

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



August 8, 2011

Office of the Comptroller of the Currency
250 E Street, NW
Mail Stop 2-3
Washington, DC 20219

Re: Docket ID OCC-2011-0012

Dear Sir or Madam:

The Financial Services Roundtable (the “Roundtable”)¹ submits this letter in response to the notice of proposed guidance (the “NPG”) from the Office of the Comptroller of the Currency (OCC) regarding safe and sound banking practices for national banks and federal savings associations (collectively referred to as “national banks”) in connection with “deposit-related consumer credit products.”²

The NPG addresses, in the context of promoting bank safety and soundness, “deposit-related consumer credit products” and the potential operational, reputational, compliance, and credit risks associated with such products. The NPG provides guidance regarding disclosures, legal compliance, program availability and prudent eligibility standards. In addition, the OCC suggests guidance relating to prudential limitations on product costs and usage, monitoring and risk assessments, management oversight, and account management and charge-offs.

The Roundtable appreciates this opportunity to share its views and concerns regarding the NPG. Our comments relate to three principal concerns:

(1) Unilateral action – layered on top of existing guidance and regulation – is not in the best interests of banks or consumers.

(2) If the OCC issues guidance on this topic, then it should clearly define the products intended to be covered.

¹ The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs. Some of our members have national bank or federal thrift subsidiaries that offer to consumers deposit products that may be construed to have credit features and, thus, would be directly affected by the proposed guidance.

² 76 FR 33409, June 8, 2011.

(3) The proposal would impose new requirements that are not found in existing regulations or guidance and which raise serious compliance concerns.

We have limited our comments to “deposit-related consumer credit products” in general, and “automated overdraft protection programs” in particular. We are not addressing “deposit advance programs.”

1. Unilateral Action – Layered on Top of Existing Guidance and Regulation – is Not in the Best Interests of Banks or Consumers.

We respect the OCC’s authority and responsibility to supervise the safety and soundness of national banks but are concerned about the prospect of overlapping and uncoordinated action among the prudential regulators and between the Consumer Financial Protection Bureau (“CFPB”) and the prudential regulators.

Deposit-related products, and, in particular, overdrafts, are already subject to several regulations and sets of guidelines. In 2005, the OCC, the Board of Governors of the Federal Reserve System (the “Board”), the Federal Deposit Insurance Corporation (the “FDIC”), and the National Credit Union Administration issued the Interagency Joint Guidance on Overdraft Protection Programs.³ Also in 2005, the Office of Thrift Supervision (the “OTS”) issued its own guidance which, for the most part, tracked the guidance of the other agencies but also addressed the order of processing.⁴ Both documents addressed safety and soundness considerations, legal risks, and set forth best practices for marketing and communications with consumers, as well as program features and operations. The Interagency Guidance and the OTS guidance applied to both marketed overdraft programs and discretionary traditional overdraft practices.

In 2009, the Board amended Regulation E to prohibit overdraft fees absent “opt-in” in the case of ATM and one-time debit card transactions.⁵ The Board also amended Regulation DD to require certain disclosures in the case of overdraft services.⁶ In 2010, the Board proposed to revise those amendments, but that proposal was not finalized.⁷ In 2010, the FDIC issued Overdraft Payment Supervisory Guidance applicable to FDIC-regulated banks setting forth supervisory expectations, Regulation E requirements, and examination expectations and practices.⁸ In 2010, the OTS proposed but did not finalize supplemental guidance on overdrafts.⁹ The OCC now proposes to issue guidance for national banks that varies in several respects from existing guidance on this topic.

The Federal Reserve Board and the FDIC could also issue guidance on this topic and the CFPB has authority to implement and enforce several federal laws, including the Electronic Fund

³ 70 FR 9127, February 24, 2005.

⁴ 70 FR 8428, February 18, 2005.

⁵ 12 CFR 205.17

⁶ 12 CFR 230.11

⁷ 75 FR 9120, March 1, 2010; 75 FR 9126, March 1, 2010.

⁸ FIL-81-2010, November 24, 2010.

⁹ 75 FR 22681, April 29, 2010.

Transfer Act and the Truth in Saving Act, dealing with the products that are the subject of the OCC's proposed guidance.¹⁰

Additional layers of regulation and safety-and-soundness-based regulation will not benefit financial institutions or consumers. Coordination and consistent requirements are critical for many reasons. Customers need, and deserve, rules that are consistent from one type of financial institution to another. From the standpoint of the industry, consistency promotes competitive equality and a level playing field among financial institutions. Having different alternatives and rules regarding these practices among financial institutions is particularly difficult and unfair to consumers.

Another reason for interagency coordination is the possible triggering of other regulatory requirements by implementation of the NPG. Because the NPG treats covered overdrafts in many ways as if they were extensions of credit, the guidance would require affirmative enrollment by the consumer, disclosures of costs and terms, the establishment of credit limits, verification of ability to repay, and even essentially notices of adverse action. Historically, overdrafts have not been subject to consumer credit laws and rules such as the Equal Credit Opportunity Act or its implementing Regulation B or the Truth-in-Lending Act or its implementing Regulation Z. However, a national bank that complies with the proposed guidance may need to comply with such laws and regulations as overdrafts are treated more and more like extensions of credit. Should this occur, the regulatory burden may force some national banks to stop offering "deposit-related consumer credit products." This would be detrimental to consumers who wish to avail themselves of these products and are unable to do so.

We urge the OCC to work with the other prudential regulators and the CFPB to thoroughly evaluate the need for additional guidance in this area and, if need exists, to act in coordination with those agencies. Assuming the OCC moves forward unilaterally on this topic, we urge the agency to allow ample time to comply and avoid disruption to customer relationships.

2. Need for Clear Definitions

Financial institutions provide a variety of products and services that might be considered "deposit-related consumer credit products" subject to the proposed guidance, but which were not subject to earlier guidance on this topic. For example, deposit accounts formally linked by written agreement to credit cards or lines of credit may or may not be deemed "deposit-related consumer credit products." While a reasonable inference could be made that the only overdrafts covered by the NPG would be non-discretionary automatic overdrafts, without further guidance that is not clear.

If the OCC adopts new guidance in this area, we urge the agency to define the products intended to be covered. The NPG does not define such as "deposit-related consumer credit products" and "automated overdraft protection," or "overdraft protection programs," "programs," and "products." The scope of these terms is unclear. For example, the instance of the payment

¹⁰ 12 U.S.C. § 5581

and clearance of a check that results in an overdraft would appear to be covered, thus requiring written customer opt-in before a national bank could cover the overdraft and before a fee might be charged. Similarly, debit transactions required to be paid under network rules that result in overdrafts would appear to be covered. The NPG could even be read as covering the payment of checks and other items against uncollected funds.

We urge the OCC to clearly define the products and services intended to be covered if indeed it moves forward.

3. The NPG Imposes Troublesome New Requirements

As noted above, since 2005, national banks have been subject to guidance issued by the OCC and the OTS.¹¹ The NPG goes beyond the 2005 requirements in several ways discussed below.

Disclosure

The NPG would require national banks to provide information to customers about alternative “deposit- related consumer credit products” as part of the disclosure process. This requirement raises a host of issues and we urge the OCC to eliminate it from the final guidance.

The alternative products likely to be suggested to customers include credit cards, consumer loans, home equity loans—each of which has a different risk profile. While institutions try to offer customers the “deposit-related consumer credit products” based on their stated needs requiring that information be offered for a whole range of products is unrealistic.

The NPG would also require national banks to give notice when overdraft protection is suspended or terminated, as well as when it is reinstated, if applicable. We ask the OCC to clarify that notice is required only when overdraft protection is suspended or terminated in its entirety. Many financial institutions structure their overdraft protection programs so that the payment of any single item is based on multiple factors. As a practical matter, because each item is approved for coverage only after analyzing multiple factors, one item may not be covered and the next item is covered. The multiple factors include considerations that change with each item, such as the item in question exceeding overdraft limits established for that consumer. It is not possible to predict and give the consumer advance notice that a particular item will be rejected.

¹¹ The 2005 Guidance suggest that institutions should adopt written policies and procedures; establish account eligibility account eligibility standards and dollar limit decision criteria; monitor for undue credit risk; report to management; establish payoff timeframes; ensure proper financial reporting, capital treatment, and third-party vendor due diligence; comply with laws; disclose operation, costs, and limitations and follow such marketing and communication and program feature and operation best practices as avoiding promoting poor account management, fairly representing programs, training staff, explaining the discretionary nature of the program, distinguishing overdraft protection from “free” features, disclosing fees and that they account against overdraft limits, demonstrating when multiple fees will be charged, explaining impact of transaction clearing policies, illustrating types of transactions covered, providing an “opt-out” opportunity, alerting consumers before a fee is triggered, distinguishing balances from overdraft protection availability, notifying consumers of program usage considering daily limits on a consumer’s costs, monitoring usage, and fairly reporting program usage. In addition, the 2005 OTS Guidance suggests that federal savings associations should not manipulate transaction-clearing rules.

Affirmative Request

The NPG provides that customers should not be automatically enrolled in programs for “deposit-related consumer credit products.” Instead, enrollment should occur only after the customer has received appropriate disclosures, made an affirmative request for the product, and agreed to abide by product terms, including associated fees.

Both the 2005 Interagency Joint Guidance on Overdraft Protection Programs and the 2005 OTS Guidance on Overdraft Protection Programs expressly permit institutions to provide overdraft protection automatically so long as consumers are permitted to “opt out” of the program. The FDIC’s 2010 Overdraft Payment Supervisory Guidance did not change that. However, the 2009 amendment to Federal Reserve Regulation E prohibits financial institutions from charging consumers fees for paying overdrafts on automated teller machine and one-time debit card transactions unless a consumer consents or opts in. Thus, the current state of the law is that “opt-in” is not required for overdraft programs that charge fees for overdrafts created by checks or automated clearing house (“ACH”) transactions. A survey conducted by the Board confirmed that consumers prefer this policy because they want their checks paid.¹² It is not as if the consumers are not aware of overdraft policies; all existing guidance requires disclosures of costs to consumers.

Under the NPG, national banks would be prohibited from assessing fees on overdrafts created by check and ACH transactions unless consumers opt in. That would place national banks at a competitive disadvantage vis-a-vis state-chartered banks not subject to a similar requirement.

For consumers who have overdraft protection at a national bank, requiring affirmative consent will disrupt existing relationships. Overdraft payment programs serve an important function for consumers, protecting them from the vagaries of check issuance, presentation and payment. Consumers cannot predict when checks will be presented or that they will be presented for payment in the same order in which they were written. These vagaries can give rise to inadvertent overdrafts. Not allowing national banks to automatically cover certain customer overdrafts would expose customers to hardship and inconvenience in the form of late payments, fees for items returned unpaid and third-party fees. The payment of overdrafts may cause a customer to incur an overdraft fee, but such payment usually enables a consumer to avoid “bounced check fees” and fees imposed by merchants when a check is returned unpaid.

Prudent Limitations

The NPG would require national banks to establish prudent programmatic limitations on the amount of credit that may be extended under an overdraft protection program, the number of overdrafts and the total amount of fees that may be imposed per day and per month, and the amount below which a transactional overdraft fee will not be imposed.

¹² 74 FR 59033, 59034, November 17, 2009.

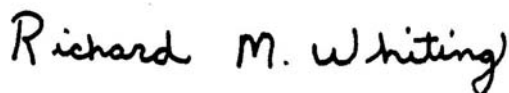
We agree that reasonable limits on the use of an overdraft protection program are both prudent and necessary. However, we are concerned with the suggestion that a financial institution should limit the number of overdrafts a customer may write. If the aggregate dollar amount of overdrafts is within the customer's limit and the customer has historically covered all overdrafts, it is not clear why the number of the customer's overdrafts should be capped. This requirement may unreasonably and unexpectedly deprive customers of the benefit of overdraft protection. In addition, it is not clear what standards a financial institution should use to set the maximum number of overdrafts per customer, and any attempt to set such a limit would risk being arbitrary.

The central purpose of the 2009 amendment to Regulation E was to give customers the information necessary to make an educated choice about what overdraft protection products, if any, they wanted to use. Regulation E requires national banks to provide detailed information to facilitate the consumer's choice. If consumers act on that information, and decide to use a particular service, then they should be entitled to full exercise of that decision. We are not suggesting that customers should be able to incur unsustainable levels of fees that they cannot pay back. However, the NPG would require national banks to discontinue a consumer's use of an overdraft service if his or her use is "excessive," without regard to whether or not the customer is repaying the overdraft and any associated fees. We submit that if the service is being used by the consumer, and maintained by the bank, in accordance with its terms and conditions, then that use is not "excessive."

Requiring national banks to monitor a customer's use of an overdraft protection service, and to intervene even if the customer is using the product as intended, will burden both the bank and the customer without benefit to either party, and indeed could have the unintended consequence of driving some customers out of the banking system and into alternative providers such as payday lenders. Banks, for their part, will have to expend additional resources in time, money and personnel to establish mechanisms to track and possibly intervene and customers would be denied the value of the informed choice they made regarding an overdraft protection service.

The Roundtable appreciates the opportunity to comment on the proposed guidance; if you have any questions about this submission, please contact me at 202-589-2413 or Anne Wallace at 202-589-1936.

Sincerely,

A handwritten signature in black ink that reads "Richard M. Whiting". The signature is written in a cursive, slightly slanted style.

Richard M. Whiting
Executive Director and General Counsel