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Federal Deposit Insurance Corporation

550 17th Street, N.W.

Washington, D.C. 20429-9990

Via email:	OverdraftComments@fdic.gov

Re: **Overdraft Payments and Consumer Protection, FIL-47-2010**

Ladies and Gentlemen:

The New York Bankers Association (NYBA) welcomes the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) Financial Institution Letter (FIL), which details the Corporation's expectations for the management and oversight of overdraft protection programs. NYBA is comprised of the community, regional, and money center banks and thrift institutions doing business in New York State, employing almost 250,000 New Yorkers. NYBA member banks have, in the aggregate, approximately $9 trillion in assets.

NYBA supports interagency efforts that provide clear direction to depository institutions and examiners on the FDIC's expectations regarding overdraft protection programs. However, we are concerned that the FIL goes well beyond setting forth supervisory expectations, by also imposing new onerous regulatory requirements – such as mandating intervention or requiring caps on the coverage elected by customers. We further believe that these new requirements are contrary to the policies of customer choice embedded in the Federal Reserve Board's (Board's) regulations.

Our specific concerns are set forth below:

> **The FDIC should not use a Financial Institutions letter whose goal is to conform past supervisory guidance on overdraft protection programs with the recent changes to Regulations E and DD, to impose new and onerous regulatory requirements.**

Currently, the state of overdraft services across the industry is unsettled. Until the impact of the recent amendments to Regulations E and DD has been thoroughly examined and understood, NYBA recommends that the FDIC not impose supervisory expectations based on presumptions about bank practices and consumer choices that have not been tested under the new regulatory framework.

In this regard, it should be noted that the recent amendments to Regulation E and DD precipitated significant changes to the business model for standard overdraft protection services and required substantial operational, communications, and compliance changes in a relatively short time period. Imposing new, additional requirements at this time would only add unnecessary complications, and uncertainty into overdraft compliance for consumers, bankers and examiners. Moreover, such new requirements would, in effect, mean that financial institutions would have to incur extensive compliance costs twice – and possibly even three times – in a fragile economic environment with no measurable benefit to consumers.

> **The recently amended regulations provide for consumer choice and flexibility. Yet, the FDIC, in its FIL, is proposing a hard definition of "excessive use" and follow-up requirements that are contrary to these regulatory goals.**

The new regulatory framework is designed to empower the consumer. For example, amended Regulation E not only establishes a consumer opt-in for ATM and one-time, point-of-sale debit card transactions, but also guarantees the consumer's right to revoke his or her opt-in at any time. Additionally, consumers are to be provided with clear disclosures on their periodic statements of all NSF and overdraft fees. Thus, customers who opt in will be making an informed choice, and are free to discontinue the service at any time.

Given the regulatory commitment to consumer choice, flexibility and disclosure, NYBA believes that there would be little consumer benefit in the imposition of new and onerous requirements to monitor overdraft programs for "excessive or chronic" customer use. Additionally, the suggestion that financial institutions follow up with customers in person or by telephone would impose a largely unworkable, unnecessary and costly procedure for customers who have pro-actively chosen the opt-in service. Taken together, these requirements could be seen as imposing a duty to stop the use of overdraft services despite the customer's wishes. As a result, NYBA believes that such requirements could, in fact, serve to drive consumers away from the traditional banking system.

Given that regulatory amendments have ensured consumer choice in opt-in overdraft protection programs, there is no need for an FDIC requirement that establishes a cap on daily consumer costs.

The FDIC states its expectations that its supervised institutions "institute appropriate daily limits on consumer 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." Again, given the level of consumer choice, flexibility, and disclosure required by recent regulatory changes, we do not believe the FDIC should impose additional, new mandates regarding limits on consumer costs. Every customer is now empowered to specifically choose overdraft protection and is given the tools and the authority to manage their use of the program. Moreover, many banks are already incorporating an array of features – including, among others, daily and monthly overdraft limits - into their own programs, allowing customers to choose their own overdraft program terms among a wide range of choices offered by competing institutions. Further regulation would, unfortunately, impede the ability of individuals to make their own informed decisions in selecting an overdraft program that makes the most sense for them, once more evading the new regulations' focus on personal informed choice and responsibility.

The Federal Reserve Board is currently reviewing the practices with regard to the order in which checks are cleared. The FDIC, therefore, should not present supervisory expectations on payment order until the Federal Reserve Board has completed its work on this topic.

Despite market research that illustrates many consumers' preference for their largest checks (which may include mortgage, automobile, medical and other critical payments) to be paid first and given priority treatment by their financial institution, the Federal Reserve Board is currently conducting a review of this matter and is considering promulgating a rule on payment order. Given the potential need for processing system changes, new disclosures and customer confusion and dissatisfaction, the FDIC should delay expressing a supervisory expectation regarding payment order until the Federal Reserve has completed its review.

The FDIC should clarify that (i) follow-up communications with customers do not constitute unlawful targeting or steering and (ii) that offering an opt-out for overdraft coverage for check and ACH transactions is not a regulatory requirement.

We are aware that Regulation B precludes banks from discriminating against applicants on a prohibited basis in any aspect of a credit transaction – including targeting certain consumers on a prohibited basis for overdraft protection programs while offering other consumers overdraft lines of credit or other more favorable credit products or overdraft services. We urge, however, that the FDIC clarify to its examiners that bank communications with customers who have used overdraft services in the past – including follow-up outreach to ensure that the consumer received and considered the opt-in notice – is not, standing alone, unlawful targeting or steering.

Additionally, we urge the FDIC to clarify that it is not a regulatory requirement that financial institutions offer an opt-out for overdraft coverage for check and ACH transactions, notwithstanding its statement that "institutions should allow customers to decline overdraft coverage (i.e., opt out)" for check or ACH transactions. This is particularly true, as statements of supervisory expectation should not be used to impose new regulatory mandates.

The FDIC has articulated an expectation that a bank's board of directors has the responsibility for "ongoing and regular board and management oversight of program features." While bank boards may be encouraged to review broad statements of policy, they should not be expected to provide ongoing oversight of overdraft program features.

Banks' boards of directors do not have the expertise to undertake the oversight of overdraft protection programs. Charging directors with the authority to oversee overdraft programs would strip knowledgeable and trained managers of their ability to make changes and adjustments to the program as market needs dictate, and would inappropriately impose a managerial duty on a board of directors that it has neither the time nor expertise to undertake. Directors do not manage bank compliance, but rather are dedicated to the strategic guidance and corporate governance of their financial institutions. Altering those roles in the overdraft context is a misuse of board expertise, and should not be imposed as a supervisory expectation in a financial institution letter or other general agency guidance.

NYBA commends the FDIC’s efforts to enhance consumer protections surrounding overdraft protection programs. However, NYBA is concerned that many of the statements in FIL-47-2010 unnecessarily layer new and onerous expectations on top of a new regulatory framework that has yet to be tested. Moreover, setting new requirements through an individual agency financial institutions letter – rather than through an interagency guidance – will create confusion and inconsistency for banks and their customers.

Sincerely,

Michael P. Smith

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