



August 5, 2004

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

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th Street & Constitution Avenue, N.W.
Washington, D.C. 20551
[Docket No. OP-1198]

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

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

Ms. Becky Baker, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 23214-3428

Re: Interagency Guidance on Overdraft Protection Programs
69 FR 31858 (June 7, 2004)

Dear Sir or Madam:

America's Community Bankers ("ACB")¹ welcomes the opportunity to comment on the proposed interagency guidance on overdraft protection programs, which was issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the National Credit Union Administration (collectively, the "Agencies").

Specifically, the Agencies have issued proposed guidance intended to assist insured depository institutions with the disclosures for, and administration of, overdraft protection services.² In issuing this proposal, the Agencies note that, while both the

¹ America's Community Bankers is the member driven national trade association representing community banks that pursue progressive, entrepreneurial and service-oriented strategies to benefit their customers and communities. To learn more about ACB, visit www.AmericasCommunityBankers.com.

² 69 Fed. Reg. 31858 (June 7, 2004).

availability and customer acceptance of overdraft protection services have increased, certain aspects of marketing, disclosure and implementation have raised concerns.

ACB Position

ACB supports the ability of community banks to offer overdraft protection services to their customers. Community banks also believe it is important to assist their customers in better managing their finances. We also believe that fair and accurate disclosures, together with regular financial education, help avoid confusion and misunderstanding among consumers about the true nature of overdraft protection and its costs.

While we generally support the efforts of the Agencies to provide meaningful examples of optimal practices relating to overdraft protection services, we have several concerns about the proposed guidance, both in terms of format and content. We urge the Agencies to revise the proposed guidance to both narrow its scope of application and to address certain ambiguities. In particular:

- The proposed guidance does not draw the important, necessary distinction between the discretionary nature of overdraft protection services, which increasingly are automated, and overdraft lines of credit, which are promises to extend credit under certain defined terms.
- ACB opposes aspects of the guidance that would incorrectly label all forms of overdraft protection as a credit service. To the contrary, only specifically developed overdraft lines of credit or similar credit products should be treated as loans, assessed for credit risk and subject to the Truth in Lending Act (TILA) and its implementing regulation, Regulation Z.³
- The proposed guidance fails to recognize that overdraft protection services are a response to customer-initiated transactions. All institutions must decide whether to pay checks or other items initiated by customers and presented against insufficient funds.
- At the same time, the proposed guidance also does not take into account that many customers have come to expect some form of overdraft coverage. For institutions that do offer some form of non-credit overdraft protection, many report that customers respond very favorably to the service.
- The proposed recommendation to “charge off” overdraft balances after 30 days is unworkable from an operational standpoint and also would negatively impact customers unnecessarily. It should be increased to at least 60 days.
- ACB strongly urges the Agencies to confirm that any best practices should not be seen as mandatory requirements that must be adopted in full by all banks. Institutions should be able to tailor their policies and procedures to the specific facts and circumstances of their institution, its customers and the particular aspects of the overdraft protection service.

³ 15 U.S.C. § 1601 *et seq.*, 12 C.F.R. Part 226.

- In addition, several of the specific proposed best practices, while laudable in concept, would be difficult or costly to implement and would not necessarily provide consumers with any additional, meaningful information to assist in their understanding of overdraft protection.

Background

In issuing this proposed guidance, the Agencies are responding to recent, negative publicity regarding certain marketing practices involving overdraft protection and consumers' perceived abuses in the administration of the services. In addition, the proposed guidance reflects information from comments received by the Board of Governors of the Federal Reserve System in response to its request for feedback about the operation of overdraft protection programs.⁴ The proposed guidance covers three key areas: safety and soundness considerations, legal risks, and best practices, which include 17 specific recommendations.

Financial Education and Informed Customers

ACB supports efforts to inform and educate consumers. In this instance, we believe it is important to inform and educate customers about the appropriate use and operation of discretionary overdraft protection services, as well as how to better manage one's personal finances. We agree with the Agencies that clear disclosures and explanations about overdraft protection help consumers use the service more responsibly.

In fact, community banks are particularly effective in working with their customers to address overdraft issues promptly while helping them improve their financial literacy and money management skills. Many deposit account agreements include language describing the discretionary nature in which the institution will respond to overdraft occurrences. And, as noted earlier, customers today increasingly expect their financial institution will honor overdrafts when they occur, to help a customer avoid additional costs and embarrassment.

Safety and Soundness Concerns

Deposit Service or Credit Product. Although the Agencies attempt to note the different approaches to overdraft protection, the proposed guidance fails to draw an important distinction between overdraft lines of credit and automated overdraft protection. An overdraft line of credit is a promise to pay overdrafts under certain defined terms. By comparison, overdraft protection services, regardless of how automated, are discretionary and utilized on a case-by-case basis, based on the institution's knowledge of its customer, the account history and other important factors.

As an example of this failure to distinguish, while attempting to note differences, the proposed guidance goes on to state that *all* overdraft balances should be reported as loans

⁴ 67 Fed. Reg. 72618 (December 6, 2002).

for purposes of required, quarterly financial reports, and that institutions should adopt written policies and procedures to assess credit and other risks.⁵ In another example, the proposed guidance also suggests that available amounts of overdraft protection be reported as “unused commitments.”

ACB strongly urges the Agencies to clarify that *only* those forms of overdraft protection specifically designed and offered as a credit product, i.e., a loan, should be reported as loans and assessed for credit risk. Making a distinction for financial reporting purposes will clarify that discretionary programs are not extensions of credit. Other forms of overdraft protection that do not meet the requirements of the statute or regulation, whether managed on an automated or occasional basis, should specifically fall outside the scope of TILA and Regulation Z.

While ACB supports the contention that general risk management principles should be applied to customer overdrafts, the proposed guidance could result in all institutions treating overdraft protection as a loan product. We oppose such an approach and urge the Agencies to revise their proposed guidance to address this ambiguity.

Charge-offs The proposed guidance indicates that overdraft balances generally should be charged off within 30 days of the date the overdraft first occurs.⁶ This timeframe is too short and will prove unworkable for institutions seeking to implement this aspect of the proposed guidance. General experience among community banks suggests that most customers will bring an account to a positive balance within a longer average time period, usually between 30 and 60 days. Requiring charge-offs within 30 days also will generate additional costs for community banks as they report this information to credit reporting agencies and respond to inquiries about such information.

Just as important, customers would likely face unnecessary consequences if financial institutions were forced to follow a 30-day charge-off rule. Customers would have to deal with negative information being reported to credit bureaus and check monitoring services, which likely would result in a damaged credit rating and potentially impair their ability to obtain additional credit in the future.

ACB does not believe, however, that fees associated with continuing overdrafts should continue indefinitely as the account is brought to positive balance.

Legal Risks

ACB generally supports the Agencies’ effort to highlight potential legal risks under various, applicable federal laws and regulations, including TILA, the Equal Credit Opportunity Act and the Truth in Savings Act.

⁵ 69 Fed. Reg. 31861.

⁶ Id.

As noted earlier, we support the Agencies' confirmation that overdraft fees are not finance charges under TILA and Regulation Z, provided the institution has not agreed in writing to pay overdrafts. This comports with the important distinction we believe is necessary elsewhere in the proposed guidance.

With respect to the Electronic Funds Transfer Act, ACB supports the general guidance that automated teller machine terminal receipts should accurately reflect the available balance without including overdraft protection funds. We understand that it may not always be possible, however, to provide accurate information about whether a particular transaction will trigger an overdraft. By way of example, some institutions do not assess fees if accounts are brought current before the end of the day, while others may establish a cap or floor for fees to be assessed. ACB urges the Agencies to clarify that it is sufficient to provide terminal receipts (or online screen information) that reflect accurate available balances without overdraft protection, including when an account has a resulting negative balance and any fees that will be incurred.

Best Practices

The Agencies have proposed best practices for financial institutions that provide overdraft protection to their customers. The practices are grouped into marketing and communications, and program features and operation. While ACB supports efforts to provide examples of optimal practices, we believe the Agencies must take into account the individual aspects of a financial institution's operations, customer base and resources. The proposed best practices should not be viewed as a minimum standard, but rather as offering a range of optimal practices that may be adapted to fit an individual institution's program and customer base. We also are concerned that examiners, consumers and others will view these best practices as mandatory requirements, which may lead to criticism and the potential for litigation. ACB strongly urges that the Agencies clarify that it is not necessary to adopt all of the suggested practices and that the practices are only guidance. We think this is particularly necessary as the Agencies otherwise explore opportunities to reduce regulatory burdens.

With respect to the specific proposed best practices:

Avoid promoting poor account management. Community banks have long been involved in helping to advance the financial literacy of the communities they serve, and ACB supports this aspect of the proposed guidance. The use of overdraft protection services should be an exception and not the rule. Customers should not regularly rely on overdraft protection services as a means of managing their finances.

Fairly represent overdraft protection programs and alternatives. Similarly, we support providing customers with clear and accurate disclosures about the nature of their overdraft protection coverage, and whether it is a deposit service or a line of credit.

Train staff to explain program features and other choices. ACB generally supports this recommendation but, again, encourages the Agencies to recognize that any training recommendations must take into account individual resources, customer experience and other factors.

Clearly explain discretionary nature of program. With respect to non-credit overdraft protection, while customers should have a clear understanding of the discretionary nature of any overdraft protection service, ACB is concerned about listing circumstances in which an institution will not pay an overdraft item or suspend overdraft protection coverage. We believe this could give rise to an unreasonable expectation that a “safe harbor” exists when, in fact, none does. As noted previously, unless a customer has obtained a pre-approved line of credit, the decision to honor an overdraft remains discretionary and will depend upon a variety of circumstances, including some outside the control of the financial institution, such as instances when deposit items have been returned. We encourage the Agencies to modify this aspect of the proposed guidance to simply state that customers should receive an accurate description of whether the overdraft protection coverage provided for the specific account is discretionary or not.

Free accounts, program fees and multiple fees. ACB supports informing customers fully about the nature and costs associated with their particular form of overdraft protection.

Explain check-clearing processes. While ACB understands the rationale behind this proposed best practice, we believe that the information needed to accurately describe the check clearing process, and its many variables, likely would confuse customers or, alternatively, create an unintended expectation of a contractual obligation between the customer and the financial institution. ACB suggests in the alternative that financial institutions be prepared to explain that the check clearing process is a complicated one involving a variety of legitimate factors, which may impact when items are presented for payment.

Alert consumers before a non-check transaction triggers any fees. As noted earlier, it may not always be possible to accurately disclose when, or if, a non-check transaction will trigger any overdraft protection fees. We believe that ATM terminal receipts or other transaction receipts should disclose the available balance following a transaction without including any overdraft protection amounts, including if a negative balance will result and any fees will be incurred. If the account will be overdrawn following a non-check transaction, the receipt similarly should disclose that information.

Usage of overdraft protection by customers. ACB believes that financial institutions must have the necessary flexibility to assess overdraft protection occurrences by customers, and to take appropriate, responsive action. Community bankers must have the flexibility to work with their customers to

address overdraft occurrences and what responses are most appropriate. There should not be a required, formulaic approach to deciding on the specific availability of overdraft protection coverage. To reiterate, ACB supports efforts to educate customers about managing finances and avoiding overdrafts and this should be the focus of dealing with repeated overdraft situations.

Conclusion

ACB appreciates the opportunity to comment on this important matter and we support the Agencies in their efforts to provide meaningful guidance on overdraft protection. We stand ready to work with the Agencies to finalize revised guidance to assist financial institutions in responding to customer needs when overdrafts occur.

Should you have any questions, please contact the undersigned at 202-857-3122 or via e-mail at mbriggs@acbankers.org; Charlotte M. Bahin, Senior Vice President, Regulatory Affairs, at (202) 857-3121 or via email at cbahin@acbankers.org.

Sincerely,

A handwritten signature in black ink that reads "Michael W. Briggs". The signature is written in a cursive, flowing style.

Michael W. Briggs
Chief Legal Officer