INDEPENDENT COMMUNITY BANKERS of AMERICA

DALE L. LEIGHTY
Chairman
DAVID HAYES
Chairman-Elect
TERRY JORDE
Vice Chairman
AYDEN R. LEE JR.
Treasurer
GEORGE G. ANDREWS
Secretary
C.R. CLOUTIER
Immediate Past Chairman

CAMDEN R. FINE
President and CEO

August 6, 2004

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Office of the Comptroller of the Currency
250 E Street, SW
Public Information Room, Mailstop 1-5
Washington, DC 20219
Docket No. 04-14

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve
20th Street and Constitution Avenue, NW
Washington, DC 20551
Docket No. OP-1198
Docket No. R-1197

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-30

Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Subject: Interagency Guidance on Overdraft Protection Programs
Truth in Savings, Regulation DD

Dear Sir or Madam:

The Independent Community Bankers (ICBA)[1] appreciates the opportunity to offer comments on both the proposed *Interagency Guidance on Overdraft Protection Programs* and the companion revisions proposed by the Federal Reserve to address concerns about the use of overdraft protection programs, often called "bounce

[1] The Independent Community Bankers of America represents the largest constituency of community banks of all sizes and charter types in the nation, and is dedicated exclusively to protecting the interests of the community banking industry. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace. For more information, visit ICBA's website at www.icba.org.

protection." At the outset, though, while the ICBA believes that the agencies are moving in the proper direction by offering guidance and while we support the agencies' efforts to protect consumers, it is extremely important to recognize that increased regulatory requirements on the ability of banks to clear overdrafts for customers could have negative unintended consequences.

A number of community banks provide overdraft protection service for their customers. Those that offer the service report that it is one that customers want and appreciate and that automation of the overdraft process is a time saving feature that allows branch personnel to concentrate on other responsibilities. Implementing an overdraft protection service provides consumers with peace of mind by knowing that if they inadvertently make a mistake in their checking account balance, it will not result in the embarrassment and fees associated with a bounced check.

However, the ICBA is extremely concerned that some of the elements of the agencies' proposals have the potential to do a great disservice to consumers, especially low- and moderate-income consumers. If regulatory barriers and requirements and the costs associated with disclosures and documentation become too burdensome, community banks report they might discontinue or not offer these services. As a result, they would be more likely to reject a check or transaction that would create a negative balance in an account. If "best practices" morph into requirements, through examiner interpretation or otherwise, regulatory burden would produce a consumer disservice.

Background

Last year, in response to complaints from consumer activists, the Federal Reserve conducted a study of automated overdraft protection programs, including how they operate, how they are promoted and the fees associated with the services. An overdraft protection service is distinct from an overdraft line of credit where the bank applies traditional underwriting to establish a line of credit tied to the account that the customer can draw on to cover a negative balance. Generally, overdraft protection programs are automated processes that allow a check to clear a customer's account using certain preset criteria, such as length of time the account has been open and the amount of the check. When the Federal Reserve started its initial investigation, the ICBA urged the Federal Reserve not to consider these programs as credit subject to the disclosures and restrictions of the Truth-in-Lending Act (TILA) and Regulation Z.

After further analysis and consideration, the Federal Reserve agreed with the ICBA that it would not be appropriate to subject these programs to TILA and Regulation Z. However, the agencies are now concerned that some consumers may be misled about how the programs work and may incur unnecessary fees. To address these issues, the agencies have proposed an *Interagency Guidance on Overdraft Protection Programs*. In addition, the Federal Reserve has proposed changes to Truth-in-Savings Act (TISA) and Regulation DD disclosures and expansion of existing prohibitions against deceptive and misleading advertising.

Overview

The ICBA believes it is appropriate for the banking agencies to offer guidance on the operation of overdraft protection programs, and we applaud the Federal Reserve for addressing courtesy overdraft programs through the Truth-in-Savings rules and not classifying the programs as loans subject to the normal disclosures under Truth-in-Lending, Regulation Z.

For well over one hundred years, banks have occasionally allowed customers to overdraw accounts. These overdrafts are permitted at the bank's discretion and result in a temporary negative balance in the customer's account that must be covered in a short period of time. While overdrafts do result in indebtedness of the customer to the bank, it would be a mistake to refer to them as "credit services."[2] Therefore, it is extremely important that the agencies classify overdrafts as negative balances and not extensions of credit to avoid unintended and negative consequences.

Recently, to clear checks more efficiently, and in keeping with statutory requirements such as the Uniform Commercial Code (UCC) and the Expedited Funds Availability Act (as implemented by the Federal Reserve's Regulation CC), banks have begun automating the overdraft clearing process, using either internally developed software or software programs purchased from third party vendors. The programs are available for customers that do not have an overdraft credit line but are otherwise good customers. Customers are allowed to overdraw their accounts up to a pre-established limit with the understanding that the overdraft will be covered in a set period of time. Typically, customers can elect to opt out of the program or the bank can determine that the customer should not be allowed to have overdrafts.

Consumer Benefits. The fee assessed under a courtesy overdraft program may be less than would be assessed by the bank for a check returned for insufficient funds (NSF), saving the customer money. But even if the fee is the same as a normal NSF fee, a courtesy overdraft program allows the customer to avoid: (a) the merchant charge for a returned check; (b) being listed in databases as having bounced a check; (c) the embarrassment, inconvenience and headaches of having a check returned; and (d) having to make arrangements for alternate payment. Establishing an overdraft protection program also takes the guesswork out of covering overdrafts and ensures consistency of treatment while providing a safety net for consumers who inadvertently overdraw their account. And, there are protections against abuse that protect the

[2] Classification of an overdraft as a "loan" in a California case involving direct deposits of Social Security payments could have done serious damage to consumers. Defining overdrafts as loans would have been very likely to cause banks to refuse direct deposits of Social Security payments, costing the government substantial sums and defeating federal government extensive efforts to encourage direct deposit of Social Security payments. Another probably outcome of the classification would have been to cause banks to refuse to allow overdrafts in accounts that received direct deposits. Either outcome would have been a serious detriment to consumers. See *Lopez v. Washington Mutual Bank, FA,* U. S. Court of Appeals for the Ninth Circuit, 2004. Even the Social Security Administration argued against classifying overdrafts as loans.

bank's safety-and-soundness since the bank can deny the privilege to any customer that might be tempted to overuse overdrafts as a financial management tool.

***Overdrafts Are Not Loans*.** The ICBA does not believe overdrafts should be classified as extensions of credit. There is no credit application and the bank does not undertake an underwriting analysis to determine the account-holder's creditworthiness. There is no amortization or collateral. The bank retains the discretion to clear any transaction that would otherwise create a negative account balance and access to the service can be cancelled at any time if a customer abuses the privilege. Any fee for use of the service is not interest or a finance charge but is designed to offset the cost of handling a transaction that cannot be processed in the ordinary course. The fee is a flat fee and not related to the amount of the overdraft or the time it is outstanding. In its own analysis of whether overdrafts are loans, the Federal Reserve stressed many of these same features to distinguish overdraft protection programs and loans.

If overdrafts are not loans, they should certainly not be subject to the requirements of the Truth-in-Lending Act and Regulation Z. As often noted by the Federal Reserve, the purpose of the Truth in Lending Act "is to promote the informed use of consumer credit by providing for disclosures about its terms and cost," and uniform disclosures are "intended to assist consumers in comparison shopping for credit." Consumers do not "shop" for overdrafts. Moreover, providing APR disclosures in advance is not feasible since the amount of the negative balance in the account is not known until the check is processed and the term is not known until the customer covers the overdraft. In fact, the only practical way to provide any APR disclosure would be an after-the-fact notice mailed to the consumer, since the decision to accept or reject a check must be made within time limits established by other requirements, such as the Federal Reserve's Regulation CC and the UCC. And, an after-the-fact notice does *not* allow shopping for credit.

Best Practices. Many of the concerns that have been raised about overdraft protection programs involve advertising and marketing. The proposed guidance would address those concerns by ensuring that fees are clearly and conspicuously disclosed. The guidelines also would ban misleading advertising generally ensure consumers are provided with appropriate information about overdraft protection services. However, the proposed guidance goes beyond addressing the objections that have been raised and includes provisions that the ICBA recommends be eliminated from the final guidance. Creating excessive and unnecessary regulatory costs and burdens is likely to discourage many banks from offering the service to the detriment of their customers.

Interagency Guidance on Overdraft Protection Programs

Scope. As noted above, banks have traditionally allowed some customers to overdraw their accounts from time to time, whether or not the service is automated or formalized. For a number of years, banks have issued automated reports of accounts that might have a negative balance if checks are allowed to clear. These reports are furnished to branch officers to allow them to review the list and make a final

determination on whether to allow the check to clear. However, these types of automated reports would seem outside the scope of what the *Interagency Guidance* intends to cover. Therefore, the final guidance should clarify what is meant by an automated process and should establish a carefully outlined scope of what programs are covered. The ICBA recommends that the guidance be limited to programs where software is used to decide to clear an overdraft, such that the only human element would be final review to possibly stop the process before the check is cleared. The scope of coverage should not include the more traditional bank determinations whether or not to clear overdrafts that may be based on automated reports provided to bank personnel.

Policies and Procedures. The proposed *Interagency Guidance* addresses the credit, operational and other risks associated with overdraft protection programs. First, the proposed *Interagency Guidance* recommends that banks adopt policies and procedures that establish eligibility criteria and provide for regular reports to management, with monitoring of the program to ensure that customers continue to satisfy established criteria. Banks should also establish timeframes for consumer repayment of overdrafts with procedural guidelines for any exceptions.

Community banks that have instituted an automated overdraft protection program report that they have established policies and procedures that cover the service. Generally, these procedures are designed to ensure both customers and employees understand how the service operates and to ensure consistency within the bank. However, the ICBA is concerned that some of the recommended procedures outlined in the *Interagency Guidelines* might be applied as mandatory by examiners. Therefore, any final guidance should clarify that these are elements and risks that the bank should take into account when developing procedures and that examiners should not require a bank that offers an automated overdraft protection service to incorporate each and every element in the *Interagency Guidance* in the bank's policies and procedures.

For these programs to operate successfully, it is important that the bank institute criteria defining which customers are eligible. The ICBA agrees that this is appropriate for the *Interagency Guidance*. For example, some of the parameters banks have used to determine customer eligibility are: time the account has been open, generally at least 30 days; whether the customer has other accounts with the bank; a restriction on the number of overdrafts within an established timeframe; and whether the customer makes regular deposits or has a direct deposit attached to the account. Community banks also report limiting the amount of an overdraft that can clear an account. These pre-set limits vary depending on the type of account, but are generally limited to $300 to $500, although some banks report setting limits as high as $700 for certain customers. However, while banks should implement policies and procedures to govern the operations of an overdraft protection program, the actual parameters for the program should be at the discretion of the individual bank and the bank's willingness to accept risk.

Charge-Offs. According to the proposed guidelines, the procedures should provide that any overdraft amount will be charged off if not repaid within 30 days.

The ICBA believes this timeframe is unreasonably brief. Thirty days is insufficient time to notify the customer and then allow any accommodations or extensions of credit so that the customer can cover the overdraft. Moreover, banks report that allowing additional time and flexibility in collecting outstanding overdrafts makes it more likely that the overdraft will be repaid. Since community banks often allow customers up to 30 days to cover an overdraft, requiring the bank to charge-off the amount if it is not covered in 30 days is problematic, since the bank needs sufficient time to process any payment that arrives on the last day. The ICBA believes that a longer period of time, up to 90 days, should be permitted before an overdraft is charged off. At a minimum, banks should be allowed at least 45 days from the date of the overdraft before the amount must be charged off. The 30-day period suggested in the proposed guidance could result in higher loss levels and runs contrary to protecting the safety-and-soundness of bank operations.

Call Reports. According to the proposed guidance, overdraft balances should be reported as loans on the call report, and if not collected, charged off against the allowance for loan and lease losses (ALLL). Although the ICBA does not believe that overdrafts should be treated as credit, we agree that overdrafts that are charged off should be charged against the ALLL balance. However, if outstanding overdrafts are reported on the call report, they should not be aggregated with any of the bank's outstanding loans.

If the bank informs customers about the available balance provided by an overdraft protection program, the proposed guidance would require that amount to be reported on the bank's call report as "unused commitments." The ICBA believes that this element of the proposal is especially burdensome and somewhat misleading. Carrying the overdraft coverage as unused commitments contradicts the discretionary nature of the programs. Since the bank always maintains the discretion to return a check or deny a transaction that would otherwise overdraw an account, the amount is clearly not analogous to an unused commitment. It also would be misleading to users of call report information, since it would reflect obligations of the bank that are not there in reality: there would be no distinction between true loan commitments, such as the unused portion of an overdraft line of credit, and the overdraft protection coverage programs that are not truly obligations. If the bank retains the discretion to clear an overdraft and can make that decision at any time and if the bank can cancel the service or change the amounts available for customers that abuse the privilege at any time, it is not really a "commitment." Calling them "unused commitments" is inappropriate and blurs the distinction between overdraft protection programs and overdraft lines of credit, a distinction that the agencies require banks to make clear elsewhere in the proposed guidance. Therefore, the ICBA recommends that this provision be eliminated from the final guidelines.

The proposed guidance would also require that outstanding overdraft balances be risk-weighted according to the obligor in accordance with existing loan procedures established by the agencies. The ICBA believes this also runs counter to the purpose of these programs. The great advantage of the automated process is that it sets parameters around which checks will clear and allows checks to clear more quickly and

efficiently. However, the bank still retains final discretion whether to clear an overdraft or not. The decision is not based on the same criteria used for credit decisions, but rather, how a customer has maintained his or her checking account. To impose the elements of loan risk-weighting as suggested by the guidance would require banks to carry out underwriting analysis on every checking account customer that has access to an overdraft protection service. As one community banker noted, trying to put these figures together would be a "nightmare." Such a burden and expense would clearly increase the costs associated with account maintenance. At a minimum, the associated costs would disadvantage low- and moderate-income customers by making the service cost prohibitive for the customers most likely to benefit from it. More likely, the associated costs and burdens would defeat any other cost savings for the bank provided by the service. Therefore, the ICBA strongly urges the agencies to eliminate this element from the *Interagency Guidance.*

Third-Party Vendors. If a bank enters into a contract with a third-party vendor to provide an overdraft protection service, the proposed guidance suggests that the bank should conduct the same type of due diligence as it would with any other service provider. The ICBA agrees that this is appropriate.

Legal Review. The agencies also recommend that a bank have counsel review its overdraft protection program before implementation to ensure compliance with all applicable laws and regulations. The ICBA questions whether this step is necessary or appropriate in all instances, and may in fact cause banks to incur unnecessary costs, especially if legal review is not part of the bank's normal due diligence for third-party vendor contracts. Instead, the guidance should recommend that banks *consider* having counsel review the program, but the final guidance should merely require banks to ensure that appropriate due diligence is conducted before entering into agreements with third-party vendors.

Marketing and Communications. When marketing or otherwise promoting these overdraft protection services, banks would be strongly encouraged by the proposed *Interagency Guidance* to: (a) avoid promoting poor account management by encouraging customers to overdraw accounts; (b) fairly represent overdraft protection programs and alternatives, such as overdraft lines of credit that the bank also offers, with an explanation of the costs associated with each option; (c) train staff to explain program features and other choices, including how to opt out of the service; (d) clearly explain the discretionary nature of the program, when the bank may refuse to pay an overdraft, and do not imply that all overdrafts will be covered; (e) distinguish overdraft protection services from "free" account features; (f) clearly disclose fees associated with the account; (g) clarify that fees count against the overdraft protection limit, if applicable; (h) demonstrate when multiple fees will be charged, such as when more than one overdraft charge may be assessed if there is more than one check that would overdraw the account; (i) explain the bank's check clearing policies and the order in which checks will clear an account; and, (j) illustrate the types of transactions covered, such as whether the service is limited to checks or whether it may be accessed through ATM or debit card transactions.

The ICBA agrees that where a bank decides to promote the service as an account feature, customers should be informed about how the service operates. This is simply a good and sound business practice and good customer service. As one community banker commented, "we have always been upfront with our customers [and] we don't want to appear that we are hiding something from them." Informing customers about how the service works establishes a clear understanding on the requirements of the program and the fees that are associated with it.

However, it may not be appropriate for all banks to provide such disclosures. If a bank has merely automated the discretionary decision-making that banks have undertaken for years and does not promote the overdraft protection program as an account feature, and if the customer would be charged the same fee whether the overdraft clears or not, then it may neither be appropriate nor necessary for the bank to provide this information to customers. This is especially so since doing so might actually lead some consumers to believe that they *can* overdraw their account at any time, regardless of the emphasis placed by the bank on the discretionary nature of the decision to clear an overdraft. The bank should make the decision, since it is the bank that is in the best position to know its own customers and how to communicate with them. If the bank does not promote or advertise the service, though, the ICBA does not believe it should not be required to make the disclosures.

The ICBA does agree that it is appropriate for banks that have adopted these programs to ensure that the appropriate employees are trained in the operations of the program. This is a hallmark of customer service, allows employees to explain the service to customers and helps employees to answer any questions that customers might have.

Community banks that offer automated overdraft protection programs report that they also often offer "free checking" accounts. Free checking is a service community activists believe is an important means to bring those without banking accounts into the mainstream of American finance. However, community banks that offer "free checking" accounts also report that they make it clear that there are fees associated with any overdrafts or overdraft protection service that are outside normal account features.

Finally, some community banks currently provide their customers with information about the order in which checks are processed. If it is furnished, the information is most likely given when the account is opened as part of the account documentation. However, not all community banks process checks in a particular order: some process items in the order received; some process larger items first, such as car payments or house payments, to ensure those items clear without problems; and some clear smaller items first to minimize the potential of any overdraft charges against the customer. While there have been legal challenges to the order in which banks clear checks, the courts have generally determined that the order in which checks clear an account is a matter of discretion for the bank. The ICBA firmly believes that the discretion for check clearing should reside with the bank and need not be disclosed.

Program Features. The agencies recommend that banks that offer an overdraft protection service: (a) allow customers to opt out; (b) alert consumers before a non-check transaction (such as an ATM transaction) would trigger any fee so that the consumer may elect not to complete the transaction; (c) prominently distinguish actual balances from overdraft protection amounts; (d) promptly notify consumers of overdraft protection program use each time the service is used, such as by sending a notice the same day the service is accessed that outlines the fees and the amount of time before the overdraft must be repaid; (e) consider implementing limits on the amount or number of overdrafts a customer may have in one day; (f) monitor overdraft program usage; and (g) fairly report program usage. The ICBA believes that these are all appropriate elements for the bank to incorporate into its overdraft protection program.

Generally, when community banks offer and promote an automated overdraft protection service, they provide notice to customers that the service is an element of their account. The information is provided at the time the account is opened in new account disclosure statements. In addition, banks include information in brochures and lobby posters and mailings to customers. The notice also stresses that payment of an overdraft is at the bank's discretion and not automatic. Some community banks also include information that abuse of the privilege can result in the bank terminating the customer's access to the automatic overdraft protection service. To some extent, these disclosures are inherent in the bank's need to ensure it is operating in a safe-and-sound manner and the ICBA agrees they are appropriate.

At the same time that community banks disclose the feature to customers, they also disclose the fees that are associated with the overdraft to ensure that customers are aware of the price of the service. The ICBA agrees that if the bank promotes an overdraft protection service as an account feature, then it is appropriate to disclose the fees associated with the service.

If the bank notifies customers about the existence of the overdraft protection program, then the ICBA agrees that customers also should be given the option to opt out. Giving customers that option is simply good customer service. While it is often more beneficial to consumers to have an automated overdraft protection service in effect, the choice should be the consumer's. However, the election to opt-out should be simple and not a burdensome process. A simple phone call to the bank with a request to be removed should be sufficient, without the need for detailed documentation to demonstrate that the customer made the election, especially since use of the service is entirely at the bank's discretion. Creating rules that demand documentation would add costs to the process and be a detriment to consumers.

The ICBA also agrees that it is appropriate to notify a customer when the overdraft protection service has been triggered, including information about the fees to be charged. Currently, community banks notify a customer whenever an overdraft occurs, generally by mail to the customer's address of record. Some community banks also telephone the customer to let them know that an overdraft has occurred, while others send the customer a periodic notice about an outstanding overdraft to ensure

that the overdraft is covered.[3] Generally, the notice alerts the customer to the item that caused the overdraft, the amount of the overdraft and any fees due as a result.

Although the fees for overdrafts vary, community banks generally charge between $20 and $30. Community banks that have automated the process generally report that the fee for an overdraft covered by an automated process is the same as their "regular" overdraft fee. Some community banks also charge a daily fee for each day that the overdraft is outstanding as "motivation" to customers to promptly cover the overdraft, but other community banks see the assessment of a daily fee as excessive and too costly for the customer. A compromise between a daily assessment and no charge, and to ensure the consumer does not neglect overdrafts, is an assessment every 10 to 15 days of a nominal fee, such as $10.

When the overdraft protection service disclosures are provided to customers, community banks also explain that in the event an overdraft occurs, it must be covered within a given timeframe, usually no more than 30 days. The customer is also informed that failure to cover the overdraft will result in termination of the privilege. Again, the ICBA agrees that this is appropriate.

After an overdraft occurs, some community banks may offer customers a short-term loan to cover the overdraft. However, the ICBA recommends that this decision be left to the discretion of the bank and not included in the disclosures, since other agency requirements that apply to the lending process would cover any loan that the bank may decide to make at a later date. Including a suggestion in the disclosures that a short-term credit may be available to cover an outstanding overdraft is apt to lead some customers to believe that such a loan is a given, when again, it is at the discretion of the bank based on the facts and circumstances of each particular situation.

Truth-in-Savings (Federal Reserve Regulation DD)

In addition to the *Interagency Guidance* proposed by the banking agencies, the Federal Reserve has proposed several amendments to Regulation DD (Truth-in-Savings Act) to ensure consumers receive appropriate disclosures and are aware of costs associated with overdraft protection services. The proposed revisions would require additional fee and other disclosures; require additional disclosures for advertisements; and expand the prohibition against misleading advertisements to include current account-holders.

The Federal Reserve is concerned about the adequacy and uniformity of existing disclosures, including whether consumers receive disclosures on a timely basis. For example, where periodic statements are provided, the fees may be dispersed amid other fees and not readily apparent to consumers. As a result, the Federal Reserve is proposing several revisions to Regulation DD.

[3] If the bank sends a periodic reminder to a customer about an outstanding overdraft, the reminder generally is sent every five to ten days, depending on the bank's individual policies and procedures.

Disclosures. At account opening, the bank would be required to disclose whether the overdraft protection service is limited to checks or whether ATM or debit card transactions can trigger the service. When providing periodic statements, the bank would be required to provide the total of fees for overdrafts covered by the overdraft protection program and returned checks, both for the statement period and for the year-to-date. Importantly, these fee disclosures could not be aggregated with other fees and fees for overdraft protection would have to be segregated from fees for returned checks and not grouped together as fees for insufficient funds.

The ICBA opposes these changes to periodic statements, due to the burden and cost that would not be offset by any minimal benefits to consumers. This element is possibly the most burdensome in the proposal, and possibly the most problematic for community banks. Many of these disclosures are already furnished to consumers but disregarded. Customers are already notified about fees when an account is opened. Customers are also notified about applicable fees when an overdraft occurs through an independent notice. And, periodic statements already include a line item that identifies any fees. Requiring an aggregation of those fees would be overkill, especially for banks that neither promote nor advertise the service. Adding a new layer of disclosures only adds to costs without any demonstration that the information will be put to use by consumers.

Moreover, these disclosures will require extensive software changes to account processing systems. The ICBA recommends that the Federal Reserve consult with third party vendors that provide account-processing systems in order to properly assess the difficulty and costs associated with this proposed requirement before moving forward. This is especially important for any requirement to aggregate all fees. However, without an extensive cost-benefit analysis that clearly demonstrates that benefits outweigh the costs, these changes should not be adopted.

Other Transactions. Community banks generally include ATM transactions and debit transactions as part of an overdraft protection service. Since the process has been automated, when a customer makes a withdrawal using an ATM or debit card, the system treats it like a withdrawal made by check. As one community banker explained, "for this product to truly be of service to the customer it must be available for any form of transaction." When customers open their accounts, it is made clear that the service applies to all types of withdrawals, including checks, ATM transactions and debit card transactions. Customers need to be aware of the features of the service so they can use it appropriately. Community bankers believe that it is only proper to notify customers about this feature.

However, not all programs include the amount of "overdraft coverage" in the available balance shown at an ATM. In some cases, this is a matter of software programming and the ability to make the disclosure accurately. Community banks that do not include the amount of overdraft coverage in the account balance exclude it by providing only the collected balance for a balance inquiry at the ATM. The ICBA recommends, though, that the Federal Reserve discuss this issue with software vendors

to clearly assess the burdens and costs to implement such a requirement before making a final determination. And, again, absent a clear demonstration that the potential costs are outweighed by the benefits, the ICBA urges the Federal Reserve not to implement this change.

Advertising. Under the proposed changes to Regulation DD, if a bank advertises the availability of an overdraft protection service, the bank would have to disclose: the fee for each overdraft, the types of transactions covered, the time period an overdraft may be outstanding, and circumstances when a bank may refuse to cover an overdraft. The general exceptions for advertising on billboards, broadcast media and telephone response machines would continue to apply.

The ICBA believes that these additional elements also would be unnecessarily burdensome and might actually discourage banks from advertising the existence of the service. Many of these elements are covered through other parts of the proposal and through the *Interagency Guidance.* Accordingly, the ICBA does not believe that it is necessary to incorporate a proscriptive set of requirements that advertisements include all these elements. Community banks report that detailed disclosure requirements for advertising causes them to restrict their advertising efforts or the information provided in advertisements. In other words, instead of providing more information to consumers, the detailed elements proposed by the Federal Reserve would actually have the opposite effect. Even if banks adhered to the extensive disclosures required by the proposal, it is likely that consumers would pay less attention to the information because there is too much information. The ICBA believes that the important elements to include in the advertising are the discretionary nature of the service and the associated fees.

Finally, misleading advertising would be prohibited and would be extended to communications with customers about their existing accounts. The revisions would provide examples of misleading advertising: implying an overdraft protection program is a “line of credit;” representing that all checks will be honored when the bank retains discretion to pay or return certain items; representing that an overdraft may remain outstanding for an indefinite period of time; describing the service as limited to checks when it may also apply to ATM and debit card transactions; describing an account as free and promoting the overdraft service when there are fees associated with the overdraft service. The ICBA does not object to these provisions, but believes that they should, as proposed by the Federal Reserve, be part of the Official Staff Commentary and not part of the actual regulation.

Conclusion

While the ICBA appreciates the need for guidance on the operation of automated overdraft protection services, we are concerned that well-intentioned guidance could actually create regulatory burdens that become a barrier that prevents banks from offering a service that is welcomed and appreciated by consumers. Since one of the major complaints from consumers relates to the marketing of these accounts, it is important to recognize that the agencies already have other mechanisms in place,

notably the ability to address misleading advertising through enforcement of Federal Trade Commission Act section 5, that are available to address problems.

Fundamentally, the ICBA believes it is misleading to characterize overdrafts as credit, since they are not a product for which consumers shop, are not underwritten by banks, and do not bear the general characteristics of a loan product. The agencies warn the banks against characterizing the availability of overdraft protection as "ready-credit" and yet themselves fail in a number of instances to make the same distinction between overdrafts and credit, as some provisions in the proposed guidance would treat overdrafts the same as credit. The final guidance should clearly distinguish overdrafts from credit.

The ICBA cannot help but note an irony: while the agencies are conducting a review of these same regulations to eliminate unnecessary burdens, they are simultaneously proposing potentially burdensome and costly guidelines and regulatory changes without a clear demonstration for the need for such extensive requirements.

Subject to the preceding comments, the ICBA believes that creating an *Interagency Guidance* will be helpful to banks that offer these services. However, the ICBA also strongly urges the agencies to include a clear admonition for examiners that these are guidelines and not mandates.

Thank you for the opportunity to comment. If you have any questions or need any additional information, please feel free to contact me at 202-695-8111 or by e-mail at robert.rowe@icba.org.

Sincerely,

Robert G. Rowe, III
Regulatory Counsel