



August 6, 2004

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

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

Dear Sir or Madam:

Commercial Federal Bank (CFB) welcomes the opportunity to comment on the proposed interagency guidance on overdraft protection programs. Commercial Federal Bank, headquartered in Omaha, Nebraska is a federally chartered thrift with approximately \$12 billion in assets with 193 locations in Nebraska, Iowa, Colorado, Missouri, Kansas, Oklahoma and Arizona.

CFB's Position

CFB supports the ability of community banks to offer overdraft protection services to their clients while, at the same time, assisting them with efforts to better manage 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.

Nevertheless, while CFB generally supports 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 and uncertainty. 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, where there is a commitment to pay.
- CFB opposes those 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.
- The proposed guidance fails to recognize that all institutions must respond to overdrafts initiated by our clients, and that clients largely have come to expect some form of protection.
- The proposed recommendation to “charge off” overdraft balances after 30 days is unworkable from an operational standpoint and would negatively impact customers unnecessarily. It is recommended to increase “charge off” to at least 60 days.
- CFB urges the Agencies to confirm that any best practices should be viewed and adopted only as examples of optimal practices, which financial institutions may employ in managing the delivery of overdraft protection services. Institutions should be able, however, to tailor their policies and procedures to the specific facts and circumstances of their institution, its clients and the particular aspects of the overdraft protection service.
- 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’ understanding of these 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. 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 Clients

CFB supports efforts to inform and educate consumers. In this instance, we believe it is important to inform and educate clients about the appropriate use of 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 clients to address overdraft issues promptly while helping them improve their financial literacy and money management skills. Moreover, as noted earlier, clients increasingly expect their financial institution will honor overdrafts when they occur, to help a client 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, which is discretionary. For example, while attempting to note such an important distinction, the proposed guidance goes on to state that *all* overdraft balances should be reported as loans and that institutions should adopt written policies and procedures to assess credit and other risks. In another example, the proposed guidance also suggests that available amounts of overdraft protection be reported as “unused commitments.”

CFB 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. Other forms of overdraft protection, whether managed on an automated or occasional basis, should continue to fall outside the scope of TILA and Regulation Z.

While CFB supports the contention that general risk management principles should be applied to client overdrafts, the proposed guidance would have all institutions treat 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. This timeframe is too short and will prove unworkable for institutions seeking to implement this aspect of the proposed guidance. General experience suggests that most clients 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, clients would suffer unnecessarily if financial institutions were to follow a 30-day rule. They would have to deal with negative information being reported to credit bureaus and check monitoring services, which likely would result in additional costs, burdens and inconveniences for the consumer.

Legal Risks

CFB 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.

As noted earlier, CFB supports 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, CFB supports that general guidance that automated teller machine terminal receipts should accurately reflect the available balance following a transaction to enable clients to know whether they have available funds to withdraw. Because of the various, individual factors that may determine whether an overdraft occurs, however, it may be very difficult to provide accurate information about whether a particular transaction will trigger an overdraft. CFB urges the Agencies to clarify that it is sufficient to provide terminal receipts (or online screen information) that reflect accurate available balances, including when an account has a resulting negative balance.

Best Practices

The Agencies have proposed best practices for financial institutions that provide overdraft protection to their clients. The practices are grouped into marketing and communications, and program features and operation. While CFB 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, client 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 client base. 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 CFB supports this aspect of the proposed guidance.

Fairly represent overdraft protection programs and alternatives. Similarly, CFB supports 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. CFB generally supports this recommendation but, again, encourages the Agencies to recognize that any training recommendations must take into account individual resources, client experience and other factors.

Clearly explain discretionary nature of program. With respect to non-credit overdraft protection, while clients should have a clear understanding of the discretionary nature of any overdraft protection service, CFB 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 client 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 clients 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. CFB supports informing clients fully about the nature and costs associated with their particular form of overdraft protection.

Explain check-clearing processes. While CFB understands the rationale behind this proposed best practice, we believe 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. CFB 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. In CFB’s view, it would be difficult in many instances to accurately disclose when, or if, a non-check transaction will trigger any overdraft protection fees. As noted earlier, we believe ATM terminal receipts or other transaction receipts should disclose the available balance following a transaction. If the account will be overdrawn following a non-check transaction, the receipt similarly should disclose that information.

Usage of overdraft protection by customers. CFB 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 clients 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, CFB supports efforts to educate clients about managing finances and avoiding overdrafts and this should be the focus of dealing with repeated overdraft situations.

Conclusion

CFB appreciates the opportunity to comment on this important matter and supports the Agencies in their efforts to provide meaningful guidance on overdraft protection.

Please contact me at 402-554-9296 or via e-mail at GaryFillman@CommercialFed.com if you have any questions.

Sincerely,

Gary R Fillman
Compliance Manager
Commercial Federal Bank