September 27, 2010

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

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

Dear Sir or Madam:

The Consumer Bankers Association (CBA)[1] offers these comments on the FDIC's Financial Institution Letter FIL-47-2010, regarding Overdraft Payment Programs and Consumer Protection (Guidance).

As set forth in the Guidance, the FDIC expects the institutions it supervises to closely monitor and oversee any overdraft payment programs they offer. Oversight measures should include appropriate measures to mitigate risks, incorporating the best practices outlined in the 2005 Joint Guidance on Overdraft Protection Programs (2005 Joint Guidance) and effective management of third-party relationships. The Guidance expects management to be especially vigilant with respect to the overuse of these services. The FDIC is seeking comment on its supervisory expectations for the financial institutions it oversees. CBA is grateful for the opportunity to comment.

We support strong and effective consumer protections; and in particular, we support the principles of customer choice, transparency and fairness in deposit account relationships.

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[1] The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

However, we believe the recent changes to Regulations E and DD address the core concerns that have been expressed regarding deposit overdrafts, and additional guidance at this time would be premature. The regulatory changes should be given time to demonstrate their effectiveness before any additional guidance is considered. In addition, to avoid inconsistent treatment, it would be preferable to coordinate guidance with the other financial institution regulatory agencies under the auspices of the Federal Financial Institutions Examination Council (FFIEC).

Our detailed comments are provided below.

Timing of Issuance

The Federal Reserve Board has just concluded a set of overdraft protection rules under Regulation E (Electronic Funds Transfer Act) and Regulation DD (Truth in Savings Act). The regulatory changes generally prohibit financial institutions from assessing fees for paying ATM and one-time debit card transactions that overdraw consumer accounts unless the consumer affirmatively consents, or "opts in," to the overdraft protection program.

Financial institutions may assess fees for paying ATM or one-time debit card transactions pursuant to an overdraft protection program only if the following conditions are met:

- The institution provides the consumer with a written notice (or electronic notice, if the consumer agrees), segregated from all other information, describing the overdraft protection program;
- The institution provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the program for ATM and one-time debit card transactions;
- The consumer affirmatively consents, or opts in, to the payment of ATM and one-time debit card transactions; and
- The institution provides written confirmation (or electronic confirmation, if the consumer agrees) of the consumer's consent and includes a statement informing the consumer of the right to revoke such consent.

The consumer may opt in at any time. Similarly, the consumer may at any time revoke the decision to opt in. The consumer's consent continues until the consumer revokes it or the financial institution terminates the overdraft protection program.

The financial institution must provide accounts with the same terms, conditions, and features to consumers who opt in and to consumers who do not opt in (other than the overdraft protection program for ATM and one-time debit card transactions). In addition, the institution may not condition the payment of other types of overdraft transactions (e.g., checks) on the consumer's opting in to the payment of ATM and one-time debit card transactions pursuant to the overdraft protection program.

For accounts opened before July 1, 2010, financial institutions could not assess any overdraft fee on or after August 15, 2010, if the consumer had not previously opted in. For accounts opened on or after July 1, 2010, financial institutions could not assess any overdraft fee unless and until the consumer opted in. Existing customers can opt in or out at any future date.

The effect of these dramatic changes has yet to be determined. The implementation process and the ways in which markets and consumers respond to these new rules through the development of new products and services and the manner in which consumers respond by opting in, changing accounts, etc., will also have an impact on whether new guidance is needed. Thus, new guidelines for FDIC supervised institutions are premature. The Guidance makes the assumption that the practices of institutions and the behavior of consumers will continue unabated unless checked by regulatory action. However, we are in a state of transition now, and the FDIC should not rely on past practices to develop guidelines for the future. Some of the changes in behavior will be a direct result of new laws (for example, the opt-in requirements for debit transactions) and some will be an indirect result (for example, the manner in which customers use debit cards). We therefore encourage you to reconsider the issuance at a later date, when the impact of these changes can be assessed. We cannot know whether or not there is a need for such guidance until we have seen how the marketplace changes in response to the existing regulations.

Additional Comments

1. Posting Order

The Guidance would require 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. Examples of appropriate procedures include clearing items in the order received or by check number." We understand and appreciate the problem this is intended to address; i.e., that institutions should not make fee decisions with the purpose of increasing the fees paid by their customers. But institutions do not determine the order of posting items for each customer on a case-by-case basis. The decision to pay an item[2] into overdraft rather than return it may be made on a case-by-case basis for a good customer, or a particular fee may be waived from time to time; however, institutions generally maintain a consistent policy on their order of posting, as a case-by-case determination would be cost-prohibitive. Nevertheless, with any uniform policy, some customers will pay more on a given occasion, while some customers will pay less. Thus, our concern with the Guidance is that there is no way to ensure a consistent posting order will not maximize *some* customer's fees on *some* occasions. It simply cannot be avoided. But by ensuring a consistent approach, the institution can ensure the policy is uniform and free from bias.

Some customers, for example, may benefit from a high-to-low posting order, as the items paid first would be the largest, and therefore the most important (e.g. mortgage payments), with the highest NSF fees, the highest returned item charge from the merchant, and the most serious consequences of a late payment. Other customers (or the

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[2] The Guidance in this section refers only to "check-clearing" procedures. Checks, of course, are not subject to the new opt-in requirements of Regulation E, which apply to nonrecurring debit transactions, so it is not clear if the Guidance is intentionally applying to checks only. Our comments assume not, since checks are only one of the types of items that are processed, and may be batched with debits and ACH transactions. However, this requires clarification.

same customers at other times) may benefit more from a low-to-high posting order, as fewer items will be returned for insufficient funds with NSF fees, or be paid into overdraft with overdraft fees. And neither of the other suggestions provided by the Guidance, to employ the order received or check number, necessarily result in fewer fees paid by the customer on any given occasion.

Although the use of check numbers or order of presentment may seem to be methods that are the most fair, they are not as simple as they appear. Check number sequence is only usable when dealing with checks, and not with other debits, so it is of limited value. Order of presentment cannot be used by many institutions, as they do not always time stamp the clearing process. <u>We have attached a methodology review and sample scenarios to demonstrate the strengths and weaknesses of the most common approaches.</u> Our purpose is to demonstrate there is no one 'right way' to do this and it is more important for an institution's practices be consistent and transparent to the customer.

2. Program Monitoring and Transaction Limits

The Guidance would require institutions to monitor programs for excessive use, and if a customer overdraws more than six occasions where a fee is charged in a rolling twelve-month period, undertake meaningful and effective follow-up action. Examples include contacting the customer to discuss less costly alternatives and giving the customer a reasonable opportunity to decide whether to continue with the service. The FDIC specifically seeks comment on the requirement to contact the customer after six such overdrafts. The Guidance also calls for the institution to impose "appropriate daily limits."

This is a good example of the Guidance addressing a concern that has been mitigated by the new regulatory requirements. Regulation E and DD require that customers affirmatively opt in to overdraft services after a clear disclosure of the services and costs, so only those who want these services have them. The regulation calls for: an opt-in notice to be provided to the consumer, segregated from other information; a reasonable opportunity to opt in; the consumer's affirmative consent to opt in; and written confirmation provided to the consumer. The purpose of these significant requirements is to ensure the service is truly voluntary. Further, it is standard practice to notify consumers each time an overdraft occurs, typically through letters, but increasingly through e-mails and text alerts. The customers who have opted in are also given monthly disclosures of the fees paid, as required by Regulation DD (the periodic statement must include aggregate costs of overdraft services for the statement period and year to date); and most institutions offer up-to-date balance information through call centers, ATMs, branches and on-line banking. If consumers who have opted in later determine they wish to cancel, they may opt out <u>at any time</u>. This significantly alleviates the danger of repeated use and the need for the institution to decide on behalf of the customer what is in his or her best interest.

While some banks currently monitor customer use and notify those who overuse the service; not all institutions have in place the systems needed to support a monitoring and outreach effort, and the cost of investing in the additional resources needed to support such an effort would be high. It is also worth noting that our members find a limit of six transactions per year to be an extremely small number to trigger a response by the institution, and it would effectively end the use of the service by many institutions because the cost of compliance would be so high. It would also be frustrating to customers who have been given the choice to freely opt in if they are then contacted by the institution after so few transactions.

Daily limits are also less needed since the passage of the new regulatory requirements. Some banks also may choose to cap the fees daily, but the requirement to allow consumers to opt out at any time under Regulation E obviates the need for this in regulatory Guidance.

3. Treatment of Checks and ACH Transfers

The Guidance states: “Although the FRB did not address the payment of overdrafts resulting from non-electronic transactions, such as paper checks or ACH transfers, the FDIC believes institutions should allow customers to decline overdraft coverage (i.e., opt out) for these transactions and honor an opt-out request." On the contrary, the FRB did address overdrafts for checks and ACH, undertook extensive consumer focus group testing, and determined coverage was not appropriate. In the supplementary information accompanying the final regulation, the FRB stated: "First, participants in consumer testing indicated that they would prefer to have their checks paid into overdraft, because those transactions represent important bills." Consumers appeared to recognize the impact of returned items is greater for these items, as they can result in unpaid bills with significant consequences, such as mortgage or rental payments, and have a greater potential impact on their credit from late payments. As the FRB also noted, "a consumer will generally be charged the same fee by the financial institution whether or not a check is paid; yet, if the institution covers an overdrawn check, the consumer may avoid other adverse consequences, such as the imposition of additional merchant returned item fees." Further: "In the Board's consumer testing, participants generally indicated that they were more likely to pay important bills using checks, ACH, and recurring debits, and to use debit cards on a one-time basis for their discretionary purchases."

Thus, though the FRB did not choose to extend the same requirements to checks and ACH transfers as one-time debits and point of sale transactions, it gave much consideration to the expanded coverage and declined for a number of good reasons. Although many institutions do permit consumers to opt out of check and recurring debit overdrafts, an additional mandate at this time would create confusion and excessive costs in order to accomplish something the FRB determined is not preferred by or desirable for many consumers.

Thank you for the opportunity to provide our comments. We would be happy to provide any additional information or respond to any questions.

Sincerely,

Steven I. Zeisel
Vice President & General Counsel

Posting Order - Methodology Review

Type:	*Check Number Sequence*	*Order of Presentment*	*By Size, Largest-to-Smallest*	*By Size, Smallest-to-Largest*
Description	Method utilizes the index order of check transactions to assign sequence in numerical order. Typically, debit transactions which do not contain an index are processed within a logical sort and/or combined with size sort.	Method processes the debit transaction within the order that it was presented to the bank and/or the time stamp that exist on the debit record.	Method processes the debit transaction by sorting all debit transactions which are within the batch cycle in order of dollar size, from largest to smallest. Batch processing will then debit the account using the highest debit item first. Hybrid solutions may organize transaction types and sort within each category.	Method processes the debit transaction by sorting all debit transactions which are within the batch cycle in order of dollar size, from smallest to largest. Batch processing will then debit the account using the lowest debit item first. Hybrid solutions may organize transaction types and sort within each category.
Pros	Aligned with the timing of original debit transaction.	Aligned with the timing of original debit transaction.	Most consistent method used in the industry driven by larger sized institutions, enables larger transactions to be paid if the account does not have full capacity to pay all requesting debits.	Most frequently used method, particularly for smaller organizations, enables the greatest number of transactions to be cleared if the account does not have full capacity to pay all requesting debits.
Cons	Mixed impact in the clearing process, majority of debit transactions are not customer indexed.	Mixed impact in the clearing process, time-stamp not always consistent with actual transaction.	Results in greater number of items being paid into overdraft if the account does not have capacity to pay all items.	Results in largest debit items, such as mortgage payments, to be returned with greater frequency if the account does not have capacity to pay all items. May result in greater non-bank charges for returned items and/or further consequences of items not being paid into OD (i.e., additional late charges, finance charges, denial of service, etc.)
Issues	Check number sequence requires an alternative method for handling debit requests which are not indexed. No inherent rule that customer would experience fewer OD transaction.	Most banks do not have time-stamp clearing processes. No inherent rule that processing in a time-stamp and/or order of presentment method would enable the customer to experience fewer OD transactions.	Processing High-to-Low can result in a greater number of transactions at the account level to experience OD.	Result may increase the type of debit being returned for NSF which may generate additional penalties and/or be presented for clearing again with a higher probability of being returned or paid into overdraft.

Posting Order – Sample Scenarios

- The use of various posting methods will typically lead to an inconsistent level of outcomes:
  - Higher propensity for a greater # of overdraft items under a Larger-to-Smallest method
  - Higher propensity for a greater # of returned items under a Smallest-to-Largest method

- Under a methodology that has a higher propensity to return items, those items will typically be higher dollar sized debits which may incur additional penalties for the returned disposition, including late fees, merchant fees and denial of service

Check Number Sequence

Balance	$		150
Overdraft Capacity	$		350
Total Avail. to Pay Debits	$		500
Presented Items:			
Mortgage Check #001	$	(300)	PAID - OD
Health Ins. Check #002	$	(200)	PAID - OD
Grocery (card T1)	$	(50)	PAID - OD
Dollar Store (card T2)	$	(25)	PAID - OD
Starbucks (card T3)	$	(5)	PAID - OD
Total Items Paid			5
Total Returned			0
Total OD/NSF			5
		Pro	Con
		All Items Paid	Maximizes Fees
Estimated Overdraft Fee	$		126.95
Estimated Merchant Return Fee			0
Plus Late Fees			NA
Plus Interest Penalties			NA
Plus Denial of Service			NA
Plus Potential OD/NSF upon 2nd Presentme			NA

Order of Presentment

Balance	$		150
Overdraft Capacity	$		350
Total Avail. to Pay Debits	$		500
Presented Items:			
Starbucks (card T3)	$	(5)	PAID
Dollar Store (card T2)	$	(25)	PAID
Grocery (card T1)	$	(50)	PAID
Mortgage Check #001	$	(300)	PAID - OD
Health Ins. Check #002	$	(200)	Returned - NSF
Total Items Paid			4
Total Returned			1
Total OD/NSF			2
		Pro	Con
		Minimizes Fees	Returns Check Additional Penalties Likely Merchant Fees
Estimated Overdraft Fee	$		50.78
Estimated Merchant Return Fee			27.78
Plus Late Fees			✓
Plus Interest Penalties			✓
Plus Denial of Service			✓
Plus Potential OD/NSF upon 2nd Presentme			✓

By Size, Largest-to-Smallest

Balance	$		150
Overdraft Capacity	$		350
Total Avail. to Pay Debits	$		500
Presented Items:			
Mortgage Check #001	$	(300)	PAID - OD
Health Ins. Check #002	$	(200)	PAID - OD
Grocery (card T1)	$	(50)	PAID - OD ^
Dollar Store (card T2)	$	(25)	PAID - OD ^
Starbucks (card T3)	$	(5)	PAID - OD ^
Total Items Paid			5
Total Returned			0
Total OD/NSF			5
		Pro	Con
		All Items Paid	Maximum OD Fees
Estimated Overdraft Fee	$		126.95
Estimated Merchant Return Fee			0
Plus Late Fees			NA
Plus Interest Penalties			NA
Plus Denial of Service			NA
Plus Potential OD/NSF upon 2nd Presentm			NA

By Size, Smallest-to-Largest

Balance	$		150
Overdraft Capacity	$		350
Total Avail. to Pay Debits	$		500
Presented Items:			
Starbucks (card T3)	$	(5)	PAID
Dollar Store (card T2)	$	(25)	PAID
Grocery (card T1)	$	(50)	PAID
Health Ins. Check #002	$	(200)	PAID - OD
Mortgage Check #001	$	(300)	Returned - NSF
Total Items Paid			4
Total Returned			1
Total OD/NSF			2
		Pro	Con
		Minimizes Fees	Returns Check Additional Penalties Likely Merchant Fees
Estimated Overdraft Fee	$		50.78
Estimated Merchant Return Fee			27.78
Plus Late Fees			✓
Plus Interest Penalties			✓
Plus Denial of Service			✓
Plus Potential OD/NSF upon 2nd Presentn			✓

* For illustration. Examples assumes fee assessment does not impact posting balance

^ Authorized check card transactions will pay into overdraft regardless of payment capacity

** Fee Info from Moebs survey: http://www.moebs.com/AboutUs/Pressreleases/tabid/58/ctl/Details/mid/380/ItemID/29/Default.aspx