Department of Banking and Finance
2990 Brandywine Road, Suite 200
Atlanta, Georgia 30341-5565
770-986-1633
http://dbf.georgia.gov/

Nathan Deal
Governor

Kevin B. Hagler
Commissioner

DECLARATORY ORDER

TO: All State-Chartered Banks July 3, 2013

RE: In order to provide parity with national banks, overdraft fees imposed by state-chartered banks in connection with deposit accounts are not subject to state law usury limitations.

The Department of Banking and Finance ("Department") has received a written request from a state-chartered bank as well as oral requests from other state-chartered banks and an industry group for the issuance of a parity order regarding overdraft fees related to deposit accounts.[1] Specifically, the written request seeks an order that "Georgia state-chartered banks may charge an overdraft fee when a customer overdraws his or her checking account – with the use of a check, debit card, ATM card or other means – as a non-interest fee without any usury restrictions." As set forth in more detail below, in light of the fact that federal law authorizes national banks to impose overdraft fees on customers' deposit accounts without any usury limitations, the Commissioner declares that overdraft fees imposed by a state-chartered bank are not subject to state law usury limitations.

The Commissioner is expressly authorized to issue parity orders pursuant to O.C.G.A. § 7-1-61 which provides in pertinent part that:

> (b) In the exercise of the discretion permitted by this Code section, the commissioner shall consider:
>
> (1) The ability of financial institutions to exercise any additional powers in a safe and sound manner;

---

[1] For purposes of this order, an overdraft occurs when a customer attempts to withdraw funds that exceed the available balance in the customer's deposit account and, notwithstanding the insufficient funds, the bank honors the transaction. In the event an overdraft takes place in a customer's deposit account and a financial institution imposes a fee for honoring the transaction, such fee is referred to as an overdraft fee. For each transaction that exceeds the available account balance, the customer is subject to the imposition of an overdraft fee.

(2) The authority of any federally chartered bank, as the term "bank" is defined in Code Section 7-1-621, operating pursuant to federal law, regulation, or authoritative pronouncement;

(3) The powers of other entities providing financial services in this state; and

(4) Any specific limitations on financial institution operations or powers contained in this chapter. ...

(e) To provide parity with other federally insured financial institutions, the commissioner may, by specific order directed to an individual financial institution or category of financial institutions, modify or amend the following qualifying or limiting requirements imposed on financial institutions by this chapter:

(1) Collateral requirements and limits on the amount of obligations owing to it from any one person or corporation;

(2) Loan to value or other limitations in lending;

(3) Limitations on the amount of investments in stock or other capital securities of a corporation or other entity;

(4) Limitations on the amount of bank acceptances to be issued; and

(5) If Georgia law has been determined to be federally preempted, other limitations or restrictions on financial institutions contained in this chapter.

No such order will be issued unless the commissioner determines that such activity will not present undue safety and soundness risks to the financial institution or institutions involved. In making such a determination, the commissioner shall consider the financial condition and regulatory safety and soundness ratings of the institution or institutions affected and the ability of management to administer and supervise the activity. Any such order pursuant to this subsection will be available for public review.

(Emphasis added). Therefore, in evaluating the request that the Commissioner exercise his parity power under O.C.G.A. § 7-1-61(e), the Commissioner must consider the permissible scope of activity for a national bank.

Among a litany of other powers, national banks are authorized to receive deposits. 12 U.S.C. § 24(Seventh). In exercising this deposit taking power, national banks may "engage in activity incidental to receiving deposits." 12 CFR § 7.4007(a). One such incidental power is the ability of a national bank to "charge its customers non-interest charges and fees, including deposit account service charges."[2] 12 CFR § 7.4002(a); see OCC Interpretive Letter No. 1082, at 1 n.1

[2] Certain fees that a national bank imposes upon its customers satisfy the definition of interest under federal law. 12 CFR § 7.4001(a). However, overdraft fees imposed by a national bank are not interest for purposes of federal law. See 12 CFR § 7.4002(b).

(May 17, 2007) ("national banks are authorized to charge non-interest fees and charges as an activity necessarily incidental to their express power to engage in deposit-taking"). Such authorized non-interest charges and fees on a deposit account that national banks can impose on their customers include overdraft fees. See OCC Interpretive Letter No. 1082, at 6 (May 17, 2007) ("[T]he processing of an overdraft and recovery of an overdraft fee by balancing debits and credits on a deposit account are activities directly connected with the maintenance of a deposit account. ... [T]he Bank is providing a service to its depositors in accordance with its federal authority under sections 24(Seventh), 7.4007(a) and 7.4002 and that – pursuant to its deposit agreement with the accountholder – the accountholder has agreed to pay for.") Overdraft fees imposed by national banks are not interest for purposes of the limitations on usury found in the National Bank Act. See Video Trax, Inc. v. NationsBank, N.A., 33 F.Supp. 2d 1041, 1059 (S.D. Fl. 1998) aff'd 205 F.3d 1358 (11th Cir. 2000); Soto v. Bank of Lancaster County, No. 08-CV-1907, 2010 U.S. Dist. LEXIS, 31648 at *4 (E.D. Pa. March 31, 2010); Terrell v. Hancock Bank, 7 F.Supp. 2d 812, 816 (S.D. Miss. 1998).

Although national banks are authorized to impose non-interest charges and fees on deposit accounts, that authorization is not unlimited. 12 CFR § 7.4002(b) provides that:

> (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, 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 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 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.

12 CFR § 7.4002(b) sets forth certain factors that a national bank must consider in establishing overdraft fees. However, nothing in the regulation suggests if a national bank fails to consider the elements set forth in 12 CFR § 7.4002(b) that a non-interest charge or fee related to a deposit account will suddenly be treated as interest for purposes of usury. Instead, a national bank that does not take into consideration the enumerated factors in establishing the amount of its overdraft fee will be subject to regulatory scrutiny. See OCC Interpretive Letter No. 1082, at 4 (May 17, 2007) ("[i]f a bank uses a decision-making process that takes these [12 CFR § 7.4002(b)] factors into consideration, then there is no supervisory impediment to the bank exercising its discretionary authority to charge non-interest fees and charges"); see also 66 Fed Reg. 34784, 34787 (July 2, 2001).

As the imposition of an overdraft fee by a national bank is a non-interest charge or fee, the imposition of such overdraft fee does not satisfy the definition of interest for purposes of federal law. See 12 CFR § 7.4001(a). Since an overdraft fee on a deposit account is not interest, an overdraft fee cannot be taken into consideration in determining whether a national bank has committed a usury violation. See 12 U.S.C. § 86 ("the taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon") (emphasis added); see also 12 U.S.C. § 85. To the extent state law characterizes an overdraft fee as interest for purposes of usury limitations, such state law is preempted as to national banks. Beneficial National Bank v. Anderson, 539 U.S. 1, 11 (2003) ("In actions against national banks for usury, [12 U.S.C. §§ 85 and 86] supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive... Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank."); see 12 CFR § 7.4002(d) (preemption principles will be applied to state laws that "purport to limit or prohibit charges and fees" imposed by national banks under 12 CFR § 7.4002).

Just like national banks, state-chartered banks are authorized to accept deposits. O.C.G.A. § 7-1-280. In addition, similar to the OCC, the Department views overdraft fees imposed on deposit accounts as part of the deposit taking power of state-chartered banks. However, unlike national banks, state-chartered banks are potentially subject to a usury challenge for the imposition of overdraft fees as such fees imposed by a state-chartered bank can in certain circumstances be viewed as interest under state law. 2003 A.G. Op. 2003-9 ("an overdraft fee will not be considered interest when the transaction is readily characterized as a checking account transaction, lacking the legal and economic reality of a loan or extension of credit, and when the fee is not determined based on the amount and time value of overdraft amounts"); see also Synovus Bank v. Griner, No. A12A1822, 2013 Ga. App. LEXIS 294, at *21 (March 28, 2013). A national bank on the other hand can never be subject to a usury claim under federal law for the imposition of an overdraft fee as such fees are defined as "non-interest charges and fees." Any efforts to characterize an overdraft fee imposed by a national bank as interest for purposes of state usury laws would be preempted. Beneficial National Bank, 539 U.S. at 11.

Therefore, pursuant to the authority conveyed by the General Assembly under O.C.G.A. § 7-1-61(e)(5), the Commissioner modifies the deposit taking authority of state-chartered banks in O.C.G.A. § 7-1-280 to provide that overdraft fees on deposit accounts are non-interest fees and charges directly related to the receipt and withdrawal of deposits in order to achieve parity with national banks.

Notwithstanding the fact the Department views overdraft fees as part of the deposit taking power of state-chartered banks, the Department recognizes that some cases indicate the possibility that under state law an overdraft can, in certain circumstances, be a loan or an advance of money and, as such, any related fees could be viewed as interest.[3] Synovus Bank, at *21; Duncan v. State, 172 Ga. 186, 189 (1931); West v. Federal Deposit Ins. Corp., 149 Ga.

[3] As set forth above, this is directly contrary to the federal approach which views an overdraft fee imposed by a national bank as a non-interest charge or fee authorized under its deposit taking authority.

App. 342, 346 (1979). In the event an overdraft is in fact a loan or advance of money under Georgia law, the interest and fees that can be imposed by a bank on the overdraft is governed by O.C.G.A. § 7-1-292. Georgia law provides in relevant part that "[a]ny bank may take, receive, reserve, and charge interest and fees on any loan, advance of money, or forbearance to enforce the collection of money at rates not exceeding the limits set by the laws of this state." O.C.G.A. § 7-1-292 (emphasis added). One such limit on the amount of charges and fees a bank can charge on a loan or advance of money is the interest and usury provisions set forth in Chapter 4 of Title 7. However, such usury limitation does not apply to national banks as there is "no such thing as a state-law claim of usury against a national bank." Beneficial National Bank, 539 U.S. at 11.

Therefore, pursuant to the authority conveyed by the General Assembly under O.C.G.A. §§ 7-1-61(e)(2) or (5), in the event an overdraft is a loan or advance of money, the Commissioner modifies O.C.G.A. § 7-1-292 to provide that the interest and usury limitations incorporated into the statute do not apply to overdraft fees imposed by state-chartered banks. For purposes of clarity, the Commissioner is modifying the phrase "at rates not exceeding the limits set by the laws of this state," so that interest and usury limitations under Georgia law do not apply to overdraft fees imposed by state-chartered banks on deposit accounts.

In order to achieve parity, the Department will require state-chartered institutions, to the extent they have not already done so, to comply with the provisions in 12 CFR §7.4002(b). In the event any institution fails to comply with these provisions, such failure will not transform any overdraft fee into interest for purposes of usury but, instead, will subject the state-chartered institution to regulatory action by the Department as well as its federal regulator. In addition to 12 CFR § 7.4002(b), the Department expects state-chartered banks to continue to implement the joint guidance on overdrafts as well as the FDIC guidance on overdrafts. 70 Fed Reg. 9127 (February 24, 2005); Overdraft Payment Programs and Consumer Protection: Final Overdraft Payment Supervisory Guidance, FIL-81-2010 (November 24, 2010). Implementation of the above guidance will help ensure that state-chartered banks are in compliance with regulatory and statutory requirements.

In issuing this parity order, the Commissioner has taken into consideration the authority of national banks to impose overdraft fees on deposit accounts free of usury implications. The Commissioner has concluded that the imposition of overdraft fees on deposit accounts does not impose a safety and soundness risk to state-chartered banks. In reaching this determination the Commissioner has considered that overdraft fees on deposit accounts have been imposed by most, if not all, state-chartered banks for a number of years and, as a result, these institutions already administer and supervise this activity. By providing for parity with national banks, the Commissioner has concluded that such order will, if anything, reduce the safety and soundness risks of state-chartered banks and improve their safety and soundness ratings as these institutions will no longer be subject to usury claims related to overdraft fees. In addition, this order will ease the administrative burden on management at state-chartered banks as overdraft fees can be imposed without having to possibly engage in a usury analysis prior to imposing an overdraft fee.

One of the primary objectives of the Financial Institutions Code of Georgia is to provide for competition and parity between state-chartered banks and national banks. See O.C.G.A. §§ 7-1-3(a), 7-1-61(e). These objectives are standards to be observed by the Department in exercising

its discretionary powers. O.C.G.A. § 7-1-3(b). Accordingly, the Commissioner issues this order to ensure that such competition and parity is, and has always been in the past, consistent with respect to overdraft fees charged in connection with deposit account transactions. Therefore, the provisions of this order apply as of June 2, 2003, the date of the Supreme Court's decision in Beneficial National Bank v. Anderson. As such, overdraft fees charged by state-chartered banks in connection with deposit account transactions on or after June 2, 2003, are non-interest fees directly related to the receipt of deposits and the maintenance of deposit accounts and are not subject to the usury limits set by the laws of this state.

The Commissioner determines that there is a genuine necessity for the provisions of this order to apply as of June 2, 2003, to ensure complete and consistent parity. State-chartered banks and national banks have charged overdraft fees in connection with deposit account transactions for years. Federal law has provided for more than a decade that such overdraft fees are not interest. National banks during this time period have charged overdraft fees outside of any usury limitations without any risk of liability. Therefore, to ensure complete and consistent parity with national banks, it is necessary that state-chartered banks not be subject to the risk of liability from claims that the imposition of overdraft fees in connection with deposit account transactions violated state-law usury provisions during the same time period. Otherwise, there would not be fair and equal competition between state-chartered banks and national banks in Georgia with respect to overdraft programs during this time period and in the future.

Furthermore, during this time period, state-chartered banks had a basis for a good faith belief that the charging of overdraft fees in connection with deposit account transactions would not subject the bank to the risk of liability under Georgia usury laws. Federal and state banking regulators did not take the position that such overdraft fees constituted interest in violation of usury limitations. Similarly, in 2003, the Georgia Attorney General issued an opinion stating that overdraft fees charged in connection with checking account transactions are generally not considered interest under Georgia law. 2003 A.G. Op. 2003-9.

In addition, safety and soundness considerations support the time period of the application of the provisions of this order. Subjecting state-chartered banks to the risk of substantial civil liability, as well as potential criminal liability, for the charging of such overdraft fees in the past will adversely impact the state-chartered banking system. It is important to the safety and soundness of the state banking system that state-chartered banks, like national banks, have certainty that the charging of such overdraft fees in the past will not subject the banks to the risk of liability.

Similarly, the Department is aware that many bank customers voluntarily choose to participate in bank overdraft programs, and the Department wants to ensure that Georgia citizens continue to have access to such programs. If state-chartered banks are subject to the risk of substantial civil liability, as well as potential criminal liability, they may consider not offering overdraft programs in the future. This would adversely affect many bank customers, including those customers in the many Georgia counties without national banks.

The gravity and importance of this issue to businesses and consumers throughout Georgia simply cannot be overstated. The Griner decision promulgates a three-part test, which represents a substantial departure from the Department's regulatory interpretation and exposes every state-chartered bank in Georgia to expensive, time consuming, and perhaps crippling litigation. The

decision threatens the continuing vitality of the dual charter system of banking that has existed in Georgia for so many years by leaving state-chartered banks guessing in a situation of great uncertainty and peril and threatening access to crucial sources of capital following a period of extraordinary economic stress. This result threatens the very fabric of many local communities where state-chartered banks are often the primary, if not only, source of capital.

These reasons demonstrate the genuine necessity for the provisions of this order to apply as of June 2, 2003, to ensure complete and consistent parity between state-chartered banks and national banks.

This determination permits state-chartered banks to impose overdraft fees free of any usury limitations in order to ensure parity with national banks operating in the State of Georgia. However, state-chartered banks are cautioned that should any federal law or regulation be enacted or amended that imposes new limitations on overdraft fees, state-chartered banks will be subject to those provisions to which national banks are subject.

SO ORDERED THIS 3rd DAY OF JULY, 2013.

KEVIN B. HAGLER
Commissioner