SWACHA
The Electronic Payments Resource®

September 24, 2010

By electronic delivery to:

OverdraftComments@fdic.gov

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429-9990

Re: Overdraft Payment Programs and Consumer Protection, FIL-47-2010

To whom it may concern:

SWACHA – The Electronic Payments Resource[1] appreciates this opportunity to respond to the proposed Federal Deposit Insurance Corporation's (FDIC) Financial Institution Letter articulating the FDIC's expectations for management and oversight of automated overdraft protection programs (the "Proposed Guidance").[2] While the Proposed Guidance addresses several issues and types of overdraft payment programs, we have limited our evaluation to how this guidance would apply to financial institutions processing debit transactions to consumer accounts through the ACH Network.

Comments

FDIC vs. Interagency Guidance SWACHA is concerned that the Proposed Guidance could have the effect of establishing a compliance expectations of financial institutions for which the FDIC is the primary regulator beyond what is now explicitly set out in Regulations E, DD and other existing consumer protection regulations. We are also concerned that its issuance by the FDIC alone, and not as interagency guidance, could lead to a disjointed view among consumers and across all financial institutions – regardless of charter type and primary regulator – as to compliance expectations with regard to overdraft policies. The fact that OTS may be issuing its own separate guidance will only compound industry confusion.

Ad Hoc Overdraft Programs SWACHA understands that the Proposed Guidance would be limited to automated overdraft payment programs and not embrace ad hoc overdraft programs. However, if the FDIC does issue final guidance, we believe it should make this distinction even clearer with specific language exempting ad hoc programs.

[1] SWACHA is a not-for-profit regional payments association representing over 900 depository financial institutions in Texas, Louisiana and New Mexico. The association supports its membership in development, implementation and understanding of the ACH operating rules and provides payments system education and training.

[2] FIL-47-2010 (August 11, 2010)

Transaction Posting Issues The Proposed Guidance would establish the expectation that financial institutions "review check clearing procedures to ensure they operate in a manner that avoids maximizing customer overdrafts and related fees through the clearing order. Examples of appropriate procedures include clearing items in the order received or by check number." While we understand the FDIC's desire to protect consumers in this regard, the expectation created and the examples given could be problematic and construed too narrowly. Payment transaction authorization, posting and settlement are complex processes and often entail multiple systems, multiple presentment times throughout a banking day and multiple third parties such as ATM networks, debit card processors and on-line banking platforms.

With respect to ACH transactions, there are a number of check conversion and check truncation applications that include the check number of the check from which the transaction was initiated (and this check number is printed to the customer's statement). Because of this, if an institution's posting routine is driven at least in part by check number, the Proposed Guidance may be read by some to imply that an institution merge its check processing and ACH processing routines together to permit ordering of transaction sequence prior to the act of posting. For an institution that is not already doing this for its own reasons, imposing this change on existing payment processing operations could be quite onerous (and the significance of this change could be compounded if different parties are providing check processing and ACH processing services).

Additionally, we are not comfortable with the Proposed Guidance identifying some but omitting other types of posting procedures (e.g., "High to Low") from what the Proposed Guidance explicitly deems "appropriate." We believe a consequence of this would be the limitation of procedures that financial institutions feel free to practice within their own discretion and to the benefit of their consumer customers. For example, many ACH transactions (including check conversion transactions with a check number) involve essential services like mortgage and installment loan payments, insurance premium payments, utilities, etc. These types of payments tend to be of relatively large value for consumer payments and it is clear that consumers want these payments made.

The FRB recognized this in its rationale for excluding ACH transactions from Regulation E's recently adopted opt-in requirements for overdraft services. In doing so, the FRB pointed to their consumer research demonstrating that most consumers appreciate overdraft protections for ACH transactions because (1) they have a strong interest in ensuring that the bills generally paid by ACH (including check conversion transactions) are paid and, (2) when those bills are not paid, consumers often incur NSF fees from both the biller and the financial institution, with non-payment possibly leading to negative credit reporting and loss of services.

One final concern we have with "appropriate procedures" for transaction posting is how the term "received" is to be interpreted. For ACH transactions, including check conversion transactions, the ACH Operator[3] prepares and makes available a file(s) of ACH debit and credit entries to the receiving institution. The receiving institution (or its processor) picks up its ACH file(s) at least once every banking day, processes the transactions and posts them to its customers' accounts. In this scenario, when would the FDIC view a particular ACH transaction as being "received?" When the file of ACH entries is made available to the receiving institution or when that institution actually picks up the file? Similarly, if the receiving institution uses a processor and there is a time lag between when the processor picks up the file from the Operator and

[3] The ACH Operators are the Federal Reserve Banks and the Electronic Payments Network (EPN) operated by The Clearing House.

when the receiving institution captures and process the transactions through its processor, at which point has receipt occurred?

Given the complexities associated with payment processing operations as they relate to posting and the desire to meet consumer needs flexibly and effectively, we believe the FDIC should avoid prescribing through guidance at this time explicit or implied posting sequence procedures.

Regulation E Compliance and Overdraft Coverage Opt-Out The Proposed Guidance states that "the FRB did not address the payment of overdrafts resulting from non-electronic transactions, such as paper checks or ACH transfers," earlier this year when it issued its Final Rule amending Regulation E. The Proposed Guidance goes on to state that "the FDIC believes institutions should allow customers to decline overdraft coverage (i.e., opt out) for these transactions and to honor an opt-out request."

SWACHA opposes any guidance that would have the effect of requiring financial institutions to employ a blanket opt-out (or opt-in) overdraft coverage policy to ACH transactions for the reasons stated above with respect to our concerns regarding "appropriate procedures" for check posting. To reiterate, the FRB considered including ACH transactions as covered transactions within any opt-out or opt-in overdraft coverage requirements when proposing changes to Regulation E. In reviewing the public comments and its own consumer research, the FRB specifically did not include such provisions in its final amendments. The rationale for not extending overdraft policy coverage to ACH transactions was because consumers prefer these transactions be paid to avoid the NSF fees and other consequences of non-payment. Also, the Proposed Guidance potentially creates a conflict within Regulation E where a consumer has affirmatively opted in (through written authorization) to a recurring ACH payment as required by the regulation and then would have to affirmatively opt in (again) for overdraft coverage for the same item, which could lead to consumer confusion and unintended consequences to the consumer.

SWACHA appreciates the opportunity to comment on these issues. We believe it is in the best interests of all users of overdraft payment programs for the Federal banking agencies to work together and develop consistent interagency guidance to address any perceived compliance gaps and consumer protection issues. This will ensure the objectives of effective consumer protections are met.

If I can be of further assistance, please do not hesitate to contact me at (214) 438-4501 or dennis.simmons@ swacha.org.

Sincerely,

DE Simmons

Dennis Simmons, AAP
President and Chief Executive Officer