Missouri Bankers Association

September 24, 2010

Federal Deposit Insurance Corporation via **OverdraftComments@fdic.gov**
or via fax to (703) 465-4303

RE: FDIC FIL-47-2010 dated August 11, 2010 "Overdraft Payment Supervisory Guidance"

The Missouri Bankers Association appreciates the opportunity to comment on the above-referenced guidance. The MBA is a non-profit trade association representing 340 Missouri financial institutions. We certainly understand that the traditional deposit account relationship between banks and their customers has evolved and continues to evolve, primarily due to increasing ways that accounts can be accessed. This evolution presents challenges for banks and their customers.

While technical innovations in many cases are ahead of the law, many potential problems can be avoided when both bank customers and banks are diligent about their responsibilities in connection with transactions to deposit accounts. However, third parties can also have an impact that are outside the control of the bank or the customer, including merchants posting point of sale transactions in a manner that can cause a customer's snapshot account balance to not be accurate due to the merchant's procedures.

In our opinion, the proposed Overdraft Payment Supervisory Guidance goes beyond what has traditionally been provided through interagency guidance – which is additional support or direction to help banks develop policies and procedures to comply with existing laws and regulations. As outlined below, we believe that certain proposed provisions go beyond guidance, imposing expectations that are not currently required by law or regulation, and that would effectively preempt Missouri law.

In addition, if the FDIC pursues the adoption of this Guidance and the Federal Reserve Board and OCC do not adopt any guidance, FDIC-regulated banks will be placed at a competitive disadvantage due to increasing costs and burdens they will have to undertake to comply with the Guidance. We believe that any guidance on a topic of this nature should always be Interagency – not just from one agency.

The following comments are directed at specific provisions of the proposed Overdraft Payment Supervisory Guidance:

FDIC expects financial institutions to provide clear and meaningful disclosures and other communications about overdraft payment programs, features and options. Many regulatory requirements currently exist requiring disclosures to consumers regarding their accounts. Suggested model forms and clauses to provide these disclosures have been adopted through consumer testing by the

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regulatory agencies. Most banks use these model forms verbatim as a safe harbor to ensure compliance, also making it easier for customers to compare fees and practices by account and by bank. This proposed Guidance seems to suggest that the FDIC expects disclosures beyond those already required by Regulation DD and Regulation E. These regulations clearly require information about overdraft fees to be disclosed to the customer prior to account opening, on customer statements, and upon request. If the FDIC expects additional disclosures, that should be accomplished through proposed rulemaking by the Federal Reserve Board to amend Regulation DD and/or Regulation E, not through this Guidance.

FDIC expects financial institutions to demonstrate compliance with new overdraft fee disclosure requirements that mandate providing a notice and reasonable opportunity for customers to affirmatively choose fee-based overdraft coverage of ATM withdrawals and one-time point-of-sale debit card transactions. MBA agrees that covered banks should be fully compliant with the regulation. What does the FDIC mean by "demonstrating compliance?" Exam procedures or additional information will be necessary to know what will be expected of financial institutions to demonstrate compliance when they are examined.

FDIC expects financial institutions to promptly honor customers' requests to decline coverage of overdrafts resulting from non-electronic transactions. There is no provision in existing laws or regulations that requires a financial institution to do so. In fact, the model form adopted by the Federal Reserve Board in the recent change to Regulation E contained verbiage stating that the bank may authorize and pay overdrafts for checks and automatic bill payments, recognizing the bank's right to do so. From a competitive, and customer relations standpoint, in our opinion banks would honor their customers' requests to decline the payment of overdrafts resulting from non-electronic transactions (and return the items instead), but this Guidance is not appropriate in "expecting" banks to do so when there is no accompanying law or regulation to point to requiring such practice.

FDIC expects financial institutions to give consumers the opportunity to affirmatively choose the overdraft payment product that overall meets their needs. This expectation implies that every bank offers more than one overdraft payment product. Banks from a competitive and customer relations standpoint will offer the products and services that best fit their market and customer base. Many community banks do not offer overdraft lines of credit as the open-end disclosures required by Regulation Z are extremely complex and require an investment in technology and resources that may not be feasible for the bank. Customers have the right to receive Regulation DD disclosures prior to account opening describing the fees and features for an account – if the bank does not offer the fees and features that suit their needs, they can look for an account elsewhere.

FDIC expects financial institutions to monitor accounts and take meaningful and effective action to limit use by customers as a form of short-term, high-cost credit, including, for example, giving customers who overdraw their accounts on more than six occasions where a fee is charged in a rolling twelve-month period a reasonable opportunity to choose a less costly alternative and decide whether to continue with fee-based overdraft coverage. Several terms are used in connection with this expectation that are very subjective and an invitation for class action lawsuits. The FDIC states that banks should monitor programs for "excessive or chronic customer use" and also should undertake "meaningful and effective" follow-up actions. No law or regulation requires a financial institution to take

either of these actions. This expectation would impose an incredible burden on banks. Customers receive information on their statements detailing the amount of overdraft fees they have incurred (per statement cycle and year to date). If customers over any period of time (including the very first time they are assessed an overdraft fee) feel those fees are excessive, they certainly have many options – close the account, ensure they do a better job keeping track of their transactions, inquire at the bank about options that may work better for them, ask to opt out of payment of overdrafts on their account, etc.

From a practical standpoint, this expectation would be extremely difficult to implement. For example, how are these six "occasions" counted? By account? Or by customer? What if the customer has three accounts? Customer relationships and accounts change constantly and this type of monitoring would be extremely costly and burdensome.

The FDIC expects follow-up action to include contacting the customer by person or via telephone. This would require enormous resources of the bank and implies that the customer would welcome such an intrusion by the bank. What an awkward and potentially insulting conversation from the customer's viewpoint! If the customer has already affirmatively opted in to the bank's payment of overdrafts via ATM and one-time debit card transactions, why should they be contacted again after they have incurred overdrafts and be given a "reasonable opportunity to decide" (also subjective terminology) whether to continue? They have the right to opt out at any time.

Banks from a safety and soundness and risk management standpoint have reasons to monitor their overdraft programs. It should be at the bank's discretion whether to take any action in connection with a customer who may have excessive overdrafts – as determined by the bank, not by a "one size fits all" standard. The bank may feel it is appropriate to stop paying overdrafts, close the account, or reach out to the customer, but that should be the bank's decision.

FDIC expects financial institutions to institute appropriate daily limits on overdraft fees. This proposed guidance goes beyond current law. Missouri law contains no limits on what a bank may charge for an overdraft fee, and does not impose a daily limit. The marketplace should and does drive this issue, and many banks have adopted such a limit as a competitive strategy. What is considered "appropriate" in the eyes of the FDIC? The FDIC states that such a limit will reduce customer costs. If the bank does not pay the overdraft and returns a check, the customer will still incur a non-sufficient funds fee at the bank and will also likely incur a returned check fee from the merchant. How does that reduce the customer's costs? If customers believe they are paying excessive amounts for overdrafts on a daily basis, perhaps they should choose another bank. The FDIC should not mandate a set limit on overdraft fees.

FDIC expects financial institutions to not process transactions in a manner designed to maximize the cost to consumers. In the past there have been a number of ways to process paper checks; there was processing by high-low amounts, low-high amounts, and chronologically as the paper check appeared. In Missouri this was allowed by section 400.4-303(b) RSMo, where the bank is allowed to process the paper check in any order, except for certain legal processes. Some banks are unable to provide immediate debit access to the deposit account on a 24 hour/7 day basis. While chronological ordering based on the time of the check receipt sounds reasonable, many more transactions than just checks can access accounts, and the technology is not perfect and continues to evolve. Customers have to understand that what appears as

a "balance" at any given time may have transactions pending that will affect that balance and it is imperative that they keep track of every single transaction that will debit or credit their account.

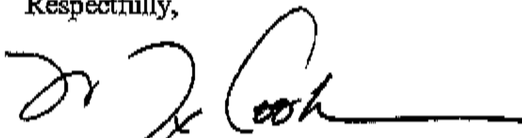
The FDIC will take supervisory action where overdraft payment programs pose unacceptable safety and soundness or compliance management system risks or result in violations of laws or regulations, including unfair or deceptive acts or practices and fair lending laws. Banks of course are required to follow laws and obey them; the federal bank regulator is empowered to review the bank's action and criticize it. We do not believe overdraft payment programs per se pose unacceptable risk for safety and soundness or that they are designed to be detrimental to customers. If customers did not want these types of programs, they would have vanished long ago. While customers may disagree philosophically with the bank's payment of overdrafts, in many cases customers are relieved that the bank has covered their payment to avoid embarrassment and unwelcome consequences of having their check returned unpaid.

The FDIC states that institutions should incorporate the best practices outlined in the 2005 *Joint Guidance on Overdraft Protection Programs*. However, that guidance itself stated that "the best practices, or principles within them, are enforceable to the extent they are required by law." Banks should be allowed to decide whether or not to implement the "best practices" outlined in the 2005 Guidance, that are not required by law.

Conclusion MBA believes that a vast majority of banks respect their customers and have acted responsibly towards them. As we move into a new era with the Dodd-Frank Act, there are real issues about the amount of regulation (and the associated costs) a bank may absorb and stay in business. There is no perfect formula to make the overdraft go away, but financial education -- particularly at the high school level -- should help along with fair disclosure by the banks and personal responsibility from their customers. We strongly support consumer financial education and have been active in efforts in Missouri to promote financial literacy efforts. The state of Missouri is one of three states that require a personal finance credit to meet high school graduation requirements (legislation pushed for by the Missouri Bankers Association). Many Missouri bankers have volunteered to assist high school teachers in educating their students and participate throughout the state in various financial education activities. It is in everyone's best interests that bank customers are informed so they may make the best decisions to manage their finances. Any efforts by the FDIC in providing financial education would be welcomed.

Thank you for your time and the consideration of our comments.

Respectfully,



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