From: Golliher, Ken [mailto:Ken@pegasusedu.net]
Sent: Sunday, September 26, 2010 10:39 AM
To: Overdraft Comments
Subject: Re: FIL 47-2010; Overdraft Payment Supervisory Guidance

Sir or Madam:

This is in response to a request for comment. My profession involves providing training for banks on compliance related issues including overdraft services. The opinions expressed are mine not those of my firm, my partners, or my clients.

The promotion of overdraft services and some banking practices used in handling items presented against insufficient funds are an embarrassment to the industry. Some practices reflect a well planned and executed scheme to take advantage of customers, turning a simple error into a financial disaster for some consumers. However, despite what the headlines and the regulatory pronouncements say, the vast majority of community banks are innocent of these practices.

Yet, all banks are directly affected by the "kick the can" method of regulation in this area. The can was first kicked with changes to Regulation DD, then interagency guidance (times two), then changes to Regulation DD and Regulation E, then "tweaks" to Regulations DD and E, then OTS guidance...

This proposed guidance is nothing more than the next "kick." There are an infinite number of ways it could be improved, but the most judicious response would be to abandon it. Its deficiencies include:

- The Federal Reserve Board of Governors (FRB) has rulemaking authority in conjunction with Regulations E and DD, not the FDIC. Yet, this guidance is aimed at issues already governed by those regulations. While the FRB has sagely consulted with itself and determined that it is empowered to add regulations to interpret statutes that contain no such dictates, there is no legal argument that the FDIC has similar powers.

- "Guidance" is entirely inappropriate for an area comprehensively addressed by regulation. It reflects a bureaucratic assumption of power without following either the legislative or rule making process. (The fact that the FDIC is seeking public comment on mere "guidance" suggests someone in your agency already knows that.)
- "Guidance" delegates substantial interpretive powers to field examiners. In some areas of the country, the 2005 Guidance is literally "enforced." In others, it is never mentioned. In the areas where it is enforced, it is not enforced uniformly. The standard regulatory response from inside the beltway is generally that the regulators are not aware of any such instances. Regardless, regulators know that not all of the dictates rendered by field personnel are reflected in the bank's written report of examination. Guidance is simply a license to regulate by intimidation.
- This field of regulation has changed dramatically since the interagency guidance was issued in 2005. Yet, instead of updating that missive, this piece will add an appendage that requires some bankers to go back and forth in their reading and attempt to figure out what it is they are "guided" to do as of today. Yet, banks supervised by agencies other than the FDIC have no reason to read it at all.
- If there is a legal foundation for guidance, the federal functional regulatory agencies should be able act in concert in presenting it. Instead they are going to afford differing "protections" to consumers depending on who their institution's regulator or even examiner in charge might happen to be. As it's very clear the regulators cannot agree on this issue, two of them must be operating on inspiration from two different divinities.

- The "supplemental information" that accompanies the proposed guidance contains specific statements that will lend themselves to "enforcement." If there is a legal foundation for guidance, you should simply say what you mean in that guidance without adding faux "supplemental information."
- The guidance fails to use legally defined or acknowledged terms where they exist; e.g. "overdraft services" or "promoted" overdraft services. Instead, it introduces a new term "automated overdraft payment plans." FYI, decisions regarding the payment of overdrafts have been *automated* in many banks for decades. Yet, that decision making mechanism was rarely if ever communicated to customers and did not induce them in any way to overdraw their accounts. By using an undefined term the FDIC is casting a broader net than warranted by any argument relating to consumer protection.
- The apparent statement of fact in the guidance, "*In contrast to automated overdraft payment programs, ad hoc overdraft payments typically involve irregular and infrequent occasions on which a bank employee exercises discretion in a specific instance about whether to pay an item or not"* bears no resemblance to the real world. It's been a few decades since I approved overdrafts each morning, but my frequent flyers were always on the list unless they happened to be on vacation. It is incredibly naïve to believe that the frequent overdrafters of the world were all induced into their position by banks that promoted overdraft services.
- Why on earth do banks need "guidance" that tells them to comply with their legal responsibilities to distribute disclosures and comply with Regulation E as amended? They will comply whether or not your agency guides them to the effort.
- I'm growing tired and my ability to maintain the illusion that public comments can offset regulatory inertia is waning, but I have to say that Pollyanna would be proud of the idea that banks should monitor customer overdrafts and "counsel" customers who rely on them to cease and desist. For a logical parallel, I imagine a consumer at the drive-thru ordering a Big Mac and the mechanical voice saying "Sorry pal, that would be your third one this week! We're giving you a salad instead."

To illustrate that my objection is to the methodology, not the goal:

- My belief is that creation of an overdraft is a single service for which there should be a single fee; five NSF items paid on the same day do not create five overdrafts and they should not generate five fees. On the other hand, five returned items generate five units of work and should generate five fees. A valid regulatory interpretation, not guidance, to this effect five years ago would have eliminated most of this worthless churning in the interim.

- My belief is that daily or sustained overdraft fees are very clearly a charge for the time value of money and should be governed by state usury laws and Regulation Z. A valid regulatory interpretation, not guidance, five years ago would have eliminated a lot more of the worthless churning in the interim.

You need to forgive my lack of a deferential tone; I know how obsequious commenters are supposed to be when they disagree with regulatory fiat. However, for the last 5 – 6 years your agency has been an active participant in putting me in front of one audience after another where I had to attempt to explain why the regulators punish the innocent with the same fervor as the guilty. I am tired of it.

You need to do something other than just kick the can one more time.

Kenneth W. Golliher
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