Overdraft Payment Programs

Introduction

Prior to the 1990s, overdraft programs were not common among financial institutions. Since that time, however, institutions have added and/or expanded the types of overdraft payment programs provided to customers. Some of these programs impose substantial fees and interest and rely on third-party vendors to develop systems to maximize the amount of fee income generated. Customer complaints have increased, along with reported legal and enforcement actions. In many cases, fees are repeatedly charged and are often disproportionate to the amount originally intended to be funded. Some institutions manipulate their transaction processing order to maximize fee income. Customers have complained that they were not made aware of the existence or potential negative consequences of, or alternatives to, various types of overdraft coverage. Some customers' financial difficulties have been exacerbated by institutions' overdraft payment practices and programs, even though the institutions maintain alternative programs more suitable for those customers. These circumstances can have an adverse impact on bank customers and present a potential risk of consumer harm.

In an effort to assist FDIC-supervised institutions in identifying, managing, and mitigating risks regarding overdraft payment programs, the FDIC issued its November 24, 2010, *Overdraft Payment Supervisory Guidance* ("*2010 Supervisory Guidance*") (FIL-81-2010). The *2010 Supervisory Guidance*, which particularly focuses on the risks associated with excessive or chronic use of automated overdraft programs, is intended to serve as a comprehensive, up-to-date source of information about concerns and risks, as well as a summary of existing guidance and recent regulatory developments. In addition, the *2010 Supervisory Guidance* encourages FDIC-supervised institutions to promote responsible use of overdraft payment programs through a series of specifically recommended actions institutions can take to help minimize the potential for consumer harm and regulatory or other risks. These overdraft payment program examination procedures:

- Incorporate recent changes to applicable laws and regulations;
- Integrate the supervisory expectations stated in the *2010 Supervisory Guidance*; and
- Reaffirm principles contained in the *2005 Interagency Joint Guidance on Overdraft Protection Programs* ("*Joint Guidance*") (FIL-11-2005) and the *2008 Guidance for Managing Third-Party Risk* ("*Third-Party Guidance*")[1] (FIL-44-2008).

The *2010 Supervisory Guidance* reaffirms existing laws, regulations, and guidance and addresses concerns regarding the risks posed by automated programs and excessive use. The specific supervisory expectations set out in the *2010 Supervisory Guidance* with respect to excessive or chronic users of automated overdraft programs do not apply to ad hoc overdraft practices. In April 2011, the FDIC published a set of Frequently Asked Questions to clarify the 2010 guidance and to respond to questions received from supervised institutions and third-party vendors.[2]

The *Joint Guidance*,[3] *Third-Party Guidance*, and range of applicable laws and regulations potentially apply to any method of covering overdrafts, including automated programs, linked accounts and lines of credit.

Examination Approach and Applicable Laws and Regulations

The FDIC's risk-scoping examination approach requires compliance examiners to focus their attention to operational areas that present the greatest potential risk of consumer harm, as appropriate, including consideration of overdraft programs. Examiners should continue to reference appropriate chapters in the Compliance Examination Manual governing laws and regulations applicable to overdraft payment programs. The scope of potentially applicable statutes and regulations that may apply to overdraft payment programs includes:

- The Truth in Lending Act (TILA) and Regulation Z;
- The Truth in Savings Act (TISA) and Regulation DD;
- The Electronic Fund Transfer Act (EFTA) and Regulation E;
- Section 5 of the Federal Trade Commission Act (FTC Act) governing Unfair or Deceptive Acts or Practices (UDAPs);
- The Equal Credit Opportunity Act (ECOA) and Regulation B;
- The Expedited Funds Availability Act and Regulation CC; and
- The Community Reinvestment Act (CRA).

1 *See* Third-Party Risk Compliance Examination Procedures issued June 1, 2010.

2 On April 1, 2011, FDIC staff published a set of Frequently Asked Questions and answers in response to questions received from supervised institutions and third-party vendors about the 2010 Supervisory Guidance, available at https://www.fdic.gov/news/conferences/overdraft/FAQ.pdf

3 Compliance examiners should pay particular attention to the "Best Practices" in the *Joint Guidance*, which cover both Marketing and Communications with Consumers and Program Features and Operation.

Compliance examiners should apply the Overdraft Payment Program Compliance Examination Procedures and relevant laws and regulations, and refer to the *2010 Supervisory Guidance*, the *Joint Guidance*, and the *Third-Party Guidance*, as appropriate, to verify that institutions are adhering to applicable laws and regulations, and implementing appropriate policies, procedures, compliance management systems, and risk mitigation strategies.

Regulation E Changes

Changes to laws and regulations place additional requirements on institutions' overdraft payment programs. Under Regulation E rules that took effect July 1, 2010, institutions must provide notice and a reasonable opportunity for customers to opt-in to the payment of automated teller machine (ATM) and one-time, point-of-sale (POS) overdrafts provided in exchange for a fee. Institutions must also inform the customer if alternatives are available.[4] In complying with these requirements, institutions should not attempt to steer frequent users of fee-based overdraft products to opt-in to these programs while obscuring the availability of alternatives.

Targeting customers who may be least able to afford such products can raise safety-and-soundness concerns about potentially unsustainable customer debt. Overly aggressive marketing, advertising, and other promotional activities require particular vigilance to ensure that they are not unfair or deceptive. Steering activity with respect to credit products raises potential legal issues, including fair lending, equal credit opportunity, and concerns about UDAPs, among others, and will be closely scrutinized. In addition, inconsistent application of waivers of overdraft fees will be evaluated in light of all applicable fair lending statutes and regulations.

Unfair or Deceptive Acts or Practices

Section 5 of the FTC Act prohibits UDAPs in or affecting commerce.[5] The FDIC enforces compliance with this important consumer protection law regarding FDIC-supervised institutions pursuant to its authority in the FTC Act and Section 8 of the Federal Deposit Insurance Act.[6] The prohibition against UDAPs applies to all products and services offered by financial institutions, including overdraft services, and regardless of whether such services are offered directly or indirectly through a third party. Moreover, the prohibition applies to every stage and activity: from product development to the creation and rollout of the marketing campaign; from account maintenance and collections all the way through termination of the customer relationship.[7]

Community Reinvestment Act

Institutions will continue to receive favorable CRA consideration under the service or lending tests (consistent with CRA regulations and FIL-50-2007 providing details on small dollar loans[8]), for offering financial education and positive alternatives to overdrafts that are responsive to the needs of customers, particularly low- and moderate-income individuals, in their local communities. Examples include lower-cost transaction accounts and credit alternatives, such as a linked savings account, a small, reasonably priced line of credit consistent with safe and sound banking practices, or a safe and affordable small dollar loan.

Third-Party Arrangements

With the growth of third-party arrangements for overdraft payment programs, Compliance examiners should ensure that financial institutions are managing these relationships in accordance with the principles outlined in the *Third-Party Guidance*.[9] In addition to general third-party oversight considerations, these third-party overdraft payment programs may raise concerns that differ from potential issues related to in-house programs. For example, some vendors have tended to promote programs that encourage generation of fee income by linking the amount or volume of overdraft fees charged to the percentage of incentive compensation paid to the vendor.[10] This practice is generally inconsistent with promoting the responsible use of these programs.

Where vendor compensation is tied to a percentage of income or fees generated by the product sold, Compliance examiners should evaluate whether the third-party relationship raises the potential for compliance, operational, financial, and reputational risks to the financial institution. For example, where a third-party arrangement provides that the vendor will take a reduced percentage of compensation if the financial institution implements a transaction processing order of largest-to-smallest, this arrangement may rise to the level of a UDAP violation if the institution, at the vendor's encouragement, is manipulating the transaction processing

4 *See* Regulation E (Electronic Fund Transfer Act) Examination Procedures. In addition, as of January 1, 2010, Regulation DD (Truth in Savings) requires institutions to disclose on periodic statements the aggregate dollar amounts charged for overdraft fees and for returned item fees, for the statement period and the year-to-date. It also requires institutions that provide account balance information through an automated system to provide a balance that does not include additional funds that may be made available to cover overdrafts. *See* Regulation DD Examination Procedures.

5 15 U.S.C. § 45(a).

6 *See* 12 U.S.C. § 1818(b).

7 *See* Unfair or Deceptive Acts or Practices Compliance Examination Procedures.

8 *See also* Interagency Questions and Answers Regarding Community Reinvestment, 75 Fed. Reg. 11642 (Mar. 11, 2010), available at http://www.ffiec.gov.

9 *See* footnote 2.

10 *See* FDIC Study of Bank Overdraft Programs (November 2008) at p. 50 (Section VII), available at https://www.fdic.gov/bank/analytical/overdraft.

order solely to generate fees and increase both the institution's fee income and the vendor's compensation. Customers may be harmed if this practice is designed exclusively to increase the amount of overdraft fees assessed without any corresponding and meaningful benefit to the consumer.

The 2010 Supervisory Guidance

The FDIC expects that supervised institutions will review their current automated overdraft payment programs, policies and procedures in light of the *2010 Supervisory Guidance*. For example, as a threshold matter, Compliance examiners should determine if the institution has reviewed its existing program and determined whether the institution is going to:

- Give customers the opportunity to affirmatively choose the credit product most suitable for their financial needs, including overdraft payment products;
- Ensure that customers understand overdraft payment programs and alternative product choices;
- Appropriately monitor accounts and take meaningful and effective action to reach customers frequently using automated overdraft programs to inform them of lower-cost alternatives;
- Structure transaction clearing practices in a neutral manner not intended to maximize overdraft-related fees charged to customers; and
- Establish appropriate daily limits on fees.

Identification of Types of Overdraft Payment Programs Offered

Compliance examiners should first identify overdraft payment practices, programs and products offered and used by the financial institution at each examination, and consider the applicability of existing laws, regulations and guidance, as appropriate. In particular, examiners will need to determine whether overdraft payment decisions and programs are automated or not.

Automated overdraft payment programs typically rely on computerized decision-making and use pre-established criteria to pay or return specific items. There is little to no case-by-case review and decision-making with respect to an individual customer or item. By contrast, ad hoc programs typically involve the exercise of bank employee judgment in making a specific decision about whether to pay or return an item, as an accommodation and based on the employee's knowledge of a particular customer. *See Management and Policy-Related Examination Procedures* of this section for further explanation of automated and ad hoc programs.

Automated overdraft payment programs are the focus of the *2010 Supervisory Guidance.* Ad hoc overdraft payments have been authorized by banks for years as an accommodation based on specific considerations and knowledge of a particular customer, and they have generally not been the subject of the type of product over-use concerns that can be associated with automated overdraft programs. **Consequently, the specific supervisory expectations set out in the Guidance regarding customer contact for excessive or chronic users do not apply to ad hoc overdraft practices.** Compliance examiners should not focus on ad hoc overdraft payments or practices when evaluating appropriate risk mitigation efforts in connection with the *2010 Supervisory Guidance*; however, if significant safety and soundness or compliance risks regarding ad hoc programs and practices are identified, an examiner may consider an expanded review (*See Expanded Review for Ad Hoc Programs or Practices*).

Examiners should focus on identifying and mitigating the significant risks posed by automated overdraft programs, including taking a risk-based approach in scoping examinations to verify that institutions' automated overdraft payment programs comply with applicable laws and regulations, and that such programs are not operating in a manner that is inconsistent with expectations set out in the *2010 Supervisory Guidance*, the *Joint Guidance* and the *Third-Party Guidance*. In examining for appropriate application of the *2010 Supervisory Guidance*, reviews of management activities, policies and procedures, and transaction testing, including document requests, should focus on automated overdraft programs.

Supervisory Action to Mitigate Risks

Overdraft payment programs that are found to pose unacceptable safety and soundness or compliance risks will be factored into examination ratings, and corrective action will be taken where necessary. Violations should be cited on the appropriate Violation pages of the Report of Examination (ROE). Other concerns regarding practices that are inconsistent with the *2010 Supervisory Guidance*, the *Joint Guidance*, and/or the Third-Party Guidance should be discussed in the Examiner's Comments and Conclusions page of the ROE. Additionally, Compliance examiners should make appropriate recommendations to bank management on the Matters Requiring Board Attention page in the ROE, when applicable. These violations and concerns should be taken into consideration when assessing the institution's Compliance Management System (CMS) and determining the overall Compliance Rating.

Appropriate corrective action will be pursued where overdraft payment practices or programs pose unacceptable safety and soundness or compliance management system risks, or result in violations of laws or regulations, including UDAPs. Depending on the circumstances, corrective action may include ratings downgrades, informal agreements, enforcement orders, customer restitution, and/or civil money penalties.

Regional Offices should ensure that appropriate post-examination tracking covers instances where the ROE identifies:

- Inconsistencies with the *2010 Supervisory Guidance*, the *Joint Guidance* and the *Third-Party Guidance* given an institution's overall CMS and risk mitigation approach, and
- Other overdraft-related violations and concerns, to ensure that timely and appropriate corrective action is taken by bank management.

In addition, at the conclusion of each compliance examination, examiners are required to complete the overdraft payment program related questions in the Credit and Consumer Product/Services Survey. Finally, Compliance examiners should consult with Risk Management examiners, as appropriate, where safety and soundness concerns are identified.

Examination Procedures

Examination Objectives

These Overdraft Payment Program Compliance Examination Procedures incorporate existing and updated laws, regulations, and guidance. These procedures demonstrate a new, heightened, and detailed focus on identifying risks resulting from excessive use of automated overdraft payment programs. Specific examination objectives include the following:

1. Assess the quality of the financial institution's compliance risk management systems and its policies and procedures governing overdraft payment practices and programs.
2. Determine the financial institution's compliance with applicable laws and regulations.
3. Assess how and whether institutions are implementing the recommended actions contained in the *2010 Supervisory Guidance*.
4. Determine the effectiveness of the financial institution's management of third-party risks, where applicable, in accordance with the *Third-Party Guidance*.
5. Determine the effectiveness of the financial institution's internal controls and procedures for monitoring overdraft payment practices and programs consistent with the *Joint Guidance* and the *2010 Supervisory Guidance*.
6. Direct corrective action when violations of laws, rules, or unsafe and unsound practices are identified, or when the financial institution's practices, policies or internal controls are found to be deficient.
7. Determine the level of compliance with the 2010 Regulation E opt-in notice requirements and relevant regulatory changes related to overdraft products (*e.g.*, TISA).

Management and Policy-Related Examination Procedures

Compliance examiners should follow the Management and Policy-Related Examination Procedures identified below, as applicable, in each examination involving overdraft payment programs. If after conducting a review of an institution's Management and Policy-Related Examination Procedures, an examiner identifies weaknesses or other areas of concern,[11] examiners should conduct appropriate transaction testing consistent with the Transaction-Related Examination Procedures (*See Transaction-Related Examination Procedures for Automated Programs*) to determine whether the overdraft program poses unacceptable safety and soundness, compliance, or other risks.

1. Determine how the financial institution handles decisions associated with overdraft payment programs and non-sufficient funds items (NSFs), including whether the institution offers overdraft payment programs to customers, and the types and characteristics of these programs.
   - Identify the overdraft practices, payments, and products used by the institution.
   - Identify who in management is responsible for daily oversight of NSFs and overdraft decisions.
   - Determine who in management has the ability to override overdraft policies and limits.
   - Determine to what extent front-line employees who interact with customers on a daily basis have been trained on the institution's overdraft and NSF policies, procedures, and products.
   - Determine the level of discretion and parameters involved in any waivers or refunds.
   - Identify the extent to which the Board of Directors (Board) and management oversee and review the activities associated with overdraft payment programs, decisions, and policies.
2. Determine if the overdraft payment programs qualify as automated programs for purposes of the *2010 Supervisory Guidance*.
   - **Automated overdraft payment programs** typically include the following characteristics:
     - They are partially or fully computerized;
     - They are used by institutions to determine whether NSF transactions qualify for overdraft coverage based on pre-determined criteria; and

11 Consistent with existing examination protocols governing Compliance Management Systems, examiners should follow these procedures (including the Transaction-Related Examination Procedures, if warranted) in the first examination conducted after issuance of the *2010 Supervisory Guidance*. The guidance states that the FDIC expects institutions to have approved, responsive compliance and risk management action plans by July 1, 2011.

  - The decision to pay or return specific items is pre-established and generally does not rely on bank employee decision-making with respect to any individual customer or item.
- By contrast, **ad hoc programs or practices** typically have the following characteristics:
  - A bank employee exercises judgment in making a specific decision about whether to pay or return an item;
  - Decisions are made based on specific considerations and knowledge of a particular customer; and
  - They are provided as an accommodation, not on a pre-determined basis.
- Some overdraft payment programs have elements that are both automated and ad hoc. In these instances, examiners should exercise judgment in making a determination about whether the program is automated or ad hoc based on the aforementioned criteria, and consider appropriate follow-up action.
- If, after completion of the Management and Policy-Related review, examiners identify significant risks and concerns covered in the *2010 Supervisory Guidance* with respect to **automated overdraft payment programs**, examiners should consult the Transaction-Related Examination Procedures (*See Consistency with Recommendations in the 2010 Supervisory Guidance – Expanded Review for Automated Programs*).
- During Management and Policy-Related reviews, the specific supervisory expectations set out in the *2010 Supervisory Guidance* regarding customer contact for excessive or chronic users generally should not be applied to **ad hoc overdraft practices**. However, institutions that authorize overdrafts on an ad hoc basis should manage potential reputational, compliance, and litigation risks regarding certain overdraft payment practices, such as check clearing practices designed to maximize overdraft fees.
- On an exception basis, where unacceptable risks are discovered during an examination regarding ad hoc programs and practices that potentially raise legal, regulatory, or other significant compliance concerns, examiners should consider whether follow-up action should be taken (*See Expanded Review for Ad Hoc Programs or Practices*).

3. Review all written policies and procedures, management's self-monitoring, customer complaints, compliance audit reports including work papers, training materials, and other reports, as appropriate based on the nature of the overdraft program. Determine whether:
   - Policies and procedures are all encompassing and take into consideration, as appropriate, issues covered by the *2010 Supervisory Guidance*, the *Joint Guidance*, and the *Third-Party Guidance.*
   - Customer complaints are captured and handled in a timely manner, with appropriate reimbursements and adjustments.
   - The scope of the audit or self-monitoring addresses, as appropriate, issues covered by the *2010 Supervisory Guidance*, the *Joint Guidance*, and the *Third-Party Guidance*.
   - Management has taken corrective action to follow-up on previously identified deficiencies.
   - Testing includes samples covering overdraft payment practices, programs, and decision centers.
   - Testing includes monitoring for risks identified in the *Joint Guidance*, as appropriate.
   - Testing encompasses monitoring accounts for excessive or chronic customer use; meaningful and effective customer follow-up with respect to automated programs; transaction processing order; establishment of overdraft payment decision parameters that ensure continued applicability and appropriateness; and other expectations, as appropriate, and consistent with the *2010 Supervisory Guidance*.[12]
   - Testing includes review of all third-party arrangements related to overdrafts.
   - The scope of the work performed is appropriate.
   - The work performed is accurate.
   - Significant deficiencies and their causes are included in reports to management and/or the Board.
   - Management and/or the Board follow up to ensure that action is taken to correct any significant deficiencies identified.
   - Review frequency is appropriate.
   - The institution documents instances of accountholder excessive use of automated overdraft payment programs (*e.g.*, more than six occasions where a fee is charged in a rolling twelve-month period).

4. Through discussions with management and review of available information, determine whether the institution's internal controls are adequate to ensure appropriate compliance with the *2010 Supervisory Guidance*, the *Joint Guidance*, and the *Third-Party Guidance* (including managing third-party arrangements related to the practices and programs under review), and applicable laws and regulations.

5. Review the following:
   - Organization charts;
   - Process flowcharts;
   - Policies and procedures;

12 *See* also *Consistency with Recommendations in the 2010 Supervisory Guidance – Expanded Review for Automated Programs* of the Transaction-Related Examination Procedures.

- Account documentation;
- Checklists;
- Computer program documentation;
- Marketing materials;
- Training materials;
- Third-party agreements;
- Reports on the frequency of customer overdraft payment program use, overdraft accommodations, and associated fees; and
- Reports documenting efforts to monitor accountholder excessive use of automated overdraft payment programs (*e.g.*, more than six occasions where a fee is charged in a rolling twelve-month period).

6. Through a review of the financial institution's training materials and procedures, determine whether:
   - The institution provides appropriate training to individuals responsible for compliance with, and operational responsibilities for, the institution's overdraft payment practices and programs, *e.g.*, customer service representatives, tellers, individuals handling complaints, audit and compliance staff, and marketing personnel.
   - The training is comprehensive and covers the various aspects detailed in the *2010 Supervisory Guidance*, the *Third-Party Guidance*, the *Joint Guidance*, and applicable laws and regulations.
   - In addition to knowledge of the institution's overdraft payment programs, practices and policies (including applicable laws, regulations and guidance), the training should specifically cover:
     - Information on alternative and less costly products and options,
     - How customers opt-in or opt-out (if the institution chooses to allow customers to opt-out) of various programs,
     - How to monitor for excessive use,
     - How and when to conduct meaningful and effective follow-up with customers, and
     - How to respond to customer complaints.

7. Determine the extent and adequacy of the institution's policies, procedures, and practices for ensuring compliance with safe and sound operational, financial and reputational risks and consumer protection laws and regulations. In particular, verify that:
   - The institution has developed overdraft payment program policies, procedures and practices that ensure compliance with applicable laws and regulations, including:
     - TILA and Regulation Z;
     - TISA and Regulation DD;
     - EFTA and Regulation E;
     - Section 5 of the FTC Act (governing UDAPs) and Regulation AA;
     - ECOA and Regulation B;
     - EFA and Regulation CC; and
     - CRA.
   - The institution's overdraft payment program policies, procedures and practices address, as appropriate, the supervisory expectations noted in the *2010 Supervisory Guidance*, compliance and risk management principles identified in the *Third-Party Guidance*, and best practices noted in the *Joint Guidance*.

Among other things, Compliance examiners should verify that:

- The institution has adopted appropriate procedures in accordance with Regulation E to eliminate overdraft charges related to ATM and one-time, point-of-sale (POS) transactions unless the customer has opted-in to having such fees charged.[13]
- The institution treats customers the same regarding the payment of other NSF items and such payment is not conditioned upon whether or not the customer has affirmatively agreed to pay overdraft fees on ATM or one-time, point-of-sale (POS) transactions.
- The institution's marketing for an overdraft payment program is consistent with the requirements of applicable laws and regulations.
- The institution has developed practices that treat all customers equally, including ensuring that customers are not steered to more expensive products based on their use of overdraft services.[14]
- The institution has developed procedures and methodologies to monitor the use of overdrafts by its customers and associated fees charged.
- The institution has enacted policies and procedures that address prompt handling of requests to opt-in (and to opt-out if the institution, within its discretion, chooses to permit consumers to opt-out) of overdraft payment programs and transactions.
- The institution has developed a process that facilitates meaningful and effective follow-up with customers who have been identified as chronic or excessive users of automated overdraft payment programs. An institution's program should be structured to provide customers with information regarding alternative credit programs or other products that would be more beneficial to their financial needs, and given a meaningful opportunity to affirmatively choose the

13 *See* footnote 4.

14 *See* FFIEC Interagency Fair Lending Examination Procedures and Regulation E Examination Procedures.

overdraft payment product that overall best meets their needs.

- According to the *2010 Supervisory Guidance*, potential excessive use can occur if a customer overdraws his or her account on more than six occasions where a fee is charged in a rolling twelve-month period.
- For ease of examination, institutions should be encouraged to incorporate excessive use monitoring triggers consistent with the *2010 Supervisory Guidance*. If an institution maintains a different standard for excessive use, this standard is expected to be reasonable and designed to implement the supervisory expectation that institutions monitor and take meaningful and effective follow-up action when customers use the overdraft payment program excessively.

- The institution has developed a transaction clearing process method that is fully supported by sound banking business reasons, is neutral in its application, and not designed to maximize the cost to consumers.
- The institution has developed appropriate overdraft payment decision parameters (*e.g.*, daily limits on fees).
- The institution performs adequate due diligence before entering into and during the course of a third-party relationship in connection with an overdraft payment program.[15]
- The institution has developed policies and procedures for monitoring and responding to customer complaints.

Transaction-Related Examination Procedures for Automated Programs

Compliance examiners should conduct transaction testing using the Transaction-Related Examination Procedures if, after completing the Management and Policy-Related Examination Procedures, they discover weaknesses or other risks requiring further investigation. Examiners should use their judgment in deciding the sample size of, *e.g.*, accounts, disclosures and advertisements. Sample sizes should be increased until confidence is achieved in reviewing various aspects of the financial institution's automated overdraft payment programs, practices, policies and procedures.

As noted in *Identification of Types of Overdraft Payment Programs Offered* and *Management and Policy-Related Examination Procedures*, for the vast majority of examinations, Compliance examiners will not conduct transaction-related testing on ad hoc programs and practices.

15 *See* footnote 2.

Further Document Collection and Review

To the extent not already reviewed pursuant to the Management and Policy-Related Examination Procedures, examiners should obtain and review copies of the following documents for consistency with applicable laws, regulations and guidance:

- Descriptions of overdraft payment programs;
- Disclosure forms;
- Account agreements;
- Opt-in and opt-out agreements;
- Excessive use and fee reports;
- Procedures for monitoring excessive or chronic customer use and undertaking meaningful and effective follow-up action;
- Overdraft activity reports and compliance documentation (including any to management or the Board related to monitoring and follow-up, workout loans, charge-offs, fee waivers, daily limits, *de minimis* transactions, etc.);
- Third-party contracts for overdraft payment programs;
- Procedural manuals and written policies;
- Approval guidelines and parameters for all overdraft payment programs, including daily fee limits;
- ATM receipts, periodic statements, and ATM/POS terminal notices;
- Form letters and other correspondence used to notify customers of NSFs or overdraft items;
- Form letters and other correspondence used to notify customers of an overdrawn account status;
- Form letters and other correspondence used in case of errors or questions concerning an account;
- Form letters and other correspondence used to contact customers who are excessive users to inform them of alternative, less expensive products;
- Form letters and other correspondence to opt-in or opt-out of overdraft products, including Regulation E ATM and one-time, POS opt-in related materials;
- All other form letters and correspondence used relating to NSF and overdraft items or programs;
- Any agreements with third-parties allocating compliance responsibilities;
- Marketing materials and scripts, including Regulation E ATM and POS-related materials; and
- Customer complaint files.

Consistency with 2005 Joint Guidance Best Practices – Expanded Review

Further review the financial institution's overdraft payment practices and programs to ensure that they reflect the "Best Practices" outlined in the *Joint Guidance*, and are consistent

with the *2010 Supervisory Guidance*. In addition to the safety and soundness considerations and legal risks identified, Compliance examiners should review efforts to mitigate risk and concerns raised consistent with the following 2005 Best Practices, including:

- Marketing and Communications with Consumers
  1. The institution does not market the program in a manner that encourages routine or intentional overdrafts.
  2. The institution informs customers of other overdraft services and credit products, if any, that are available and the differences in each product (terms and fees), including the consequences of extensively using overdrafts to cover short-term credit needs.
  3. The institution trains staff to explain overdraft payment practices, program features, costs, terms, how to opt-in (or if the institution, within its discretion, chooses to permit consumers to opt-out, how to opt-out), and availability of other products to cover overdrafts.
  4. The institution makes clear when payment of overdrafts is discretionary and does not indicate that payment is guaranteed if the institution retains discretion to not pay an overdraft item.
  5. The institution does not promote "free" accounts and overdraft payment programs in the same advertisement in a manner that would suggest that the program is free of charges (consistent with Regulation DD).
  6. The institution clearly discloses the dollar amount of the fee for each overdraft and any interest rate or other fees that may apply, in communications about overdraft payment programs.
  7. The institution informs customers that the overdraft fees, as well as the amount of the overdraft, will be subtracted from any overdraft limit disclosed (consistent with Regulation DD).
  8. The institution clearly discloses, where applicable, that more than one overdraft fee may be charged against the account per day, depending on the number of checks presented or withdrawals made from the customer's account.
  9. The institution clearly explains to consumers that transactions may not be processed in the order in which they occurred, and that the order in which the transactions are received and processed can affect the total amount of overdraft fees incurred.
  10. The institution clearly discloses the types of transactions that can incur an overdraft fee (*e.g.*, ATM withdrawals, debit card transactions, preauthorized automatic debits, telephone-initiated transfers, or other electronic transfers), to avoid implying that check transactions are the only transactions covered.
- Program Features and Operations
  1. The institution provides a specific notice, where feasible, to inform the customer that completing the withdrawal or fund transfer may trigger an overdraft fee and presents the notice in a manner that permits the customer to cancel the transaction after receiving the notice. If this is not feasible, the institution prominently displays notices explaining that transactions that overdraw accounts may be approved and fees may be incurred.
  2. The institution does not include overdraft payment program funds when providing a single balance for an account by any means (consistent with Regulation DD).
  3. The institution promptly notifies customers each time an overdraft payment program has been accessed. The notice identifies the date of the transaction, type of transaction, item amount, overdraft amount, fee imposed, amount necessary to return the account to a positive balance, amount of time the customer has to return the account to a positive balance, and the consequences of not returning the account to a positive balance within that time period. Additionally, the institution notifies customers if the institution terminates or suspends customer access to the service.
  4. The institution establishes daily limits on the customer's costs from overdraft payment programs, *e.g.*, by limiting the dollar amount of fees or number of transactions per day.
  5. The institution monitors excessive customer use of overdrafts, which would indicate a need for alternative credit arrangements or services, and informs customers of these options.
  6. The institution does not report negative information to consumer reporting agencies when overdrafts are paid under the terms of the institution's overdraft payment program.

Consistency with Recommendations in the 2010 Supervisory Guidance – Expanded Review for Automated Programs

Where transaction testing is warranted, examiners should perform a detailed review of the financial institution's automated overdraft payment practices and programs for appropriate consistency with the "Supervisory Expectations" outlined in the *2010 Supervisory Guidance*, as well as the "Regulation E Requirements" and "Examinations" discussions. Examiners should discuss with institutions which recommendations, expectations, and items are appropriate given the institution's overdraft payment programs and practices, customer base and use patterns, and business model, as well as other efforts by the institution to address excessive use.

In particular, for **automated overdraft payment programs** Compliance examiners should determine whether:

1. The institution gives customers the opportunity to affirmatively choose the overdraft payment product that best meets their needs.
   - This includes, for example, a linked savings account,[16] a more reasonably priced line of credit that is consistent with safe and sound banking practices, or a safe and affordable small-dollar loan.[17]
2. The institution's Board provides appropriate oversight of programs consistent with its ultimate responsibility for overall compliance, and management provides oversight of program features and operations on an ongoing basis, including annual review of an overdraft payment program's key features.
3. The institution reviews its marketing, disclosures, and implementation of such programs to minimize potential customer confusion and promote responsible use.
4. The institution trains staff to explain program features and other choices.
5. The institution prominently distinguishes account balances from any available overdraft coverage amounts (consistent with Regulation DD).
6. The institution monitors programs for excessive or chronic customer use, and undertakes meaningful and effective follow-up action.
   - Meaningful and effective follow-up means that the institution has made reasonable efforts to provide the customer with information on alternatives to automated overdraft payment programs that may be better-suited to the individual's need for short term credit, and a clear mechanism for the customer to avail him or herself of those alternatives.
     - The key goal is to ensure that customers are able to make informed choices among available options to manage recurring needs for short-term credit.
     - An institution should be able to demonstrate it monitors account usage, undertakes programs designed to address excessive or chronic use, and monitors its success in informing frequent users of overdraft payment programs of the high cumulative costs of the program and the availability of less costly or otherwise more appropriate alternatives.
     - Although institutions are encouraged to provide responsible alternatives, and most institutions offer some form of short-term alternative, including lines of credit, fixed-term small dollar loans, and linked savings accounts, they are not required to develop new products in response to the *2010 Supervisory Guidance*.
   - Compliance examiners should weigh the institution's overall approach in addressing excessive or chronic customer use and assess whether a chosen course of action demonstrates meaningful and effective follow-up.
     - Steps should include assessing the institution's level of effort to reach customers, and the ease with which customers are able to select alternative products.

   Key areas of focus regarding meaningful and effective follow-up include:
   - Institutions are encouraged to be proactive in contacting customers, clearly communicating available options and giving a meaningful choice among options.
   - Institutions may employ a variety of techniques, based on individual customer profiles and general business practices, to contact excessive or chronic users of overdraft payment programs.
   - While examples of meaningful and effective follow-up could include contacting a customer via telephone, in person, by mail, or through electronic notifications, a single action may or may not necessarily show appropriate follow-up. When evaluating meaningful and effective follow-up, examiners should consider the institution's overall process for providing notice to excessive use customers and the circumstances at that institution. Factors to consider include whether:
     - The institution has a regular program to inform excessive or chronic users of overdraft usage and cumulative costs in a prominent or conspicuous fashion;
     - The institution highlights availability of alternatives to overdraft payment programs that may be lower-cost or more appropriate;
     - The institution provides a clear and simple manner to contact the institution to discuss available alternatives;
     - Contact with the customer was cursory;
     - The customer and the institution engaged in relevant dialogue or exchanged correspondence; or
     - Other information provided by the institution that documents meaningful and effective follow-up.
   - Although institutions should use their judgment in determining what risk mitigation response is appropriate for their particular institution, two specific examples of ways in which an institution could demonstrate meaningful and effective follow-up regarding excessive or chronic use of automated overdraft programs are: 1) providing enhanced periodic statements; or 2) employing a targeted outreach approach.

16 *See* The FDIC's Model Safe Account Pilot which provides a template for safe, low-cost transactional and savings accounts (http://www.fdic.gov.)

17 *See* A Template for Success: The FDIC's Small-Dollar Loan Pilot Program which provides a template for safe and affordable small dollar loans (http://www.fdic.gov).

1. ***Enhanced Periodic Statement Approach***

   - Under the enhanced periodic statement approach, an institution would augment existing, required disclosures for overdraft fees under Regulation DD (requiring disclosure of the total amounts of fees charged for overdrafts during the statement period and calendar year-to-date), by:
     - Prominently highlighting how excessive or chronic users of automated overdraft programs can contact the institution to discuss available alternatives, and
     - Encouraging meaningful and effective contact.
   - If a customer incurs more than six overdrafts in a rolling twelve-month period, the institution would prominently display on the periodic statement information describing how the customer can contact the institution to discuss alternative options.
     - An effective method is to include the name or names of specific employee(s) who have knowledge of alternative credit products for which the customer might qualify and are able to assist the customer in determining whether he or she qualifies for them.
     - For example, the following statement could be used: *"You have been paying multiple overdraft fees and there may be cheaper alternative products that may be better suited for your needs. Please call [name(s) of employees] at xxx-xxx-xxxx to discuss other options with a customer service representative or visit us at your local branch."*
   - Under this approach, institutions should continue to send enhanced periodic statements to customers for as long as the customer continues to exhibit chronic or excessive usage.

2. ***Targeted Outreach Approach***

   - A targeted outreach approach would involve contacting excessive users in person or by telephone to discuss less costly alternatives to automated overdraft payment programs.
   - An institution would initiate outreach within a reasonable time period (*e.g.*, 30 days) when a customer incurs more than six overdrafts in a rolling twelve-month period to discuss overdraft usage and available alternatives to the overdraft payment program.
   - If a customer decides to remain in the automated overdraft payment program, the institution should also engage the customer to determine the customer's preferences regarding future contact regarding participation in the automated overdraft payment program.
   - Absent an indication of customer preference regarding subsequent contact, a targeted outreach approach would involve contacting a customer whenever there is a cycle of repeated, excessive use (*e.g.*, subsequent occurrences of more than six overdraft occasions where a fee is charged in a rolling twelve-month period).

Additional key areas of focus regarding meaningful and effective follow-up include:

- Institutions should establish a reasonable period of time in which to reach the customer to discuss less costly alternatives (*e.g.*, 30 days).
- Institutions are not expected to suspend the availability of or limit access to overdraft coverage during the period in which they are engaging in good faith efforts to reach customers.
- Once successful contact with the customer occurs, institutions should evaluate the appropriate course of action. Before pursuing a course of action, institutions should consider the overall risks and circumstances, including whether the customer has expressed a desire to pursue alternatives or continue participating in the overdraft payment program.
- An occasion occurs when an overdraft fee is charged (*e.g.*, a per-transaction, sustained daily, or other overdraft fee, but not an NSF fee charged where payment for an item is rejected). If three overdraft fees are charged in one day, that constitutes three occasions. If four overdrafts occur in one day but only three fees are charged for three transactions that day (*e.g.*, if the institution waives fees after a daily limit of three is met), that similarly constitutes three occasions.
- If a financial institution posts a single $105 fee to an account for three, per-transaction overdrafts (*i.e.*, a $35 fee is charged for each overdraft), this would still constitute three overdraft fees and, consequently, three occasions.

Is there documentation or empirical evidence that the institution's follow-up has resulted in customers choosing more affordable alternatives?

- After meaningful and effective contact, and repeated instances of follow-up, a customer may not wish to receive follow-up contact envisioned by the *2010 Supervisory Guidance.*
  - Regardless of customer choice, institutions should continue to monitor account usage.
- At the same time, institutions should not attempt to steer frequent users of fee-based overdraft products towards continuing fee-based overdraft coverage while obscuring the availability of less costly alternatives. In addition, institutions should not employ inappropriate efforts, including overly aggressive advertising or other

promotional activities to coerce consumers to choose to continue with fee-based overdraft coverage.

- As with all customer communications, simple and clear language is preferred. Regardless of customer choice, institutions should continue to monitor accounts for excessive use that may pose safety and soundness risks.

7. The institution has appropriate daily limits on customer costs. For example, the financial institution has done the following:
   - Limited the number of transactions that will be subject to a fee (*e.g.*, no more than three per day), or
   - Provided a dollar limit on total fees that will be imposed per day.

   Daily limits should be reviewed as one element of the institution's overall overdraft payment program. Failure to institute daily limits on customer costs with respect to overdraft payment programs does not in and of itself mean that the institution is not acting in a manner that is consistent with the expectations set out in the *2010 Supervisory Guidance*.
8. The institution has implemented transaction-clearing procedures that operate in a manner so as to avoid maximizing customer overdrafts and related fees through manipulation of the clearing order, and ensures that any third-party vendor has similar procedures in place.
   - Determining clearing order does not in and of itself necessarily indicate whether an institution is or is not acting consistent with the expectations set out in the *2010 Supervisory Guidance*. Examiners should review and consider whether the processes, practices, policies, and procedures of the financial institution and their third-party vendor provide an overall compliance management system or framework that is consistent with those expectations.
   - To the extent that institutions make decisions regarding transaction processing order, transactions should be processed in a neutral order that avoids manipulating or structuring processing order to maximize customer overdraft and related fees.
   - Institutions are discouraged from implementing systems that re-order transactions to clear the highest item first, as this approach will tend to increase the number of overdraft fees. In addition, although processing batches of transactions in a random order or order received is a neutral approach, institutions are discouraged from arranging the order of types of transactions (*i.e.*, batches) cleared in order to increase the number of overdrafts and maximize fees.
   - Compliance examiners should consider the overall risk-profile of the institution and the following factors or characteristics:
     - Is the transaction order neutral (*e.g.*, by order received, check number, serial number sequence, or other potentially equitable approaches)?
     - Has the institution established that their transaction processing order is necessary for sound business reasons and is not manipulated so as to maximize fees?
9. The institution monitors and, where necessary, mitigates credit, litigation, reputational, safety and soundness, and other risks, as appropriate.[18]
10. The institution complies with Regulation E requirements requiring institutions to provide notice and a reasonable opportunity for customers to opt-in to the payment of ATM and one-time POS overdrafts for a fee and does not steer frequent users of fee-based overdraft products to opt-in to these programs while obscuring the availability of alternatives (raising safety and soundness concerns about potentially unsustainable consumer debt, as well as potential fair lending and UDAP concerns).
11. The institution is consistent in its application of overdraft fee waivers, in light of applicable fair lending statutes and regulations.

In addition, an institution in its discretion may choose or elect to implement further risk mitigation efforts. If an institution decides to implement such activities or practices, examiners should weigh these further efforts in evaluating the overall effectiveness of an institution's compliance management system and evaluate whether an institution's overdraft program and practices are consistent with the expectations set out in the *2010 Supervisory Guidance*. Examples of additional efforts that mitigate risks include the following:

1. The institution has an appropriate process in place for eliminating overdraft fees for transactions that overdraw an account by a *de minimis* or very low amount.[19] Examples of possible de minimis limits that could be implemented include: transaction amounts of less than $10, or an institution could decline to charge overdraft fees for transactions that overdraw an account by less than $10.
2. The institution has effectively employed cost effective, existing technology, as appropriate, to alert customers when their account balance is at risk of generating a fee for NSFs.
3. The institution has provided information to customers about how to access free or low-cost financial education workshops or individualized counseling to learn how to more effectively manage personal finances. Small or rural institutions may want to consider using Web-based resources or referrals to reputable, non-profit organizations.

18 Compliance examiners should consult with Risk Management examiners, as appropriate, where safety and soundness concerns are identified.

19 If a fee is charged such a fee should be reasonable and proportional to the amount of the original transaction.

4. The institution has appropriate policies and procedures in place for allowing customers to decline overdraft coverage (*i.e.*, opt-out) for non-electronic transactions (meaning transactions that are not subject to the Regulation E opt-in requirements), such as paper checks, automated clearing house transfers and recurring debits, and honor an opt-out request.[20]
   - It is recommended that institutions consider occasional communications to remind customers of available options to terminate overdraft coverage.
5. The institution has appropriate policies and procedures in place for reminding their customers, especially chronic or excessive users of overdraft programs, that even if they have chosen to opt-in to the payment of ATM and one-time POS overdrafts for a fee, at any time they can still choose to opt-out of ATM and one-time, POS overdraft programs.

Expanded Review for Ad Hoc Programs or Practices

For **ad hoc programs or practices**, if unacceptable risks are identified on an exception basis during the Management and Policy-Related review, examiners should consider whether the institution's ad hoc payment practices require closer review. For example:

- When weaknesses or other risks are discovered that may indicate that ad hoc programs or practices are not in compliance with existing laws and regulations; and/or
- When red flags are raised indicating potential reputation, compliance, and litigation risks regarding certain practices, such as check clearing practices designed to maximize overdraft fees, examiners should consider inquiring about:
  - The nature of the red flag;
  - Why the issue occurred; and
  - How the institution oversees and manages such issues, including a potential review of policies and procedures.

Overdraft Payment Program Supervisory Guidance Frequently Asked Questions

FDIC staff has developed the following Frequently Asked Questions (FAQs) and answers in response to questions from supervised institutions and third-party vendors about the FDIC's Overdraft Payment Supervisory Guidance issued in November 2010 (FIL-81-2010) (Guidance). The responses represent the views and opinions of FDIC staff regarding incorporation of the Guidance into the examination process.

I. Defining Automated and Ad Hoc Programs

1. How does an "automated" overdraft payment program differ from "ad hoc" overdraft payment practices?

Automated overdraft payment programs typically rely on computerized decision-making, and use pre-established criteria to pay or return specific items. There is little to no case-by-case review and decision-making with respect to an individual customer or item.

By contrast, *ad hoc* practices typically involve the exercise of bank employee judgment in making a specific decision about whether to pay or return an item. This is done as an accommodation and based on the employee's knowledge of a particular customer.

2. Do the specific supervisory expectations about customer contact apply to ad hoc overdraft payments?

No. The FDIC's November 2010 Guidance is focused on assisting institutions in identifying, managing, and mitigating the particular risks posed by automated overdraft payment programs. Ad hoc overdraft payments have been authorized by banks for years as an accommodation based on specific considerations and knowledge of a particular customer, and they have generally not been the subject of the type of product over-use concerns that can be associated with automated overdraft programs. Consequently, the specific supervisory expectations set out in the Guidance regarding customer contact for excessive or chronic users of automated overdraft payment programs do not apply to ad hoc overdraft practices.

3. Should institutions monitor and manage risks associated with ad hoc payments of overdrafts?

Yes. While the Guidance's specific supervisory expectations relate only to automated overdraft payment programs, institutions that authorize overdrafts on an ad hoc basis should manage potential reputational, compliance, and litigation risks regarding certain overdraft payment practices, such as check clearing practices designed to maximize overdraft fees. In addition, the Guidance provides updated information on the laws, regulations, and other guidance that apply to all types of overdraft payment practices and programs.

II. Excessive Use and Meaningful Follow-Up

1. The Guidance states that FDIC-supervised institutions should 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. What is an "occasion" where a fee is charged?

20 Revised Regulation E provides consumers with an ongoing right to rescind their prior opt-in to coverage of ATM and one-time POS overdrafts.

An "occasion" occurs each time an overdraft transaction generates a fee. For example, this would include a per-transaction overdraft fee or a daily fee for an outstanding overdraft status. As a result, potentially more than one "occasion" can occur per day. If three overdraft fees are charged as a result of three transactions (even if the fees are aggregated), that would constitute three occasions. If a fee itself triggers an overdraft, that event would count if a further overdraft fee is charged as a result.

By contrast, overdraft items paid where no fee is charged (for example, if a bank pays an item after a daily limit is met on overdraft items paid and the bank waives additional fees) would not be included. Thus, if four overdrafts occur in a day but the bank only charges three fees as a result of a per-day limit on fees charged, this would constitute three occasions.

2. What is meaningful and effective follow-up for chronic or excessive use and how can an institution demonstrate it has made meaningful efforts to reach chronic or excessive users of automated overdraft payment programs?

Meaningful and effective follow-up means that the institution has made reasonable efforts to provide the customer with information on alternatives to overdraft payment programs that may be better-suited to the individual's need for short-term credit, as well as a clear mechanism for the customer to avail himself or herself of those alternatives. The key goal is to ensure that customers are able to make informed choices among available options to manage recurring needs for short-term credit. The FDIC will assess the institution's level of effort to reach customers, the institution's program for providing notice to customers of available alternatives, and the ease with which customers are able to select alternative products.

Institutions may employ a variety of techniques, based on individual customer profiles and general business practices, to contact excessive or chronic users of overdraft payment programs. For example, the institution's overall approach could incorporate contacting a customer via telephone, in person, by mail, or through electronic notifications. Relevant factors include whether the institution:

- Has a regular program to inform excessive or chronic users of overdraft usage and cumulative costs in a prominent or conspicuous fashion;
- Highlights availability of alternatives to overdraft payment programs that may be lower-cost or more appropriate; and
- Provides a clear and simple manner to contact the institution to discuss available alternatives.

The institution should be able to demonstrate that it monitors account usage, undertakes programs designed to address excessive or chronic use, and monitors its success in informing frequent users of overdraft payment programs of the high cumulative costs of the program and the availability of less-costly or otherwise more appropriate alternatives.

Two examples of ways in which an institution could demonstrate meaningful and effective follow-up regarding excessive or chronic users of overdraft programs are to provide enhanced periodic statements or employ a targeted outreach approach. Specific information discussing meaningful and effective follow-up when utilizing these approaches is described in the attached Illustrations. Institutions may employ other approaches for engaging in effective and meaningful follow-up with chronic or excessive users.

III. Fee Limits and Maximizing Fees

1. What is an example of an appropriate daily limit on overdraft fees?

Daily limits can help prevent a customer's individual lapse in financial management from triggering a cascade of overdraft fees, and will be reviewed as one possible element of the institution's overall approach for addressing chronic or excessive use of automated overdraft payment programs. For example, some institutions have implemented limits on the number of transactions that will be subject to a fee (*e.g.*, no more than three per day) or on total allowable fees (*e.g.*, a specific maximum dollar amount of allowable fees per day).

2. What is an example of an appropriate de minimis overdraft amount?

Institutions should consider the use of a de minimis threshold before an overdraft fee is charged in order to reduce reputational risk related to charging fees that are disproportionate to the item being cleared. For example, some institutions have implemented de minimis limits whereby they do not charge overdraft fees for underlying transaction amounts of less than $10, while some have declined to charge overdraft fees for transactions of any amount that overdraw an account by less than $10.

3. What is a reasonable and proportional overdraft fee?

As noted in FAQ # III.2 (*de minimis*), institutions may increase reputational risk when overdraft fees are significantly greater than the amount of the item being cleared. Institutions should review the amount charged for the overdraft payment compared to the amount of the underlying transaction that triggered the overdraft, and assess whether the charge is reasonable and proportionate in comparison. Institutions should consider *de minimis* limits to reduce the reputational risk of overdraft fees that are disproportionate to the cost of the underlying transaction.

4. How can institutions and their third-party vendors work to process transactions in a manner that addresses risks identified in the Guidance?

Transactions should be processed in a neutral order that avoids manipulating or structuring processing order to maximize customer overdraft and related fees. Examples of a neutral order include order received, check number, serial number sequence, or other approaches when necessary based on sound business justification.

Re-ordering transactions to clear the highest item first is not considered neutral because this approach will tend to increase the number of overdraft fees. By contrast, processing batches of transactions in a random order or order received is a neutral approach; however, institutions should not arrange the order of types of transactions (*i.e.*, batches) cleared in order to increase the number of overdrafts and maximize fees.

IV. Other Questions

1. Is an institution required to provide new alternatives to automated overdraft payment programs?

No. Banks are not required to develop new products in response to the Guidance. However, most banks offer some form of short-term alternative, including lines of credit, fixed-term small dollar loans, and linked savings accounts, and the FDIC encourages institutions to provide linked accounts or responsible, short-term credit products (such as those offered under the FDIC's small dollar loan pilot). Banks are expected to inform excessive or chronic users of overdraft payment programs about alternative products that the institution has available for its customers, and to make these programs available to customers that qualify. Such products may qualify for CRA consideration under the service or lending tests.[21]

2. Is an institution required to terminate or suspend a customer's access to the automated overdraft payment program if the customer engages in chronic or excessive use?

No. Institutions are expected to monitor usage and engage in meaningful and effective follow-up to inform excessive users of available alternatives. However, as discussed in the Guidance, a number of risks are associated with chronic or excessive use of automated overdraft programs, including reputational, compliance, safety-and-soundness, and litigation risks. If such risks are identified during the course of an institution's monitoring and oversight of an automated overdraft program, institutions should take appropriate action to mitigate risks, as has been the case in the past.

3. The Guidance states that the FDIC believes institutions should allow customers to decline overdraft coverage (i.e., opt-out) for payment of overdrafts resulting from non-electronic transactions such as paper checks or automated clearing house (ACH) transfers. Can you clarify to which transactions this recommendation applies?

To promote consumer choice and awareness, institutions are encouraged to permit customers to decline overdraft coverage (*i.e.*, opt-out) for transactions that are not subject to the Regulation E opt-in requirements, including checks, ACH transactions and recurring debits. As part of an institution's on-going relationship with its customers, the FDIC recommends that institutions consider occasional communications to remind customers of available options to terminate overdraft coverage.

4. How can small or rural institutions provide information about financial education?

In addition to educational resources identified in the Guidance, institutions may want to consider using Web-based resources or referrals to reputable, non-profit organizations.

5. When are institutions expected to have reviewed and responded to the Guidance?

As stated in the Guidance, the FDIC expects that institutions will have approved, responsive compliance and risk management action plans, policies and procedures by July 1, 2011.

Meaningful and Effective Follow-Up Illustrations

The following information is provided to illustrate two examples of ways in which institutions may demonstrate meaningful and effective follow-up with excessive or chronic users of overdraft payment programs.

An enhanced periodic statement approach would involve augmenting existing, required disclosures for overdraft fees under Regulation DD (Truth in Savings), which requires disclosure of the total amounts of fees charged for overdrafts during the statement period and calendar year-to-date, by prominently highlighting how excessive or chronic users of automated overdraft programs could contact the institution to discuss available alternatives, and encouraging meaningful and effective contact.

A targeted outreach approach would involve contacting excessive users in person or via telephone to discuss less costly alternatives to automated overdraft payment programs.

21 *See* Affordable Small Dollar Loan Guidelines, FIL-50-2007 (June 19, 2007), available at: http://www.fdic.gov/news/news/financial/2007/fil07050.html, and Interagency Questions and Answers Regarding Community Reinvestment, 75 Fed. Reg. 11642 (Mar. 11, 2010), available at: http://www.ffiec.gov.

Approach #1: Enhanced Periodic Statements

If an institution chooses to take an enhanced periodic statement approach that augments the requirements of Regulation DD for overdraft fees charged during the current statement period and calendar year-to-date, and if a customer incurs more than six overdrafts in a rolling twelve-month period, an institution could include a message on the periodic statement that describes how the customer could contact the institution to discuss alternative options. An effective approach could be to include the name or names of specific employee(s) who have knowledge of alternative credit products for which the customer might qualify and are able to assist the customer in determining whether he or she qualifies for them. For example, the following statement could be used: "You have been paying multiple overdraft fees and there may be cheaper alternative products that may be better suited for your needs. Please call [name of employee] at xxx-xxx-xxxx to discuss other options with a customer service representative or visit us at your local branch."

Under this approach, it would be reasonable for an institution to continue to send enhanced periodic statements to a customer for as long as the customer continues chronic or excessive usage.

Approach #2: Targeted Outreach

If an institution chooses to take a targeted outreach approach, an institution would initiate outreach within a reasonable time period (*e.g.*, 30 days) when a customer incurs more than six overdrafts in a rolling twelve-month period, to discuss overdraft usage and available alternatives to the overdraft payment program. If a customer decides to remain in the automated overdraft payment program, the institution should also engage the customer to determine the customer's preferences for future contact regarding participation in the automated overdraft payment program. Absent an indication of customer preference regarding subsequent contact, a targeted outreach approach would involve contacting a customer whenever there is a cycle of repeated, excessive use (*e.g.*, subsequent occurrences of more than six overdraft occasions where a fee is charged in a rolling twelve-month period).

References

FIL-81-2010: Overdraft Payment Programs and Consumer Protection: Final Overdraft Payment Supervisory Guidance

FIL-11-2005 Overdraft Protection Programs Joint Agency Guidance

FIL 44-2008 Third-Party Risk: Guidance for Managing Third-Party Risk

FDIC Industry FAQs (April 1, 2011