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MID-SIZE BANK COALITION OF AMERICA

Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 2-3
Washington, D.C. 20219

Re: **Guidance on Deposit-Related Consumer Credit Products**
Docket ID OCC–2011–0012

Dear Office of the Comptroller:

On behalf of the Midsize Bank Coalition of America ("MBCA"), I am writing to provide the MBCA's comments on the above-referenced notice of proposed guidance (the "Proposal" or "Proposed Guidance") published by the Office of the Comptroller of the Currency ("OCC") on June 8, 2011.[1]

The MBCA is a non-partisan financial and economic policy organization of 24 mid-size banks doing business in the United States. Founded in 2010, the MBCA was formed for the purpose of providing the perspectives of mid-size banks on financial regulatory reform. As a group, the MBCA banks do business through more than 3,350 branches in 41 states, Washington D.C. and three U.S. territories. The MBCA's members' combined assets exceed $343 billion (ranging in size from $7 to $25 billion). Together, our members employ approximately 60,000 people. Member institutions hold nearly $258 billion in deposits and total loans of more than $205 billion. The MBCA's members include both national banks and federal savings banks/associations ("FSBs"), both of which would be directly affected by any final guidance.[2]

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[1] *Guidance on Deposit-Related Consumer Credit Products*, 76 Fed. Reg. 33,409 (June 8, 2011).

[2] *See Guidance on Deposit-Related Consumer Credit Products*, 76 Fed. Reg. 39,989 (July 7, 2011) (extending period for comment on the Proposed Guidance in part because FSBs need more time to consider and express their views on the Proposal's impact on them).

The MBCA supports much of the Proposed Guidance, but has serious reservations about several of its substantive requirements and believes its issuance is premature. We strongly believe any additional guidance regarding overdraft protection programs should be the product of interagency consultation and be based on empirical evidence of how overdraft protection is performing since the recent overdraft-related changes to Regulation E and Regulation DD. We believe such an interagency process, including gathering data on recent consumer and industry experiences, would afford the OCC and the other federal banking agencies a better-informed basis for any final guidance and would provide the banking industry as a whole with more consistency, stability and predictability in designing and operating overdraft protection programs. We do not, however, suggest a formal *rulemaking* (as opposed to supplemental interagency guidance).[3]

We therefore urge the OCC to postpone its current plan to adopt a supplemental Guidance on Overdraft Protection Programs in favor of an interagency process including collection of empirical evidence and consideration of recent industry and customer experiences.

If, however, the OCC chooses to move forward with its current plan, we believe it is critical that the OCC:

- provide more detail than is in the Proposal on the criteria and processes institutions must apply to determine customers' eligibility for and use of overdraft protection programs;

- explicitly exempt from any customer "opt-in" requirements automated overdraft protection programs operated for administrative convenience and not marketed to consumers;

- revise the currently proposed guidelines on enrollment procedures, including by allowing default selections and clarifying acceptable procedures for linking overdraft protection among different products;

- reevaluate the proposed new disclosure requirements, which are in certain respects ambiguous and could result in disclosures that would confuse rather than benefit consumers;

- take into account the effort and expense that would be entailed for banks in complying with the currently proposed monitoring

[3] Although our comments herein focus on the portion of the Proposed Guidance relating to automated overdraft protection programs, the MBCA believes an interagency process also should be undertaken in developing any final guidance on deposit advance products.

requirements, and identify more realistic approaches for banks to stay aware of customers who are overly dependent on overdrafts;

- exclude any requirement that accounts be closed or overdraft privileges suspended under specified circumstances without exception or the exercise of bank discretion;

- exclude any requirement for monthly limits on overdraft fees;

- provide more detail than the Proposal contains regarding acceptable practices for the development, election, and use of posting orders; and

- expressly acknowledge that many existing practices employed in the industry meet the OCC's objectives for disclosures, eligibility determinations, and monitoring.

I. Overdraft Protection Programs Should Be Addressed On an Interagency Basis.

We believe the OCC's Proposed Guidance is premature. The Proposal purports to take into account the recent and highly significant changes to Regulation E addressing debit card overdrafts that went into effect in July, 2010[4] and changes to Regulation DD in 2009.[5] However, the effects of those new rules have not yet been measured or evaluated. Accordingly, the OCC's current effort to prescribe "best practices" would appear to be necessarily impaired by a lack of information on how banks are and will be establishing systems and policies consistent with consumer expectations and rights under revised Regulations E and DD.

Even if the time were ripe to issue additional guidance concerning overdraft protection, we believe the OCC should approach this topic through an interagency process. The OCC notes that the Proposal "updates and expands on" the 2005 Joint Agency Guidance on Overdraft Protection Programs ("Joint Agency Guidance"),[6] including that document's illustration of "best practices." The MBCA submits that proper updating and expansion of the Joint Agency Guidance requires soliciting other agencies' viewpoints and seeking to

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[4] *See, e.g.*, *Electronic Fund Transfers*, 75 Fed. Reg. 31,665 (June 4, 2010), *Electronic Fund Transfers*, 75 Fed. Reg. 33,681 (June 15, 2010) (clarifying aspects of earlier issued final rule relating to overdraft fees on ATM and one-time debit card transactions, codified at 12 C.F.R. Part 205).

[5] *See Truth in Savings*; 74 Fed. Reg. 5584 (Jan. 29, 2009) (official staff commentary, codified at 12 C.F.R. Part 230).

[6] *Joint Agency Guidance on Overdraft Protection Programs*, 70 Fed. Reg. 9127 (Feb. 24, 2005).

harmonize standards across the range of types of federally regulated financial institutions. Disparate regulatory guidances on a single issue typically create confusion for consumers and raise the prospect of competitive disadvantage for certain institutions and their customers. Uniform standards, by contrast, help to ensure that all affected financial institutions compete on a "level playing field," and encourage the development of lower-cost, more consumer-friendly products.

Among the concerns raised by the OCC's current unilateral approach are the following:

- The Proposed Guidance states that "additional supervisory guidance is warranted to address the heightened safety and soundness risks," affecting overdraft protection programs, beyond existing rules and guidance. However, the Proposal does not identify any nexus between safety and soundness issues and overdraft fees. It is thus unclear what the OCC perceives as the connection between the two issues that would suggest additional guidance is currently necessary.

- The OCC does not address in the Proposal compliance enforcement or any coordination it might envision with other agencies with compliance responsibilities, such as the Federal Deposit Insurance Corporation ("FDIC") and the Federal Reserve Board. It is therefore unclear how the OCC plans to coordinate with those agencies to ensure consistency, avoid duplicative examinations, and address the likelihood of inconsistent standards.

With regard to these and other concerns, the MBCA offers below several recommendations for OCC to consider.

Recommendations

A. *The OCC should approach this issue in a more comprehensive fashion.*

Supplementing or expanding upon the Joint Agency Guidance through an interagency process would provide a more comprehensive approach to overdraft protection and factor in recent market experience among institutions beyond national banks and FSBs. For example, the comprehensive approach employed in drafting Regulations DD and E led to those regulations expressly addressing their relationship to state law provisions,[7] yet OCC's proposed

[7] For example, Regulation DD explicitly pre-empts inconsistent state law provisions.

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Guidance does not address this issue, leaving institutions uncertain as to any state-based liability they may face if they fail to comply with any aspect of the Guidance. As another example, the OCC's Proposed Guidance adopts the term "deposit-related consumer credit products," within which overdraft protection programs are addressed.[8] While the 2005 Joint Agency Guidance specifically addressed the interrelationship between overdraft protection programs and "credit," OCC's Proposed Guidance does not. At the same time, the Proposal requires additional disclosures and agreements that may need to be expressed to customers in writing, which might implicate other regulations relating to the provision of credit. The OCC should therefore clarify whether it intends any additional heightened requirements to implicate required disclosures under Regulation Z.

B. *The OCC should inform its efforts through consumer testing.*

Previous interagency collaboration was informed not only by the participation of multiple agencies, but also through those agencies' conduct of extensive consumer testing, as was employed when Regulations DD, E, and Z were promulgated. The absence of any similar testing by the OCC in the post-revised Regulatory E and DD environments suggests that the OCC's current Proposal may lack a sound foundation in current and future realities. The absence of post-revised Regulation E and DD testing is particularly objectionable given that checks and ACH transactions are specifically and deliberately excluded from the Regulation E overdraft rules, and yet the OCC intends to subject them to the Guidance's requirements.[9]

C. *The OCC should recognize the adverse impact new restrictions on overdrafts could have on consumers.*

The Proposal indicates the OCC's intent to impose a variety of new restrictions on overdraft practices and products. If regulatory requirements become too burdensome, financial institutions will no longer offer these

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> (d) Effect on state laws. State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. Additional information on inconsistent state laws and the procedures for requesting a preemption determination from the Board are set forth in appendix C of this part.

12 C.F.R. § 230.1(d).

[8] Proposed Guidance at 33,410.

[9] The OCC is proposing a significant expansion of certain limitations on overdraft protection, applying to all "automated overdraft protection plans that cover overdrafts from electronic (including ATM, point of sale ("POS"), preauthorized debits, and online banking transactions) and check-based consumer transactions." Proposed Guidance at 33,411.

services. Yet research and marketing studies have consistently demonstrated that consumers want overdraft protection. Many consumers feel this is a valuable service that allows them to continue to make necessary purchases when their account balance is unexpectedly insufficient. A contraction, or even cessation, of overdraft protection programs offered by financial institutions will likely expose customers to *at least* the same magnitude of fees due to items being returned for non-sufficient funds ("NSF"), but without the value of having their items paid. This will likely drive consumers to use non-supervised financial institutions to meet their financial needs, and result in increasing the number of unbanked consumers, who would be forced to rely on more costly services such as prepaid debit cards or check-cashing services.

D. *The OCC should attempt to harmonize the Guidance with other OCC guidelines.*

There appear to be certain discrepancies between the Proposed Guidance and the OCC's own prior guidance documents. For example, the Proposed Guidance refers to previous OCC guidance on the application of unfair and deceptive act or practice ("UDAP") laws, in which the agency made clear that a deceptive act or practice involves a representation or omission that is *likely to mislead* a reasonable consumer *in some material way*.[10] Whether particular conduct constitutes an unfair act or practice would depend on the particular facts and circumstances presented, but generally would involve acts or practices that are unscrupulous, unconscionable, or contrary to public policy, and that harm consumers.[11] Although the OCC suggests in a footnote in the Proposed Guidance that any reference to "best practices" is not intended to affect whether or when such laws as Truth In Lending Act ("TILA") & Equal Credit Opportunity Act ("ECOA") may apply to a particular program,[12] any final Guidance should clarify whether the OCC considers deviation from "best practices" as evidence of a possible UDAP violation.[13]

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[10] *See* OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices," (Mar. 22, 2002).

[11] *Id*. ("The practice causes substantial consumer injury. The injury is not outweighed by benefits to the consumer or to competition. The injury caused by the practice is one that consumers could not reasonably have avoided.").

[12] Proposed Guidance at 33,411 n.6.

[13] The need for wider collaboration is also evidenced in the actions of other agencies that have issued separate guidance documents, supplementing the 2005 Joint Agency Guidance. The FDIC issued a final Supplemental Guidance on overdraft protection in November, 2010, which is in a number of respects inconsistent with the OCC's Guidance. The recently-issued FDIC Guidance, unlike the OCC Guidance, does not require banks to discontinue overdraft services following "excessive" use, nor does it extend the opt-in requirement to all types of overdraft products. Such inconsistencies could lead to consumer

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II. The OCC Should Exempt Non-Marketed Automated Overdraft Protection Programs From Any Opt-In Requirements.

The Proposal states that the OCC Guidance would apply to "any" deposit related consumer credit programs.[14] At the same time, the Proposal explicitly states the OCC's understanding that only "a small percentage" of its supervised banks are administering the programs without proper attention to the risks identified.[15] We respectfully request that the OCC consider a more targeted approach to address its concerns. Specifically, we urge that any final Guidance at least allow those banks who responsibly provide non-marketed automated overdraft protection programs, consistent with the Joint Agency Guidance, to continue to do so exempt from the Proposed Guidance's requirements that banks obtain an affirmative customer request prior to affording the customer with overdraft protection. To that end and at a minimum, we urge the OCC to carve out from the "opt in" requirements of the Proposal (if they are adopted at all) automated overdraft protection programs that, consistently with the Joint Agency Guidance, are created and operated by a financial institution primarily for the administrative convenience of that financial institution, and are not marketed directly or indirectly to customers as an available overdraft protection product. The Joint Agency Guidance explicitly points out that programs of this type have not raised significant concerns,[16] and we respectfully suggest that these programs will not raise such concerns in the future.

The Joint Agency Guidance recognizes that, as an accommodation to their customers, certain financial institutions pay overdrafts on a discretionary, ad-hoc basis. This practice is memorialized in the Uniform Commercial Code ("UCC") in Section 4401(a), which allows for the payment of a check even though its payment creates an overdraft, and in Section 4303(b), which allows for the payment of checks in any order.[17] These two UCC sections preserve the

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confusion as well as disrupting competitive conditions in the market. *See* Financial Institution Letter, FIL-81-2010, issued November 24, 2010 ("FDIC Guidance"). The final FDIC Supplemental Guidance sets a July 1, 2011 deadline for implementing risk mitigation efforts, and institutions subject to the FDIC Guidance are just now completing such implementation.

[14] Proposed Guidance at 33,409.

[15] *Id*. at 33,410.

[16] *See* Joint Agency Guidance at 9128 (stating that automated discretionary and ad-hoc accommodation of overdrafts by banks have "not raised significant concerns," contrasted to overdraft protection programs "marketed to consumers essentially as short-term credit facilities").

[17] *See* UCC § 4-401(a) ("A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft"); § 4-4303(b) (subject to stop payment orders or similar

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practice of ad hoc payment that began years ago as a procedure for bank staff (usually a branch manager or assistant manager) to decide, on a case-by-case, discretionary basis, whether to pay or not pay a check creating an overdraft. This discretionary practice allowed bank staff members knowledgeable about the client and, in many cases, also aware of the client's needs, to make the decision of what was an important check to pay, as opposed to a check that might be returned unpaid without serious adverse impact on the customer who wrote it.

Some member banks still pay checks creating overdrafts based on this type of ad-hoc, personal "hands on" decision-making. However, as recognized in the Joint Agency Guidance, in an effort to achieve operational efficiency, some financial institutions have automated the accommodation overdraft payment process by limiting the customers eligible, the dollar amount allowed, the frequency of the use, or otherwise, while still preserving the right to pay or reject any individual item, and by not marketing or offering the program as a product to its customers.[18] When administered fairly, such programs meet the needs of customers, better utilize the time of management who would otherwise be reviewing checks daily, and reduce costs.

The cost savings resulting from the automation of these discretionary practices are negated, however, if a customer must first receive disclosures and consent to participation in the program. The "opt-in" requirements included in the Proposed Guidance, if adopted as suggested, could prompt the cancellation of these accommodation programs, returning the payment or non-payment of checks to the costly ad-hoc, personal decision-making mode of the past. The resulting increased costs would inevitably be passed on to bank customers in the form of higher fees, while providing no added value to consumers. We therefore urge the OCC, if it proceeds to issue a final overdraft guidance, to provide a carve-out for these non-marketed accommodation programs, consistent with the approach taken by the Joint Agency Guidance.

III. The OCC Proposal's Requirements for Determining Customer Eligibility and Overdraft Protection Limits Are Unworkably Vague.

The Proposed Guidance directs banks not to enroll customers in overdraft protection programs until they have "sufficient information about the customer to evaluate that the customer meets the bank's eligibility standards."[19] Without specifying what information might be deemed "sufficient," the Proposal

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events, banks may charge check payment "to the indicated account of its customer in any order").

[18] See Joint Agency Guidance at 9128.

[19] Proposed Guidance at 33,410.

suggests "prudential criteria" banks should apply.[20] Such criteria include "the credit and deposit profile of the customer and other relevant risk factors," with a focus on where a customer poses "undue risks" as shown in a "history of overdrawing an account or information suggesting an inability or unwillingness to repay credit." When applying these criteria, according to the Proposal, banks must evaluate whether customers meet those eligibility standards, applying "an appropriate degree of analysis … to determine whether the customer will be able to manage and repay the credit obligations arising from the product appropriately." And once a customer has initially qualified to be enrolled in an overdraft protection program, banks must establish "prudent programmatic limitations on the amount of credit that may be extended." Such credit limitations "should be established taking into account general ability to repay," and "should be clearly disclosed to customers at the time the product is offered."[21] The Proposal separately notes that disclosure of overdraft protection programs, and obtaining a consumer's affirmative request to participate in such a program, can be done through an "account agreement" provided to a new customer.[22]

These aspects of the Proposed Guidance raise several questions relating to determining customer eligibility and overdraft protection limits, including:

A. What is "sufficient information," and does it vary in differing circumstances?

B. How much latitude will banks be accorded in determining "prudential criteria" to establish eligibility and overdraft protection limits?

C. Must banks disclose any "prudential criteria" they employ to determine eligibility or overdraft protection limits?

D. How often should accounts be reviewed to determine changes in programmatic overdraft limits?

E. Must banks provide adverse action notices to customers deemed ineligible to participate in overdraft protection programs, or if overdraft limits are subsequently reduced?

F. If banks are required to suspend or terminate a customer's participation in overdraft protection programs, may they later

[20] *Id*. at 33,411.

[21] *Id*.

[22] *Id*. at 33,410.

reinstate participation, and if so, must banks apply to the reinstatement the same criteria as for initial eligibility?

G. What would banks be required to do in the event of joint accounts, where only one account holder has created overdrafts?

In preparing any final Guidance, the OCC should provide answers to these questions, as indicated further below.

Recommendations

A. *The OCC should clarify that what might constitute "sufficient information" varies under differing circumstances.*

Banks have markedly different information about new and existing customers, and the factors used to establish eligibility or credit limitations for new customers often differ from those used to evaluate the status of existing customers. As banks cannot have detailed information (previous overdrafts, average daily balance, regular income, *etc*.) on new customers, apart from credit scores and what those customers report on account applications, the OCC should clarify that these criteria constitute "sufficient information" to evaluate new customers' eligibility for overdraft protection programs.[23]

In providing such clarifications, the MBCA believes that the OCC should highlight the acceptability of practices already in use and not suggest hypothetical eligibility-evaluation mechanisms.

B. *The OCC should clarify that "prudential criteria" need not comprise a full analysis of a customer's financial status.*

There are several inconsistencies within the Proposed Guidance as to what is expected from banks in this area. For example, the following provision from the Proposal would authorize the traditional approach based on principles of safety and soundness:

> If not already conducted as part of the initial deposit account opening, prudential criteria for enrolling a customer in an overdraft protection program should include an initial assessment of the customer's risk with respect to overdraft account privileges. The scope and rigor of this assessment may vary

[23] For example, the Proposed Guidance should clarify that a statement of a consumer's income, debts, monthly obligations and the like are not required when enrolling the consumer in an overdraft program. Bank employees are generally not equipped to obtain or evaluate such information, and consumers are unlikely to want to provide it. Further, such information is not necessary to operate an overdraft program on a safe and sound basis.

> depending on the credit and deposit profile of the customer and other relevant risk factors, but an objective should be to determine whether the customer poses undue risks as indicated by, for instance, a history of overdrawing an account or information suggesting an inability or unwillingness to repay credit.[24]

However, other provisions seem to require banks' evaluation of something akin to a full-blown income statement from consumers, by referring to "ability to repay" as distinguished, for example, from "likely to pay."

> National banks should establish prudent programmatic limitations on the amount of credit that may be extended under an overdraft protection program, the number of overdrafts and the total amount of fees that may be imposed per day and per month, and any transaction amount below which an overdraft fee will not be imposed. *These limitations should be established taking into account general ability to repay* and safety and soundness considerations and the order in which the bank processes transactions.[25]

We recommend that any final Guidance explicitly permit banks to assess a consumer's eligibility for overdraft protection based on any information that enables the bank to make reasonable estimates of the consumer's likelihood of repayment. The OCC should clarify that banks are *not* required to obtain and evaluate income and debt information from a consumer to determine "ability to pay." The OCC also should clarify that institutions have the flexibility to design and utilize programs that evaluate customers without reliance upon criteria normally utilized in traditional unsecured loan or other similar programs, and that "prudential criteria" may be unique to overdraft protection programs.[26]

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[24] Proposed Guidance at 33,411.

[25] *Id*. (emphasis added). Other provisions similarly focus on "repayment capacity," *id.*, and an "analysis of the borrower's ability to manage and repay," *id*. at 33,412.

[26] Banks may make reliable predictions of the likelihood that they will be repaid, and thus the consumer's ability and willingness to repay, based on information in account records associated with a checking account. This approach, which is the traditional approach taken by banks, may include information such as the age of an account and other combinations of relationships the customer may have with the bank. Over time, banks are able to measure and validate the effect that these combinations of variables have on their collection ratios, and therefore net income or loss on their overdraft services.

C. *The OCC should limit disclosure requirements for "prudential criteria."*

Many financial institutions employ third-party software tools to create risk profiles and recommendations based upon a variety of factors related to a customer's credit-worthiness and previous banking history. The OCC should clarify that only a description of the factors used to evaluate a customer's eligibility is required to be disclosed, rather than complete disclosure of the weights and calculations any particular tool might employ.

IV. Enrollment Procedures Should Allow Default Selections and Linking of Eligibility for Overdraft Protection Programs.

The Proposed Guidance would extend requirements to obtain a customer's opt-in[27] to overdraft protection programs for additional types of transactions ("products"), and heighten disclosure and eligibility standards over and above those required by Regulation E.[28] According to the Proposal, disclosures prior to enrollment should include "sufficient information about a product's costs, risks, and limitations when the product is offered to make an informed choice"; "alternative overdraft services and credit products"; and "clear disclosure about the order of processing transactions and the fact that the order can affect the total amount of overdraft fees incurred by a customer."[29]

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[27] The Proposal states that "customers should not be automatically enrolled in programs for deposit-related credit products," but should only be enrolled after a customer has received "appropriate disclosures, has made an affirmative request for the product, and has agreed to abide by product terms, including associated fees." Proposed Guidance at 33,410. Rather than specifying particular opt-in disclosure language, the Proposal notes that, "unless otherwise specified in regulation or guidance, banks have flexibility in how they obtain a customer's affirmative request," suggesting that banks may at their option provide "clear and conspicuous language in an application, separate opt-in form, or account agreement," through which a customer affirmatively provides his consent for enrollment. *Id.*

[28] Regulation E requires financial institutions to obtain a customer's opt-in agreement, prior to imposing any fee or charge for overdraft services, but only for overdraft services associated with ATM and one-time debit card transactions. To obtain this agreement, an institution must provide a customer with separate written notice "describing the institution's overdraft service," obtain a customer's affirmative consent or opt-in for the service, and provide the customer written confirmation that includes a statement of the customer's right to later revoke his or her consent. 12 C.F.R. § 205.17.

[29] Proposed Guidance at 33,411.

Recommendations

A. *The OCC should not require affirmative opt-in to overdraft protections for products outside the scope of Regulation E.*

The MBCA believes that requiring consumers affirmatively to opt in to overdraft protection for check, ACH and other transactions outside the scope of Regulation E's opt-in requirement is inconsistent with sound policy. Empirical evidence has consistently demonstrated that the majority of consumers prefer that check and ACH overdrafts, often representing their more important payments, are paid rather than returned.[30] Although accountholders should be free to exercise their choice to terminate participation in any overdraft program at any time, the MBCA sees no basis − and the Proposal does not indicate any basis − to require an opt-in for check and ACH transactions. Unless and until reliable testing reveals that such a requirement is consistent with consumer demand, the only transactions subject to an opt-in requirement should be ATM and one-time debit card transactions, in accordance with Regulation E.

B. *Any final Guidance should explicitly allow linkage of overdraft protection privileges among different products.*

Even if the proposed expansion of the existing opt-in requirement to cover checks and ACH transactions had an empirical basis, the Proposed Guidance would be deficient in informing national banks and FSBs of how to ensure their customers make informed opt-in decisions. For example, the Proposed Guidance does not provide any detail as to whether institutions might link overdraft protection products together or must offer them individually, or how institutions might treat customers who have already opted-in under Regulation E. The Proposed Guidance could be read to suggest that new customers must be given the option to opt-in to overdraft protection for each type of product individually.[31] However, many financial institutions either may not technically be able to segregate overdraft privileges according to individual products, or may find it prudent to only allow overdraft protection to one-time debit transactions if a customer has already agreed to participate in overdraft protection programs for checks or ACH transactions. The OCC should clarify that institutions have flexibility in this regard and are not required to allow a

[30] *See Electronic Fund Transfers*, 74 Fed. Reg. 59,033, 59,034 (November 17, 2009) (final rule and official staff commentary) (providing results of Federal Reserve Board survey confirming consumers prefer policies that facilitate their checks being paid rather than returned for NSF).

[31] Proposed Guidance at 33,411 ("Such policies and procedures should provide that a customer must ''opt-in'' to the program, such as by making an affirmative request or application to be enrolled in the service and affirmatively agreeing to pay any fee that may be imposed for payment of overdrafts arising from debits, checks, POS and ACH transactions, as applicable.").

customer to select overdraft protection on a product-by-product basis, other than in accordance with Regulation E.

V. Disclosure Requirements Need to Reflect Further Consideration of the Impact on Customers.

The Proposed Guidance would require banks disclose to customers "sufficient information about a product's costs" even before those customers agree to use of any overdraft service; a "clear disclosure" about the order of processing transactions and how an order can affect the total amount of overdraft fees a customer may incur; a separate notice on each instance where overdraft protection is suspended, terminated, or potentially reinstated; and notification to the customer of "alternatives to overdraft protection, such as linked deposit accounts, or other lines of credit."[32]

Some of the required disclosures would potentially be confusing and misleading to consumers, and thereby create liability risks for banks. These requirements would very substantially increase the amount of information customers receive, lessening the possibility that customers will be able to digest that information, as well as needlessly increasing bank compliance costs. The MBCA believes, as do many consumer protection advocates, that disclosures should be simple and straightforward.[33] The additional disclosure requirements contemplated in the Proposed Guidance would clutter overdraft protection disclosures, undercutting Regulation E's objective to ensure short, easy-to-understand communications with consumers. Further, several new disclosure requirements in the Proposal appear at least partially duplicative of requirements that are already required of banks, and any changes or supplements to those existing disclosure requirements should be done within the context of those other requirements, rather than in separate guidance.

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[32] Proposed Guidance at 33,412. In addition to these requirements, the Proposal would impose an additional requirement on banks that "prudent limitations on the amount of credit that may be extended under an overdraft protection program," be "clearly disclosed" to customers when a product is offered. In addition to clarifying how these prudential limitations might be established for new customers (as discussed above), any Final Guidance should clarify whether banks' disclosure requirements extend to the terms of such credit (*e.g.*, ceiling amount, duration, terms), or the factors that banks might utilize to establish these limits (*e.g.*, creditworthiness, prior banking history, etc.).

[33] *See, e.g.*, Oversight of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services, 112th Cong. (2011) (testimony of Elizabeth Warren Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau, highlighting the utility of simple disclosures), *available at* http://financialservices.house.gov/media/pdf/031611warren.pdf.

Recommendations

A. *The OCC should not require disclosure of overdraft limits, or notice of overdraft suspension or reinstatement.*

Any requirement to disclose the amount of overdraft protection a bank might make available to a consumer could lead the consumer to believe the bank is committing to approve overdrafts up to that limit. However, banks generally retain the discretion to pay or not pay any overdraft. Therefore, there is significant risk of consumer confusion if banks disclosed the overdraft limit on the one hand, while on the other hand disclosing that the limit is discretionary. The same applies to any requirement to disclose when overdraft protection privileges are suspended or reinstated. Again, such disclosures could lead consumers to believe the bank is committed to approving overdrafts up to the specified limit when in fact the bank retains discretion not to do so.

We also are concerned that these proposed disclosures might be construed as a written commitment to pay overdrafts, in which case they could subject a bank's overdraft program to TILA disclosure requirements. Banks ordinarily are not subject to TILA in connection with their overdraft programs, and a number of difficulties would be presented if they were. Specifically, overdraft protection programs are not normally subject to Regulation Z because any overdraft fees imposed do not constitute a "finance charge."[34] However, charges may be considered a "finance charge" if "the payment of such items and the imposition of the charge were previously agreed upon in writing."[35] Thus, if a bank apparently had committed in writing to paying a consumer's overdrafts, overdraft fees could be considered finance charges and TILA disclosures would be required.

A similar concern exists related to other temporary credit-extension programs offered by many of our member banks to customers. Does the OCC intend to require banks to treat their overdraft protection programs the same as credit extension programs, which may additionally require underwriting to be deemed sufficiently safe or sound?

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[34] *See* 12 C.F.R. § 226.1(c).

[35] 12 C.F.R. § 226.4(c)(3). *See also* Paragraph 4(c)(3) of the Official Staff Commentary to Section 226.4, which provides: "[a] charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items."

B. *The OCC should clarify whether disclosures required by other regulations are sufficient to satisfy the requirements of the Proposed Guidance.*

Under the Proposal, banks would be required to make several types of new disclosures to customers before enrolling them into overdraft protection programs.[36] These disclosures include "sufficient information about a product's costs" so as to allow a customer to make an informed choice.[37] Aside from the ambiguity of what might constitute "sufficient information," disclosure requirements related to overdraft costs are already addressed in Regulation DD.[38] Regulation DD requires identification of all overdraft amounts, fees or charges imposed in regular statements and by calendar year; shown in close proximity to those fees within any statement.[39] The OCC should clarify whether it deems the disclosures required by Regulation DD to constitute "sufficient information," or whether it considers more information necessary. At a minimum, any final Guidance should provide examples similar to the model disclosure form that accompanies Regulation E to clarify how banks may properly provide customers with such information.

Regulation DD also includes several requirements for the advertising or marketing of overdraft services.[40] It requires "clear and conspicuous" disclosures of any overdraft fees, the types of transactions that might incur an overdraft fee, and any circumstances under which the institution might not pay an overdraft.[41] The Proposed Guidance simply states that advertising "should not mislead customers about the optional nature of the program or otherwise promote routine use or undue reliance on the program."[42] If the OCC intends to require disclosures of additional information beyond those required by Regulation DD, it should expressly say so. Preferably, any final Guidance should explicitly state that compliance with Regulation DD is sufficient to

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[36] "Customers … should be provided sufficient information about a product's cost, risks, and limitations when the product is offered to make an informed choice [and also] should be provided information about alternative … services." Proposed Guidance at 33,411.

[37] *Id.*

[38] Regulation DD addresses overdraft disclosure requirements in 12 C.F.R. § 230.11, and specifies in § 230.6(a)(5) that any overdrafts or costs must also be shown in aggregate amounts on periodic statements.

[39] *See* 12 C.F.R. § 230.11(a).

[40] 12 C.F.R. § 230.8(f) specifically requires advertisements for overdraft services to include disclosures as detailed in 12 C.F.R. § 230.11(b).

[41] *Id.* at § 230.11(b)(1).

[42] Proposed Guidance at 33,411.

ensure customers are not misled and are sufficiently informed of potential costs and fees of overdraft protection programs.

C. *Any final Guidance should confirm the acceptability of reasonable attempts to provide suspension or termination notices, and clarify that subsequent communications regarding overdraft protection alternatively do not constitute improper steering.*

The Proposal would require banks to notify customers whenever "overdraft protection is suspended or terminated, and when it is reinstated, as applicable."[43] Any final Guidance should state if there are minimally-acceptable methods of providing such notice. Banks should only be required to make reasonable attempts to notify customers, as some customers may fail to acknowledge or respond to notices provided. In addition, any final Guidance should explicitly confirm that any post-suspension or termination follow-up communications with customers about alternative products do not constitute improper targeting or steering.

VI. The Proposal's Monitoring and Mandatory Suspension or Closure Requirements Are Unwarranted.

The Proposed Guidance states that all accounts "should be subject to monitoring and segmentation by customer usage to detect indications of excessive overdrafts (and related overdraft protection fees) and/or potential changes to repayment capacity with respect to the overdraft product."[44] Although the customer suitability goals of the two proposed monitoring and underwriting requirements may be laudable, as a practical matter, the suggested monitoring and underwriting will be infeasible for many, if not all, banks. To fully satisfy OCC's proposed requirements, it appears that banks would need:

- to develop and put into place new systems to perform automated monitoring of overdraft fees and to generate reports of accounts that have met established overdraft fee limitations;
- dedicated personnel to manage the automated monitoring process and to review the reports generated by the automated monitoring process; and
- mechanisms to review each individual customer's eligibility for other low-cost alternatives prior to reaching out to the customer.

[43] *Id.*

[44] Proposed Guidance at 33,411-12.

Beyond these operational obstacles, the MBCA is extremely concerned by the OCC's proposed requirement that banks suspend or close an account due to "excessive" overdrafts, as discussed below.[45]

Recommendations

A. *The OCC should not require accounts to be closed, or that overdraft protection be suspended or terminated.*

Any requirement to automatically discontinue a customer's overdraft privileges or close the customer's account if overdraft activities exceed a certain threshold is unnecessary for safety and soundness purposes and would deprive consumers of choices. It would also be at odds with the approach taken by the FDIC, which is to require banks to reach out to customers in these instances to assure they are aware of any lower-cost alternatives to overdrafts. National banks should not be subject to such a requirement if FDIC-regulated banks are not, and consumers should not be subject to disparate treatment by banks following the OCC's guidelines versus banks governed by the guidelines of other agencies. Terminating overdraft privileges will almost certainly force some needy consumers into the category of the "unbanked" and make checking accounts more expensive, with attendant adverse effects.

The Proposal's requirement to terminate a customer's overdraft privileges or close an account in the event of excess overdraft activities is purportedly grounded on safety and soundness considerations.[46] However, terminating a customer's overdraft privileges or closing an account for excessive overdraft activity is not necessarily required for safety and soundness purposes, particularly in cases where the consumer has a history of paying his or her obligations in full. In such cases, neither banks nor consumers are served by involuntarily terminating customers' overdraft privileges or closing deposit accounts.

Moreover, the OCC's proposed requirement for termination or account closure is inconsistent with the FDIC's overdraft guidance, and would thereby

[45] *See* Proposed Guidance at 33,412 ("If, after account review and making any appropriate changes to an account, the account continues to demonstrate excessive overdrafts, overdraft privileges should be terminated and, if appropriate, the account should be closed.").

[46] *See, e.g.*, Proposed Guidance at 33,410 ("The Office of the Comptroller of the Currency (OCC) is issuing guidance to clarify the OCC's application of principles of safe and sound banking practices in connection with deposit related consumer credit products such as automated overdraft protection and direct deposit advance programs.").

disadvantage national banks in relation to institutions subject to the FDIC guidance.[47]

B. *If the OCC is to require closure, suspension, or termination, it should specify that banks may use their discretion to define "excessive" overdraft use.*

The Proposal states that banks should monitor deposit accounts for "excessive" overdrafts. The term "excessive" varies by context. For example, "excessive" overdrafts may be identified in relation to the frequency of overdrafts or, alternatively, based on the dollar amount of overdrafts. In defining the requirements for monitoring or subsequent action, the OCC should explicitly recognize that banks already rely upon several factors in making eligibility evaluations, and clarify that use of these factors is both relevant and satisfactory for purposes of monitoring for "excessive" overdraft reliance.[48] The OCC also should explicitly acknowledge that some banks may look to other agencies' guidelines for a standard as to what constitutes "excessive" overdrafts, and clarify that banks following such other guidelines would also meet the OCC's expectations.[49]

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[47] In its overdraft guidance, the FDIC has stated that financial institutions are required to "monitor programs for excessive or chronic customer use, and if a customer overdraws his or her account on more than six occasions where a fee is charged in a rolling twelve month period, undertake meaningful and effective follow-up action, including, for example: . . . . Contacting the customer (*e.g.*, in person or via telephone) to discuss less costly alternatives to the automated overdraft payment program such as a linked savings account, a more reasonably priced line of credit consistent with safe and sound banking practices, or a safe and affordable small-dollar loan; and [g]iving the customer a reasonable opportunity to decide whether to continue fee-based overdraft coverage or choose another available alternative." FDIC Guidance at 4.

[48] For example, some of our member institutions utilize software programs that develop and update scores to determine each customer's overdraft eligibility levels on a daily basis, and apply these scores automatically to adjust overdraft limits daily. These programs ensure objectivity in the overdraft limitation process. The scores are derived from evaluating numerous factors, including deposit balances or frequency, previous overdraft activity, and the length of time a customer has maintained an account. The OCC, whose examiners have approved the use of these programs, should explicitly clarify they serve to satisfy the OCC's intent that overdraft eligibility be monitored and assessed on an ongoing basis to ensure that overdraft privileges are permitted in a safe and sound manner.

[49] We note in this regard that the Proposed Guidance's mandates with respect to "excessive" are inconsistent with FDIC's Guidance, which equates "excessive or chronic use" as more than six overdrafts in a year, but allows customers to elect to continue to use overdraft protection programs so long as they are offered alternatives. The FDIC Guidance states that, after monitoring accounts for

Footnote continued on next page

VII. Monthly Fee Limitations Are Unwarranted.

The Proposed Guidance states that overdraft protection products should be subject to "prudent limitations" on customer costs, and fees should be based on "safe and sound banking principles," as described in 12 C.F.R. § 7.4002.[50] However, the Proposal otherwise only instructs banks to develop limitations on the "total amount of fees that may be imposed per day and per month," and a threshold below which fees will not be imposed, without providing further elaboration.

Before prescribing any fee limitations, the OCC should conduct consumer testing. In the experience of many MBCA member banks, limiting fees on a *daily* basis appropriately accommodates customers who may experience unexpected account shortfalls, and serves to prevent injurious "ripple on" effects in the form of a series of overdraft fees. However, the OCC points to no study of consumer behavior to justify limiting fees on a *monthly* basis. Such limitations could invite abuse by certain consumers who might attempt to "game the system." The MBCA strongly urges OCC to exclude monthly fee limitations from any final Guidance.

VIII. Any Final Guidance Should Identify Additional Acceptable Posting Orders.

The Proposed Guidance provides that banks may not utilize a posting order "solely designed or generally operated to maximize overdraft fee income."[51] The MBCA believes this general prohibition is unworkably vague.

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"excessive or chronic use," if a customer overdraws an account more than six times in a rolling 12-month period, an institution must contact the customer (in person or via telephone) to discuss alternative programs, giving customers an opportunity to elect alternatives over overdraft programs. *See* FDIC Guidance at 4.

[50] The OCC's regulation on non-interest fees, 12 C.F.R. § 7.4002, provides that the imposition of fees should be determined based on consideration of, *inter alia*, "[t]he cost incurred by the bank in providing the service." It is unclear whether the OCC's Proposed Guidance would require any sort of proportionality analysis. Any final Guidance should clarify this and provide that, if such analysis is required, the assessment should take into account not only costs incurred by the bank in offering the service, but also costs avoided by the consumer through use of the service – *e.g.*, NSF charges from merchants, consequences of non-payment, etc.

[51] "The order in which transactions will be processed also should be subject to standards to ensure that transaction processing is not solely designed or generally operated to maximize overdraft fee income. For example, such standards may provide for processing individual or batch items in the order received, by check or serial number sequence, or in random order." Proposed Guidance at 33,411.

For example, the Proposal is silent as to numerous factors other than fee income that are routinely applied in the development of posting orders, including customer preferences or expectations, the feasibility of different technical systems, and efficiency in account administration, and how those factors may interplay with or potentially be perceived as "operat[ing] to maximize overdraft fee income."

The Proposal also does not address whether a particular posting order must be uniformly applied by a given institution, such that any variation in the operation of a posting order between products or groups of customers that might lead to different fee outcomes might constitute a transgression. This point is important, as banks may face technical difficulties in establishing or implementing uniform posting orders for different types of products. For example, individual checks are generally received in physical batches or electronic image files without accompanying date or time-stamps for the individuals checks, and many posting systems are therefore not designed for or capable of posting checks in the order received.[52] Posting checks in check-number order affects the posting for only those checks received in a single day's processing cycle, and does not necessarily result in posting checks in the order in which they were written by the depositor.

Recommendations

A. *Any final Guidance should provide additional, specific examples of posting orders (e.g., high-to-low; low-to-high) that are either permissible or impermissible,[53] and should also provide "safe harbor" factors that may be used to develop or select posting orders apart from fee maximization, including customer preferences.*[54]

B. Any final Guidance should clarify whether the OCC will evaluate posting orders' fee generation in the aggregate (e.g., for all customers), by product (e.g., check only), by specific groups of users (e.g., customers that subscribe to multiple overdraft protection programs), or by another methodology.

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[52] Any final Guidance should specify that for posting order purposes, items are defined as being "received" by the bank as soon as they are authorized by the bank or the bank otherwise guarantees the item's payment.

[53] The proposed Guidance only provides as examples processing items chronologically by reception, by check number, or in a random order.

[54] Many ACH transactions involve essential services like mortgage and installment loan payments, insurance premium payments, and utilities. The failure to pay such items often leads consumers to experience negative credit reporting and a loss of services, outcomes disfavored by consumers.

C. *Any final Guidance should specify that posting order standards may vary between products.*[55]

IX. Conclusion

For the reasons stated above, the MBCA supports many of the apparent intentions behind the Proposed Guidance, but urges the OCC to seriously reevaluate many of the provisions in the Proposal and to pursue an interagency process and further testing to gather empirical data before adopting any final Guidance. We appreciate the opportunity to express the views of the MBCA in this context and look forward to further communication with the OCC on overdraft protection and related issues.

We appreciate this opportunity to provide you with our comments and look forward to discussing these matters with you in the future.

Yours Truly,

Russell Goldsmith
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Chairman and CEO, City National Bank

cc: Mr. Jack Barnes, CEO, People's United Bank
Mr. William Cooper, CEO, TCF Financial Corp.
Mr. Raymond Davis, CEO, Umpqua Bank
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Mr. Richard Hickson, CEO, Trustmark Corp.
Mr. Peter Ho, CEO, Bank of Hawaii
Mr. John Hope, CEO, Whitney Holding Corp.
Mr. Don Horner, CEO, First Hawaii Bank
Mr. Robert Jones, CEO, Old National

[55] For example, electronic transactions generally take priority because they are assumed to settle the next day, or a financial institution may have to pay a debit card transaction that needed no prior approval because it fell below the required threshold.

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