American Bankers Association

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By electronic delivery to:
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Office of the Comptroller of the Currency
250 E Street, S.W., Mail Stop 2-3
Washington, D.C. 20219

Re: Proposed Guidance on Deposit-Related Consumer Credit Products, Docket ID OCC-2011-0012

Ladies and Gentlemen:

The American Bankers Association (ABA) welcomes the opportunity to respond to the Office of the Comptroller of the Currency's (OCC) proposed Guidance on Deposit-Related Consumer Credit Products, including automated overdraft protection and direct deposit advance programs (Guidance).[1] ABA represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets.

The OCC states that it is issuing the Guidance "to clarify the OCC's application of principles of safe and sound banking practices" in connection with deposit-related consumer credit products, such as automated overdraft and direct deposit advance programs. The Agency further explains that it intends to "provide a high degree of flexibility for banks to structure and operate their programs in a safe and sound manner that provides for fair treatment of customers without dictating specific product terms."[2] ABA appreciates the OCC's intent to articulate broad principles without dictating specific product terms. We have consistently advocated for a regulatory framework that recognizes the power of informed choice and supports responsible and sustainable industry competition.[3]

ABA believes that the Board of Governors of the Federal Reserve System (Board) established such a framework with respect to overdraft services and programs. Its amendment of Regulation E empowers customers with a consumer-tested disclosure and opt-in form that clearly describes a bank's overdraft program, fees, and available alternatives for covering overdraft transactions. In order to ensure meaningful consent, Regulation E provides consumers with the right to revoke their opt-in at any time without consequence or cost.[4] Finally, the requirements of amended Regulation DD augment Regulation E's consumer choice by providing consumers with clear disclosures on periodic statements of all NSF and overdraft fees and by requiring that institutions only disclose funds available for immediate use when disclosing automated account balances to a customer.[5]

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[1] 76 Fed.Reg. 33409 (June 8, 2011).
[2] *Id*.
[3] *See A New Framework for Overdraft Protection,* a report by ABA's Overdraft Task Force (August 2010) *available at* http://www.aba.com/aba/documents/Compliance/2010/NewFrameworkforOverdraftCompliance2010.pdf; *Overdraft Protection: A Guide for Bankers*, American Bankers Association and Alex Sheshunoff Management (2003) *available at* http://www.aba.com/aba/documents/Compliance/ABAOverdraftGuide2003.pdf.
[4] 12 C.F.R. §205.17(b).
[5] 12 C.F.R. §230.11. Regulation DD's requirement to disclose a running balance of aggregated overdraft fees in periodic statements was a vindication of the RECAP formula favored by behavioral economists and advanced by the Obama Administration's head of the Office of Management and Budget's Office of Information and Regulatory Affairs and avowed libertarian paternalist, Cass Sunstein. *See e.g., Nudge: Improving Decisions About Health, Wealth, and Happiness,* Richard H. Thaler and Cass R. Sunstein (Yale University Press, 2008).

Thus, the Board established a regulatory framework that empowers consumers to make informed decisions about overdraft protection, but it also gives banks latitude to evaluate their regulatory obligations and to design overdraft programs that provide transparent and fair options for consumers. We believe that this framework will yield a variety of programs designed to address consumer needs fairly while also encouraging the further development of deposit-related credit products as technology and consumer needs change. ABA urges the OCC to refrain from layering additional requirements – even in the form of principles-based supervisory guidance – on this regulatory framework.

A multi-layered regulatory framework will result in unnecessary confusion and compliance burden.

From the Obama administration's initial white paper announcing its plan for restructuring federal and state regulation and supervision of the financial services industry, a foundational principle was the recognition that "fairness, effective competition, and efficient markets require consistent regulatory treatment for similar products."[6] Accordingly, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA) created the Consumer Financial Protection Bureau (CFPB) and granted its director exclusive rule-writing authority for an enumerated list of consumer financial protection laws. The goal of consistent regulatory treatment of similar products, however, is undermined by individual regulatory agency issuances of "guidance" announcing supervisory expectations inconsistent with those required by the underlying rule. The resulting patchwork of federal agency interpretations – coupled with individual examiner application of that guidance in the field – will create an unlevel playing field for financial institutions, and the disparate regulatory standards for identical products and services will confuse consumers unnecessarily.

The banking industry fears that recent experience with the regulation of overdraft protection programs may be a harbinger of a future in which there is little uniformity in federal consumer protection regulation, despite the clear intent of the Administration and Congress for there to be one rule-writer and one set of rules. Previously, rule-writing authority for Federal Trade Commission Act unfair or deceptive acts and practices (UDAP) and the Electronic Fund Transfer Act (EFTA) was vested in a single entity[7], the Board, who in 2009 exercised that authority after extensive consumer testing and consideration of 20,700 public comments.[8] The Board concluded that overdraft protection practices covering check, ACH, and recurring debit transactions were neither unfair nor deceptive. Rather, the Board recognized that consumers receive substantial benefits from avoiding merchant bounced check or rejected transaction fees and are able to avoid unwanted overdraft fees by responsibly managing their finances. The Board also concluded that consumer protection issues involved ATM and one-time debit card transactions that overdraw an account and that these concerns should be addressed by the regulatory authority afforded under Regulation E and Regulation DD, also within the exclusive rule-writing province of the Board.

We understand that soon after the amendments to Regulation E were finalized and became fully effective in August 2010, interagency discussions to update exam procedures and to supplement the 2005 Guidance were initiated but ultimately abandoned. Thereafter, the OTS, then the FDIC, and finally, the OCC each proposed supplemental guidance for the management and oversight of automated overdraft programs. Now, instead of one clear rule applicable to all overdraft protection programs, three different regulatory standards are emerging. The goal of ensuring uniformity so that consumers can readily understand and compare overdraft services across different financial service providers and bankers can compete fairly for depositors has been disregarded completely.

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[6] *See* U.S. Department of the Treasury, *Financial Regulatory Reform – A New Foundation: Rebuilding Financial Supervision and Regulation* (June 2009) p. 53.

[7] The OTS also had rule-writing authority for UDAP under the Federal Trade Commission Act Section 18(f) with respect to federal savings associations and proposed a rule covering overdraft practices, but when the Board chose to reject UDAP theories in favor of Regulation E, the OTS effectively concurred in that course of action by withdrawing its proposed UDAP rule.

[8] 15 U.S.C. §1693b.

The consequences of this piling on of regulatory requirements should not be underestimated. Regardless of the issuing agency, each new statement of regulatory expectation sets in motion an industry-wide review and attempt to reconcile it with existing regulations and guidance. Next, institutions must consider its impact on their business model and must identify the operations, systems, and compliance adjustments that may need to follow. For many institutions, the cost of implementing the new regulatory requirements means that they must raise fees or restrict product availability. Even for those institutions not directly impacted by particular guidance, the uncertainty about what it portends for future regulatory action by their regulator discourages innovation and frequently restricts access to financial products. Thus, it is the consumer who ultimately feels the impact of these regulatory tangles in the form of higher fees, decreased product availability, or both.

Because the OCC asserts that its authority to issue the Guidance – and to examine all national banks and thrifts for compliance with it regardless of asset size – springs from its broad authority to define and eliminate unsafe and unsound banking practices, the OCC *ensures* that disparate standards will continue to exist, at least for national banks and thrifts. Moreover, assuming the OCC finalizes the Guidance, the overdraft practices of institutions with assets greater than $10 billion will be examined twice, a wasteful and burdensome exercise.

ABA urges the OCC to withdraw the proposed Guidance and to work with the other federal regulatory agencies through the FFIEC to replace the 2005 Joint Guidance on Overdraft Protection Programs (2005 Guidance)[9] with new interagency guidance that reflects the new rules and addresses supervisory gaps, if and when they become apparent. We believe that any new statements of supervisory expectation must apply consistently and fairly across all depository institutions offering automated overdraft protection. Otherwise, the Board's policy determinations, as reflected in Regulation E and DD, will be eviscerated by individual bank regulatory agencies seeking to demonstrate their independent visions for consumer protection. Ironically, the consumer will lose as a result of this agency one-upmanship as choice will be limited rather than empowered; and simplicity and clarity will be sacrificed to compliance complexity.

Banks are managing the credit, operational, and reputation risks of deposit-related credit products.

Although the Comptroller of the Currency has broad authority to define and eliminate unsafe and unsound conduct, it is well-established that conduct considered to be unsafe and unsound is "conduct deemed contrary to accepted standards of banking operations which might result in *abnormal risk or loss* to a banking institution or shareholder" (emphasis added).[10] The OCC, however, has not demonstrated how the prevailing management of overdraft protection or deposit advance programs presents an "abnormal risk" to a bank, nor has it suggested that the discussion of safety and soundness considerations in 2005 Guidance inadequately addresses the credit and operational risks presented.

The discussion about managing the credit and operational risks presented by overdraft protection programs is a cornerstone of the 2005 Guidance, and ABA agrees that managing the prudential risks in compliance with the 2005 Guidance is essential to the responsible operation of an automated overdraft program. However, we believe that the OCC's attempt to articulate *new* principles of safe and sound banking practices has resulted in an inappropriate overlay of credit principles on deposit products and that the only threat to safety and soundness will emanate from the increased compliance and operational challenges, if the Guidance is adopted as proposed.

Both overdraft protection and deposit advance programs are predicated on streamlined, *but clearly defined*, program eligibility standards and dollar-limit criteria. Banks can, and do, make reliable predictions of the likelihood of repayment based on variables including the age of an account, average

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[9] 70 Fed. Reg. 9127 (Feb. 2005).
[10] *See Cavallari v. OCC*, 57 F.3d 137(2nd Cir. 1995); *Sinclair V. Hawke*, 314 F. 3d 934 (8th Cir. 1978); *see also The Director's Book: The Role of a National Bank Director, available at* http://www.occ.gov/static/publications/director.pdf.

balance and deposit history, and information about other relationships a customer may have with the bank. Over time, they have been able to validate the reliability of these variables on their collection ratios, ensuring they can make streamlined, yet safe, eligibility determinations. Banks also ensure that credit risk remains in line with expectations by establishing specific time frames by which customers must pay off outstanding balances, adopting procedures for the suspension of program availability when a customer no longer meets program eligibility requirements, and complying with FFIEC Uniform Retail Credit Classification and Account Management charge-off rules. As a result of these risk management practices, the historical charge-off rates for both overdraft and direct deposit advance products are low, ranging between 3-5%, a number that cannot reasonably be deemed to present an abnormal risk or loss.

Similarly, the OCC cannot credibly assert that reliance on overdraft fee income raises safety and soundness concerns. A June 2011 study by Market Rates Insight, an independent market research firm, confirms the fact that there is nothing – short of the Guidance – threatening a further decline in overdraft fee income. During the first two quarters following the Regulation E compliance date, there was an expected decline in deposit account service fee revenue; however, there has been no further decline in revenue in the first quarter of 2011.[11] Clearly, consumers value overdraft protection, and the threat of a sudden decline in overdraft fee income is illusory.

In addition, although data from 1,336 national banks with assets under $10 billion shows that for 70.4% of these banks, fee income from non-sufficient fund and overdraft transactions exceeds net profit; the data also shows that fee concentrations are not unusual for smaller institutions. There are eleven other single fee income sources that exceed net profit, and there has been no suggestion by bank regulatory agencies that these concentrations raise safety and soundness concerns.[12]

Finally, the OCC includes reputation risk within the list of prudential concerns justifying the issuance of the Guidance. ABA believes that the consumer protections put in place by the amendments to Regulation E and DD obviate the threat of reputation risk. As previously discussed, the amendments to Regulation E and DD establish a regulatory framework that delivers choice to consumers in a transparent, responsible manner, and consumers have responded with industry average opt-in rates of between 40 – 80%, clearly demonstrating that consumers value overdraft protection. Reputation risk is further reduced by the fact that banks, acting in accordance with the best practices suggested by the 2005 Guidance and ABA's Overdraft Taskforce Report, are increasingly identifying and communicating with customers who have frequent overdraft transactions. This outreach provides bankers with the opportunity to do what they do best – to identify how to effectively serve the banking needs of the individual customer.

Thus, there is nothing in the record to suggest that the operation of deposit-related consumer credit programs presents operational, credit, or reputational risks that are not addressed adequately by existing regulation and guidance. ABA believes that the OCC's assertion of safety and soundness concerns is a thinly disguised attempt to impose additional consumer protections on the existing regulatory framework. We urge the OCC to refrain from setting this precedent, as it will undermine a fundamental goal of financial regulatory reform, the uniform and consistent regulation of consumer financial products and services so that markets work in a fair, transparent, and efficient manner.

Specific comments on Appendix A, Safe and Sound Banking Practices in Connection with Automated Overdraft Protection Programs.

1. Program Availability and Prudent Eligibility Standards

   As explained previously, to continue piling on regulatory requirements suggests a regulatory conclusion at odds with Regulation E. Nowhere is this more evident than the OCC's announcement that it expects national banks to require customers to opt-in to overdraft protection for check, ACH,

[11] *See* American Banker, "Service Fees Decline by $1.6 Billion in Months Following Reg. E" (June 22, 2011).
[12] *See* Appendix I, attached.

and recurring debit card overdraft transactions.[13] The Board's judicious amendments to Regulation E were based on extensive consumer testing that clearly showed consumers want and expect important payments to be paid, and not returned as they appreciate the ability to avoid the embarrassment, hassle, expense, and negative reporting to checking account management databases. The testing also showed that consumers were evenly divided on whether ATM and one-time debit card transactions should be paid into overdraft; as a result, the Board imposed an opt-in requirement only for ATM and one-time debit card overdraft protection.

Yet without comment, the OCC completely disregards this policy determination and announces its supervisory expectation for banks to require customers to opt-in not only for ATM and one-time debit card overdraft protection but also for check, ACH, and recurring debit card overdraft protection. In broadening the opt-in mandate beyond the Board's conclusion, the OCC is in direct conflict with the Board and since the transfer date, the CFPB. It has created this conflict without conducting any similar consumer research to demonstrate flaws in the Board's factual record or to uncover any changed circumstances.

There is no attempt to articulate a safety and soundness rationale for the new requirement and no acknowledgement of its impact on consumers and national banks and thrifts. Indeed, the OCC's discussion of the new requirement is limited to a footnote in which the OCC states that the opt-in requirement for check, ACH, and recurring debit transactions will apply only to new customers and that banks "have flexibility in how they obtain a customer's affirmative request."[14] This – albeit implicit – acknowledgement of the compliance burden will do little to minimize the impact of the new compliance obligation and the disparate standards imposed. Even if opt-in rates are high, as expected, implementing the opt-in requirement will significantly increase compliance costs and limit profitability, and national banks and thrifts will be forced to operate at a significant competitive disadvantage to other financial institutions.

Similarly, the OCC's newly announced expectations for "prudent eligibility standards" will impose significant new compliance costs that are not necessary to operate an overdraft program on a safe and sound basis. As previously discussed, the 2005 Guidance establishes expectations for the adoption of express account eligibility standards, and banks have responded by adopting and applying criteria that consider the age of an account, average balance and deposit history, and information about other relationships a customer may have with the bank. Consistently low charge-off rates clearly demonstrates the reliability of these variables. Statements in the proposed Guidance such as the "scope and rigor of this assessment may vary depending on the credit and deposit profile of the customer" and "an objective should be to determine whether the customer has demonstrated "an inability or unwillingness to repay credit"[15] suggest an expectation for an ability to repay analysis, including a review of a consumer's credit history, that is neither feasible nor necessary for the safe and sound operation of an overdraft program. ABA urges the OCC to clarify that it is not imposing a requirement for consideration of a consumer's income, debts, monthly obligations and the like when enrolling a customer in an overdraft protection program and that currently used program eligibility standards suffice.

2. Disclosures

The Guidance states, "Customers who apply for and obtain overdraft protection should be provided sufficient information about a product's costs, risks, and limitations when the product is offered to make an informed choice. Customers also should be provided information about alternative overdraft services and credit products, if any, offered by the bank."[16] It is unclear whether the OCC intends for this statement to impose a requirement for disclosures in addition to those required by Regulation E and DD. However, we believe that to the extent they do, these additional disclosures are unnecessary

[13] 76 Fed. Reg. *supra* at 33411.
[14] *Id.*
[15] *Id.*
[16] *Id.*

and will confuse, and perhaps mislead, consumers. For example, the requirement to disclose product "limitations" suggests a requirement to disclose the amount of overdraft protection a bank might make available to a customer; however, this information could lead the customer to believe that the bank is committing to approve overdrafts up to that limit. Moreover, customers may be confused by a disclosure of an overdraft limit followed by a statement that the payment of overdrafts is discretionary.

The disclosure requirements of Regulation E and DD ensure that consumers have adequate information to make an informed choice about whether to opt-in to a bank's ATM and one-time debit card overdraft program. We note that the Model A-9 was the product of extensive consumer testing to ascertain the facts consumers need to make that decision and the most salient language and format for conveying the information.[17] The product of consumer testing always reflects a collective determination that some information is essential and that other information should be excluded. Although such conclusions may be second-guessed, the goals of uniformity and certainty demand that they not be. We urge the OCC to clearly state that the only mandatory disclosures are those required by EFTA (and Regulation E) and TISA (and Regulation DD).

We also urge the OCC not to impose a new requirement for "clear disclosure about the order of processing transactions" to "enable customers to manage their account prudently."[18] Disclosure of a financial institution's transaction posting order will only contribute to customer confusion, invite false reliance, and increase legal risk for financial institutions. Posting order is a complex system that is dependent on a variety of factors that may affect presentment and system delivery. The 2005 Guidance recommends that institutions explain generally that transactions may not be processed in the order in which they occur and that the order of presentment, processing, and settlement may affect the total amount of overdraft fees imposed. This recommended practice of providing general information alerts the customer to uncertain contingencies that may impact overdraft experience, but it does not overload them with detailed and lengthy information likely only to confuse or, worse, to invite efforts to "game" the system.

ABA strongly believes that the general principle on disclosures that OCC should follow is simply, "Where there are regulations covering the programs, services or products at issue, disclosures should observe those regulatory requirements."

3. Prudent Limitations

The Guidance states that national banks should establish "prudent programmatic limitations" including the number of overdrafts and the total amount of fees that may be imposed per day and per month; any transaction amount below which an overdraft fee will not be imposed; and in a footnote, suggests "offering a grace period of one or more days to allow a customer to return the account to a positive balance before any overdraft fee may be imposed."[19] Although ABA believes that banks may consider adopting program limitations – and many of our members report that they are – we urge the OCC to clarify that it does not intend to announce a supervisory expectation for the adoption of daily or monthly caps, *de minimis* transaction thresholds, or a grace period. We believe that the imposition of such a requirement on safety and soundness grounds does not withstand scrutiny. The value of paying transactions into overdraft does not diminish as the number of transactions paid increases as is demonstrated by the financial success of overdraft programs. Moreover, we believe that the new rules attenuate the need for caps or thresholds. Customers are receiving monthly reports of overdraft and NSF fees and are free to opt-in and out of an overdraft program at any time.

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[17] We note that throughout the supplemental materials published with the final Regulation E rule, the Board discusses the results of the testing and its conclusions based on that testing.

[18] *Id.*

[19] ABA does not agree with the suggestion that a grace period would be an appropriate program limitation. We believe that providing a grace period may only encourage customers to try to "play the float" provided by the grace period rather than promoting responsible management of their finances and checking account relationships.

As noted by ABA's Overdraft program Task Force in its report, *A New Framework for Overdraft Program Compliance,* a corollary of the new regulatory framework's endorsement of consumer choice is the responsibility of consumers to make their own comparisons among overdraft program elements offered by competing institutions. This, in turn, encourages financial institutions to compete for customers by providing more options than the simple opt-in. Increasingly, banks are incorporating within their overdraft programs design elements that make consumer choice more competitive. They are choosing to introduce daily or monthly aggregate limits into their standard overdraft programs without a regulatory mandate, and in this way are empowering their customers to determine the limitations on the program that they prefer. Market-wide, this will result in an array of customer options that cannot be obtained through regulatory pronouncements.

Finally, ABA does not believe that the OCC should attempt to define supervisory expectations for transaction processing. There is a reason that there are no federal regulations that govern the order of posting among transactions processed on the same day. Transaction processing is an enormously complex matter, and many of the variables lie outside of the control of the institution, especially for community banks that rely on core processors. There are a variety of clearing orders in the industry: some are real-time or near real-time and some are batch. There are combinations of both processes as some payments are cleared by type such as electronic with electronic and paper against paper. Each of these can have a different impact on overdraft experience given a particular set of customer transactions conducted in a particular order or using a particular type of payment. No one in the industry manipulates their clearing process to capture these individual customer variations in order to maximize bank income.

OCC should consider the following example as illustrative of how current practices afford most customers a result consistent with their behavior: Customers continue to count on an ever-vanishing float by writing checks ahead of the deposits they rely on. Clearing by order made or randomly can actually result in more overdraft events than the common practice of batch processing where all credits are cleared before batched debits are processed. This assures that irrespective of when those credits and debits actually occurred, the customer is given the benefit of all available funds before batched debits are processed. In other words, whatever order debits are actually cleared within the batch, the payment processing system is intended to give access to all available funds at day's end despite the customer's actually spending money he did not have at the time the transaction was conducted. Such a system does not maximize overdraft incidences, but rather gives depositors the benefit of the doubt with regard to funds availability.

Accordingly, we urge the OCC to eliminate the proposed statement "The order in which transactions will be processed also should be subject to standards to ensure that transaction processing is not solely designed or generally operated to maximize overdraft fee income."[20]

4. Monitoring and Risk Assessments

ABA has consistently encouraged banker identification of and outreach to frequent users of overdraft protection,[21] and we appreciate the OCC's attempt to avoid prescriptive definitions of excessive use and to articulate specific expectations for monitoring and follow-up. Nevertheless, our members believe that in practice, demonstrating compliance with this element of the Guidance will be a costly and challenging exercise.[22] Not only will national banks and thrifts be required to establish systems to track and generate reports demonstrating that they have identified and communicated with customers exhibiting at least one of the four "circumstances" deemed to constitute excessive use, but the Guidance also imposes a requirement to detect indications of "potential changes to repayment capacity" which in some cases, may require the bank to terminate overdraft protection privileges and

[20] *Id.*
[21] *See Overdraft Protection: A Guide for Bankers, supra* at 18*; A New Framework for Overdraft Program Compliance, supra* at 8.
[22] Results of an informal ABA poll show that almost 60% of respondents would prefer to have the FDIC rather than the OCC Guidance apply to their overdraft operations.

perhaps even to terminate the checking account relationship.[23] ABA does not believe that account evaluations are necessary to ensure the safe and sound operation of an overdraft program. Rather, they may threaten safety and soundness as operational costs are significantly increased and as many customers, denied the overdraft protection they affirmatively chose, decide to leave or are forced to leave the bank.

For each account deemed to exhibit excessive overdraft activity, the Guidance would require an evaluation described as "a more in-depth analysis of the borrower's ability to manage and to repay overdraft protection." Although the precise nature of this evaluation is unclear, the language used suggests an expectation for credit history and ability to repay analysis. Such an evaluation is not typically associated with small dollar deposit-related credit products, and it is not necessary to operate an overdraft program in a financially safe and sound manner. Currently, financial institutions have risk management policies and procedures in place to monitor for and manage accounts not maintained in good standing. Typically, if a customer exceeds the overdraft limit or does not make a deposit to cover overdrafts and associated fees within defined timeframes, overdraft privileges are suspended. In addition, as required by the 2005 Guidance, overdraft privileges are usually suspended if the account holder no longer meets the eligibility criteria, for example, if the customer has declared bankruptcy or has defaulted on another loan with the bank. Finally, overdraft balances are charged off when considered uncollectible, but no later than 60-days from the date first overdrawn.[24] Consistently low charge-off rates clearly demonstrate the effectiveness of this risk management framework. We urge the OCC to refrain from imposing an expectation for a credit evaluation of frequent users and "appropriate" account level modifications as this will increase compliance burden and cost with no countervailing improvement of safety of soundness.

Indeed, safety and soundness could be threatened by the requirement to terminate the overdraft privileges, and in some instances the checking account relationship, of a frequent user. The Guidance directs, "If, after account review and making any appropriate changes to an account, the account continues to demonstrate excessive overdrafts, *overdraft privileges should be terminated and, if appropriate, the account should be closed"*(emphasis added).[25] This requirement presumes that the customer made and continues to make the wrong choice, albeit an informed choice, for managing his or her short-term credit needs. It is the clearest example of the OCC overriding the policy determinations made by the Board in its amendment of Regulation E, and yet the OCC has introduced no empirical evidence that demonstrates that safety and soundness considerations require the government to impose limits on the voluntary use of overdraft services.

Moreover, national banks and federal savings associations will be forced to operate on unlevel playing field as other institutions are not similarly obligated to terminate the overdraft privileges of frequent users. Consumers will be surprised, confused, and likely angry when a service they have freely elected is terminated unilaterally, and they may choose to end their banking relationship with the institution. Many may choose to move from the regulated banking sector into the less regulated world of payday and pawn shop lenders to meet their short-term banking needs. We urge the OCC to avoid this result by deleting any requirement for national banks or federal savings associations to terminate overdraft privileges or the checking account relationship.

6. Management Oversight

ABA agrees that bank management should receive regular reports on volume, profitability, and credit performance of overdraft programs and that these reports should be segmented to identify the number or percentage of accounts exhibiting frequent use as defined by the bank. However, as explained above, we do not agree that banks should be required to "evaluate" these accounts. Therefore, we urge the OCC to delete from the Guidance the statement "Management should also

[23] 76 Fed. Reg. *supra* at 33412.
[24] *See* 2005 Joint Guidance on Overdraft Protection Plans, *supra* at 7.
[25] 76 Fed. Reg. *supra* at 33412.

receive reports that describe the status and outcome of internal reviews and evaluations of accounts identified as demonstrating excessive usage." Rather, safety and soundness guidance should be focused on management receiving reports on revenue/cost experience, trends in write-offs and customer growth/attrition.

Specific Comments on Appendix B, Safe and Sound Banking Practices in Connection with Deposit Advance Programs.

ABA appreciates the OCC's attempt to "provide a high degree of flexibility for banks to structure and operate their programs in a safe and sound manner that provides for fair treatment of customers without dictating specific product terms," and we recognize the difficulty of applying general supervisory principles to specific products. However, we believe that the proposed Guidance on deposit advance programs reflects a failed attempt to provide the necessary latitude for banks working to offer consumers transparent, responsible, and sustainable alternatives to meet their short-term funds availability needs. Instead, we believe that Appendix B announces a series of prescriptive "expectations" that would introduce unnecessary operational and compliance complexity and burden that will further reduce consumer choice for managing their funds availability.

Our members who offer a deposit advance program, report considerable demand for the product. Their customers appreciate the anonymity and ease of taking an advance when an unexpected expense arises. Reviews of accounts that have used the product show that many users are not overdraft program users; instead, they use the product as a means to actively manage their short-term, emergency credit needs and to avoid overdraft, NSF, or returned check fees. They value the fact that the advance is made directly into their checking account. Finally, deposit advance customers appreciate the fact that deposit advance limits are low (usually the lesser of $500 or 50% of the total of recurring electronic deposits into the account) and repayment occurs automatically from the next electronic deposit, ensuring that they avoid the "cycle of debt" that often traps customers of payday lenders. ***In reality, direct deposit advance programs enable customers to live within their means by permitting them to manage the timing of the receipt of those means.***

Customers understand that deposit advance programs are the functional equivalent of receiving an advance on income or other regular deposit. Thus, when the recurring deposit actually occurs, the balance not previously advanced is credited to the account. In other words, the normal, recurring payment is bifurcated into an accelerated portion (the advance), and the remaining balance received on schedule less the fee for taking the advance. When a person goes to his or her employer for an advance on their salary or commission payout, the obliging employer naturally pays only the balance (regular periodic earnings less the advance) on the scheduled pay day. The bank that offers a deposit advance program is behaving similarly, but as a third party, the bank charges a fee for the accommodation.

Banks that offer deposit advance services, and those considering doing so, have gone to considerable lengths to ensure that the operational, credit, compliance, and reputational risks are well understood and well managed. Bearing in mind experience with overdraft protection regulation, they have sought to design fair, but sustainable, programs that offer consumers another alternative within the regulated banking system to meet their short-term funds availability needs. They give customers the opportunity to elect, or opt-in, to participate in a deposit advance program, providing consumers with clear disclosures about initial and on-going eligibility requirements, how advances are requested and repaid, how credit lines are calculated, cooling off periods that may apply, and fees. Most banks that offer the product even provide frequently asked questions about how the product works to ensure that customers fully understand the advantages and limitations of the product.

ABA urges the OCC to resist the temptation to hide behind the foil of safety and soundness as grounds for publishing what are in fact statements of supervisory expectation responding to perceived consumer protection concerns. We remind the OCC that effective July 21, 2011, Congress granted the CFPB exclusive rule-writing authority under TISA and EFTA, the appropriate vehicles for the

regulation of deposit advance programs. We believe that the OCC should rescind Appendix B, permitting the CFPB to determine whether the further amendment of Regulations E and DD or the issuance of guidance or governing deposit advance programs is necessary.[26] As our comments to specific elements of Appendix B will demonstrate, we believe that proceeding with the publication of Appendix B will introduce unnecessary operational complexity and burden that will reduce availability of this emerging alternative for managing unexpected, short-term funds availability needs.

1. Product Availability and Prudent Eligibility Standards

ABA agrees that national banks should adopt policies and procedures that set forth the eligibility criteria for a customer to opt-in to a deposit advance service, and we appreciate the fact that the OCC recognizes that eligibility analysis for the program is limited. However, our members are concerned by the OCC's expectation for "an assessment of the customer's willingness and ability to repay the advance based on information about the customer's continued employment or other recurrent source(s) of income from which the direct deposit is derived and other relevant information."[27] They report that customers interested in participating in a deposit advance program do not complete an application, and banks do not engage in any form of credit check or credit history analysis. Accordingly, the bank does not have "information about the customer's continued employment or other recurrent source of income." Instead, eligibility for the service is based on the consumer (1) having at least one recurring electronic deposit of $100 or more into the account every thirty-five days; (2) maintaining a checking account with the bank for a defined period of time (typically six-months); and (3) maintaining the account in good standing.[28]

The source of the electronic deposit is not always known to the bank because not all ACH transaction codes are readily identifiable, but we believe that knowledge of the source is irrelevant to safety and soundness. It is the *recurrence* of the electronic deposit that matters, and banks re-evaluate a customer's eligibility each statement cycle (and daily, if an advance has been requested) to ensure that electronic deposits of at least $100 continue to be made regularly and that the account is being maintained in good standing. Experience demonstrates that abiding by these minimal standards results in a financially sound customer service that does not display "abnormal risk" of fiscally adverse consequences for the bank's operations or reputation.

Therefore, ABA urges the OCC to clarify that there is no supervisory expectation for the bank to consider information about the customer's continued employment or the source of any other recurrent income. In addition, we urge the OCC to clarify that the requirement to consider "other relevant information" relates only to deposit and account management information.

2. Disclosures

ABA agrees that consumers should receive clear and conspicuous disclosures describing "key program criteria and limitations, costs, and risks" before the customer is given the opportunity to enroll a deposit advance program. However, we urge the OCC clarify the statement that banks should "explain transaction-processing policies for repayment of a credit advance." We agree that banks should disclose the fact that repayment of a deposit advance may take priority over the payment of other items presented for payment and may result in overdraft or non-sufficient fund fees being assessed. But, as discussed in our response to Appendix A, we do not believe that the disclosure should also include a broader disclosure of the bank's transaction clearing policy and process.

In addition, we agree that disclosures should describe controls used to protect against excessive use including automatic cooling off periods and program termination policies. However, our members do not believe that program disclosures should be required to include information about refund policies.

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[26] ABA would encourage the Bureau's Division of Research, Markets and Regulation to study bank deposit advance programs and practices – as well as consumer response to them – to ensure that regulatory action is necessary and is empirically based.

[27] *Id.*

[28] Requirements for an account being in good standing vary, but factors considered include: not being overdrawn continuously for a defined period of time; not subject to bankruptcy, garnishment, or levy; and not subject to charge-off or in a repayment plan.

Although there are instances in which a bank may choose to refund deposit advance fees, such refunds are discretionary and are not subject to defined policy that can be (or should be) disclosed at the time of enrollment. Instead, we believe that customers should be informed that if they have a question or believe there is an error concerning their use of the deposit advance service, they should follow the procedure for resolving questioned or disputed electronic funds transfers described in their checking account agreement.

There are banks that have chosen to apply Regulation Z's disclosure requirements to their deposit advance product; for those banks, we believe disclosures about program operations are adequately addressed under that regulatory framework. To layer addition standards on top of the current account disclosures is truly reinventing the wheel and is another example of regulatory redundancy.

3. Prudent Limitations

We agree that banks should establish prudent programmatic limitations to ensure the safe and sound operation of a deposit advance program. Our members offering this service report that they have policies and procedures establishing the following prudent limits on program usage: (1) the number of periods that back-to-back advances may be made before a cooling off period will be triggered; (2) the number of months in which advances may be outstanding; (3) and the total amount or percentage of any deposit that may be advanced in any period. However, we do not agree that limiting the "total amount or percentage of any deposit that may be used for repayment of the advance" is necessary for the safe and sound operation of a deposit advance program. We believe that adoption of this requirement could have the opposite effect; it could significantly increase the risk of operating a deposit advance program.

In addition, our members report that operationally, repayments cannot be adjusted in real time to deduct only a certain amount or percentage of a particular electronic deposit. As disclosed initially, a fundamental operational feature of a deposit advance program is the fact that the repayment of total outstanding advances and related fees occurs via an *automatic* deduction from the checking account at the time of the next electronic deposit of $100 or more into the account.[29] ABA urges the OCC to omit the requirement that banks adopt program limits on the total amount or percentage of a deposit that may be used for repayment of an advance. We believe that market forces will better encourage the development of alternative means to ensure the efficient, but fair, operation of deposit advance programs.[30]

4. Repayment Terms

Our members believe that the discussion of repayment terms demonstrates a fundamental misunderstanding of the product and the reason that so many consumers choose to enroll in it. For example, the proposed prohibition of advances during any periods of account overdraft reflects the OCC's failure to understand that many consumers who use the product do so to avoid overdraft, NSF, and returned item fees. Our members report that consumers who typically enroll in a deposit advance program are looking for a way to actively manage those instances in which the timing of unexpected expenses has depleted checking account balances. They anticipate account overdrafts and take advances to cover them. In addition, customers appreciate the "discipline" that is imposed by deposit advance limits and repayment terms. Advances and maximum credit lines are modest – an advance can be as low as $20 and maximum credit lines usually are limited to the lesser of $500 or 50% of the total amount of recurring electronic deposits – and repayment of an advance occurs

[29] This helps consumers avoid the cycle of debt frequently associated with payday loans.

[30] Some banks are considering introducing an operational "fix" that does not require changes to the automatic functionality inherent to the program, but that ensures that accounts are never completely depleted by an automatic repayment. This fix requires the bank to program in a minimum balance threshold. Thus, the system could continue to take the full automatic deduction but only if doing so leaves a minimum balance in the account. For example, assume a bank adopts a minimum balance threshold of $100 and has a customer with outstanding advances and fees in the amount of $450. Assume also that the customer has a $500 deposit advance limit and receives two $500 electronic deposits into the account each month. When the next $500 electronic deposit is made into the account, the bank will deduct only $400, rather than the full $450, leaving a minimum balance of $100.

automatically with the next electronic deposit into the account. Thus, we urge the OCC to delete the statement that "When program terms allow for substantial advances relative to the regular deposit amount, advances should be permitted to repaid in more than one installment over an extended period of more than one month." A deposit advance is just the acceleration of a portion of a regularly received deposit of wages, benefits, or other income. It is naturally deducted when the regular deposit occurs; indeed, it is this timing that makes it an "advance." It is not the election of an installment obligation.

5. Monitoring and Risk Assessments

We agree that deposit advance accounts should be subject to reasonable periodic monitoring to identify excessive use and note that monitoring has been built into the product. Eligibility for deposit advances is dynamic; it is re-evaluated at the end of each statement cycle and if advances are taken, with each advance. This evaluation considers the amount of electronic deposits, overdraft activity, and advances taken so banks are constantly monitoring product usage and can readily identify excessive users. The product also has built-in controls – cooling off periods during which no additional advances are permitted – to prevent excessive use, and customers whose advance privileges have been suspended are notified of this fact in writing. Although we encourage banks to reach out to frequent users to discuss account management and alternative credit options, we appreciate the fact that the OCC has not announced specific expectations for this follow-up.

6. Management Oversight

ABA agrees that bank management should receive regular reports on volume, profitability, and credit performance of deposit advance programs and that these reports should be segmented by line usage to identify frequent users. However, we urge the OCC to clarify that its expectation for "reports describing the status and outcome of internal reviews and evaluations of accounts identified as demonstrating excessive usage" would not require an evaluation of information other than deposit history and account management.

Conclusion

ABA appreciates the opportunity to comment on these important issues. We have provided input on specific elements of the proposed Guidance, but strongly recommend that the OCC refrain from publishing final Guidance. We believe that any statements of supervisory expectation must apply consistently and fairly across all depository institutions offering so-called deposit-related credit products or an unlevel playing field will continue to exist to the detriment of both safety and soundness and consumer protection.

Sincerely,

Richard R. Riese
Senior Vice President

Appendix 1

Number of Banks* Where Line Item Revenue Exceeded Institution's Net Profit

Commercial Bank Line Items	# of Banks Where Line Item Revenue Exceeded Net Profit	% of Banks out of Total OCC Banks Under $10B in Assets
Insurance & Re-insurance Underwriting Fees	1,092	81.7%
Safety Deposit Box Rent	1,089	81.5%
Insurance Commissions	1,087	81.4%
Rent from OREO	1,087	81.4%
Fees & Commission from Securities Brokerage	1,085	81.2%
Income from Credit Cards	1,084	81.1%
Bank & Credit Card Interchange	1,076	80.5%
Fees from ATMs	1,076	80.5%
NSF & Overdraft Fees	***941***	***70.4%***
Income from Loans to Individuals	926	69.3%
Income from C&I Loans	820	61.4%
Income from 1-4 Family Residential Loans	509	38.1%
Total Number of OCC Banks*	1,336	100.0%

* Analysis based on OCC regulated bank that are under $10 billion in assets

Source: Highline Data, December 31, 2010