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Sent: Monday, September 20, 2010 4:02 PM
To: Overdraft Comments
Subject: Overdraft Protection Comment

Attachments: Bounce Protection Rulemaking CommentAugust 24.docx

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Attachment:

Bounce Protection "Supervisory Guidance" Comment September 20, 2010

First, in this newly proposed "Supervisory Guidance" it would be refreshing to see a commentary reflecting what statutory authority is given to have any "Guidance" issued. Using UDAP for the authority to promulgate the effective equivalent of rule making by circumventing the process for the same would appear to be an unfair and deceptive practice on behalf of the FDIC. I do not believe that the Congress has authorized any such rulemaking in any existing law or regulation. The agencies have taken on the role of the legislature and the courts by deciding arbitrarily what constitutes legal and reputation risk in an area covered by many years of existing case law relating to overdrafts and to charges for those services.

The Uniform Commercial Code, case law regarding reasonable charges for overdrafts and contract law between a bank and their customer are well established laws and precedents that may directly conflict with the assumptions of legal, reputation and compliance risk contained in this proposed Guidance.

Perhaps these precedents caused the ambiguity and limited scope of the previous Guidance. The Regulation Z citation and the reference to recent additions to Regulations E and DD are well presented and supported by congressional authority. It would be prudent, in the final rule, to use actual case law supporting which courts have made the decisions that you used for the basis of your legal and reputation risk assessments. Publications of your risk assessments for insured institutions with regard to each part of the proposal would lend great insight into which parts covered by the guidance are, in your opinion, especially risky.

Second, no thought appears to have been given to those consumers who may be the most affected by this change. Banks are not required to pay overdrafts and the return check fee is often as much as the fee to pay the item into overdraft. In addition, consumers who are at present not accustomed to having their checks returned will incur fees from the source presenting the item and, in cases of checks over the amount of a misdemeanor, face serious criminal charges under State laws. In addition, the number of accounts that will be closed due to returned check charges will leave many more people unbanked.

The Guidance gives no assistance to the consumers of lower or moderate income that may have credit histories that prevent loans and overdraft lines of credit and do not have available funds to cover overdrafts through a sweep account arrangement.

The Guidance cap of six overdrafts per year or similar period being considered overuse is extremely low and will directly result in the exclusion of the consumers that rely most heavily of this type of protection

for their accounts. This will result in an environment where the banks have some kind of product to cover overdrafts for everyone but the people who need one.

Most of the consumers using these products are in checking account types which are either free or nearly free in order to attract more customers into the program. These low cost and free accounts may quickly disappear from the landscape as further restrictions are imposed, penalizing the consumers using the product as it was designed to be used.

Third, it is difficult to estimate how many retail dollars per day will not be spent nationwide without these programs. It could pull millions of dollars in sales out of already struggling state economies and dramatically reduce sales tax revenues.

The loss of this non-interest income to smaller banks could trigger a major loss in revenue. They may be forced to sell to bigger banks that are better able to spread the risk of handling such transactions on a credit basis. This has a very real probability of increasing the number of too big to fail institutions while decreasing the number of Community Banks.

The Guidance could not come a worse time. The current Guidance and other regulations already in place are sufficient to protect the consumer. More importantly, issuing guidance unilaterally without agreements with all other enforcement agencies leads to an unlevel playing field. It reduces income for State Non-Member Banks as compared to National and Federal Reserve Member Banks, especially in defining in excess of 6 transactions per year as excessive. Instead of issuing more guidance, why not make strong suggestions to banks that operate their programs without daily limits, overall limits and other controls to bring their programs to an affordable level for the consumer, rather than using a paint roller to paint the head of a pin?

Each new addition in the regulatory arena is stretching the already straining resources of Community Banks. Do we really need to issue guidance that could severely affect small bank income and have the unintended result of adding to the number of unbanked consumers in these tough economic times?

Respectfully,

John R. Frey