the fee would impair the negotiability of official checks or otherwise contravene the UCC. Concerning negotiability, the Bank has concluded that charging a fee for cashing an official check has no effect on the negotiability of that check under the UCC. The Bank notes that the official check fee only applies to over-the-counter check cashings by a non-accountholder, and are not assessed when the check is deposited or negotiated to another holder. The Bank observes that the holder of an official 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. Thus, the Bank concludes it is

¹¹ See Regulation CC, 12 C.F.R. § 229.10(c)(1)(v) (2007).

performing a separate service in cashing an official check and the fee for doing so does not affect the negotiability of the check under the UCC.¹²

The Bank next notes that the obligations imposed on a bank under the UCC depend on the type of check at issue. Thus, the Bank addresses the effect of the fee under UCC §§ 3-412 and 3-413, as applied to cashier's checks, and under UCC §§ 3-411(b) and 3-414(b), as applied to teller's checks.

UCC § 3-412 requires a cashier's check to be paid "according to its terms at the time it was issued." Similarly, UCC § 3-413 concerns the obligation of an "acceptor" of a draft "to pay the draft . . . according to its terms at the time it was issued." The Bank states that the official check cashing fee does not violate either of these provisions because the fee is assessed for the separate service the Bank renders to the non-accountholder customer in providing immediate payment in cash and does not affect the payment of the check according to its terms.¹³

UCC § 3-411(b) provides that a drawer of a teller's check is liable on a teller's check only if it refuses to pay a dishonored teller's check or if it wrongfully stops payment on a teller's check. UCC § 3-414(b) also provides that the drawer of a teller's check is obligated to pay only if the item is first dishonored by the drawee.¹⁴ Thus, the Bank states that if the conditions in these provisions of the UCC are not satisfied with respect to a transaction, the Bank has no duty to pay its teller's check. Accordingly, the Bank concludes that these provisions impose no impediment to the Bank's charging a fee for negotiating and providing immediate payment of the check.

¹² The Bank notes that this is the same analysis employed by its predecessor bank, which was the recipient of OCC Interpretive Letter 933, with respect to fees charged to a non-accountholder for cashing a check drawn on an account held by an accountholder of the bank. In that case, the predecessor bank similarly concluded that safety and soundness concerns were not implicated where the fee charged by the bank did not affect negotiability, under the UCC, of an "on-us" check it cashed for a non-accountholder. OCC Interpretive Letter 933 at 3-4. Here, the Bank concludes the same analysis is appropriate in the context of official checks whether those checks are cashier's checks drawn on the Bank or teller's checks drawn on another bank.

¹³ The Bank notes that the official check cashing fee arises only when a non-accountholder customer has voluntarily chosen to do business with the Bank in order to get immediate cash, and courts have rejected arguments that a bank's check cashing fee imposed only as a result of the voluntary decision of the holder of the check violates the UCC. *See, e.g., Sexton v. PNC Bank, N.A.*, 43 UCC Rep.2d 341 (Pa. Ct. Comm. Pl. 2000) ("The [check-cashing fee] 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 [the bank] into his or her own account at another financial institution will receive the full face amount of the check.").

¹⁴ UCC § 3-502(b)(2) defines "dishonor" of a "draft payable on demand," such as the Bank's teller's checks, to require "presentment for payment . . . to the drawee." UCC § 3-502(b)(2) (emphasis added).

III. 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 official check cashing fee and, based on the analysis provided by the Bank, 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