

TO: OverdraftComments@fdic.gov
DATE: September 23, 2010
SUBJECT: Comment Letter RE: Overdraft Guidance – FIL 47-2010

Thank you for the opportunity to comment on the Overdraft Payment Supervisory Guidance – FIL-47-2010 Overdraft Payment Programs and Consumer Protection (“Guidance”) issued August 11, 2010. This comment letter is being written from the perspective of a regional community bank (“Bank”) with approximately \$3 billion in assets.

Given the extensiveness of the Guidance, it is difficult not to be apprehensive as to the expectations set forth therein. Additionally, the mere fact that the expectations are issued as Guidance, instead of through the regulatory process, creates some fear that Banks will be criticized for their decisions about following it. The Guidance is very subjective and does not fully describe expectations.

Compliance is complicated by the fact that institutions must now look at a fourth document – the 2005 Joint Overdraft Protection Guidance, revised Regulation DD and E, and now this newly proposed Guidance. This strains any good faith effort to understand the combined overdraft requirements by either financial institutions or examiners.

At a minimum, it would be helpful if the original Joint Overdraft Protection Guidance was rewritten instead, to include all requirements in one document. Even better would be a delay in the adoption of the Guidance until the FDIC has had the opportunity to work with the new Consumer Finance Protection Bureau to update and replace, rather than merely supplement, the original Overdraft Protection Guidance so that it addresses any new issues, provides consistency among regulators, and facilitates compliance. This would also provide the time needed for consumers and financial institutions alike to work through and fully understand the Regulation E changes, effective July 1, 2010, that required opt-in for the payment of one-time debit card and ATM transactions. Repeated updates to rules and regulations (or Guidance) causes confusion for all parties -- for financial institutions, for regulators, and especially for consumers, whom the rules are intended to help.

The following comments are made in the same order as the Supplemental Information included with the Guidance. If no comment is made in regard to a bullet point, it is because the Bank generally supports the suggested action(s).

Supervisory Expectations

It is certainly understandable that the FDIC expects institutions to present information accurately and not misleading, as their overdraft payment programs are updated. Existing Guidance already in place under Regulation DD addresses this requirement and the Bank is supportive and agrees with those requirements.

While the FDIC indicates it is particularly concerned about the risks posed by automated overdraft payment programs, the Bank wishes to point out that the use of such programs eliminates the discretionary decisions made by employees under an ad hoc overdraft program. Not only are automated programs more cost effective, they also provide for more consistent treatment of all customers, as the decision is not reliant on the subjective opinion of, or personal relationship with, a branch manager.

It would be helpful to have more a more detailed description of the FDIC's expectations in regard to "ongoing and regular board and management oversight" of overdraft programs. The Guidance does indicate an annual review would be appropriate, however this is limited to a review of the program's features. It would be easy enough to report on the features of the program; however, that information by itself would not be particularly meaningful. The Bank is concerned that this could morph into more statistical reporting of fees collected, number of consumers using the program(s), etc.

Monitoring programs for excessive or chronic customer use is easy enough; however, the suggested customer follow-up is not practical. It would not be effective for institutions to contact customers who repeatedly overdraw their account. At our Bank, customers are already repeatedly provided with information regarding less costly alternatives to the automated overdraft payment program, such as a linked savings account or a line of credit, subject to credit qualification. In addition, they are given the opportunity to opt-out of the automated overdraft payment program.

The Bank supports the recommendation that customers be provided with this information upfront as part of its regular program, or at a minimum the first time an overdraft is paid under the automated program. We believe customers have the right to this information, and that a financial institution has a responsibility to provide full customer disclosures as to overdraft alternatives. While the Guidance suggests contacting a customer after six transaction fees have been assessed, there is no explanation for how often the contact should occur. Would the additional contact be required one time? After every sixth overdraft? Once per year? Customers have a responsibility for conducting their transactions within their means and an obligation to be informed about their account balance. They are in the best position to know what their "actual" balance is – only they know what checks they have written, automatic payments they have authorized and debit card transactions they have engaged in. Regulations should not encourage customers to assume they may simply put their account on automatic pilot and rely on the institution to be their private accountant. The Guidance should not require that financial institutions perform that service, by requiring customer contact every sixth (or any other number) overdraft.

Regulation E Requirements

Of great concern is the implication in the Guidance that targeting customers who may be least able to afford such products can raise safety and soundness concerns about potentially unsustainable consumer debt, and could lead to Unfair and Deceptive Acts or Practices (UDAP). It is important that the FDIC remembers that institutions do not collect income information about its deposit customers and, thus, decisions regarding the payment of overdrafts are not made on that basis.

The Bank supports the idea that customers should all be provided with alternative overdraft options. We also hope, however, that the FDIC recognizes that institutions have little control over whether individual consumers would qualify for lines of credit -- whether a traditional overdraft line of credit or a Small Dollar Loan as defined by the FDIC -- or have enough money to maintain a linked savings account. When institutions inform customers of the various options, but the customer doesn't qualify for or choose another option, will the FDIC expect institutions to stop paying all items into overdraft for them or to close their account?

The Guidance indicates that the FDIC believes institutions should allow customers to decline overdraft coverage (i.e., opt out) for payments resulting from non-electronic transactions, such as paper checks or ACH transactions. This sounds like the same opt-in currently required for one-time debit card or ATM transactions. Will there be a prescribed notice for this purpose? If so, will the notice be combined with the existing opt-in required under Regulation E? Shouldn't Regulation E be amended to effectuate such a requirement? If a customer opted-out of all overdrafts, how is an institution to handle transactions that must be paid, such as debit card transactions that an institution can't stop.

The Guidance states that “inconsistent application of waivers of overdraft fees will be evaluated in light of all applicable fair lending statutes and regulations”. How would the FDIC review for potential discriminatory practices, in light of the fact that institutions do not collect personal information, such as age, ethnicity, income, etc., about its customers. Would there be specific reporting required by institutions related to fee waivers? Many factors are considered when institutions decide to waive fees, including overall account relationships (loans and deposits), average balance, frequency of overdraft occurrence, and other factors. If the FDIC intends to review the application of waivers for overdraft fees, it would be helpful to have more specific parameters, so that institutions are not subjectively criticized or charged with a claim of UDAP.

The Bank’s overall position on this Guidance is that it is premature, particularly given the impending rules and regulations surely to come from the Consumer Financial Protection Bureau. Compliance rules and regulations should be well thought out, with all regulating agencies on the same page. This would be better accomplished through regulations than Guidance, so that expectations are more clearly defined.

We appreciate the opportunity to comment on this Guidance and support updating and replacing the original Overdraft Protection Guidance. We strongly recommend, however, that the FDIC work with the other agencies or the Consumer Finance Protection Bureau to replace rather than supplement the existing guidance. Updated guidance should integrate changes to Regulations E and DD rather than add one more, separate layer of overdraft regulations. Guidance should also recognize that consumers overwhelmingly want important payments, such as check and ACH transactions, paid, even if it means incurring a fee.

Sincerely,

Peggy Herzog
Senior Vice President
Compliance Manager
Mechanics Bank
3170 Hilltop Mall Road
Richmond, CA 94806
Peggy_herzog@mechbank.com
510-262-7939