August 4, 2004

Via Email

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., NW
Washington, DC 20551
regs.comments@federalreserve.gov
Docket No. OP-1198

Public Information Room
Office of the Comptroller of Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
regs.comments@occ.treas.gov
Attention: Docket No. 04-14

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Comments@FDIC.gov/

Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
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regs.comments@ots.treas.gov
Attention: No. 2004-30

RE: Interagency Guidance on Overdraft Protection Programs

Dear Ladies and Gentlemen:

The Wisconsin Bankers Association (WBA) is the largest financial institution trade association in Wisconsin, representing over 300 state and nationally chartered banks, savings and loan associations, and savings banks located in communities throughout the state.

WBA appreciates the opportunity to comment on the federal banking regulatory agencies (Agencies) proposed Interagency Guidance on Overdraft Protection Programs (Guidance).

While historically institutions have helped consumers protect their accounts against overdrafts by offering lines of credit or paying overdrafts on an ad hoc basis, in the past several years "automated overdraft protection programs" (Programs) have emerged. The Agencies generally describe the characteristics of these programs as:

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- Institutions inform consumers that overdraft protection is a feature of their accounts and promote the use of the service. Institutions also inform consumers of their aggregate dollar limit under the overdraft protection program.

- Coverage is automatic for consumers who meet the institution's criteria (e.g., account has been open a certain number of days, deposits are made regularly). Typically, the institution performs no credit underwriting.

- Overdrafts generally are paid up to the aggregate limit set by the institution for the specific class of accounts, typically $100 to $500.

- Many program disclosures state that payment of an overdraft is discretionary on the part of the institution, and may disclaim any legal obligation of the institution to pay any overdraft.

- The service may extend to check transactions as well as other transactions, such as withdrawals at automated teller machines (ATMs), transactions using debit cards, pre-authorized automatic debits from a consumer's account, telephone-initiated funds transfers, and on-line banking transactions.

- A flat fee is charged each time the service is triggered and an overdraft item is paid. Commonly, a fee in the same amount would be charged even if the overdraft item were not paid. A daily fee also may apply for each day the account remains overdrawn.

- Some institutions offer closed-end loans to consumers who do not bring their accounts to a positive balance within a specified time period. These repayment plans allow consumers to repay their overdrafts and fees in installments.

The Guidance is proposed by the Agencies to address concerns raised by the marketing and disclosure practices of some institutions of these automated overdraft protection programs. In particular, the Agencies cite some institutions marketing these programs in a manner which: (1) Leads consumers to believe that it is a line of credit; (2) Encourages consumers to overdraw their accounts; and (3) Do not clearly disclose to consumers that the program allows consumers to overdraw their accounts by means other than checks. In response to these concerns, the Agencies provide guidance in three main sections: Safety and Soundness Considerations; Legal Risks; and Best Practices.

SAFETY AND SOUNDNESS CONSIDERATIONS

The Guidance Should Provide A 60-Day Charge-Off Period For Unpaid Overdrafts.

The Agencies state that overdraft protection programs may expose an institution to more credit risk than overdraft lines of credit and traditional ad hoc overdraft coverage because the programs lack individual underwriting. Thus, the Guidance suggests institutions

should adopt written policies and procedures that adequately address the credit, operational, and other risks associated with these types of programs. To that end, the Agencies expect institutions, among other things, to incorporate prudent risk management practices related to account repayment of overdrafts.

In particular, the Guidance states that overdraft balances should be charged off within 30 days from the date first overdrawn. The WBA agrees that a charge off timeframe should be established; however, imposing a 30 day timeframe does not take into account unforeseen circumstances or expenses that a consumer may encounter. Since one of the goals of this section is to decrease the risk of loss to an institution, we urge the Agencies to adopt a 60 day timeframe. We are confident that doing so will dramatically increase the number of repayments, as most consumers have good intentions to repay debt, even when unexpected expenses, etc., arise.

Institutions Should Not Be Required To Report Overdrafts as Loans Nor Charge Overdraft Losses Against The Allowance For Loan and Lease Losses.

The Guidance directs institutions to report overdrafts as loans and charge overdraft losses against the Allowance for Loan and Lease Losses. As discussed below, the Agencies erroneously believe that an overdraft paid under these programs constitutes credit. We adamantly disagree with this position, and therefore disagree with the concept of requiring institutions to treat overdrafts as credit and, thus report them as loans. In the same vein, we disagree with an approach that requires institutions to charge overdraft losses against the loan and lease allowance. Institutions are not required to treat overdrafts paid on the traditional ad hoc basis in this fashion. We see no justifiable reason to treat overdrafts paid pursuant to these programs any differently. Therefore, the WBA urges the Agencies to adopt guidance which allows overdraft balances to be netted against deposits.

LEGAL RISKS

The Guidance Should Not Refer To These Overdraft Programs As Credit.

The Agencies are concerned that some institutions are leading consumers to believe that these automated overdraft protection programs are lines of credit, yet the Guidance repeatedly refers to the payment of overdrafts pursuant to these programs as "credit." In fact, the Agencies state: "When overdrafts are paid, credit is extended." The Agencies should not refer to overdrafts paid under these programs as "credit," as they simply are not credit.

Credit involves more than the creation of debt. A debt is 'credit" if the consumer has the *right* to incur it and the *right* to defer its payment. While it is true that a consumer incurs debt when an institution pays an overdraft item, the payment of such an item under these programs is *discretionary* and does *not* give the consumer a right to incur the debt *nor* a

right to defer its payment. Under these programs, there is no agreement between the institution and the consumer which establishes any such rights.

The WBA is very concerned that the use of the term "credit" in the Guidance will invite risk of litigation, as plaintiff's attorneys will look to the Guidance as law and will attempt to sue institutions for violations of Truth in Lending if disclosure under that law are not provided to consumers. Therefore, it is critical that the Agencies eliminate any reference to credit when characterizing the payment of overdrafts under these programs.

In addition, the WBA is very troubled that the Agencies reference to "credit" could invite unwarranted litigation under the Equal Credit Opportunity Act (ECOA). The Agencies state that ECOA applies to these overdraft programs. To the great extent that these overdraft programs are not credit, as discussed earlier, the ECOA simply does not apply. The WBA detests and does not in any way condone illegal discrimination of any kind, whether in credit, deposit or any other context. Likewise, we detest and do not condone baseless litigation. The WBA is quite concerned that plaintiff's lawyers will use the Agencies references to credit in the Guidance as the basis for asserting ECOA violations against institutions that provide overdraft protection programs. Therefore, we reiterate that it is critical for the Agencies to eliminate any reference to credit when characterizing the payment of overdrafts under these programs.

BEST PRACTICES

The Agencies Should Delete From The Guidance The Practices Enumerated Below.

The Agencies make numerous recommendations on an institution's practices regarding marketing and communicating with consumers about overdraft protection programs. The WBA is certain that these practices will be considered mandatory by examiners and is concerned that compliance with some of the recommendations is simply not possible or feasible. In particular the following give us greatest pause:

(1) *Explain check clearing policies.* This can be very complicated. The order in which items are ultimately paid can depend on the type of transaction, dollar amount, volume of items, etc. Because of the myriad factors that are considered in determining the order in which items are paid, it would be extremely difficult, if not impossible, to identify every scenario that could dictate payment order.

(2) *Provide election or opt-out of service.* The WBA believes that an opt-in or an opt-out approach to such programs does not serve the interests or desires of the majority of consumers. Consumers like these programs, and should have unfettered access to them. For those that want to use the program, an opt-in is cumbersome. For those who do not wish to take advantage of the program, no opt-out is necessary since they simply will not use the program.

(3) *Alert consumers before a non-check transaction triggers any fees.* This provision will be impossible to comply with if the terminal involved is not operated by the account holding institution. In addition, most of these systems do not operate on a real-time basis. As a result, the balance information at the time of the transaction may not reflect the actual amount in the account; therefore, it is nearly if not completely impossible to alert a consumer at such a terminal as to whether the transaction at hand will create an overdraft.

(4) *Prominently distinguish actual balances from overdraft protection balances.* This may not be economically or operationally feasible for some institutions because the display of such information would create significant expense for the installation or upgrade of equipment and software.

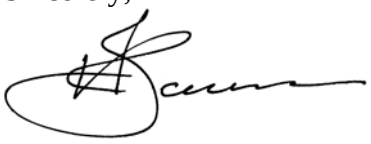
Because of the concerns we raise with respect to each of the above-enumerated practices, we strongly encourage the Agencies to eliminate such practices from the final Guidance.

Conclusion.

Without question, overdraft protection programs have become an attractive service to both financial institutions and consumers alike. With the growing popularity of these programs, many questions have arisen in the past several years. The WBA supports the Agencies' efforts to provide guidance in helping resolve some of these issues, and trusts the Agencies will carefully review the comments we submit today.

The WBA, again, appreciates the opportunity to comment on these very important matters.

Sincerely,



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