THE FINANCIAL SERVICES ROUNDTABLE

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Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room
Mail Stop 1-5
Washington, D.C. 20219
Attention: Docket No. 04-14

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: Docket No. 2004-30

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attention: Docket No. R-1198

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

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Interagency Guidance on Overdraft Protection Programs

Dear Sir or Madam:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to comment to the members of the Federal Financial Institutions Advisory Council ("FFIEC") in relation to the Interagency Guidance on Overdraft Programs (the "Guidance").

I. Background

The members of the of the FFIEC, including the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, Office of Thrift

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

Supervision, the Federal Deposit Insurance Corporation, and the National Credit Union Administration (collectively, the "Agencies") issued the proposed Guidance to assist insured depository institutions in the responsible disclosure and administration of overdraft protection services. The proposed Guidance identifies concerns raised by institutions, financial supervisors, and the public about the marketing, disclosure, and implementation of overdraft protection programs.

The Agencies have proposed guidance in three primary areas: Safety and Soundness Considerations, Legal Risks and Best Practices. The Roundtable would like to offer the following recommendations on this Guidance.

II. Safety & Soundness Considerations

A. Credit, Operational and Risk Policies and Procedures

The proposed Guidance generally describes that financial institutions should adopt written policies and procedures adequate to address the credit, operational, and other risks associated with these programs. Roundtable member companies agree that adopting written policies and procedures to address the risks of overdraft protection may be beneficial to financial institutions, however we oppose any assessment be made for credit risk. Overdraft protection programs are not credit-based. These programs represent an operational risk to the institution, not credit risk.

We strongly urge the Agencies to propose a guidance that would require institutions to adopt policies sufficient to address the operational risk associated with these programs. We request that financial institutions be able to determine whether an account or accountholder may participate in an overdraft protection program and that the criteria not be made on a case-by-case basis. Overdraft payment programs are designed, in part, to provide an automated process which allows consistency and predictability for institutions. Criteria may be established by the institution based on its operational risk tolerance, experience, portfolio performance and circumstances. We believe the automated nature of an overdraft protection program would be severely hampered if individualized decisions are required on an account-by-account basis. We believe this could result in greater uncertainty and higher costs for the consumer.

The proposed Guidance suggests that programs should be administered and adjusted, as needed, to ensure that credit risk remains in line with expectations. Again, we disagree with treating these programs as a credit risk. We do however believe that reports detailing volume, profitability and performance should be provided to management on a regular basis. In addition, we agree that increases, decreases or termination from participation in the program of a specific account holder or with respect to a particular account should be consistent with safe and sound operations.

Roundtable member companies believe that measures should be put into place to monitor the operational risk to the institution. We urge the Agencies to confirm that such a process may be done using systems or individualized operational determinations, based on what the financial institution believes is consistent with its operational risk tolerance and financial condition. With that said, any requirement to make these determinations on a more individualized basis would be difficult, inefficient and costly, and would be in

conflict with the benefits that automated programs provide to the consumer and institutions.

B. Reporting as Loans

The proposed Guidance states that with respect to reporting of income and loans recognition on overdraft protection programs, institutions should follow generally accepted accounting principles ("GAAP") and that overdraft balances should be reported as loans. Roundtable member companies strongly oppose this proposal. We believe there are other methods that can accurately assess and account for the potential losses resulting from overdraft balances. For example, overdraft balances could be reported as a contra account to deposit balances, or reported as an "other asset" with the appropriate explanation. We urge the Agencies to consider utilizing other methods to report potential operational risks and potential losses rather than reporting overdraft balances as loans.

In addition, it appears that the Guidance only addresses overdraft balances resulting from an overdraft protection program. Overdrafts can occur in other transactions, such as returned deposited items and fees, as well as NSF transactions. We recommend that these other types of overdraft balances be included in the analysis for reporting of overdraft balances.

C. Allowances for Loan and Lease Losses

The Guidance proposes that overdraft losses (other than the portion of the loss attributable to uncollected overdraft fees) should be charged off against the allowance for loan and lease losses. We disagree with this assessment. As stated previously, we believe that these losses are operating charge offs and should be reflected accordingly. We do not believe that overdraft balances should be characterized as credit balances.

D. Charge Off Timeframes

The Guidance indicates that overdraft balances generally should be charged off within 30 days from the date first overdrawn. We strongly oppose the 30-day time frame for the charge off of an overdraft balance. We believe this time frame is too short and therefore we recommend extending the period to a minimum of 60 days for a number of reasons.

- A 30 day charge off requirement would not allow sufficient time for some customers to replenish their account due to the monthly payment cycles for some customers. A 30 day charge off period often may not even cover a statement cycle so that the account would be charged off before the customer even receives a statement reflecting the overdraft. In addition, significant collections of overdrafts can occur beyond 30 days.
- Experience has shown that more consumers will bring their account to a positive status between 30 and 60 days, than before 30 days. Analysis of accounts from reporting member companies demonstrates that 44 percent of accounts are brought to a positive status before 30 days while 56 percent are brought to a

positive balance between 30 and 60 days.

- Although an overdraft protection service is not a credit service, even unsecured consumer credit need not be charged off until it is 120 days past due under regulatory guidance.
- An account charged off at 30 days is harmful to the consumer. For example, when an account is charged off, it is reported as such to credit bureaus. Consumers reported to credit bureaus would be faced with difficulties opening new accounts or, at the very least, would be limited in their account choices.
- We would also expect that fewer consumers would be willing to enter repayment agreements if the account has been charged off and already reported to credit bureaus.
- There will be additional expenses to the financial institution for reporting charge offs and recoveries on financial records and with credit reporting agencies. Also, there would be additional costs associated with responding to consumer and credit reporting agency inquiries in relation to the accuracy of credit report information.

The Guidance states that some overdrafts are individually underwritten and supported by documented assessment of that consumer's ability to repay. We believe that overdrafts should not be underwritten or evaluated as a typical credit transaction since overdrafts are the result of operational decisions related to the instrument which was returned, historical average balances, and/or pending deposits. Therefore, we do not believe that the timeframes described in the FFIEC Uniform Retail Credit Classification and Account Management Policy would apply.

The proposed Guidance also states that if the institution allows the consumer to cover an overdraft through an extended repayment plan, the existence of the repayment plan would not extend the charge off period and that any payments received after the account is charged off, up to the amount charged off against the allowance, should be reported as a recovery. We recommend that in cases where a repayment plan, or promise to pay, has been executed between the consumer and the institution, this type of circumstance would constitute an extension of credit thereby deferring the charge off of the overdraft resulting in an extension of credit. This provides consumers an incentive to correct their account, without negative reporting.

E. Excessive Users

The Guidance proposes that institutions monitor accounts on an ongoing basis to be able to identify individual consumers who may be excessively reliant on overdraft protection or who may represent undue credit risk to the institution. We recommend greater flexibility in relation to monitoring excessive users. We believe that financial institutions should be given discretion to take reasonable actions to review these accounts. Although we agree that additional guidance would be helpful in this area, we are concerned that prescriptive requirements may unintentionally create liability for institutions. Therefore, we urge the Agencies to outline examples on how institutions may comply with the Guidance while making it clear that institutions may use other means to monitor

accounts.

F. Unused Commitments

The Guidance states that when an institution routinely communicates the available amount of overdraft protection to depositors, these available amounts should be reported as "unused commitments" in regulatory reports. We strongly disagree with this requirement. Elsewhere in the proposed Guidance (and in the Federal Reserve Board's recent proposed amendments to Regulation DD) the Agencies have set forth guidance to retain the discretionary nature of these programs. Reporting "unused commitments" as loans would inappropriately characterize deposit accounts as loans. Additionally, such reporting would detract from the discretionary nature of the programs. Institutions with overdraft protection programs, if administered appropriately, have disclosed that the program can be unconditionally cancelled at any time and the institution has no commitment to pay NSFs. It does not seem prudent to report these as loans as the proposed Guidance suggests.

The Agencies have indicated that they also expect proper risk-based capital treatment of outstanding overdraft balances and unused commitments. Overdraft balances should be risk-weighted according to obligor. Unused commitments that are unconditionally cancelable at any time pursuant to applicable law and those with an original maturity of one year or less, as defined in the risk-based capital standards, are subject to a zero percent credit conversion factor. Commitments with an original maturity of more than one year are subject to a fifty percent credit conversion factor and the resulting credit equivalent amount should be risk-weighted according to obligor.

We request confirmation that "unconditionally cancelable" applies to any program which discloses that the institution has no obligation or commitment to pay an overdraft, and that the program itself can be terminated at any time.

III. Legal Risks

The Guidance states that overdraft protection programs must comply with all applicable federal laws and state laws. The federal laws and regulations include Section 5 of the Federal Trade Commission Act, the Equal Credit Opportunity Act, the Truth in Lending Act, the Truth in Savings Act, and the Electronic Fund Transfer Act. In addition, overdraft programs must comply with state laws, such as those dealing with usury, crime or unfair or deceptive acts or practices.

A. Truth in Lending Act

The Truth and Lending Act ("TILA") and Regulation Z require creditors to give cost disclosures in connection with extensions of consumer credit. The Roundtable applauds the Agencies' affirmation in the Guidance that overdraft fees are not finance charges under TILA and Regulation Z, provided the institution has not agreed in writing to pay overdrafts. We support the adoption of this portion of the Guidance.

B. Electronic Fund Transfer Act

The Electronic Fund Transfer Act ("EFTA") and Regulation E require an institution to provide consumers with account-opening disclosures and to send periodic statements for months in which an electronic fund transfer ("EFT") has occurred and at least quarterly if no transfer has occurred.

The proposal states that if, under an overdraft protection program, a consumer could overdraw an account by means of an ATM withdrawal or point-of-sale debit card transaction, both are electronic fund transfers subject to EFTA and Regulation E. As such, periodic statements must be readily understandable and accurate regarding debits made, current balances, and fees charged. Terminal receipts also must be readily understandable and accurate regarding the amount of the transfer.

Depending on the processing rules of an individual institution, it may not be possible to disclose accurately whether a particular transaction will incur an overdraft fee. Some institutions do not assess fees if accounts are brought current before the end of the day, or may establish a cap or floor for fees to be assessed. Consumers have been provided fee information at account opening. We believe that because of the programming required and the potential uncertainty that any disclosed information will be reflective of the ultimate experience of the consumer, disclosing whether a particular transaction will incur an overdraft fee should not be required. We would suggest that terminal receipts be required to show the amount withdrawn and, if the account is online, the current available balance of the account following the transaction. If the ending balance is overdrawn, this would be noted on the terminal receipt. The Guidance should confirm that terminal receipts be accurate in relation to the amount of the transfer, but not be required to display associated fees.

IV. Best Practices

The best practices in the Guidance are intended to provide positive examples of practices that are recommended by the industry. These practices address the marketing and communications that accompany overdraft protection programs and the disclosure and operation of these programs.

A. Marketing and Communications with Consumers

<u>Fairly represent overdraft protection programs and alternatives.</u> This best practice would require the disclosure of the cost of alternative products in descriptions of an overdraft protection service. In order to take into account different pricing for alternative products from market to market and other situations that might result in non-uniform pricing of alternative products, we believe institutions should be permitted to refer customers to a customer service number or to a local branch to discuss such alternatives.

<u>Clearly explain discretionary nature of program.</u> This best practice suggests that if the overdraft payment is discretionary, describe the circumstances in which the institution would

refuse to pay an overdraft or otherwise suspend the overdraft protection program. Furthermore, if payment of overdrafts is discretionary, information provided to consumers should not contain any representations that would lead a consumer to expect that the payment of overdrafts is guaranteed or assured.

We agree that disclosure of this nature is valuable to assist consumers in understanding that overdraft protection is discretionary and not a commitment to pay by the institution. However, any requirement to describe the "circumstances in which the institution would refuse to pay an overdraft" will have the effect of converting the program from a discretionary program to a program under which the institution will not pay an item if one of the described circumstances exists. The practical effect of this requirement would in essence change the discretionary nature of the program.

Explain check clearing policies. This best practice suggests that institutions clearly disclose to consumers the order in which the institution pays checks or processes other transactions (e.g., transactions at the ATM or point-of-sale terminal). We strongly believe this practice should be eliminated from the list of best practices. The precise order in which checks and other items are paid can be highly technical and not easily explained to consumers. Institutions may base an order of payment on a number of factors, including where the item was presented, whether the item was payable to the institution itself, the size of the item, or the item's serial number.

In addition, this proposed best practice is inconsistent with the Uniform Commercial Code, which recognizes that an institution should be allowed to process items in any order it chooses. The disclosure of the order of payment of items could create a contractual obligation between the consumer and the financial institution as the institution would be obligated to process items in that order. Subsequently, a bank's ability to change or modify such policies would be hampered. In order to change its check clearing policies, an institution would have to provide notice to its entire customer base. An institution should reserve the right to process items in any order it chooses and consumers should be encouraged to keep adequate available funds in their account to cover all authorized transactions regardless of the order in which presented.

B. Program Features and Operation

Alert consumers before a non-check transaction triggers any fees. This best practice suggests that when consumers attempt to use means other than checks to withdraw or transfer funds made available through an overdraft protection program, that the institution provide a specific consumer notice, where feasible, that completing the withdrawal will trigger the overdraft protection fees. The proposed best practice suggests that this notice should be presented in a manner that permits consumers to cancel the attempted withdrawal or transfer after receiving the notice. If this is not possible, then proposed best practice suggests posting notices on proprietary ATMs explaining that withdrawals in excess of the actual balance will access the overdraft protection program and trigger fees for consumers who have overdraft protection services. Institutions may make access to the overdraft protection program unavailable through means other than check transactions.

This practice places serious burdens on financial institutions. As the Guidance acknowledges, giving prior notice that a given transaction will trigger an overdraft fee is not always feasible and therefore notice should be posted on proprietary ATMs. We believe that the Guidance should clarify and acknowledge that there are situations, including in some instances, access by an ATM, in which it is not possible to post notices. These include, for example, non-proprietary ATMs (those operated by someone other than the financial institution holding the deposit account); transactions made online, over the phone, or at point of sale (online or offline debit); and preauthorized ACH transactions. Additionally, it should be noted that if the notice is designed to be presented at the ATM as part of the transaction, that there will be cases when the notice is not possible, for example in offline situations.

Also, it may not be possible to disclose accurately whether a particular transaction will incur an overdraft fee. Some institutions do not assess fees if accounts are brought current before the end of the day, or may establish a cap or floor for fees to be assessed. We feel that because of the programming required, and the potential uncertainty that any disclosed information will be reflective of the ultimate experience of the consumer, that disclosure of whether a particular transaction will incur an overdraft fee should not be required. We would suggest that proprietary ATM terminal receipts be required to show the amount withdrawn and, if the account is online, the current available balance of the account, following the transaction. Thus, if the ending balance is overdrawn, such would be noted on the terminal receipt.

Promptly notify consumers of overdraft protection program usage each time used. This best practice suggests that institutions promptly notify consumers when overdraft protection has been accessed. The notification should also identify the transaction, and disclose the overdraft amount, fees assessed, amount of time consumers have to return their accounts to a positive balance, and the consequences for not doing so.

We request clarification about reiteration of terms for consumers who access the service for the first time. Specifically, we recommend that there be adequate flexibility to allow institutions to notify consumers by whatever means is appropriate (telephone, letter, e-mail, etc.). Additionally, we recommend that this notification only apply to accounts that have been opened only in the last twelve months. Monitoring individual historical account records beyond twelve months will be burdensome and may not result in a useful communication to the consumer.

We believe that since most overdrafts must be repaid immediately, the requirement to notify a consumer about the consequences of not returning the account to a positive balance is unnecessary. In addition, the consequences may be difficult to determine since it often depends on the amount of the overdraft, the time it takes to clear the overdraft, prior account history and the customers other relationships with the institution.

Finally, we believe that requiring an institution to notify customers in writing about the overdraft, the fees imposed, and the period of time in which repayment can be made, may constitute a written agreement to extend credit and subject the institution to liability under Regulation Z and other lending laws.

Monitor overdraft protection program usage. This best practice suggests that institutions monitor excessive consumer usage, which may indicate a need for alternative credit arrangements or other services, and should inform consumers of these available options.

Roundtable member companies have several concerns and recommendations in relation to this best practice including:

- The guidelines do not provide a specific definition of excessive use.
- The guidelines should state that there is no notice requirement when there are no alternative options available and financial institutions are not obligated to provide alternative overdraft protection products.
- The guidelines should make clear that, except for safety and soundness reasons, institutions are not required to limit a consumer's use merely because the consumer meets a definition of "excessive use."
- We recommend that institutions be allowed the flexibility to develop programs that are manageable based on overall transaction volume and account base.

V. General Comments

The Roundtable strongly urges the Agencies to exempt the traditional practice of paying overdrafts on a discretionary basis where the bank does not promote or disclose the overdraft payment criteria. Unlike bounced check protection and other programs that market the ability to use overdraft, traditional overdraft protection is a way to manage operational risk and does not harm consumers. We request that the exemption for traditional overdraft protection programs apply regardless of whether or not automated means are used.

VI. Conclusion

Roundtable member companies appreciate the efforts of the Agencies to provide guidance on overdraft protection services. We support the Agencies' goals to enhance these services, but we do have some concerns with the Guidance. First, although we agree that adopting written policies and procedures to address the risks of overdraft protection may be beneficial to financial institutions, we oppose any assessment be made for credit risk. We believe that overdraft protection programs represent an operational risk to institutions, not credit risk. Second, we strongly oppose the 30-day time frame for the charge off of an overdraft balance. We believe this time frame is too short and therefore we recommend extending the period to a minimum of 60 days. And finally, we recommend that the Agencies allow institutions sufficient time to assess, develop, test and implement required system changes, and to train personnel that may be necessary to comply with the Guidance.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel