



September 16, 2010

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, D.C. 20429-9990

DELIVERED VIA EMAIL:
overdraftcomments@fdic.gov

Re: Comments on Overdraft Payment Supervisory Guidance (FIL-47-2010)

Dear Sir or Madam,

Strunk & Associates, L.P., is pleased to submit our comments to the proposed Overdraft Payment Supervisory Guidance issued by the Federal Deposit Insurance Corporation (FDIC). In business since 1976, Strunk & Associates, L.P., is an independent financial institution advisory service. For more than a decade, our resources have been dedicated to the development of our Overdraft Privilege Service Program. Strunk & Associates, L.P., currently serves nearly 2,000 Overdraft Privilege Service clients throughout the United States and the Caribbean.

General Comments

Strunk and Associates generally agrees with many of the regulatory expectations the FDIC has provided related to the management of automated overdraft payment programs. Many of its regulatory expectations will continue to ensure that accountholders understand how financial institutions' overdraft programs work. In fact, many of the items touched on by the FDIC have been recommended by us to our clients over the past ten years.

However, one of our concerns is that some of the FDIC's expectations may go too far in shifting the responsibility of managing an individual's account from the accountholder to the financial institution. Accountholders will increasingly rely on financial institutions to become their de facto accountant. This will assist in negating the accountholders' responsibility to maintain their accounts in good standing. Overdrafts have always been reasonably avoidable for accountholders who exercise reasonable care in managing their transaction accounts.

Second, if regulatory expectations/requirements become too burdensome, financial institutions will no longer offer these services. This will likely expose customers to the same magnitude of fees due to items being returned as non-sufficient, but without the value proposition of having their items paid into the overdraft.

Comments on Specific Actions Proposed by the FDIC Regarding Automated Overdraft Privilege Programs

- Ensure ongoing and regular board and management oversight of program features and operation. Appropriate steps include an annual review of an overdraft program's features.
- ✓ *We generally agree that financial institutions should review and ensure that their overdraft programs, whether ad hoc or automated, continue to conform to all applicable laws and regulations. In addition, financial institutions should continuously administer and adjust their overdraft programs to ensure that all inherent risks are mitigated and remain within established benchmarks. Prudent risk-management practices should include the review of established policies and procedures regarding account eligibility standards, documented overdraft program dollar-limit thresholds, and revocation standard practices.*

However, the FDIC should clarify expectations and requirements regarding the oversight of overdraft programs. The vagueness of the proposed action will place an extreme burden on financial institutions, acting in good faith to comply with the FDIC under the threat of supervisory action, to "guess" at the requirements for compliance with said action. As currently presented, it is unclear how financial institutions would comply.

- Review their marketing, disclosure, and implementation of such programs to minimize potential consumer confusion and promote responsible use.
- ✓ *We believe the areas of marketing, disclosure, and implementation of overdraft programs have been adequately addressed in the recent amendments to Regulations DD and E. Regulation DD § 230.11(b) already requires financial institutions that advertise overdraft services to disclose the following: the fee or fees for the payment of each overdraft, the categories of transactions for which a fee may be imposed, the time period within which the consumer must repay or cover an overdraft, and the circumstances under which the institution will not pay an overdraft. Regulation E § 205.17(b)(i) requires a financial institution to provide a notice describing the institution's overdraft services. The model notice provided by the Fed (A-9 Model Consent Form for Overdraft Services) details the institution's Standard Overdraft Practices. Standard Overdraft Practices include transaction types, delivery point availability, fees assessed, and alternate overdraft services the institution may offer (linked accounts or an overdraft line of credit).*

Since the recommended practices of reviewing marketing, disclosures, and implementation of overdraft programs to minimize potential consumer confusion and promote responsible use are addressed in existing regulations, we recommend that the "Overdraft Payment Supervisory Guidance" include references and section numbers to overdraft protection services provisions contained in Regulation DD and Regulation E. This straightforward approach will lessen the burden on both financial institutions and examiners to wade through multiple iterations of supervisory guidance to sort out what has been supplanted by new regulations.

- Train staff to explain program features and other choices.
- ✓ *We generally believe that a financial institution's staff should be able to articulate the dynamics of its overdraft program, including alternative overdraft services.*

However, the FDIC should clarify and expand on the expected standards regarding employee training. As the proposal is currently presented, it is unclear how financial institutions would comply.

- Prominently distinguish account balances from any available overdraft coverage amounts. Note also that, as of January 1, 2010, Regulation DD (Truth in Savings Act) prohibits institutions from including overdraft coverage amounts in any account balance information provided by an automated system.
- ✓ *In light of the final Regulation E opt-in requirement, the Fed extended the account balance disclosure requirement in Regulation DD to include scenarios in which consumers have not opted in to, or as applicable, have opted out of, the institution's discretionary overdraft service for some but not all transactions (e.g., the consumer has not opted into overdraft services for ATM and one-time debit card transactions). An institution that includes these additional overdraft funds in the second balance is required to convey the information that the overdraft funds are not available for all transactions.*

The FDIC should clarify its expectation on the distinguishing of account balances from any available overdraft coverage amounts by giving examples of when a financial institution might be in compliance with Regulation DD but not meet the FDIC's standard.

- Monitor programs for excessive or chronic customer use, and if a customer overdraws his or her account on more than six occasions where a fee is charged in a rolling twelve-month period, undertake meaningful and effective follow-up action, including, for example:
 - Contacting the customer (e.g., in person or via telephone) to discuss less costly alternatives to the automated overdraft payment program such as a linked savings account, a more reasonably priced line of credit consistent with safe and sound banking practices, or a safe and affordable small-dollar loan; and
 - Giving the customer a reasonable opportunity to decide whether to continue fee-based overdraft coverage or choose another available alternative.
 - The FDIC specifically seeks comment on whether an effective way to monitor for excessive use of automated overdraft programs would be for supervised institutions to contact a customer after the six transaction fees trigger and discuss available alternatives. The bank would explain, for example, that it also offers linked savings accounts, overdraft lines of credit or small dollar loans, each of which may be less expensive than the automated overdraft program. The consumer would then be asked to pick the available option he or she prefers to cover any future overdrafts, including the choice of opting in to the bank's overdraft program.
- ✓ *In today's environment, accountholders are made aware of alternatives to overdraft services during account opening, when they are more likely to apply and enroll for such services. Due to recent amendments to Regulation E, prior to opting in to a financial institution's overdraft service for ATM and everyday debit card transactions, an accountholder must review the model notice provided by the Federal Reserve (A-9 Model Consent Form for Overdraft Services). Among other items, the model notice contains details regarding the institution's Standard Overdraft Practices, which include alternatives to overdraft services. Furthermore, one of the FFIEC's best practices published in the "Joint Guidance on Overdraft Protection Programs" issued in 2005 states, "When informing consumers about an overdraft protection program, inform consumers generally of other overdraft services and credit products, if any, that are available at the institution and how the terms, including fees, for these services and products differ."*

Inundating accountholders with redundant information regarding alternatives to overdraft services does not guarantee they will elect to enroll in or apply for these alternate products. Moreover, enrollment into alternative overdraft products does not guarantee that accountholders will have either the necessary funds in an adjoining account or the available credit to avoid NSF/OD fees.

The majority of financial institutions that offer an automated overdraft program utilize a payment hierarchy when dealing with an item presented for payment drawn on an account without sufficient funds to cover the item. Accountholders who have elected to enroll in a service that transfers funds from another account held by the individual and/or apply for and qualify for a traditional line of credit (subject to Federal Reserve Board's Regulation Z [12 CFR part 226]) will likely have their non-sufficient funds (NSF) transactions handled in the following manner:

- o First the financial institution will attempt to cover the non-sufficient funds (NSF) item by transferring funds from an additional account, enrolled in a transfer service, held by the accountholder.*
- o If the necessary funds are not available in the accountholder's additional account to cover the non-sufficient funds (NSF) item, the financial institution will advance funds from the accountholder's line of credit account to cover the non-sufficient funds (NSF) item.*
- o If the payment of an item would result in the accountholder's credit line being exceeded, the item would potentially be paid into the overdraft pursuant to the financial institution's overdraft program.*
- o Lastly, if the item does not meet the criteria for payment under the established guidelines of the financial institution's overdraft program, the item is rejected and/or returned NSF to the merchant.*

We see no material benefit in requiring financial institutions to repeatedly notify customers of overdraft program alternatives once they reach an arbitrary threshold related to overdraft activity ... especially when applying/enrolling in such alternative programs will not guarantee a decrease in accountholder overdraft activity.

The proposed method of contacting customers regarding overdraft volume is also of serious concern. The FDIC proposes that financial institutions contact accountholders in person or via telephone. It is very unlikely an accountholder will visit a branch location for the sole purpose of being counseled on personal overdraft activity. Furthermore, the success rate of unsolicited messages regarding overdraft activity would not be much higher. This statutory requirement alone will place severe compliance costs, to include additional staffing, infrastructure, and training, on all financial institutions without manifesting the intended results. Added compliance cost will ultimately result in fewer products and higher prices for accountholders. Any required customer notification should continue to be in written form, or electronically if the accountholder agrees.

We oppose the requirement that financial institutions obtain opt-in for transactions outside the scope of Regulation E's requirements. The main focus of customer complaints regarding overdraft fees was related to debit card overdrafts, because some customers may not have expected a debit card transaction to be approved if there were not sufficient funds in their account. Recent Regulation E amendments have addressed this concern. If a check or ACH transaction is returned as unpaid, the accountholder would still incur an NSF fee, which is typically the same as an overdraft fee. In addition, the accountholder would also be subject to merchant fees, possible late fees, and potential legal action from the merchant. The Federal Reserve agreed with this assessment when it concluded that payment of overdrafts [related to check and ACH transactions] may enable consumers to avoid adverse consequences that could result if such items are returned unpaid. For these reasons, customers have come to expect and welcome a financial institution's overdraft service. Accordingly, the "default" should be that check and ACH transactions will automatically be covered by overdraft programs. However, if an accountholder wishes to terminate participation in any overdraft program, he or she should be free to exercise that choice at any time.

In regard to the offering of a “small-dollar loan” to accountholders as an additional alternative to a financial institution’s overdraft services, the FDIC stated in its one-year review of its small-dollar loan pilot program, “... given the small size of SDLs [Small-Dollar Loans] and to the lesser extent, NSDLs [Nearly Small-Dollar Loans], the interest income and fees generated are often not sufficient to achieve short-term profitability.” Unless expressly required, financial institutions are unlikely to adopt a non-profitable product such as SDLs. Additionally, as with all loans, SDLs require formal underwriting and processing. Given the fact that accountholders require immediate accommodations when attempting to draw on unavailable funds, SDLs would provide a poor substitute for existing overdraft services.

- Institute appropriate daily limits on customer costs by, for example, limiting the number of transactions that will be subject to a fee or providing a dollar limit on the total fees that will be imposed per day.
- ✓ *We generally do not object to the concept of a dollar limit on the total overdraft fees that can be imposed per day. In fact, today many financial institutions have informal limits on overdraft fees, or simply waive them when multiple overdrafts occur as a result of a single incident. We, however, are concerned about the possible moral hazard of disclosing an absolute daily limit. Accountholders will be tempted to “game the system” and time transactions to minimize their exposure. Once the daily limit is reached, there will no longer be a deterrent. A possible way to mitigate the moral hazard related to disclosure of a daily limit on overdraft fees is to adhere to a daily limit, but not require a financial institution to disclose the daily limit as part of its account agreement or fee schedule.*
- Consider providing information to consumers about how to access free or low-cost financial education workshops or individualized counseling to learn how to more effectively manage personal finances. If an institution’s community-based partners do not already provide counseling, the Federal Trade Commission’s (FTC) *Choosing a Credit Counselor* may be one resource to help institutions choose quality credit counseling partners.
- ✓ *We generally agree that financial institutions are in a good position to help facilitate the dissemination of information regarding access to free or low-cost financial education workshops or individualized counseling.*

However, the FDIC should clarify and expand on the expected standards for providing accountholders with information regarding access to free or low-cost financial educational workshops or individual counseling. As the standards are currently presented, they are unclear on how financial institutions would comply.

- Review check-clearing procedures to ensure they operate in a manner that avoids maximizing customer overdrafts and related fees through the clearing order. Examples of appropriate procedures include clearing items in the order received or by check number.
- ✓ *We believe financial institutions’ check-clearing practices should not be intentionally designed to maximize overdraft activity. However, it should be pointed out that payment order is not simply an issue of clearing checks in ascending, descending, or check number order. The order of payment is a very complex system that is dependent on various situations that can effect presentment and system delivery. For example, electronic transactions generally take priority because they are assumed to settle the next day, or a financial institution may have to pay a debit card transaction that needed no prior approval because it fell below the required threshold.*

- Monitor and, where necessary, mitigate credit, legal, reputational, safety and soundness, and other risks, as appropriate. Legal and compliance risks associated with the overdraft payment programs include: Section 5 of the Federal Trade Commission Act, the Equal Credit Opportunity Act, the Truth in Savings Act, the Electronic Fund Transfer Act, as well as related implementing regulations and any changes to those regulations or statutes.
- ✓ *As stated earlier, we generally agree that financial institutions should review their overdraft programs and ensure that they continue to conform to all applicable laws and regulations.*

The FDIC strongly cautions financial institutions not to steer customers into fee-based overdraft products while obscuring the available alternatives. The likelihood of a financial institution obscuring any available alternatives to fee-based overdraft programs is remote due to the recent amendments to Regulation E. Regulation E § 205.17(b)(i) requires a financial institution to provide a notice describing the institution's overdraft services. The model notice provided by the Fed (A-9 Model Consent Form for Overdraft Services) details the institution's Standard Overdraft Practices. Standard Overdraft Practices detail all alternate overdraft services the institution may offer, including linked accounts or an overdraft line of credit, if applicable.

This is the sole example provided by the FDIC regarding possible exposure to the FTC's UDAP statute and the ECOA. If the FDIC has concerns regarding other practices related to automated overdraft payment programs, we strongly recommended that it clarify these additional concerns.

Regulation DD and Regulation E are explicit in their requirements concerning overdraft programs.

Strunk & Associates appreciates the opportunity to comment on this important matter.

Regards,



David M. Escobedo
Senior Vice President