American Bankers Association
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January 28, 2011

Mr. Mark Pearce
Director, Division of Consumer Protection
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Overdraft Payment Programs and Consumer Protection, Final Overdraft Payment Supervisory Guidance, FIL-81-2010

Dear Mark:

Ginny O'Neill and I appreciated the opportunity to meet with you, Luke, and Sylvia to discuss the financial institution letter on the management and oversight of automated overdraft protection programs, FIL-81-2010 (the FIL). We value the opportunity for face-to-face discussions about important issues and appreciated your candor about the FDIC's expectations for compliance with the prescriptive elements of the FIL. I think this kind of discussion is exactly what Chairman Bair and ABA CEO Frank Keating had in mind when they met in December. In response to your invitation to identify specific compliance concerns arising from the FIL and possible solutions, we have attached a list of such concerns and suggestions.

As you are aware from our discussion and the American Bankers Association's (ABA) comment letter to the proposed FIL, ABA believes that unified interagency guidance is helpful when it provides direction for depository institutions and examiners on supervisory implementation of regulatory standards. Following the Federal Reserve Board's recent amendments of Regulations E and DD, all will benefit from clear statements of supervisory implementation that confirm the standards articulated and policies established by the new regulations. However, there is an important and significant difference between articulating interpretive guidance applying existing rules and imposing additional regulatory obligations whether by threatening enforcement, assigning an adverse rating, enumerating matters requiring attention, or other means of insisting on supervisory expectations. ABA believes that the FIL crosses the line and extends beyond the appropriate boundaries for guidance by, for example, imposing a rigid definition of "excessive or chronic use" (six in a rolling twelve- month period) coupled with mandated customer counseling; requiring caps on the overdraft coverage freely elected by customers; and requiring payment order policies and practices that ensure they do not operate in a manner that maximizes overdraft fees.

In addition, ABA believes that these new regulatory requirements are at odds with the spirit of the regulatory relief initiative announced by President Obama on January 18, 2011. Although we recognize that Executive Order 12866 (the Order) strictly applies only to executive agencies and departments, the pressing need to reduce regulatory burden presumably will encourage independent regulatory agencies to ensure that any regulatory requirements they announce are also consistent with the guiding principles of the Order. These principles require agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs" – one that is based

on the "best available science" or in the case of bank regulations, the best available research and consumer testing. As explained in our comment letter, ABA believes that the FIL is based upon an outdated model of industry programs and an outdated survey, and that it is premature to impose additional burdensome regulatory requirements until the impact of the amendments to Regulations E and DD have been thoroughly examined and understood. In addition, with respect to obtaining regulatory compliance, the Order instructs regulators to ensure that they "to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." ABA believes that the prescriptive elements of the FIL micro-manage the business behavior of banks, telling them what they must adopt, rather than illuminating the performance objectives sought by Regulations E and DD.

Another guiding principle of the Order calls for consideration of "regulatory approaches that reduce burdens and maintain freedom of choice for the public," a goal undermined by the FIL's requirement to institute arbitrary caps on overdraft coverage despite the fact that by opting-in to overdraft coverage, customers have unmistakably indicated their desire to have their debit card transactions paid. Finally, the Order requires agencies "to promote coordination, simplification, and harmonization" of regulations to reduce costs and promote certainty for business and the public. ABA believes that consumer protections – particularly those involving such a widely available and popular product as overdraft protection – should be consistent across all depository institutions. By acting alone, the FDIC has created an untenable situation in which consumers will be subject to overdraft programs governed by disparate regulatory standards. We encourage you to undertake the analysis contemplated by Executive Order 12866, and to consider rescinding the prescriptive elements of the FIL, particularly those that will impede unnecessarily a bank's ability to provide a valued product to customers who have clearly indicated their desire for fee-based debit card overdraft protection

In addition, we urge you again to reconsider the effective date of the FIL so that the recent Federal Reserve rules changes and customers' experience with them can be studied before deciding whether additional regulatory actions or requirements are appropriate.

That being said, we appreciate your offer to address some of the questions our members have asked as they consider how to comply with the FIL. We attach a list of the issues requiring clarification accompanied by suggested interpretive language. We look forward to our continued discussions about these issues.

Sincerely,

Richard R. Riese
Senior Vice President
Center for Regulatory Compliance

Cc. Luke H. Brown, Associate Director, Compliance Policy Branch
Sylvia H. Plunkett, Associate Director, Examinations Branch

Attachment to ABA Letter on Overdraft FIL-81-2010

1. Are institutions to monitor ***all*** overdraft transactions – including check, ACH and recurring debit card transactions that overdraw an account – and to include these transactions within their tracking of "excessive or chronic use"?

   Banks engaged in significant customer outreach and education to explain the new regulatory requirements applicable only to ATM and one-time debit card transactions and to offer customers the right to opt-in to debit card overdraft protection. To minimize customer confusion, ABA believes that expectations for tracking "excessive or chronic use" should not apply to transactions other than ATM and one-time debit card transactions that overdraw an account.

2. What is "an occasion?"

   - Is it one day on which at least one debit card overdraft transaction occurs?
   - Or does each overdraft transaction count as an occasion, even if multiple overdrafts occur on one day?
   - What if a bank has adopted a policy of imposing caps on the number of overdraft fees to be imposed in a single day – do overdraft transactions that exceed the cap but for which no fee is charged count as an occasion?

   A customer who has opted in to debit card overdraft protection understands and intends that the service be available to cover multiple overdrafts that occur in a single day. Indeed, occurrences of multiple overdrafts in a single day are not unusual considering the degree of debit card usage by consumers today. Having incurred an instance of multiple overdrafts in a single day, the customer may be surprised and annoyed to be considered a "frequent or excessive" user. To minimize customer confusion and annoyance, ABA believes that it would be less burdensome to bank customers and to banks if "occasion" were to be defined as <u>one day</u> on which a customer incurs a fee on an overdraft debit card transaction, regardless of the number of overdraft transactions that occur on that day.

3. What constitutes "meaningful and effective follow-up action?"

   - Does the FDIC expect banks to have a *conversation* – either in person or over the telephone – with a customer who has overdrawn his account more than six times in a rolling twelve-month period?
   - What documentation of these conversations will be required?
   - Are letters, emails or text messages that indicate the availability of alternative options and invite a customer response adequate?
   - What constitutes "giving the customer a reasonable opportunity to decide whether to continue fee-based overdraft coverage or [to] choose another available alternative?"
   - What course of action is required if a bank attempts to contact a customer, but the customer does not respond?
   - Is a bank required to suspend overdraft services immediately after the 6th occasion until customer contact or counseling has been completed?

Imposing a requirement for an in-person conversation ignores the fact that fewer and fewer banking transactions are conducted at a bank branch. A 2009 ABA-Ipsos-Reid survey of the banking method consumers use most frequently shows that only 21% of consumers choose to conduct their banking transactions at a branch. Moreover, the likelihood of communicating with customers via telephone is also limited. Few are at home able to answer the phone during the banking day when bank employees would be placing these calls. To reduce burden and increase efforts to contact consumers, banks might consider using autodialers and prerecorded messages to request that a customer contact his or her local branch, but proposed amendments to the Telephone Consumer Protection Act by the Federal Communications Commission would require a bank to get express written consent to place these calls to a customer's mobile phone.

ABA urges that examiners applying the FIL should permit banks to send a letter, text message, or email (for those customers who have agreed to receive electronic communications from their bank) reminding the customer about recent debit card overdraft activity and about available alternatives for handling overdrafts and requesting that the customer indicate whether he wants to continue fee based overdraft protection or to choose another available alternative. We believe that this option permits customers to attend to their banking business at their convenience and may increase the likelihood of a response. To increase convenience further and to avoid potential embarrassment for customers – embarrassment that may result in some customers leaving the banking system – customers should be given a variety of means to respond: either by making their election on the letter, replying to the email, or placing a call or visit to their local bank branch. FDIC should not require suspension of service after 6 occasions, unless the customer actually revokes his opt-in in accordance with Regulation E.

4. What contact frequency is meant by the directive to undertake follow-up action "after 6 occasions in a rolling twelve month period?"

   - Assume a customer who opted-in to debit card overdraft protection overdraws his account once each month. Seven months later, the customer would have overdrawn his account six times in a rolling twelve month period, and according to the guidance, the bank should "undertake meaningful and effective follow-up action." Assuming that the customer elects to continue fee-based overdraft coverage and overdraws his account again, must the bank contact the customer again each time another overdraft transaction occurs? By definition, each subsequent overdraft transaction would occur within a rolling twelve-month period.

     Customers are unlikely to welcome such repeated contact by their bank, further reducing the likelihood of the bank and customer engaging in meaningful communication about the overdraft activity and available options. Over time, such harassment may drive the customer from the bank. ABA notes that the FDIC could avoid this result by simplifying this requirement so that a bank contacts a customer who has incurred more than six overdraft transactions no more than <u>once</u> in a calendar year. This would reduce regulatory burden and customer annoyance and promote the meaningful and effective communication with customers the FDIC hopes to encourage. This would also harmonize the expectation with the fee reporting period used under Regulation DD which requires a bank to provide customers with a cumulative accounting of overdraft fees incurred during a calendar year.

5. The FIL directs banks "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."

   ABA urges the FDIC to adhere to the guidance articulated in the 2005 OTS Guidance on Overdraft Protection Programs: "Transaction-clearing rules (including check-clearing and batch debit processing) should not be administered unfairly or manipulated to inflate fees." FDIC should limit its expectation for review of check clearing procedures to ensure that there is no effort to "manipulate" check clearing to maximize overdraft fee revenue. In addition, FDIC should make it clear to bankers and examiners that the two examples of "appropriate procedures" are not intended to be the only acceptable clearing order.

6. The FIL requires banks to "institute appropriate limits on customer 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."

   - What constitutes an "appropriate" cap on fees?
   - How are banks to determine "appropriate" caps?
   - Will these determinations be subject to examiner second-guessing?

   ABA urges the FDIC to omit this directive. We believe that the customer's ability to opt-out attenuates the need for caps. Moreover, rather than imposing a regulatory requirement for banks to adopt daily limits, ABA believes that the industry should be given latitude to evaluate its regulatory obligations and the market in which it operates and to design overdraft programs that deliver choice to consumers in a transparent, responsible manner.

7. The FIL suggests that banks consider eliminating overdraft fees for transactions that overdraw an account by a de minimis amount, noting in a footnote that "If a fee is charged, such fee should be reasonable and proportional to the amount of the original transaction."

   - How are banks to define "a transaction that overdraws an account by a de minimis amount?"
   - Is a $300 transaction that overdraws an account by $7.00 to be considered a de minimis overdraft transaction?

   ABA believes that the value of having a $300 check paid to cover a heating bill that happens to overdraw an account by only $7 dollars is not de minimis. In addition, ABA urges the FDIC to delete the footnote. There is no accepted definition or history that adequately explains the meaning of "reasonable and proportional" as it applies to NSF or overdraft fees. Finally, we note that automated overdraft programs are not capable of varying the fee based on the amount of the overdraft transaction.

8. The FIL states that the FDIC is "particularly concerned about the risks posed by automated overdraft payment programs," distinguishing ad hoc programs as those that "typically involve irregular and infrequent occasions on which a bank employee exercises discretion in a specific instance about whether to pay an item or not, as a customer accommodation and not on a pre-determined or formulaic basis. Such ad hoc activities are not the focus of this guidance. Similarly, linked lines of credit are not the focus of this guidance."

   We appreciate the FDIC's intent that the FIL not apply to ad hoc, occasional customer accommodation overdraft payment programs. However, rather than stating that overdraft programs are "not the ***focus*** *of this guidance"—language that raises the possibility that an examiner in the field could apply the guidance to such a program –we urge the FDIC to state clearly that the FIL is not intended to apply to, and will not be applied to, ad hoc programs. Similarly, we urge the FDIC to state clearly that it does not intend to apply, and will not apply, the FIL to advances made pursuant to the terms of a linked line of credit.*