

**From:** Scott Carr [mailto:scarr@yourcommunitybank.com]  
**Sent:** Monday, September 27, 2010 10:48 AM  
**To:** Overdraft Comments  
**Subject:** Re: Overdraft Payment Programs and Consumer Protection, FIL-47-2010

September 27, 2010

By electronic delivery to:  
[OverdraftComments@fdic.gov](mailto:OverdraftComments@fdic.gov)

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

As a community banker, I appreciate the opportunity to comment on the Federal Deposit Insurance Corporation's proposed guidance on Overdraft Payment Programs and Consumer Protection as published on August 11, 2010 as Financial Institution Letter 47-2010.

While the majority of this guidance is merely a reiteration and reinforcement of existing joint guidance of overdraft payment programs, there is one section of the guidance which implements new requirements on only FDIC-regulated financial institutions. I believe that these new requirements would create a new unnecessary burden on FDIC-regulated financial institutions and provide us, an FDIC-regulated financial institution, with a strategic disadvantage to those not covered by this proposed rule (non-FDIC-regulated financial institution), if this proposal is approved as proposed. The applicable section is as follows:

- Monitor programs for excessive or chronic customer use, and if a customer overdraws his or her account on more than six occasions where a fee is charged in a rolling twelvemonth period, undertake meaningful and effective follow-up action, including, for example:
  - Contacting the customer (*e.g.*, in person or via telephone) to discuss less costly alternatives to the automated overdraft payment program such as a linked savings account, a more reasonably priced line of credit consistent with safe and sound banking practices, or a safe and affordable small-dollar loan; and
  - Giving the customer a reasonable opportunity to decide whether to continue fee based overdraft coverage or choose another available alternative.
  - The FDIC specifically seeks comment on whether an effective way to monitor for excessive use of automated overdraft programs would be for supervised institutions to contact a customer after the six transaction fees trigger and discuss available alternatives. The bank would explain, for example, that it also offers linked savings accounts, overdraft lines of credit or small dollar loans, each of which may be less expensive than the automated overdraft program. The consumer would then be asked to pick the available option he or she prefers to cover any future overdrafts, including the choice of opting in to the bank's overdraft program.

After careful thought and consideration, I believe that this section of the guidance is not effective as a "way to monitor for excessive use of automated overdraft programs." The following is my reasoning for each sub section noted above.

**Definition of "excessive or chronic customer use":** The proposed guidance defines excessive or chronic customer use as "if a customer overdraws his or her account on more than six occasions where a fee is

charged in a rolling 12-month period.” I would recommend that the FDIC review the recent amendments to Regulation D related to limiting the number of allowable transactions from a “savings deposit account.” In monitoring excessive transactions under Regulation D, the rule specifically states that the financial institution, “Adopt procedures to monitor those transfers on an ex post basis and contact customers who exceed the established limits [currently defined as 6 per statement cycle] on more than an occasional basis. For customers who continue to violate those limits after they have been contacted by the depository institution, the depository institution must either close the account and place the funds in another account that the depositor is eligible to maintain or take away the transfer and draft capacities of the account.”

The definition of “excessive or chronic customer use” should be defined, as the terms excessive transactions are defined in Regulation D, to include the specific number of fee-charged-overdraft transactions per statement cycle and the number of statement cycles per rolling 12-month. For example, it could be, “more than 6 fee-charged-overdrafts in a statement cycle, in more than 3 months in a rolling 12-month period.”

**Identification of Excessive or Chronic Usage Accounts:** In reviewing our system capabilities, it appears we would have a difficult time in identifying a specific number of overdrafts, such as six in a rolling 12-month period. It is my understanding that our system may be able to monitor such activity based on the previously described Regulation D monitoring (e.g., more than 6 fee-charged-overdrafts in a statement cycle, in more than 3 months in a rolling 12-month period). With that being said, to comply with these requirements as proposed, it would appear we would have to implement a cumbersome, manual process. Please understand that since this is simply guidance targeted at FDIC-regulated financial institutions software vendors may not address this change in their overall programming as it is not a formal rule or regulation, and it only applies to a section of the industry, banks regulated by the FDIC.

**Contacting the Customer :** The requirement the customer be contacted, “in person or via telephone”, appears to be excessive as current overdraft protection program guidance already requires this information be included in the program disclosures, which the customer receives when they agree to participate in the program. Additionally, “contacting the customer in person or via telephone” would appear to establish a new regulatory precedent, as most all other disclosure requirements in other regulations require notice be provided in writing and in a form the consumer can keep. Additionally, under the Do-Not-Call rules in the State of Indiana, it may not be permissible to contact a current customer to discuss “alternatives” to the Overdraft Protection Program, as it may appear that the financial institution is soliciting the customer to obtain new products or services such as another deposit account or applying for a line of credit. The Indiana Attorney General’s Office previously published a letter to financial institutions advising them that it was not permissible to contact customers on the state’s Do-Not-Call list to solicit their participation in the Opt-In/Out provisions of Regulation E. So the recommendation in the guidance may have a negative effect on financial institutions with financial centers in the State of Indiana. Also, in most instances, many consumers that excessively utilize overdraft protection do so because they usually do not qualify for the alternatives. Thus, the unnecessary burden resulting from this guidance would not prove effective.

**Giving the Customer Reasonable Opportunity to Decide:** When “giving the customer a reasonable opportunity to decide whether to continue fee based overdraft coverage or choose another available alternative,” does that mean that the financial institution, after the “customer overdraws his or her account on more than six occasions where a fee is charged in a rolling 12-month period,” should suspend the payment of any item that may overdraw their account until such time they make a decision? This requirement would cause great confusion amongst customers that utilize overdraft protection. Their access to the service may be suspended prior to them being notified and cause more financial hardship on them as all items presented will be returned and they may be charged return item fees from other financial

institutions and/or merchants. I believe that if a customer has opted-in to participate in an overdraft protection program in which they are provided with a disclosure that specifically defines, in accordance with rules and regulations currently in place for addressing such programs, the procedures to opt-out of further participation, no further communication should be required. On a monthly basis, in accordance with the amendments to Regulation DD, the customer is receiving a statement that reflects the total fees charged to them for items that cause their account to become overdrawn. Having additional procedures in place to ensure that customers pay attention to their own finances is an additional regulatory burden on financial institutions regulated by the FDIC and relieves the consumer from being responsible for their finances. There is a cost to implementing these additional procedures and those costs may be passed on to the customer.

Again, I appreciate the opportunity to comment on these important issues. I understand and support the FDIC's efforts to identify existing compliance gaps and to address them. As previously stated, I believe that this proposed guidance imposes new regulatory requirements on only FDIC-regulated financial institutions and feel it would provide an unfair advantage to those financial institutions not covered by the guidance. I urge the FDIC to refrain from imposing these requirements and work with the other banking agencies to draft interagency guidance to address these concerns.

Sincerely,

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