Massachusetts Bankers Association

September 27, 2010

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

Via email: **OverdraftComments@fdic.gov**

To Whom It May Concern:

I am writing on behalf of the Massachusetts Bankers Association (MBA), which represents approximately 190 commercial, savings and co-operative banks, federal savings banks, and savings and loan associations throughout the Commonwealth and New England. MBA appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) proposed Overdraft Payment Supervisory Guidance, detailed in Financial Institution Letter (FIL) 47-2010.

The proposed guidance complements the joint regulatory guidance the federal banking agencies released in 2005 as well as the recent amendments to Regulation E that were finalized in 2009 and have now been implemented by depository institutions. MBA has serious concerns with the proposed guidance, which we believe will be extremely burdensome for banks to implement while providing minimal benefit to consumers – all of whom have already affirmatively opted-in to their institution's overdraft program.

The Association is troubled that only FDIC-supervised institutions will be subject to the new guidance. We strongly believe that any guidance or regulation in this area must be promulgated as a joint rulemaking among all of the federal banking and credit union regulatory agencies. Subjecting only state-charted institutions to the new guidance will create additional confusion among bank customers and put these institutions at a competitive disadvantage to other depository institutions, including credit unions.

In addition, the guidance does not appear consider the time, expense, and resources that banks just recently invested to implement the extensive Regulation E changes. These new rules, which have only been in effect for the last three months, required banks to obtain an affirmative opt-in from both existing and new customers. Any potential changes to overdraft guidance should be delayed until the results of the Reg. E changes can be fully measured. While the proposed guidance states that overdraft programs "often result in customer dissatisfaction and complaints", based on anecdotal evidence from most of our member banks, many of which had opt-in rates greater than 50 percent, it appears that many consumers appreciate and want an overdraft protection program.

Our comments on specific sections of the guidance are below:

Institutions should give consumers the opportunity to affirmatively choose the OD payment product that overall meets their needs.

While many of our member institutions offer a range of overdraft protection products, in many cases customers may not qualify for a line of credit or linked savings account. For example, if a customer does not have a savings account or does not have any funds in a savings account, this option will not provide any assistance if they overdraw their checking account. Similarly, an overdraft line of credit

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requires bank underwriting and many customers may not qualify. In addition, many banks do not offer unsecured personal loans because of the high cost of administrating these products and unacceptable default rates.

The amendments to Regulation E already require banks to obtain affirmative consent from customers prior to charging any overdraft fees for most electronic transactions, and MBA has encouraged our member institutions to provide customers with information on other overdraft products offered by the bank during the opt-in process.

Institutions should monitor accounts and take meaningful and effective action to limit use by customers as a form of short-term, high-cost credit, including giving customers who overdraw their accounts more than 6 occasions in a 12-month period, an opportunity to choose a less costly alternative and decide whether to continue with fee-based OD coverage.

MBA believes that if the FDIC moves forward with the guidance, clarification of the monitoring criteria for excessive overdrafts is necessary. The proposal indicates the trigger is the assessment of six fees; human error in making a single deposit could conceivably result in six overdrafts in only one or two days. Even with the establishment of daily maximum on overdraft fees, an account could reach the "excessive" level extremely quickly, especially if the six fees come from all types of transactions. We believe the six-occasion threshold is far too low, and would recommend that banks should be allowed to determine "excessive use" using their own metrics that would be subject to review by examiners.

This section of the proposed guidance would also be extremely burdensome for banks, specifically the suggestion that banks contact customers in person or via telephone. Unless the customer walks into the branch, it is almost impossible to contact the individual in person, while telephone contact is time consuming and resource intensive. While we agree that bank customers should be made aware of their options, particularly when they utilize an overdraft program on a more regular basis, the guidance places all of the responsibility on the bank and none on the customer that has overdrawn his/her account.

We are also concerned that the proposal appears to require banks to undertake all three follow-up actions, which seems excessive. In addition, the guidance does not take sufficient account of the fact that consumers will have already received a detailed description and decided to opt-in to the program. None of these steps is required by Regulation E and may cause additional customer confusion among individuals that have already requested the product by opting-in.

Institutions should institute appropriate daily limits on OD fees.

Consumers in Massachusetts and throughout New England can choose to conduct their banking business with a variety of depository institutions. Some of these institutions already have daily limits on overdraft fees, and MBA strongly encourages consumers to shop around and choose the bank and bank products that best meet their individual needs. While we generally support banks putting appropriate limits on overdraft costs for their customers, we are concerned that the FDIC is prescribing a limit when this decision should be made on an individual bank basis.

The proposed guidance ignores the fact that even if a bank caps its daily overdraft fees, customers will still be subject to merchant fees or fees levied by other payees such as utility companies if the institution returns these payments instead of paying the overdrafts. These fees, which are entirely unregulated, can easily exceed the overdraft fee, putting the customer in more debt and potentially negatively affecting his/her credit rating. We would encourage all of the federal regulators, especially the Federal Trade Commission, to examine the returned item fees charged by unregulated non-depository institutions.

Institutions should not process transactions in a manner designed to maximize the cost to consumers.

The guidance implies that clearing checks from highest to lowest is always a bad policy, which is not uniformly true. Many banks choose to clear items in that manner to avoid bouncing large items, such as mortgage or car payments, which, as we stated above, can carry large late fees or returned item charges. At many smaller institutions, a third-party processor may be responsible for clearing some items, especially ACH and other electronic transactions. The bank may only have limited control over how these items are cleared and should not be punished on an examination for something that is outside the institution's control. At a minimum, we recommend revising the guidance to suggest that banks should not structure their clearing processes solely to increase overdraft fees.

Ensure ongoing and regular board and management oversight of program features and operation.

Singling out one bank product for Board supervision given the fact that consumers have already opted-in seems excessive. We would recommend regular management oversight and an annual review of the program by the board of directors.

Conclusion

Finally, we are concerned by the overall tone of the guidance, which implies that all overdraft programs are bad and that banks do not treat their customers fairly. For the most part, consumers like this product for convenience and to avoid significant late payments and the resultant costs charged by retailers and non-banks. Unfortunately, some customers use these programs because they have poor financial management skills or because they have no other options available to them. If the FDIC finalizes the proposed guidance, some institutions may decide to discontinue their overdraft programs entirely, forcing these customers to pay higher merchant and late payment fees or turning to unregulated financial products such as payday loans to pay their bills.

Thank you again for the opportunity to comment on the proposed guidance. If you have any questions or need additional information, please contact me at (617) 523-7595 or via email at jskarin@massbankers.org.

Sincerely,

Jon K. Skarin
Director, Federal Regulatory & Legislative Policy