

disclosure and administration of overdraft protection services.

DATES: Comments must be submitted on or before August 6, 2004.

ADDRESSES: Because the Agencies will jointly review all of the comments submitted, interested parties may send comments to any of the Agencies and need not send comments (or copies) to all of the Agencies. Because paper mail in the Washington area and at the Agencies is subject to delay, please consider submitting your comments by e-mail or fax. Commenters are encouraged to use the title "Overdraft Protection Guidance" to facilitate the organization and distribution of comments among the Agencies. Interested parties are invited to submit comments to:

OCC: Your comment must designate "OCC" and include Docket Number 04-14. In general, the OCC will enter all comments received into the docket without change, including any business or personal information that you provide. You may submit your comment by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- OCC Web Site: <http://www.occ.treas.gov>. Click on "Contact the OCC." Next, scroll down and click on "Comments on Proposed Regulations."

- E-Mail Address: regs.comments@occ.treas.gov.

- Fax: (202) 874-4448.
- Mail: Office of the Comptroller of the Currency, 250 E Street, SW., Public Information Room, Mailstop 1-5, Washington, DC 20219.

- Hand Delivery/Courier: 250 E Street, SW., Attn: Public Information Room, Mail Stop 1-5, Washington, DC 20219.

- Docket Information: For access to the docket to read comments received or background documents you may:

View Docket Information in Person: You may personally inspect and photocopy docket information at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect the docket by calling us at (202) 874-5043.

View Docket Information Electronically: You may request that we send you an electronic copy of docket information via e-mail or CD-ROM by contacting regs.comments@occ.treas.gov.

Request Paper Copy: You may request that we send you a paper copy of docket information by faxing us at (202) 874-4448, by calling us at (202) 874-5043, or mailing the OCC at 250 E Street, SW.,

Attn: Public Information Room, Mail Stop 1-5, Washington, DC 20219.

Board: You may submit comments, identified by Docket No. OP-1198, by any of the following methods:

- Agency Web Site: <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.

- Fax: 202/452-3819 or 202/452-3102.

- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information.

Public comments may also be viewed in electronic or paper form in Room MP-500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit comments by any of the following methods:

- Agency Web site: <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow the instructions for submitting comments on the Agency Web site.

- E-Mail: Comments@FDIC.gov.

- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Instructions: All submissions received must include the agency name. All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html> including any personal information provided.

OTS: You may submit comments, identified by No. 2004-30, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail address: regs.comments@ots.treas.gov. Please include No. 2004-30 in the subject line

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 04-14]

FEDERAL RESERVE SYSTEM

[Docket No. OP-1198]

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[No. 2004-30]

NATIONAL CREDIT UNION ADMINISTRATION

Interagency Guidance on Overdraft Protection Programs

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); and National Credit Union Administration (NCUA).

ACTION: Proposed Guidance with request for comment.

SUMMARY: Member agencies of the Federal Financial Institutions Examination Council (FFIEC), the OCC, Board, FDIC, OTS, and NCUA (the Agencies), request comments on this proposed Interagency Guidance on Overdraft Protection Programs (Guidance). This proposed Guidance is intended to assist insured depository institutions in the responsible

of the message and include your name and telephone number in the message.

- Fax: (202) 906-6518.
- Mail: Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2004-30.
- Hand Delivery/Courier: Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: No. 2004-30.

Instructions: All submissions received must include the agency name and No. 2004-30 for this proposed Guidance. All comments received will be posted without change to the OTS Internet Site at <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>. In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906-7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

NCUA: You may submit comments by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include "[Your name] Comments on Overdraft Protection" in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Becky Baker, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

FOR FURTHER INFORMATION CONTACT:

OCC: Margaret Hesse, Special Counsel, Community and Consumer Law Division, (202) 874-5750; Michael Bylsma, Director, Community and Consumer Law Division, (202) 874-5750; or Kim Scherer, National Bank Examiner/Credit Risk Specialist, Credit Risk Policy, (202) 874-5170.

Board: Minh-Duc T. Le, Senior Attorney, Daniel Lonergan, Counsel, or Elizabeth Eurgubian, Attorney, Division of Consumer and Community Affairs, (202) 452-3667; or William H. Tiernay, Supervisory Financial Analyst, Division of Bank Supervision and Regulation, (202) 452-2412. For users of Telecommunications Device for the Deaf ("TDD") only, contact (202) 263-4869.

FDIC: April Breslaw, Chief, Compliance Section (202) 898-6609; Patricia Cashman, Senior Policy Analyst (202) 898-6534; James Leitner, Examination Specialist (202) 898-6790, Division of Supervision and Consumer Protection; and Mark Mellon, Counsel, (202) 898-3884.

OTS: Maurice McClung, Program Manager, Market Conduct, Consumer Protection and Specialized Programs, (202) 906-6182; and Richard Bennett, Counsel, Banking and Finance, (202) 906-7409.

NCUA: Elizabeth A. Habring, Program Officer, Office of Examination and Insurance, (703) 518-6392; or Ross P. Kendall, Staff Attorney, Office of the General Counsel, (703) 518-6562.

SUPPLEMENTARY INFORMATION:

I. Background

Under the auspices of the FFIEC, the Agencies have developed this proposed Guidance to address a service offered by insured depository institutions commonly referred to as "bounced-check protection" or "overdraft protection." This credit service is sometimes offered to transaction account customers as an alternative to traditional ways of covering overdrafts (e.g., overdraft lines of credit or linked accounts).

While both the availability and customer acceptance of these overdraft protection services have increased, aspects of the marketing, disclosure, and implementation of some of these programs have raised concerns with the Agencies. For example, in a 2001 letter, the OCC identified some of these particular concerns.¹ In November 2002, the Board sought comment about the operation of overdraft protection programs.² The Board received approximately 350 comments; most were from industry representatives

describing how the programs work. This proposed Guidance is the result of information gleaned from public comment letters and other publicly available material, and from information provided by institutions, consumer groups, State representatives, and vendors offering overdraft protection program.

II. Principal Elements of the Guidance

The proposed Guidance first identifies the historical and traditional approaches to providing consumers with protection against account overdrafts, and contrasts these approaches with the more recent overdraft protection services that are marketed to consumers. The Agencies then identify some of the existing and potential concerns surrounding the offering and administration of such overdraft protection services. That section of the proposed Guidance identifies particular issues that previously have been identified by Federal and State bank regulatory agencies, consumers groups, financial institutions, and their trade representatives.

In response to these concerns, the Agencies provide guidance in the three primary sections: Safety and Soundness Considerations, Legal Risks, and Best Practices. In the section on Safety and Soundness Considerations, the Agencies want to ensure that financial institutions offering overdraft protection services adopt adequate policies and procedures to address the credit, operational, and other risks associated with these services. For example, the proposed Guidance emphasizes the need for institutions to incorporate prudent risk management practices related to account eligibility, repayment, and suspension. The proposed Guidance specifically provides that overdraft balances generally should be charged-off within 30 days from the date first overdrawn. Institutions also are advised to monitor carefully their programs on an ongoing basis and adjust them as needed to account for credit risk.

The Legal Risks section of the proposed Guidance generally alerts institutions offering overdraft protection services to the need to comply with all applicable Federal and State laws, and advises institutions to have their overdraft protection programs reviewed by legal counsel to ensure overall compliance prior to implementation. Several Federal consumer compliance laws are outlined in the proposed Guidance.

Finally, the proposed Guidance sets forth best practices that serve as positive

¹ OCC Interpretive Letter 914, September 2001.

² 67 FR 72618, December 6, 2002.

examples of practices that are currently observed in, or recommended by, the industry. Broadly, these best practices address the marketing and communications that accompany the offering of overdraft protection services, as well as the disclosure and operation of program features. Clear disclosures and explanations to consumers about the operation, costs, and limitations of overdraft protection services should promote consumer understanding, limit complaints, and encourage appropriate consumer use. Credit and reputational risks to the institution can also be minimized through the incorporation of these best practices.

III. Request for Comment

Comment is requested on all aspects of the proposed Guidance. Interested commenters are also asked to address specifically the proposed Guidance's expectation that institutions will generally charge off overdraft balances following a 30-day timeframe.

The text of the proposed Interagency Guidance on Overdraft Protection Programs follows:

Interagency Guidance on Overdraft Protection Programs

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and National Credit Union Administration (NCUA), collectively "the Agencies," are issuing this interagency guidance concerning a service offered by insured depository institutions that is commonly referred to as "bounced-check protection" or "overdraft protection." This credit service is sometimes offered to transaction account consumers, including small businesses, as an alternative to traditional ways of covering overdrafts. This interagency guidance is intended to assist insured depository institutions in the responsible disclosure and administration of overdraft protection services, particularly those that are marketed to consumers.³

³ Federal credit unions are already subject to certain regulatory requirements governing the establishment and maintenance of overdraft programs. 12 CFR 701.21(c)(3). This regulation requires a Federal credit union offering an overdraft program to adopt a written policy specifying the dollar amount of overdrafts that the credit union will honor (per member and overall); the time limits for a member to either deposit funds or obtain a loan to cover an overdraft; and the amount of the fee and interest rate, if any, that the credit union will charge for honoring overdrafts. This interagency guidance supplements but does not change these regulatory requirements for Federal credit unions.

Introduction

To protect against account overdrafts, some consumers obtain an overdraft line of credit, which is subject to the disclosure requirements of the Truth in Lending Act (TILA). If a consumer does not have an overdraft line of credit, the institution may accommodate the consumer and pay overdrafts on a discretionary, ad-hoc basis. Regardless of whether the overdraft is paid, institutions typically have imposed a fee when an overdraft occurs, often referred to as a nonsufficient funds or "NSF" fee. Over the years, this accommodation has become automated by some institutions. Historically, institutions have not promoted this accommodation.

More recently, some depository institutions have begun offering "overdraft protection" programs. Unlike the discretionary accommodation traditionally provided to those lacking a line of credit or other type of overdraft service (e.g., linked accounts), these overdraft protection programs are marketed to consumers essentially as short-term credit facilities, and typically provide consumers with an express overdraft "limit" that applies to their accounts.

While the specific details of overdraft protection programs vary from institution to institution, and also vary over time, those currently offered by institutions incorporate some or all of the following characteristics:

- 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.⁴

- 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.

Concerns

Aspects of the marketing, disclosure, and implementation of some overdraft protection programs, intended essentially as short-term credit facilities, are of concern to the Agencies. For example, some institutions have promoted this credit service in a manner that leads consumers to believe that it is a line of credit by informing consumers that their account includes an overdraft protection limit of a specified dollar amount without clearly disclosing the terms and conditions of the service including how fees impact overdraft protection dollar limits, and how the service differs from a line of credit.

In addition, some institutions have adopted marketing practices that appear to encourage consumers to overdraw their accounts, such as by informing consumers that the service may be used to take an advance on their next paycheck, thereby potentially increasing the institutions' credit exposure with little or no analysis of the consumer's creditworthiness. These overdraft protection programs may be promoted in a manner that leads consumers to believe that overdrafts will always be paid when, in reality, the institution reserves the right not to pay some overdrafts. Furthermore, institutions may not clearly disclose that the program allows consumers to overdraw their accounts by means other than check, such as at ATMs and point-of-sale terminals.

Institutions should weigh carefully the credit, legal, reputation, and other risks presented by the programs. Further, institutions should carefully review their programs to ensure they do not lead consumers to believe the service is a traditional line of credit, do not encourage irresponsible consumer

⁴ Transaction accounts at credit unions are called share draft accounts. For purposes of this interagency guidance, the use of the term "check" includes share drafts.

financial behavior that potentially may increase risk to the institution, and do not mislead consumers about the costs or scope of the overdraft protection offered.

Safety & Soundness Considerations

The overdraft protection programs discussed in this interagency guidance may expose an institution to more credit risk (e.g., higher delinquencies and losses) than overdraft lines of credit and other traditional overdraft programs because of a lack of individual account underwriting. Therefore, institutions providing overdraft protection programs should adopt written policies and procedures adequate to address the credit, operational, and other risks associated with these types of programs. Prudent risk management practices include the establishment of express account eligibility standards and well-defined and properly documented dollar limit decision criteria. Institutions also should monitor these accounts on an ongoing basis and be able to identify individual consumers who may be excessively reliant on the product or who may represent an undue credit risk to the institution. The programs should be administered and adjusted, as needed, to ensure that credit risk remains in line with expectations. This may include, where appropriate, disqualification of a consumer from future participation in the program. Reports detailing product volume, profitability, and credit performance should be provided to management on a regular basis.

Institutions also are expected to incorporate prudent risk management practices related to account repayment and suspension of overdraft protection services. These include the establishment of specific timeframes for when consumers must pay off their overdraft balances. For example, there should be established procedures for the suspension of overdraft services when the account holder no longer meets the eligibility criteria (such as when the account holder has declared bankruptcy or defaulted on another loan) as well as for when there is a lack of repayment of an overdraft. In addition, overdraft balances should generally be charged off within 30 days from the date first overdrawn.⁵ The 30-day charge off timeframe applies to all overdrafts created under the overdraft protection programs described in this interagency guidance. Some overdrafts are

⁵ Federal credit unions are required by regulation to establish a time limit, not to exceed 45 calendar days, for a member to either deposit funds or obtain an approved loan from the credit union to cover each overdraft. 12 CFR 701.21(c)(3).

individually underwritten and supported by a documented assessment of that consumer's ability to repay. In those instances, the charge off timeframes described in the FFIEC Uniform Retail Credit Classification and Account Management Policy would apply.⁶ For corporate and small businesses, existing credit relationships may support exceptions to the 30-day charge off guidance.

In some cases, an institution may allow a consumer to cover an overdraft through an extended repayment plan when the consumer is unable to bring an account to a positive balance within the required time frames. Even in such cases, the existence of the repayment plan would not extend the charge-off determination period beyond 30 days measured from the date of the overdraft. Any payments received after the account is charged off (up to the amount charged off against the allowance) should be reported as a recovery.

With respect to the reporting of income and loss recognition on overdraft protection programs, institutions should follow generally accepted accounting principles (GAAP) and the instructions for the Reports of Condition and Income (Call Report), Thrift Financial Report, and NCUA 5300 Call Report. Overdraft balances should be reported as loans. Accordingly, 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 and uncollected overdraft fees should be reversed against overdraft fee income or an associated earned fee loss allowance.⁷ Institutions should adopt rigorous loss estimation processes to ensure that any allowances related to earned fees reflect all estimated losses and that earned but uncollected fees are accounted for accurately. The procedures for estimating an adequate allowance should be documented in accordance with the Policy Statement on the Allowance for Loan and Lease Losses Methodologies and Documentation for Banks and Savings Institutions.⁸

⁶ For federally insured credit unions, charge-off policy for booked loans is described in NCUA Letter to Credit Unions No. 03-CU-01, "Loan Charge-off Guidance," dated January 2003.

⁷ Institutions may also charge off uncollected overdraft fees against the allowance for loan and lease losses if estimated credit losses on the fees are provided for in that allowance.

⁸ Issued by the Board, FDIC, OCC, and OTS. The NCUA provided similar guidance to credit unions in Interpretive Ruling and Policy Statement 02-3, "Allowance for Loan and Lease Losses Methodologies and Documentation for Federally Insured Credit Unions," 67 FR 37445, May 29, 2002.

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. The Agencies also expect proper risk-based capital treatment of outstanding overdrawn balances and unused commitments.⁹ Overdraft balances should be risk-weighted according to the 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 50 percent credit conversion factor and the resulting credit equivalent amount should be risk-weighted according to the obligor.

Institutions entering into overdraft protection contracts with third-party vendors must conduct thorough due diligence reviews prior to signing a contract. The interagency guidance contained in the November 2000 Risk Management of Outsourced Technology Services outlines the Agencies' expectations for prudent practices in this area.

Legal Risks

Overdraft protection programs must comply with all applicable Federal laws and regulations, some of which are outlined below. State laws that may be applicable include usury and criminal laws, and laws regarding unfair or deceptive acts or practices. It is important that institutions have their overdraft protection programs reviewed by counsel for compliance with all applicable laws prior to implementation.

Federal Trade Commission Act/Advertising Rules

Section 5 of the Federal Trade Commission Act (FTC Act) prohibits unfair or deceptive acts or practices.¹⁰ The Federal banking agencies enforce this section pursuant to their authority in section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818.¹¹ An act or practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably

⁹ Federally insured credit unions should calculate risk-based net worth in accordance with the rules contained in 12 CFR part 702.

¹⁰ 15 U.S.C. 45.

¹¹ See OCC Advisory Letter 2002-3 (March 2002); and joint Board and FDIC guidance on Unfair or Deceptive Acts or Practices by State-Chartered Banks (March 11, 2004).

avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. An act or practice is deceptive if, in general, it is a representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances, and it is material.

In addition, the OTS and the NCUA have promulgated similar rules that prohibit savings associations and federally insured credit unions, respectively, from using advertisements or other representations that are inaccurate or misrepresent the services or contracts offered.¹² These regulations are broad enough to prohibit savings associations and federally insured credit unions from making any false representations to the public regarding their deposit accounts.¹³

Overdraft protection programs may raise issues under either the FTC Act or, in connection with savings associations or federally insured credit unions, the OTS's or NCUA's advertising rules, depending upon how the programs are marketed and implemented. To avoid engaging in deceptive, inaccurate, misrepresentative, or unfair practices, institutions should closely review all aspects of their overdraft protection programs, especially any materials that inform consumers about the programs.

Truth in Lending Act

TILA and Regulation Z require creditors to give cost disclosures in connection with extensions of consumer credit.¹⁴ TILA and the regulation apply to creditors that regularly extend consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments.¹⁵

When overdrafts are paid, credit is extended. However, fees for paying overdraft items currently are not considered finance charges under Regulation Z if the institution has not agreed in writing to pay overdrafts.¹⁶ Since this regulatory exception was created for the occasional *ad-hoc* payment of overdrafts, its application to these automated and marketed overdraft protection programs could be reevaluated in the future. Even where the institution agrees in writing to pay

overdrafts as part of the deposit account agreement, fees assessed against a transaction account for overdraft protection services are finance charges only to the extent the fees exceed the charges imposed for paying or returning overdrafts on a similar transaction account that does not have overdraft protection.

Some financial institutions also offer overdraft repayment loans to consumers who are unable to repay their overdrafts and bring their accounts to a positive balance within a specified time period.¹⁷ These closed-end loans will trigger Regulation Z disclosures, for example, if the loan is payable by written agreement in more than four installments. Regulation Z will also be triggered where such closed-end loans are subject to a finance charge.

Equal Credit Opportunity Act

Under the Equal Credit Opportunity Act (ECOA) and Regulation B, creditors are prohibited from discriminating against an applicant on a prohibited basis in any aspect of a credit transaction.¹⁸ This prohibition applies to overdraft protection programs. Thus, steering or targeting certain consumers on a prohibited basis for overdraft protection programs while offering other consumers overdraft lines of credit or other more favorable credit products or overdraft services, will raise concerns under the ECOA.

In addition to the general prohibition against discrimination, the ECOA and Regulation B contain specific rules concerning procedures and notices for credit denials and other adverse action. Regulation B defines the term "adverse action,"¹⁹ and generally requires a creditor who takes adverse action to send a notice to the consumer providing, among other things, the reasons for the adverse action.²⁰ Some actions taken by creditors under overdraft protection programs might constitute adverse action but would not require notice to the consumer if the credit is deemed to be "incidental credit" as defined in Regulation B. "Incidental credit" includes consumer credit that is not subject to a finance

charge, is not payable by agreement in more than four installments, and is not made pursuant to the terms of a credit card account.²¹ Overdraft protection programs that are not covered by the TILA would generally qualify as incidental credit under Regulation B.

Truth in Savings Act

Under the Truth in Savings Act (TISA), deposit account disclosures must include the amount of any fee that may be imposed in connection with the account and the conditions under which the fee may be imposed.²² In addition, institutions must give advance notice to affected consumers of any change in a term that was required to be disclosed if the change may reduce the annual percentage yield or adversely affect the consumer.

When overdraft protection services are added to an existing deposit account, advance notice to the account holder may be required, for example, if the fee for the service exceeds the fee for accounts that do not have the service.²³ Where the added overdraft protection fees do not exceed previously disclosed NSF fees, a new disclosure may be required if the previous disclosure did not adequately disclose that the fees would be assessed for both paid checks and returned checks. In addition, TISA prohibits institutions from making any advertisement, announcement, or solicitation relating to a deposit account that is inaccurate or misleading or that misrepresents their deposit contracts.

Since these automated and marketed overdraft protection programs did not exist when most of the implementing regulations were issued, the regulations may be reevaluated.

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 a periodic statement for each monthly cycle in which an electronic fund transfer (EFT) has occurred and at least quarterly if no transfer has occurred.²⁴ If, under an overdraft protection program, a consumer could

¹² 12 CFR 563.27 (OTS) and 12 CFR 740.2 (NCUA).

¹³ See OTS Op. Chief Counsel (September 3, 1993), 93-CC-21.

¹⁴ 15 U.S.C. 1601 *et seq.* TILA is implemented by Regulation Z, 12 CFR part 226.

¹⁵ Institutions should be aware that whether a written agreement exists is a matter of State law. See, e.g., 12 CFR 226.5.

¹⁶ Traditional lines of credit, which generally are subject to a written agreement, do not fall under this exception.

¹⁷ For Federal credit unions, this time period may not exceed 45 calendar days. 12 CFR 701.21(c)(3).

¹⁸ 15 U.S.C. 1691 *et seq.* The ECOA is implemented by Regulation B, 12 CFR part 202. The ECOA prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the fact that all or part of the applicant's income derives from a public assistance program, and the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

¹⁹ See 12 CFR 202.2(c).

²⁰ See 12 CFR 202.9.

²¹ See 12 CFR 202.3(c).

²² 12 U.S.C. 4301 *et seq.* TISA is implemented by Regulation DD at 12 CFR part 230 for banks and savings associations, and by NCUA's TISA regulation at 12 CFR part 707 for federally insured credit unions.

²³ For example, an advance change in terms notice would not be required if the consumer's account disclosures stated that their overdraft check may or may not be paid and the same fee would apply.

²⁴ 15 U.S.C. 1693 *et seq.* The EFTA is implemented by Regulation E, 12 CFR part 205.

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. Moreover, readily understandable and accurate statements and receipts will help reduce the number of alleged errors that the institution must investigate under Regulation E, which can be time-consuming and costly to institutions.

Best Practices

Clear disclosures and explanations to consumers of the operation, costs, and limitations of an overdraft protection program and appropriate management oversight of the program are fundamental to enabling responsible use of overdraft protection. Such disclosures and oversight can also minimize potential consumer confusion and complaints, foster good customer relations, and reduce credit and other potential risks to the institution. Institutions that establish overdraft protection programs should take into consideration the following practices that have been implemented by institutions and that may otherwise be required by applicable law. These best practices currently observed in or recommended by the industry include:

Marketing and Communications With Consumers

- *Avoid promoting poor account management.* Do not market the program in a manner that encourages routine or intentional overdrafts; rather present the program as a customer service that may cover inadvertent consumer overdrafts.
- *Fairly represent overdraft protection programs and alternatives.* When informing consumers about an overdraft protection program, inform consumers generally of other available overdraft services or credit products, explain to consumers the costs and advantages of various alternatives to the overdraft protection program, and identify for consumers the risks and problems in relying on the program and the consequences of abuse.
- *Train staff to explain program features and other choices.* Train customer service or consumer complaint processing staff to explain their overdraft protection program's features, costs, and terms, including how to opt out of the service. Staff also should be able to explain other available overdraft

products offered by the institution and how consumers may qualify for them.

- *Clearly explain discretionary nature of program.* 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.
- *Distinguish overdraft protection services from "free" account features.* Avoid promoting "free" accounts and overdraft protection services in the same advertisement in a manner that suggests the overdraft protection service is free of charges.
- *Clearly disclose program fee amounts.* Marketing materials and information provided to consumers that mention overdraft protection programs should clearly disclose the dollar amount of the overdraft protection fees for each overdraft and any interest rate or other fees that may apply. For example, rather than merely stating that the institution's standard NSF fee will apply, institutions should restate the dollar amount of any applicable fees in the overdraft protection program literature or other communication that discloses the program's availability.
- *Clarify that fees count against overdraft protection program limit.* Consumers should be alerted that the fees charged for covering overdrafts, as well as the amount of the overdraft item, will be subtracted from any overdraft protection limit disclosed, if applicable.
- *Demonstrate when multiple fees will be charged.* Clearly disclose, where applicable, that more than one overdraft protection program fee may be charged against the account per day, depending on the number of checks presented on and other withdrawals made from the consumer's account.
- *Explain check clearing policies.* 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).
- *Illustrate the type of transactions covered.* Clearly disclose that overdraft protection fees may be imposed in connection with transactions such as ATM withdrawals, debit card transactions, preauthorized automatic debits, telephone-initiated transfers or other electronic transfers, if applicable. If institutions' overdraft protection programs cover transactions other than check transactions, institutions should

avoid language in marketing and other materials provided to consumers implying that check transactions are the only transactions covered.

Program Features and Operation

- *Provide election or opt-out of service.* Obtain affirmative consent of consumers to receive overdraft protection. Alternatively, where overdraft protection is automatically provided, permit consumers to "opt out" of the overdraft program and provide a clear consumer disclosure of this option.
- *Alert consumers before a non-check transaction triggers any fees.* When consumers attempt to use means other than checks to withdraw or transfer funds made available through an overdraft protection program, provide a specific consumer notice, where feasible, that completing the withdrawal will trigger the overdraft protection fees. 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 post 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.
- *Prominently distinguish actual balances from overdraft protection funds availability.* When disclosing an account balance by any means, the disclosure should represent the consumer's own funds available without the overdraft protection funds included. If more than one balance is provided, separately (and prominently) identify the balance without the inclusion of overdraft protection.
- *Promptly notify consumers of overdraft protection program usage each time used.* Promptly notify consumers when overdraft protection has been accessed, for example, by sending a notice to consumers the day the overdraft protection program has been accessed. The notification should identify the transaction, and disclose the overdraft amount, any fees associated with the overdraft, the amount of time consumers have to return their accounts to a positive balance, and the consequences of not returning the account to a positive balance within the given timeframe. Institutions should also consider reiterating the terms of the overdraft protection service when the consumer accesses the service for the first time.

Where feasible, notify consumers in advance if the institution plans to terminate or suspend the consumer's access to the service.

- *Consider daily limits.* Consider limiting the number of overdrafts or the dollar amount of fees that will be charged against any one account each day while continuing to provide coverage for all overdrafts up to the overdraft limit.

- *Monitor overdraft protection program usage.* Monitor excessive consumer usage, which may indicate a need for alternative credit arrangements or other services, and should inform consumers of these available options.

- *Fairly report program usage.* Institutions should not report negative information to consumer reporting agencies when the overdrafts are paid

under the terms of overdraft protections programs that have been promoted by the institutions.

This concludes the text of the proposed Interagency Guidance on Overdraft Protection Programs.

Dated: May 26, 2004.

John D. Hawke, Jr.,
Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, May 27, 2004.

Jennifer J. Johnson,
Secretary of the Board.

Dated in Washington, DC, the 10th day of May, 2004. By order of the Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

Dated: May 26, 2004.

By the Office of Thrift Supervision.

James E. Gilleran,
Director.

By the National Credit Union Administration Board on May 20, 2004.

Becky Baker,
Secretary of the Board.

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