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Via email

OCC – regs.comments@occ.treas.gov.

Board of Governors
of the Federal Reserve System – regs.comments@federalreserve.gov.

FDIC – comments@FDIC.gov.

Office of Thrift Supervision – regs.comments@ots.treas.gov.

RE: Inter-Agency Guidance on Overdraft Protection Programs

Gentlemen:

The Independent Bankers Association of Texas ("IBAT") is a trade association representing over 600 independent community banks domiciled in Texas and Oklahoma. Virtually all of our members offer some overdraft protection to customers. A large number of our members have recently automated such services to greater facilitate the efficiency of the service and to provide products and services that customers desire.

IBAT is particularly concerned that this overdraft protection for the occasional or inadvertent overdraft continue as a cost effective service for customers without being subjected to the open end credit requirements of Regulation Z. In polling our members, we have concluded that if, in fact, the disclosure and other requirements of Regulation Z are imposed on this very popular service, the cost will render the product ineffective for banks to offer, thereby depriving many customers of important protection. Perhaps most significantly, most of the programs of which we are aware offer the inadvertent overdraft privilege to all customers without requiring the customers to go through an underwriting process. This decreases the cost of providing the service. In addition, it makes the protection available to persons who might otherwise not qualify for open-end consumer credit.

The introductory remarks in the inter-agency guidelines indicate that overdraft balances should generally be charged off within 30 days from the first date overdrawn. IBAT believes that this flies flatly in the face of existing accounting statements and current requirements. The overdraft, rather, should be written off only after a minimum of 90-120 days to be in conformity to other existing guidelines with regard to problem debt. Again, most programs have a system for collection that begins a series of collection letters at 15 or 30 days in order to assure that the customer remains on a sound footing. However, requiring an absolute charge-off at 30 days is unnecessary and contrary to current normal practices.

IBAT members understand that overdrafts are, in fact, a type of extension of credit. This has long been a position of Regulation O and is supported by Texas case law. However, we would strenuously oppose any requirements that the available amount of overdraft protection to the entire customer base be reported as unused commitments in regulatory reports. Although overdraft privilege may be available to every customer in an institution, only a small percentage of customers actually avail themselves of that protection. Therefore, calculating the potential that each and every customer overdrew in the maximum amount would lead to an absolutely absurd result and would distort regulatory reports rather than be useful.

IBAT concurs that overdraft protection programs are, in fact, credit for purposes of the Equal Credit Opportunity Act. In fact, these programs are offered without underwriting to all customers. Discrimination is the very last motivation for bankers offering these types of programs. However, we also concur that these programs fall in the category of incidental credit and should not trigger adverse action notices under Regulation B. So, for example, when a customer abuses its overdraft privilege and has such privilege revoked, IBAT would suggest that since this is merely incidental credit, no adverse action notice would need to be sent to the customer under Regulation B. Clearly, a notice is sent to the customer as a matter of contract practices to make sure that the customer is aware of his or her new standing with the institution.

The overdraft privilege is probably most commonly used at ATMs next to checks. It is also used at Point of Sale terminals. The section in the guide dealing with applicability of the Electric Funds Transfer Act is absurdly unworkable. The terminal receipt at the grocery store or the mall simply will not be able to provide additional Reg E disclosures.

BEST PRACTICES

IBAT appreciates the efforts to identify appropriate best practices for this growing area. Many of these practices are already in place. However, we have concern with several of the recommendations.

ALTERNATIVES

One of the best practices would give customers the opportunity to opt-out of overdraft privilege and instead select another alternative. As noted before, the cost of compliance with Regulation Z is such that there is no other alternative other than returning the check, imposing the exact same fee that would be imposed under the overdraft privilege plan and then subjecting the customer to the additional cost of the 'hot check fee' imposed by the merchant, the potential for criminal action by prosecutors, and the cost of obtaining a money order to replace the item. If, in fact, the regulators believe that this alternative should be offered and clearly explained, then banks will do so. However, that is the only viable alternative in Texas. Our open-end credit laws are extremely restrictive and render this type of product unprofitable particularly when combined with the Reg Z data processing and other requirements.

DISTINGUISHED OVERDRAFT PROTECTION FROM "FREE" ACCOUNT FEATURES

It is clear under the Truth-In-Savings Act that a fee for overdrawing an account is a fee over which the customer has control and is not a maintenance fee subject to the limitations on "free" accounts. Many banks offer free accounts and overdraft protection services in a package. We understand that this "best practice" would simply require the institution to assure that the customer understands that although the account is free in the sense that there is no maintenance or service charges, in the event the customer does overdraw the account, there will be an NSF charge.

CLARIFY THAT FEES COUNT AGAINST OVERDRAFT PROTECTION PROGRAM LIMITS

In fact, at least some marketing programs in Texas are already clarifying the effect of the overdraft program limit using clearer explanations and examples to assure that customers realize the full impact of the fee—or multiple transactions with multiple fees—on their balance.

CHECK CLEARING POLICIES

Many Texas banks are already disclosing to consumers the order in which the institution pays checks or processes other transactions. However, it is quite clear under Article 4 of the Uniform Commercial Code that banks may pay checks in any order. Numerous court cases have validated that right and clarified the meaning of that section of Uniform Commercial Code. This best practice would appear to fly in the face of uniform law throughout the United States. None-the-less, many institutions are already disclosing payment order. For those that are not, there will be significant additional paperwork in advising existing customers of the bank's practice and revisions to standard depository contacts.

ELECTION OR OPT-OUT OF SERVICE

Obtaining an affirmative consent of consumers to receive overdraft protection will increase the paperwork burden of financial institutions, particularly with regard to an existing customer base. If this is to be a best practice, it should be prospective only.

ALERT CUSTOMERS BEFORE A NON-CHECK TRANSACTION TRIGGERS ANY FEES

This particular best practice is simply not possible to satisfy. In reviewing the recommendations with data processors, ATM companies and community banks generally, we have learned that when customers use off-premises ATMs or use debit cards in a POS transaction the community bank, which is off-line, has absolutely no ability to provide the consumer notices suggested by this section. It would be possible for institutions to explain in the initial disclosure that ATM balances may reflect available balance and not just collected and/or ledger balances. Currently, there is no way to revise the data processing for off-line community banks to assure disclosures of ledger or collected balance. Even if there were, there is no guarantee that that will be an absolutely accurate balance for off-line transactions. For example, a payee may come to the customer's institution and cash a check thereby changing the actual balance before the off-line ATM or POS transaction is posted.

At our request, several bankers experimented with eliminating overdraft privilege at ATM and POS since they could not control the data processing issues in this best practice. The result was a 30% drop in volume and significant customer dissatisfaction.

DAILY LIMITS

This proposal is too complicated for community banks to implement. The customer has control over how many items he or she issues or uses in any given day that could overdraw the account. Banks are happy to provide additional education to customers about the impact of multiple transactions in a day. However, setting daily limits at the institution is simply too costly for community banks to implement.

MONITOR OVERDRAFT PROTECTION PROGRAM USAGE

Currently, this is not available through data processing programming that is widely used by community banks. Also, this is a rather open-ended recommendation. What is excessive to one customer may be minor to another. Again, the customer has the ultimate of choice in the types of systems that are now available.

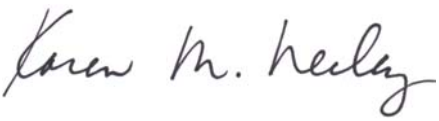
NEGATIVE REPORT PROGRAM USAGE

IBAT agrees that institutions should not report negative information to consumer reporting agencies so long as the overdrafts are paid under the terms of the overdraft protection program.

In conclusion, IBAT believes that the current overdraft privilege systems that are working well in Texas allow banks to offer more services for each of their customers and, in fact, have expanded services to the unbanked prospect who feared overdrafts. Reasonable revisions to Regulations DD and Appropriate Best Practices can help everyone continue to offer this program in a cost-effective way that allows maximum flexibility to the consumer.

Thank you for this opportunity to comment.

Sincerely,



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