September 27, 2010

Attention: Overdraft Comments
Federal Deposit Insurance Corporation
550 17th Street N.W.
Washington, D.C. 20429-9990

Re: Comment on Overdraft Payment Programs and Consumer Protection Financial Institution Letter - FIL-47-2010 (Aug. 11, 2010)

Dear Sirs and Madams:

The Clearing House Association L.L.C.[1] ("The Clearing House") respectfully submits this comment letter in response to an invitation to comment on Financial Institution Letter 47-2010, entitled "Overdraft Payment Programs and Consumer Protection," issued by the Federal Deposit Insurance Corporation ("FDIC") on August 11, 2010 ("Overdraft Guidance" or "Guidance").

The Overdraft Guidance supplements recent Federal Reserve Board ("Board") amendments to Regulation E[2] by setting forth the FDIC's expectations for FDIC-supervised institutions that offer products with overdraft features. The Clearing House respects and appreciates the FDIC's efforts at providing clarity with respect to the agency's supervisory expectations. The Clearing House also appreciates the opportunity to comment on the Guidance and welcomes future dialogue on this matter.

---

[1] Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs and white papers the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

[2] 74 Federal Register 59033 (November 17, 2009). The complete text of Regulation E can be found at 12 C.F.R. Part 205.

The Clearing House Association L.L.C. : 450 West 33rd Street : New York, NY 10001
Phone 212.613.0100 : Fax 212.613.0184 : www.theclearinghouse.org

As further explained below, The Clearing House has several comments to the Overdraft Guidance, which include (1) general comments regarding the Overdraft Guidance set forth in section I of this letter, (2) specific comments to the overdraft-related supervisory expectations outlined in the Guidance set forth in sections II through VIII of this letter, (3) comments regarding the section of the Guidance related to Regulation E set forth in section IX of this letter; and (4) comments to the examination section of the Guidance in section X of this letter.

I. Comments to Overdraft Guidance At Large

With respect to the Overdraft Guidance, as a whole, The Clearing House believes that certain aspects of the Guidance are more appropriately suited to be addressed through a formal rulemaking process. Specifically, some areas of the Overdraft Guidance are consistent with the function of interpretive agency guidance, which is to clarify existing legal requirements.[3] However, in other areas the Overdraft Guidance goes beyond the function of interpretive guidance, procedural guidance or policy statements, and instead creates a framework of substantive requirements that have not been appropriately developed through the regulatory procedural requirements set forth in the Administrative Procedures Act and do not take into consideration stakeholder interest.[4] The Clearing House does not believe that these new

---

[3] The function of interpretative guidance is to clarify or explain existing law. Guidelines, general statements of policy, memorandum and pamphlets published by an agency are characterized as interpretive and do not have the effect of binding law. *See* 5 U.S.C. §553(b)(A)-(B) (2010) (providing a statutory exemption from the notice-and-comment requirements set forth in the Administrative Procedures Act ("APA") for agencies with respect to "interpretative rules, general statements of policy"); *see Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (noting that "if a rule is 'substantive' the [APA] exemption is inapplicable, and the full panoply of notice-and-comment-requirements must be adhered to scrupulously"); *see also Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (noting that "courts have struggled with indentifying the difference between legislative rules and interpretive rules," but have generally arrived to the conclusion that "interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule") (*citing to Yesler Yerrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). The Court also noted that "[l]egislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Id.*

[4] Unlike interpretive guidance, a rule promulgated by an agency modifies or effects current law. When an agency is engaged in rulemaking it must follow the notice-and-comment requirements set forth in the APA. *See* 5 U.S.C. §553(b) (requiring an agency to publish a general notice of proposed rulemaking in the Federal Register which must include (1) the nature of the rulemaking, time and place; (2) reference to the legal authority pursuant to which the proposed rulemaking is promulgated; and (3) a description of the proposed rulemaking's substance). An agency can only issue a rulemaking without providing advance notice to the public if "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *See also Prof'ls & Patients for Customized Care* 56 F.3d 592, 595 (acknowledging that the APA does not define "substantive rules," "interpretive rules," or statements of policy," but noting that "courts over the years have developed a body of jurisprudence" that provides a helpful framework in distinguishing among the three types of rules"); *Sekula v FDIC,* 39 F.3d 448, 457 (3d Cir. 1994) (recognizing that "[i]nterpretive rules are not intended to alter legal rights, but to state the agency's view of what existing law requires").

substantive expectations are necessary, as discussed in detail throughout this letter. In particular, The Clearing House believes that Regulation E and Regulation DD[5] afford consumers a great deal of protection in the form of detailed disclosures and the requirement that a consumer opt in to an overdraft program for ATM and one-time debit transactions. Accordingly, additional expectations at this point in time would be overly burdensome and unnecessary. If, however, the FDIC proceeds with these expectations, The Clearing House respectfully recommends that the FDIC address these issues through a formal rulemaking process.

The areas of the Guidance that we believe are *interpretive in nature* – in that they clarify existing legal requirements – and that are therefore appropriately suited to be included in interpretive guidance are the expectations that institutions: (1) review overdraft program materials within existing review channels, (2) train employees through existing training programs, (3) mitigate risk, as appropriate, through the institution's existing risk mitigation processes, (4) provide customers with account balances that exclude overdraft protection coverage, and (5) allow institutions flexibility in determining the financial education-related information they provide to consumers.

Conversely, the areas in which the Overdraft Guidance does not merely interpret existing requirements and instead *imposes new duties upon depository institutions* include the expectations that: (1) a depository institution's board oversee overdraft programs, (2) depository institutions monitor overdraft activity and engage in customer outreach to promote alternative products; (3) depository institutions establish daily overdraft limits; and (4) depository institutions expand their Regulation E overdraft compliance to check and ACH transactions, particularly where the Federal Reserve Board purposefully decided to exclude such transaction types from its overdraft rulemaking under Regulation E. As noted above, these latter expectations and possibly others discussed in this letter involve new substantive obligations (rather than clarifying existing requirements), compliance with which would involve considerable, substantive changes to institutions' systems and operations, which would be both costly and burdensome. The Clearing House does not believe that these new substantive obligations are necessary for the reasons discussed in detail throughout this letter, including that Regulation E and Regulation DD already afford consumers adequate protection in the relevant areas (including detailed disclosure and opt in).

Specifically, under recent amendments to Regulation E, consumers cannot be charged an overdraft fee for an ATM or one-time debit transaction unless: (1) the depository institution provides the consumer with a detailed written notice, segregated from all other notices, describing the institution's overdraft program; (2) the institution affords the customer a reasonable opportunity to affirmatively consent to the program; (3) the consumer affirmatively consents to participate in the program; and (4) the institution provides written confirmation of the consumer's consent and includes a statement informing the consumer of the right to revoke such consent. In addition, Regulation DD imposes disclosure obligations that are both consistent with the requirements of Regulation E and that go beyond the such requirements to

---

[5] 75 Federal Register 31673 (June 4, 2010). The complete text of Regulation DD can be found at 12 C.F.R. Part 230.

provide even further consumer protection regarding covered bank products. Accordingly, a consumer may only be charged an overdraft fee for ATM and one-time debit transactions once the consumer has been *fully informed* about the program and has *affirmatively consented* to the imposition of such fees. Given this high level of consumer protection, and the significant burden on institutions of implementing the many new expectations set forth in the Guidance, The Clearing House believes the new expectations to be unnecessary and overly burdensome. If, however, the FDIC proceeds with these expectations, The Clearing House strongly advocates that the FDIC address these matters through a formal rulemaking process.

In addition, because institutions are continuing to adapt to newly effective provisions of Regulation E (which became effective on July 1, 2010) and Regulation DD (most of which became effective on July 6, 2010; and one provision of which will not become effective until October 1, 2010), The Clearing House believes that the Overdraft Guidance is premature. The changes required by Regulation E and Regulation DD involve significant modifications to depository institutions' business models, systems, and operations (including policies, procedures and controls) and it will take time for institutions to refine these changes to ensure effective and efficient compliance. Thus, The Clearing House strongly recommends that the FDIC table the Overdraft Guidance in order to allow time for (1) depository institutions to appropriately refine their Regulation E and Regulation DD compliance efforts, (2) institutions and customers alike to become accustomed to the changes brought about by the revisions to Regulation E and Regulation DD and the ways in which they impact products, customer behavior and the marketplace as a whole, and (3) all interested parties, including depository institutions, the FDIC, the Federal Reserve Board and other federal regulators, to fully realize the way in which the new provisions of Regulation E and Regulation DD impact the industry and the regulatory needs generated by those changes. Once this has occurred, The Clearing House believes that the FDIC will have more detailed information in regard to customer behavior and the corresponding consumer protection measures that institutions may need to undertake. At that time, the FDIC can best determine whether overdraft guidance is warranted, and if so, issue overdraft guidance that is most effective.[6]

With those generally applicable observations, below are The Clearing House's comments on the specific measures outlined in the Guidance.

---

[6] The Clearing House further notes that overdraft protection and related matters (including fees, limitations, check processing order, disclosure requirements, customer needs and preferences, among others) are extremely complex and involve important implications for customers and depository institutions, alike. For this reason, The Clearing House believes that new expectations and requirements should be imposed only after the appropriate studies are performed so that regulatory changes are made in light of empirical data and can more effectively meet consumer and industry needs.

II. Board and Management Oversight

The Overdraft Guidance states that the FDIC expects supervised institutions to "[e]nsure ongoing and regular board and management oversight of program features and operation." Further, the Guidance notes that appropriate steps "include an annual review of an overdraft program's features."

The Clearing House agrees that an overdraft program should be administered by the appropriate level of management, which should oversee and remain suitably involved in an institution's overdraft program. However, The Clearing House does not believe that board-level oversight is necessary or appropriate in all cases. In addition, expecting depository institutions to establish a new board oversight process would be burdensome both for the institution's compliance and risk infrastructure (requiring the establishment of new reporting and tracking processes), and to the institution's board of directors (requiring the board to take on review of an additional area of operation that involves technical details and risks with which the board may not be familiar). In addition, for many institutions, having their boards of directors oversee an additional program would require a formal board resolution and detailed compliance with numerous state and federal corporate governance laws, rules and guidance, which is an onerous process that should be limited to only those matters that absolutely warrant board oversight. Also, as noted in this section, depository institutions can effectively manage overdraft programs without board oversight.

In managing their overdraft programs, depository institutions should instead be afforded the flexibility to determine the proper oversight authority within the institution. For example, depending upon an institution's size, structure and the nature of its overdraft product features, its overdraft program might best be managed through a compliance or risk management function and may not necessitate board level involvement (aside from significant issues that may need to be escalated to the board of directors, as appropriate). In such cases, the compliance or risk authority responsible for overseeing an institution's overdraft program should be fully empowered and given adequate resources to manage the program, ensure compliance with applicable law, and escalate matters to the board of directors as needed.

Similarly, if a depository institution determines that board involvement in its overdraft program is appropriate, the institution should be afforded the flexibility to determine the level of board involvement that is suitable for the institution. For example, a depository institution may elect to have its board of directors review policy-type documents, but may not deem it necessary to have the board review extensive and detailed documentation or be involved in routine management of its overdraft program.

Moreover, given the technical and detailed nature of overdraft programs, annual review by the board may not be suitable. Instead, senior management should determine the persons that are in the best position to perform thorough and effective reviews of the institution's overdraft program, the frequency for such reviews, and any necessary adjustments based on the findings of such reviews.

Accordingly, The Clearing House recommends that the Overdraft Guidance should empower depository institutions to determine the appropriate oversight authority for their overdraft programs, to make decisions regarding whether board involvement is appropriate, and to develop the suitable reviews of such programs, which would ensure that overdraft programs are effective, compliant and suitably mitigate risk.

III. Monitoring and Follow Up of Customer Use

The Overdraft Guidance sets forth an expectation that institutions monitor overdraft 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 twelve month period, undertake meaningful and effective follow-up action...." The Guidance identifies that such follow-up may include (1) contacting the customer to communicate less costly alternatives "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 (2) giving the customer "a reasonable opportunity to decide whether to continue fee-based overdraft coverage or choose another available alternative."

Depository institutions are not currently required to engage in this type of monitoring and customer outreach in connection with their overdraft programs. Monitoring and outreach of this sort expected by the Guidance would be extremely burdensome in that it would require, among other things: (1) new systems to be developed and put in place to perform automated monitoring of overdraft fees and to generate reports of accounts that have met established overdraft fee limitations; (2) dedicated personnel to manage the automated monitoring process and to review the reports generated by the automated monitoring program; (3) a mechanism to have each individual customer reviewed for eligibility for other low-cost alternatives (because not all customers that rely on overdraft protection will qualify for other alternative products) prior to reaching out to the customer; (4) dedicated personnel to perform customer outreach to communicate alternatives to the customer; and (5) an established process to make any changes that the customer may elect during the course of the customer outreach conversation. Given that this is quite a substantial new expectation and involves a high level of burden that would require significant time and resources to comply, this expectation warrants a formal rulemaking. Furthermore, having a depository institution approach a customer, in-person or via telephone, to communicate about a customer's permissible use of a product could be uncomfortable for customers that chose to rely on overdraft protection to manage their cash flow and could, in fact, result in a negative customer experience.

Overdraft protection is an important product that certain customers prefer to utilize to cover temporary shortfalls in available funds, which is reflected both in the consumer survey undertaken by the Federal Reserve Board and by an individual customer's *election to participate in an overdraft program.* The Clearing House strongly supports providing consumers with adequate disclosures and protections in overdraft programs, as well as all other relevant products and services. The Clearing House believes that Regulations E and DD, as revised,

and many voluntary efforts by the industry and industry associations to educate customers on overdraft fees, afford consumers with adequate protection with respect to ATM and one-time debit transactions and should be allowed to take full effect before additional expectations or requirements are imposed. Specifically, as detailed above, under the new provisions of Regulation E and corresponding changes to Regulation DD, (1) customers are required to be provided first with detailed disclosures regarding overdraft features; (2) then must be afforded with a reasonable opportunity to consent to the overdraft program; (3) the consumer must affirmatively opt-in to the overdraft program; and (4) be provided with a written confirmation of their consent from their depository institution. In addition, Regulation DD imposes disclosure obligations that are both consistent with the requirements of Regulation E and that go beyond such requirements to provide even further consumer protection regarding covered bank products. Given this high level of consumer protection, The Clearing House believes that the type of monitoring and follow up called for in the Guidance is unnecessary because consumers are adequately protected under Regulations E and DD. Furthermore, The Clearing House believes this to be the position of the Federal Reserve Board, the entity with primary rulemaking authority in this area, and which recently undertook significant detailed studies of the issues involved in revising these rules.

In addition, with respect to check and ACH transactions, according to the study carried out by the Federal Reserve Board, customers want the ability to overdraft on check and ACH transactions. For this reason the Federal Reserve Board did not cover these transaction types in the final version of its Regulation E overdraft rulemaking. The affirmative decision by the Federal Reserve Board to omit check and ACH transactions from Regulation E coverage as applied to overdraft protection programs was undertaken purposefully in light of the Federal Reserve Board's close examination of overdraft functions and consumer needs, and in connection with a formal rulemaking process. Furthermore, consumers that engage in check and ACH transactions are adequately protected in the disclosures they are required to receive and other protections afforded to them under Regulation DD, Regulation CC and other rules, as well as the voluntary efforts by the industry and industry associations to educate customers on overdraft fees. Therefore, The Clearing House believes that the FDIC should not unilaterally and significantly broaden overdraft program compliance obligations by requiring monitoring and customer outreach for overdrafts that result from check and ACH transactions (and especially not outside of the formal rulemaking process).

Moreover, reaching out to customers to offer less costly alternatives would be tantamount to steering customers into other products, which may not be beneficial to the customers in many cases. For example, customers that regularly rely on overdraft protection may not be eligible for other low-cost alternative products, and such products may not be suitable for such customers. In order to be able to communicate with an individual customer regarding realistic alternatives for that customer, an institution would need to analyze that customer's creditworthiness for certain alternative products, such as the line of credit suggested in the Guidance. However, the depository institution may not have the customer's authorization to review the customer's credit history, which could impede the institution's ability to determine the alternative products truly available to the customer. Institutions would then be faced with the decision to (1) present

products to a customer that may not be suitable for the customer, which may not be a safe or sound approach and certainly would be harmful to the institution's customer relationship; (2) allow a customer to obtain a credit product that may not ordinarily be suitable for the customer because the institution does not have the ability to review the customer's full credit profile but is required by the Guidance to present the customer with alternatives, which, again, may not be safe or sound and may result in inconsistent application of a bank's standards; or (3) not reach out to the customer at all, which would involve legal and regulator risk in that it would be inconsistent with the Overdraft Guidance. Also, institutions that may be smaller or have less diverse product offerings may not have low-cost alternatives to offer customers.

For the reasons discussed above, The Clearing House respectfully requests that the FDIC remove the monitoring and customer outreach requirements from the final version of the Overdraft Guidance.

IV. Institute Daily Limits

The Overdraft Guidance directs institutions to institute appropriate daily limits on customer overdraft 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.

Depository institutions are not currently required by statute or regulation to set daily limits for overdraft fees. Accomplishing such an objective would be extremely burdensome in that it would involve, among other things: (1) significant systems changes to implement limits on overdraft fees by customer, which could possibly require instituting limits across multiple accounts held by a customer; and (2) review of and revisions to customer agreements and other documentation governing accounts and disclosure of such changes to affected customers; and (3) dedication of additional customer service resources to address customer inquiries and complaints relating to newly imposed limits having been set on a product that many customers rely on for their short-term funding needs. Furthermore, the establishment of daily limits may restrict consumer choice by limiting the number of overdrafts banks are willing to pay, especially where the cost and risk of loss increase without off-setting revenue.

For the reasons articulated above, The Clearing House believes that the imposition of the limits set forth in the Guidance would interfere with an institution's right to set fees for deposit services under applicable law. If, however, the FDIC elects to proceed with such an expectation, The Clearing House believes doing so would warrant a formal rulemaking, particularly in light of the fact that the expectation is quite a substantial new expectation and involves a high level of burden that would require significant time and resources to comply and is a direct regulation of pricing on a private industry.

V. Check-Clearing Procedures

The Overdraft Guidance instructs institutions to review check-clearing procedures to ensure they operate in a manner that avoids maximizing customer overdrafts and related fees through the clearing order. The Guidance identifies examples of appropriate procedures, specifically clearing items in the order received or by check number.

However, Article 4-303 of the Uniform Commercial Code allows depository institutions to clear items in any order, stating that "items may be accepted, paid, certified, or charged to the indicated account of its customer in any order."[7] Thus, the FDIC should not be imposing requirements that are clearly contrary to well-established state law. Moreover, clearing items in the order received or by check number would be contrary to customer preferences. That is, according to the Federal Reserve Board's consumer testing, a significant portion of consumers prefer that large and/or more important payments be made first (irrespective of check number and order received). In addition, there may be multiple checkbooks for one account, particularly where the account is owned by multiple individuals, and these checks are not likely to be consecutively numbered, which would preclude an institution from being able to process checks received by check number. Further, delays in mail delivery, as well as individual behavior often makes it difficult to clear a customer's checks by check number, specifically because consumers write checks out of sequence and payees frequently hold checks for extended periods prior to presentment, which would preclude clearing checks solely in chronological order (unless done by chronological order of the checks included in a particular batch). Either way, significant systems and other changes would be required here in order to reconfigure a depository institution's clearing operations.

It must also be noted that individual checks are generally received for posting in physical batches or electronic image files without accompanying date or time stamps for the individual checks. Therefore, many deposit posting systems are not designed for, or capable of, posting checks in the order received. In addition, posting checks in check number order affects the posting order for only those checks received in a single day's processing cycle. Check number posting does not necessarily result in posting in the order in which they were written because, as noted above, individual checks may be delayed in the mail or held by the payee before being negotiated. In addition, a check clearing process that in fact maximizes, minimizes or is neutral as to overdraft fees may differ by institution, individual customer and/or the batch of transactions processed on any given day, and also may be impacted by other relevant factors. Thus, no check clearing process, when uniformly applied, would have the desired effect of lowering overdraft fees across the board. It is also not clear that overdraft fees alone should be the determining factor in establishing a check clearing process.

---

[7] U.C.C. § 4-303(b). One exception to the Uniform Commercial Code's rule on payment order relates to an institution's knowledge or notice of stop-payment order or legal process. *Id.* § 4-303(a).

As referenced above, clearing items in the order received or by check number is not the current practice of most depository institutions and to make it so would require institutions to implement substantial system changes, which would be a significant burden. Further, this significant burden may prove to be needless because the Federal Reserve Board is currently studying matters relating to payment order and is considering issuing rules that address payment order. The Clearing House believes that it would be unreasonable and excessively burdensome for institutions to be expected to make significant systems changes to comply with the Overdraft Guidance and to again make significant process and possibly systems changes in response to future Federal Reserve Board regulations on payment order.

For these reasons, The Clearing House strongly advocates that the FDIC postpone guidance on payment order in order to allow the Federal Reserve Board to complete its review. If, however, the FDIC elects to proceed with this expectation, The Clearing House believes doing so would warrant a formal rulemaking.

VI. Request for Clarity on Certain Aspects of the Overdraft Guidance

Review of Marketing, Disclosure, and Implementation. The Overdraft Guidance states that the FDIC expects depository institutions to review their marketing, disclosure, and implementation of overdraft programs "to minimize potential consumer confusion and promote responsible use." Depository institutions are already required to review overdraft programs including marketing, disclosures and implementation under Regulation E, Regulation AA - Unfair or Deceptive Trade Practices (prohibiting a range of unfair and deceptive practices that may mislead consumers), and Regulation DD - Truth in Savings (imposing various requirements on deposit product advertisements). The Clearing House agrees that overdraft programs and corresponding documentation should be adequately reviewed and actively managed and reads the Overdraft Guidance as instructing institutions to continue their efforts under the regulations referenced above, rather than requiring a new and separate review process.

Train Staff. The Overdraft Guidance directs institutions to train staff to explain program features and other choices. The Clearing House believes that appropriate employees should be, and already are, required to be trained regarding program features and choices and reads the Guidance as directing institutions to continue to train employees and to ensure that overdraft *features and choices* are explicitly covered in such training, rather than requiring new and separate overdraft program training.

Risk Mitigation. The Overdraft Guidance instructs institutions to "[m]onitor and, where necessary, mitigate credit, legal, reputational, safety and soundness, and other risks, as appropriate." The Guidance goes on to note that legal and compliance risks associated with the overdraft payment programs include: "Section 5 of the Federal Trade Commission Act, the Equal Credit Opportunity Act, the Truth in Savings Act, the Electronic Fund Transfer Act, as well as related implementing regulations and any changes to those regulations or statutes."

The Clearing House agrees that it is important that in managing their overdraft programs, depository institutions should ensure compliance with applicable law, including the laws referenced above with which institutions are already required to comply and reads the Guidance as expecting institutions to continue to have robust internal mechanisms to reduce risk, rather than requiring new programs of risk mitigation that are dedicated to overdraft programs.

All of the Above. If, contrary to our reading, the Guidance is in fact instructing institutions to establish new and separate programs for review of overdraft programs, staff training, and/or risk mitigation, The Clearing House believes that such an expectation is unnecessary and unduly burdensome. Expecting institutions to establish new and separate review channels, training programs and/or risk mitigation mechanisms that would be dedicated solely to overdraft features would unnecessarily duplicate efforts requiring onerous new measures, including new and separate policies, procedures, operations, systems, documentation, monitoring, reporting, and audit among others. Further, new and separate programs would be unduly burdensome and unnecessary since program review, training and risk mitigation are readily and effectively conducted and can continue to be accomplished within an institution's existing programs. Thus, if the Overdraft Guidance is instructing institutions to establish new and separate review, training or risk mitigation programs, The Clearing House believes that a formal rulemaking process is warranted as discussed in Section I of this letter.

VII. Account Balances

The Overdraft Guidance identifies as an FDIC supervisory expectation that institutions prominently distinguish account balances from any available overdraft coverage amounts. The Guidance further notes that, as of January 1, 2010, Regulation DD (Truth in Savings Act) prohibits institutions from "including overdraft coverage amounts in any account balance information provided by an automated system."

As correctly noted by the Overdraft Guidance, institutions are required to provide customers with account balances that exclude available overdraft coverage, which The Clearing House regards as an important measure to avoid customer confusion. The Clearing House reads this expectation as reiterating Regulation DD obligations and agrees that it is important for customers to receive clear information regarding their true account balances.

If, contrary to our reading, the Guidance is in fact establishing a new and separate disclosure requirement regarding account balances, The Clearing House believes that such an expectation is unnecessary and unduly burdensome. Expecting institutions to establish new and separate account balance disclosures would be unnecessarily duplicative, particularly because the objectives of this expectation can be (and, we would argue, are) efficiently and effectively accomplished through existing account balance disclosure practices. Accordingly, if the Overdraft Guidance is instructing institutions to establish new and separate account balance disclosures, The Clearing House believes that a formal rulemaking process is warranted as discussed in Section I of this letter.

VIII. Provide Information Regarding Alternatives

The Overdraft Guidance states that institutions should consider providing information to consumers about "how to access free or low-cost financial education workshops or individualized counseling to learn how to more effectively manage personal finances." The Clearing House supports the FDIC affording depository institutions the flexibility to consider providing specified information to consumers and advocates that the FDIC maintain this flexibility in finalizing the Overdraft Guidance.

IX. Regulation E

The Overdraft Guidance instructs institutions to include check and ACH transactions in their overdraft programs subject to the Guidance. However, the Federal Reserve Board purposefully excluded these transactions types from the overdraft protection requirements included in the final version of Regulation E and thus The Clearing House believes that these transaction types should not be included in the Guidance.

In particular, according to the study carried out by the Federal Reserve Board, customers want the ability to overdraft on check and ACH transactions, which is the reason that the Federal Reserve Board did not cover these transaction types in the final version of its Regulation E overdraft rulemaking. The affirmative decision by the Federal Reserve Board to omit check and ACH transactions from Regulation E coverage as applied to overdraft protection programs was undertaken purposefully in light of the Federal Reserve Board's close examination of overdraft functions and consumer needs, and in connection with a formal rulemaking process. Therefore, The Clearing House believes that the FDIC should not unilaterally and significantly broaden this requirement, especially outside of the formal rulemaking process.

X. Examination

The Clearing House agrees that any guidance should be developed and managed in a way that is designed to ensure compliance with applicable law, regulation, or directive. The Clearing House notes, however, that if there are enforcement consequences to the Overdraft Guidance, including the section on examination, that the prescriptive provisions need to be better defined and capable of objective measurement. Any guidance must be consistently and uniformly applied, and designed to avoid conflicting enforcement due to the vagaries of differing examiners. The significant implications of the proposed Guidance should require that its development be subject to a formal rulemaking process to ensure the proper level of industry notice and involvement by interested parties.

* * * * *

Thank you for the opportunity to comment on the Overdraft Guidance. If you have any questions or wish to discuss The Clearing House's comment letter, please do not hesitate to contact me at 212.612.9216.

Very truly yours,

Henry V. Wysocki
Senior Vice President and Senior Counsel
The Clearing House Association L.L.C.