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September 27, 2010

By electronic delivery to:
OverdraftComments@fdic.gov

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

Re: Overdraft Payment Supervisory Guidance, FIL-47-2010, August, 11, 2010

Dear Sir or Madame:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) proposed supervisory guidance addressing overdraft payment programs issued in Financial Institution Letter (FIL)-47-2010.

Background

This proposed guidance builds upon the 2005 Joint Guidance on Overdraft Protection Programs Feb. 18, 2005 (FIL-11-2005) and the Federal Reserve Board's (Board) amendments to Regulation DD (Truth in Savings) and the Nov. 12, 2009 amendments to Regulation E (Electronic Fund Transfers).

¹The Independent Community Bankers of America represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold \$1 trillion in assets, \$800 billion in deposits, and \$700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

On April 26, 2010, the Office of Thrift Supervision issued proposed Supplemental Guidance intended to convert many of the current best practices recommendations to requirements with failure to comply resulting in violations of the Federal Trade Commission (FTC Act) prohibition against unfair or deceptive acts or practices.

The FDIC's proposed guidance takes a more limited approach, and seeks to address risks posed by automated overdraft programs. While the proposal states that ad hoc overdraft payment programs are not the focus of the guidance, it does not specifically exempt these programs from this guidance.

ICBA Position

While ICBA understands the FDIC's objective of protecting consumers from unfair or deceptive acts or practices, we strongly urge the FDIC to table this proposal for several reasons.

First, we do not believe it is prudent for the FDIC to proceed with finalizing new guidance as the industry has recently complied with the new regulatory requirements governing overdraft payment imposed by amendments to Regulation DD (Truth in Savings) and Regulation E (Electronic Fund Transfers).

The Regulation DD amendments, effective Jan. 1, 2010, add requirements designed to ensure consumers receive disclosures regarding the aggregate total of all overdraft and return fees for the statement period and year-to-date. The amendments also improve consumer balance information provided via automated systems by prohibiting banks from including in the balance amount funds available from overdraft payment services unless the amount attributable to overdraft payment funds is prominently disclosed.

The new Regulation E rule, effective July 1, 2010, prohibits financial institutions from charging consumers (both existing and new account holders) a fee for paying overdrafts on ATM and non-recurring point-of-sale (POS) debit card transactions unless the consumer affirmatively consents, or opts in to overdraft payment for these transactions.

Financial institutions of all sizes and charter types have spent countless manpower hours and dollars to comply with the new rules. Now is not the time to subject financial institutions to additional regulatory uncertainty and burden as the financial services industry makes good-faith efforts to provide overdraft payment that is in compliance with the new rules. Moreover, ICBA believes it is unwise to issue guidance based on a two-year-old study, the FDIC's November 2008 Study of Bank Overdraft Programs, and on consumer complaints submitted prior to the industry's implementation of the new rules referenced above.

Instead of proceeding with additional regulatory requirements, ICBA strongly urges the FDIC to institute an educational program to raise banker awareness regarding consumer complaints and examiner findings in the first year following adoption of the new Reg DD and Reg E rules.

Second, the FDIC should avoid issuing any independent guidelines that would create a bifurcated regulatory framework for overdraft services – one for FDIC-regulated banks and one for everyone else. It would be gravely unreasonable to subject one segment of the industry to new and additional requirements.

Lastly, ICBA is deeply concerned that elements in this proposed guidance will ultimately do a great disservice to consumers. The vast majority of community banks provide overdraft payment – either automated or on an ad hoc basis, to their customers. Those that offer the service report that it is highly valued by customers, who perceive it as a safeguard against an accidental overdraft that would otherwise result in a bill being returned unpaid or a merchant-imposed fee being levied.

If regulatory barriers and requirements become too burdensome, community banks will discontinue these services. And, as a result, would be more likely to reject a check or other debit transaction, exposing consumers to fees far greater than the overdraft fees currently imposed by community banks.

Summary of ICBA Comments

Below, please find a summary of our general comments in the unfortunate event the FDIC nonetheless proceeds with adoption of the proposed guidance.

- ICBA appreciates FDIC efforts to limit the focus of this guidance to automated overdraft payment programs as noted in the supervisory expectations section of the guidance’s supplemental information. However, ICBA strongly urges the FDIC to specifically exempt ad hoc overdraft payment programs from this guidance.
- ICBA strongly opposes ongoing and regular board and management oversight of overdraft payment program features and operations, including an annual review of program features, as it is excessive and particularly burdensome for community banks.
- ICBA vehemently opposes the requirement that financial institutions should monitor programs for excessive or chronic customer use—triggered by six occasions where a fee is charged in a rolling twelve-month period—and then contact the customer (in person or via telephone) to discuss less costly alternatives (including “a safe and affordable small-dollar loan”) to the automated overdraft program. This requirement is extremely burdensome

and operationally unworkable to financial institutions and should be removed from the guidance. Specifically, ICBA strongly opposes this because:

- The trigger of six fees charged is too low and the amount of time for monitoring is too long. This would result in an excessive number of calls, causing financial institutions to either discontinue the overdraft payment program, or to close the customer's account and return all transactions.
 - The requirement of either phone or personal contact is not reasonable and would not always be effective as the customer may not pick up the phone or be willing to engage in a personal discussion about their overdrafts even in person.
 - Since the proposed requirement is triggered every six fees or every month (when the rolling period goes to 12 months), consumers will regard the calls as harassment and ignore the financial institution's calls.
- ICBA vehemently opposes any efforts to set daily thresholds on overdraft fees, as these fees are priced to off-set financial institutions' risks and as an incentive to encourage more financially-responsible practices.
 - ICBA urges the FDIC to be mindful that most community banks excel in customer-focused personalized service. In many cases, this is more effective education than financial education workshops or individualized financial counseling.
 - ICBA strongly urges the FDIC not to dictate the precise order of posting, but instead, prohibit overt manipulation of transactions to maximize fee income.
 - ICBA urges the FDIC to exercise caution when extending consumer choice by allowing consumers to opt out of overdraft payment for check and ACH transactions. ICBA would only support an opt-out for checks and ACH if financial institutions would still be able to charge a fee for returning the items. Processing return checks and ACH items represent expense and employee attention and should not be free of charge.
 - Overall, ICBA urges the FDIC to ensure that the guidance does not impede financial institutions' ability to provide overdraft payment services to their customers. If community banks are forced to abandon or significantly alter these services due to regulatory burden and the inability to reduce the commensurate risk, the result could lead more consumers into becoming unbanked or relying on other products such as prepaid debit cards and check

cashing services, which have higher fees and foster unsound financial practices.

ICBA comments are addressed in greater detail below.

The Community Bank Service Model.

Many community banks offer overdraft services that are not automated – meaning that overdrafts are reviewed on an ad hoc basis by community bank staff to determine which overdrafts should be paid or returned the next business day. This review is done as a customer service and is based on the bank’s knowledge of and experience with the individual customer and his or her account history. It is common for community banks to contact customers to discuss overdrafts and ascertain when customers are able to make deposits. In most instances, this is widely appreciated by community banks’ customers who avoid the embarrassment of a returned check, costly late fees or merchant returned check fees, and the possible cancellation of a valuable service or contract (e.g. utility or insurance).

ICBA understands the FDIC’s concern that some financial institutions may be using overdraft payment as a way to generate higher fees and revenue for the financial institution -- often at the customer’s expense. This is not, however, a practice of community banks whose business model is predicated on personalized customer service tailored to their customers’ needs. If community banks were to engage in “price-gouging” tactics, community banks would have greater difficulty doing business in their communities.

Exempting Ad Hoc Overdraft Payment.

The supplemental information to the proposed guidance notes that ad hoc overdraft payment programs are not the focus of the guidance, yet these programs are not specifically exempted.

ICBA Comments:

If the FDIC deems it appropriate to finalize the proposed guidance, ICBA strongly urges the FDIC to specifically exempt ad hoc programs in keeping with the supplemental information to the guidance. By focusing the guidance on automated overdraft payment programs and specifically exempting ad hoc programs, the FDIC recognizes the distinction between the two programs.

ICBA believes provisions such as daily limits on fees, account monitoring and posting order are irrelevant for institutions that cover overdrafts on an ad hoc basis. In these instances there is no formal process of when and how overdrafts would be covered.

Monitoring Overdraft Activity.

The proposed guidance requires that financial institutions monitor programs for excessive or chronic customer use—triggered by six occasions where a fee is charged in a rolling twelve month period—and then contact the customer (in person or via telephone) to discuss less costly alternatives (including “a safe and affordable small-dollar loan”).

ICBA Comments:

ICBA vehemently opposes this requirement as it is extremely burdensome and operationally unworkable to financial institutions and should be removed from the guidance

The trigger for this contact, six fees in a rolling 12-month period, is very low and most likely would be a nuisance to the consumer, who would likely avoid the contact. This is the opposite of the community bank model that leverages knowledge of the customer (his/her banking habits and preferences) into constructive assistance (done in a discrete and individualized manner that is usually welcomed by the customer). If contact occurs every six fees (as outlined in the proposal) it would be counterproductive to good service and would most likely be ignored by the customer or viewed as harassment. Worse yet, it would convert the strong relationship that community banks foster with their customers into an adversarial one.

Additionally, this requirement is extremely burdensome and operationally unworkable for financial institutions, which may not have the customer’s current phone number, and may not possess the staffing to contact every customer. Financial institutions then have to choose between absorbing enormous expenses or closing accounts.

Effect on the Unbanked.

Despite noble intentions, ICBA has great concerns that the guidance, as currently drafted, will make it more difficult, especially for community banks, to provide overdraft services, (including overdraft payment on checks and ACH transactions) to their customers and will lead to the complete elimination of this valuable service. As a result, consumers will incur returned-item fees as well as higher merchant fees and any merchant late fees. The lack of this customer service will lead more consumers to become unbanked or to rely on other products such as prepaid debit cards which have higher fees and foster unbanked habits. If the FDIC and the other banking agencies want to encourage greater financial literacy among consumers, it should be their goal to ensure that financial institutions can provide services to their customers without extensive and variable regulatory burdens. Without significant revision the proposed guidance and its added regulatory burden would only further discourage financial institutions from providing any overdraft payment services, which will greatly disadvantage their customers.

ICBA strongly urges the FDIC to ensure that the guidance does not impede financial institutions' ability to provide overdraft payment services to their customers. If community banks are forced to abandon or significantly alter these services due to regulatory burden and the inability to reduce the commensurate risk, the result could lead more consumers into becoming unbanked or relying on other products such as prepaid debit cards and check cashing services, which have higher fees and foster unsound financial practices.

ICBA is also concerned that increasing the risk related to overdrafts would result in financial institutions revising their account opening policies to be more stringent to mitigate this increased risk. Such standards would result in the unintended consequence of increasing the number of unbanked consumers and forcing them to rely on costly services such as prepaid debit cards and check cashing services.

Providing Information About Other Alternatives.

The proposed guidance recommends that financial institutions provide information about other overdraft services such as overdraft payment through linked accounts or lines of credit, or small dollar loans.

ICBA Comments:

ICBA appreciates the FDIC's efforts to ensure consistency with the recent amendments to Regulation E, which already requires financial institutions to provide consumers a separate disclosure and consent notice in writing, or if the consumer agrees, electronically, containing a description of all overdraft services offered by the institution, such as credit lines and transfers from another account.

Review of Posting Order Procedures.

The proposed guidance states that financial institutions should review check-clearing procedures to ensure they operate in a manner that avoids maximizing customer overdrafts and related fees through the clearing order and recommends clearing items in the order received or by check number.

ICBA Comments:

ICBA believes that financial institutions should not be allowed to manipulate transaction clearing policies in order to generate more overdraft payment fees -- a practice that is not common among community banks. However, any guidance should be written to allow financial institutions, on a customer-by-customer basis, to change whatever transaction clearing policy they consistently use at the request of the consumer or if it would benefit the consumer.

A community bank that offers overdraft payment on an ad hoc basis may typically pay transactions low to high in order to avoid the customer incurring more than one overdraft fee, but may make an exception to this policy by paying a higher mortgage payment first to protect the customer from the repercussions of a returned check for such a significant payment. Often, these decisions are made by community bankers after they have contacted the consumer and received direction from the consumer. Therefore, for these types of ad hoc programs there is not a formal policy that is always applied regarding the order that overdrafts should be paid.

In addition, for some financial institutions that offer an automated overdraft payment program, there usually is a formal policy of how items are to be paid, i.e., largest to smallest, smallest to largest, order received or by check number. Community banks with automated overdraft payment services will still review the overdrafts, and if there is a large or significant check returned unpaid, they will contact the customer to ask if he/she would rather have this check paid over other items. Again, this manual intervention is typical for community banks because they have closer relationships with their customers and have a better understanding of their banking habits than larger, less-personal financial institutions. This provision does not address this type of manual intervention in the transaction clearing process, and should therefore not be included in the final guidance.

One of the primary reasons why customers value community banks is because they are small enough that they have the flexibility to provide these types of personalized services to their customers. Further unnecessary regulation by the agencies must not impede an institution's ability to continue to serve their customers. This best practice should expressly state that financial institutions can have this flexibility in processing checks and other debit transactions, as long as there is not a policy of doing so as a means to generate greater customer fees.

Provide Consumer Choice by Enabling Customers to Opt Out of Payment for Check and ACH Transactions.

In the proposed guidance the FDIC states that financial institutions should allow customers to decline overdraft payment (*i.e.*, opt out) for check and ACH transactions and honor an opt-out request.

ICBA Comments:

ICBA supports this provision provided that there is no fee prohibition for returning a check. When a check or ACH transaction is returned as unpaid, consumers would still receive a returned fee, but unlike with overdraft payment, would also incur merchant fees and possible late fees if the returned item causes a late payment. Community bank customers value overdraft payment for check and ACH transactions and there are very few, if any, circumstances in which a consumer would opt out of this overdraft payment. However, returning the transaction is not

without expense to the bank and extending the prohibition to returned check and ACH items would encourage financial irresponsibility by eliminating a fee for the returned item.

Daily Limits on Overdraft Fees.

The proposed guidance states financial institutions should set appropriate daily limits on customer costs by, for example, limiting the number of transactions that will be subject to a fee or providing a dollar limit on the total fees that will be imposed per day.

ICBA Comments:

ICBA maintains however, that community banks' business model would render the decision to overcharge customers for overdrawn accounts unwise. Moreover, because community banks reach out to customers who frequently overdraw their accounts they are able to offer alternative credit options so customers are not put in the position of relying on overdraft programs and incurring excessive fees for overdrafts. Community banks' ongoing review of consumers chronically overdrawing affords the bank the last-resort option of closing the customer's account.

Moreover, because community banks reach out to customers who frequently overdraw their accounts they are able to offer alternative credit options so customers are not put in the position of relying on overdraft programs and incurring excessive fees for overdrafts. Moreover, community banks' ongoing review of consumers chronically overdrawing affords the bank the last-resort option of closing the customer's account.

Placing limits on daily fees will encourage customers to draw on funds they do not have, rather than seeking short-term credit.

Conclusion

ICBA strongly urges the FDIC to table this proposal. It is not prudent to finalize the proposal and impose additional and costly regulatory burden on financial institutions given the new Regulation DD (Truth in Savings) and Regulation E (Electronic Fund Transfers) requirements governing overdraft services. Additionally, this proposed guidance unreasonably targets financial institutions only and creates an uneven playing field amongst financial institutions.

Lastly, and most importantly, this is bad for consumers. Community banks provide overdraft services as an extension of their commitment to provide the highest level of customer service. If regulatory barriers and requirements become too burdensome, community banks will discontinue these services.

If, in light of the above concerns, the FDIC chooses to continue with the guidance, ICBA urges the FDIC to:

- exempt ad hoc or non-automated overdraft payment services from the final FIL;
- understand and factor in the operational differences between community banks and larger financial institutions;
- eliminate the requirement to monitor consumer accounts and take meaningful action to educate the customer on other alternatives;
- eliminate the requirement of daily overdraft fee limits; and
- eliminate a prescribed posting order.

ICBA is happy to meet with the FDIC to discuss the concerns presented in this letter, and we encourage the FDIC to contact us at any time. Please do not hesitate to contact me at (202) 659-8111 or by e-mail at cary.whaley@icba.org.

Again, thank you for the opportunity to comment.

Sincerely,

/s/

Cary Whaley

Vice President, Payments and Technology Policy

cc: Federal Reserve Board
Office of Comptroller of the Currency
Office of Thrift Supervision