American Bankers Association
Building Success. Together.

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By electronic delivery to regs.comments@ots.treas.gov
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW,
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June 28, 2010

Re: OTS-2010-0008
Proposed Supplemental guidance on Overdraft Protection Programs

Dear Sir or Madam,

The American Bankers Association[1] is pleased to submit our comments to the proposed Supplemental Guidance on Overdraft Protection (Supplemental Guidance) issued by the Office of Thrift Supervision (OTS) the OTS[2] released for comment to update its Overdraft Guidance issued in February 2005. It states that the proposal is designed to "complement rather than replace" the 2005 Overdraft Guidance and encourages institutions to review overdraft protection programs to confirm that they are operated in a manner that is "effective, compliant with the law, and fair to consumers."

ABA supports OTS's efforts to harmonize, consolidate, and streamline its overdraft protection guidance to ensure consumer choice and understanding and provide clear direction and instructions to depository institutions. We agree with many of the OTS's proposed suggestions, and agree, for example, that it is useful to highlight the overdraft-related provisions of Regulation E (Electronic Fund Transfer Act), and Regulation DD (Truth in Savings Act) in any Overdraft Protection Guidance. However, we believe that the proposed guidance is premature, given the recent, far-reaching and significant changes to Regulation E addressing debit card overdrafts that go into effect in July, 2010. In addition, rather than harmonizing or consolidating, the proposal piles on another separate, at times inconsistent, layer to the existing, multi-layered regulatory

1 The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ over 2 million men and women. Included in our membership are 503 savings associations regulated by the OTS with combined assets of $695 billion.

2 Go to: http://www.ots.treas.gov/_files/482132.pdf or http://edocket.access.gpo.gov/2010/pdf/2010-10006.pdf

scheme and creates confusion and uncertainty. The result will be more opportunity to misinterpret the guidance, compliance complication, and uncertainty for institutions as well as examiners. In addition, the overall direction of the proposal is at odds with consumer testing that finds consumers overwhelmingly want important payments paid (especially bill payments by check and ACH) and are willing to pay an overdraft fee for the service. The approach of the proposal also appears to move away from efforts to ensure consumers receive digestible information about important terms and conditions and avoid information overload. Finally, the proposal to characterize failure to adopt best practices as unfair or deceptive is contrary to the Federal Reserve Board's (Board) and the OTS's rejection, after public comment, to address concerns about overdrafts under an unfair or deceptive acts or practices (UDAP) analysis.

For these reasons, we recommend that the OTS delay adoption of its proposed Supplemental Guidance until the impact of the amendments to Regulation E is examined and understood and work with the other agencies (or the new Consumer Protection Bureau currently under Congressional consideration) to update and replace, rather than merely supplement, the original Overdraft Protection Guidance so that it addresses any new issues, provides consistency among regulators, and facilitates compliance. To the degree that there are critical, discrete issues to address sooner, e.g., marketing practices with regard to second chance accounts, OTS can convey the message using alternative methods, as it has.

The proposal to issue "Supplemental Guidance" is premature, especially given the basis for the new rule and the Board's findings with regard to consumer preferences. Application of the proposed Supplemental Guidance prior to experience with implementation of the new rules will confuse customers, institutions, and examiners without any benefit to consumers generally.

With Regard to the Foundation of the New Rules.

The Board recently adopted a very strong, pro-consumer rule under its Electronic Funds Transfer Act authority that addressed the main concerns raised by Congress, consumer groups, regulators, and the media with regard to overdrafts, that is, debit card overdrafts. This was the end result of an extensive notice and comment process initiated as a UDAP rule-making in which the OTS was a full partner with the Board and the National Credit Union Administration (NCUA.) In substituting Regulation E for a UDAP solution, the Board, the OTS and the NCUA recognized certain key features and realities about overdraft accommodation practices in the current consumer financial market place. The OTS should allow time to learn how the new rule works before adopting additional requirements that may not be useful or helpful.

First, in drafting the final Regulation E rule, the Board conducted testing and evaluated other data that led it to recognize that overdraft accommodation practices provided benefits that bank customers valued and for which they were willing to pay. ***Consumer testing has consistently found that consumers want, appreciate, and expect important payments to be paid and not returned.*** The Board found that most of the participants in its focus groups were not surprised banks offered overdraft protection, understood that they would be automatically enrolled, and indicated that the overdraft coverage was a positive feature for those who need it or for particularly important transactions. [3] The Center for Responsible Lending in its January 2007 survey found a similar attitude among consumers; over 92 percent, when asked, said they would like the bank to pay an item even though there were insufficient funds and they were willing to pay something for it. [4] ABA's survey found that of the 20 percent of consumers who had paid an overdraft fee in the last year, 85 percent were glad their bank did so.[5]

Indeed, there are good reasons customers value having the payment made, even it if means incurring an overdraft fee. Customers value the ability to avoid the embarrassment, hassle, costs, and other adverse consequences of having a check or automatic electronic payment returned. Whether made by check or electronically, returning a payment to a merchant, mortgage company, landlord, government agency, or utility usually means the customer pays additional fees charged by the person receiving the payment and suffers other adverse consequences. In addition to avoiding additional fees, through overdraft protection, customers avoid the inconvenience of having to resolve the issue and arrange a second payment. They also escape the risk that their landlord, merchant, or other payment recipient will in the future refuse their checks or electronic payments and insist on a cashier's check or cash. Customers avoid having adverse information reported to a negative "bad check" database.

After all, the origin of paying overdrafts was to accommodate "good" customers. Good customers expect their institution to know that they are "good

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[3] "Review and Testing of Overdraft Notices," submitted by Macro International Inc. to the Board of Governors of the Federal Reserve System, December 8, 2008. "Most participants were not surprised that a depository institution would offer overdraft protection of this type." Eight of the nine participants indicated that they would keep the overdraft coverage, because they wanted to ensure that important transactions went through." (Page 8.) (Page 8.) " "Almost all indicated that they would want their cable bill covered, because having this bill paid would be worth paying an overdraft fee." (Page 9.) "Participants generally indicated that the overdraft coverage described in the disclosure was a positive feature for those who needed it, or for particularly important transactions." (Page 14.)

[4] See attachment to attachment 1, July 30, 2008 ABA letter to OTS and Board regarding UDAP proposal

[5] See ABA Overdraft Fee Study, Ipsos U.S. Express Telephone Omnibus, (July 11-13, 2008).

for the overdraft" and are offended and sometime infuriated when their institutions' actions indicate that they do not trust them to repay. Moreover, the automated programs adopted in recent years represent an effort to identify and accommodate *all* "good" customers in a manner that promotes consistent treatment of customers. The automated systems mean that the decision is not reliant on the subjective opinion of or personal relationship with a branch manager.

Second, and of particular significance in moving the regulatory initiative away from a UDAP solution, was the recognition that ***customers have a responsibility for conducting their transactions within their means and an obligation to be informed about their account balance*.** After all, consumers may easily avoid overdrafts --and most do—by keeping track of their account, keeping a cushion, linking to another account, or setting up alerts when their balance is low. Moreover, the bottom line is that customers are in the best position to know what their "actual" balance is – only they know what checks they have written, automatic payments they have authorized, and debit card transactions they have approved. The bank will not be aware of checks written, automatic payments scheduled, or even some debit card transactions until they reach the bank. It is important not to reinforce the incorrect and harmful notion that customers may assume that institutions are aware of all transactions that the customer has authorized and that it is not necessary for customers to keep track or use other available options to manage their accounts. Managing the account is not only important for avoiding overdrafts, but also for controlling spending and protecting against identify theft and fraudulent activity. Regulations should not encourage customers to assume they may simply put their account on automatic pilot and rely on the institution to be their private accountant.

Indeed, in 2005, OTS joined the other depository institution regulators in endorsing the interagency consumer brochure, "Protecting Yourself from Overdraft and Bounced-Check Fees," distributed with a press release that noted: the *best way to avoid* overdraft and bounced-check fees is to manage accounts wisely. That means keeping an up-to-date check register, recording *all electronic* transactions and automatic bill payments, and monitoring account balances carefully. (Emphasis added.) The brochure itself describes *nine* different ways to avoid such fees, the second bullet point of paying special attention to electronic transactions being emphasized in bold print. The fundamental validity of this consumer responsibility was an inescapable rebuttal to the unfounded assertion that overdraft fees were unfair because they were not reasonably avoidable.

Rather than pursue an unwarranted and unsubstantiated UDAP solution, the agencies concurred in the Board's alternative to address more directly the kernel of concern about overdraft accommodation practices as they applied to electronic transactions and expressly abandoned their UDAP rule-making initiatives in favor of the Board's Regulations E and DD amendments.

In brief, final Regulation E was based on consumer preferences and a recognition of bank customers' role and control in managing accounts and avoiding overdrafts. The OTS should allow time for the impact of the new rule to be understood before adding or changing the rules, especially based on a UDAP analysis, which may have retroactive application and significant liability.

With Regard to Elements of the New Rules.

Amended Regulation E and the associated changes to Regulation DD were based on extensive consumer testing and public comment. The new Regulation E provides that depository institutions may not impose an overdraft fee for ATM or one-time point-of-sale debit overdrafts unless the customer expressly consents, or opts-in. This is a pivotal requirement of the new rules that places "standard overdraft practices"[6] on a different plane from other deposit account features by empowering customers to elect to receive the benefits of overdraft accommodation but starting them in the default position of not receiving such coverage. Holding all other features of any particular account type constant, the customer may voluntarily choose to obtain the benefits of an institution's standard overdraft practices.

Perhaps even more significant than the opt-in provision is the unfettered freedom preserved by the regulation for customers to revoke their opt-in "at any time." Thus, opting-in to debit card overdraft protection, unlike, for example, other contracts such as cell phone contracts, creates no commitment on the part of customers. ***Customers may always change their mind without consequence or cost.***

In other words, the policy "nudge"[7] is clearly against overdraft protection for ATM and one-time debit card transactions. However, the key to "libertarian paternalism" is to preserve the consumer's right to choose to move away from the policy default position. In this case, the customer's choice is doubly protected by requiring opt-in and protecting virtually unlimited non-abusive, opt-in revocation. No greater empowerment of consumer choice can be created than what Regulation E establishes by protecting the customer's freedom to opt-in and to revoke opt-in.

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6 "Standard overdraft practices" is the term defined in the rule, but "standard overdraft services" is the term used in the mandatory opt-in notice.

7 Cass R. Sunstein, Richard H. Thaler, *Nudge (*New Haven & London: Yale university Press 2008)

The final rule in fact protects consumers even when the institution does not knowingly pay debit card overdrafts. For various reasons, debit card overdrafts may occur that the institution cannot stop. For example, some merchants, to save time and money, will check to verify a card's validity, but not actually request approval for the transaction. The debit card transaction is then later presented to the institution and paid, even though there are insufficient funds. In this case, even though the customer authorized the transaction and received the goods, the institution may not impose a fee unless the customer has opted-in.

In amending Regulations E and DD, the Board has defined a new baseline of fairness that has precipitated changes in the business model for standard overdraft protection services and for the transaction accounts they protect. Introducing supplemental and sometimes inconsistent requirements will reduce consumer choices and confuse consumers and compliance efforts with little if any benefit.

With Regard to the Transition to the New Rule.

The new rule has meant significant operational changes, business model adjustments, and customer communication challenges in a relatively short time period. Many institutions have made basic re-evaluations of their position on offering standard overdraft services based on the new rules. Some institutions have discontinued offering debit card overdraft services, while others have introduced it. Those offering debit card overdraft services after the effective date had to ensure that significant changes to core processors were made in order to distinguish "recurring" debit card transactions from one-time debit card transactions so they are treated differently for purposes of overdraft decisions. Even those institutions who had never knowingly paid debit card overdrafts had to make adjustments and incur costs to ensure that fees are not charged for debit card overdrafts that the institution cannot avoid.

Two overriding policy points follow from the fundamental business changes precipitated by the new rules. First, no agency has a clear picture of the full variety of options customers will be offered by their bank or their bank's competitor in a world predicated on mandatory opt-in and unfettered opt-in revocation. All that is certain is that prevailing practices and account features will be different than they are today. In other words, there is no adequate record upon which to base the invention of new duties mid-stream during the current implementation process. We do not yet know the gaps, if any, that should be addressed. To guess at the predominant practices of the industry or its customers is to tilt at imaginary windmills. Second, imposing new requirements and potential costly liability in effect means having to incur twice, and probably three times when unfounded policy guesses prove wrong, extensive compliance costs during a fragile economic environment with no measurable benefit to consumers generally.

Furthermore, the new rule means that consumers have been receiving information about changes to various aspects of overdraft programs along with the opt-in information. Complicating the rules and terms of overdraft protection programs in the midst of implementing the new rule impacts not only depository institutions, but more importantly, their customers. Having only just received new information and instructions about the overdraft protection – and having made a choice based on that information – customers will again be hit with new changes, which will create confusion and frustration. For example, having made a decision based on their understanding that they must opt-in for covered debit card overdrafts, but not for checks and ACH transactions, they may be met with yet another notice that will contradict the earlier information and their understanding. In addition, they might receive another disclosure related to changes in the maximum number of overdrafts that contradicts earlier but recently conveyed information.

Moreover, the inconsistency with Regulation E and Regulation DD will leave both institutions and examiners confused and uncertain. For example, may the disclosures of the proposed Supplemental Guidance about payment order and the impact of fees on the overdraft protection amount be contained in Regulation E's opt-in notice? Or, may – or must -- they be disclosed with the Regulation DD disclosures? Or, must they be included in all communications to consumers? Must customers be able to opt-in for check overdrafts even though Regulation E's opt-in notice is limited to certain debit card overdrafts? Must any such check and ACH overdraft opt-in notice be a notice separate from the Regulation E opt-in notice related to debit cards? How does the OTS's proposed requirement to provide information about options to overdraft protection services fit with similar provisions in the Regulation E opt-in notice and Regulation DD requirements to provide certain information with any overdraft protection promotion? These are just some of the examples of how the proposal clouds compliance.

The simple fact that institutions and examiners now must look at a fourth document – the original Overdraft Protection Guidance, which OTS states is not being replaced, revised Regulations DD and E, and now the Supplemental Overdraft Protection Guidance -- strains any good faith effort to understand the combined overdraft requirements by both institutions and examiners. The challenge is exacerbated by the fact that the proposed Supplemental Guidance does not address the fact that many provisions in the original Overdraft Protection Guidance have been supplanted by Regulations DD and E and the proposed Supplemental Guidance, which means wading through the original

Overdraft Guidance to sort out what has been supplanted by new regulations and guidance.

For these reasons, OTS should also not proceed with its premature and independent proposal of issuing Supplemental Guidance.

***Revision of the 2005 guidance and harmonization with changes to new regulatory requirements and market experience should be done on an interagency basis*.**

OTS is correct in recognizing that there is value in updating its 2005 Overdraft Protection Guidance and the parallel Interagency Overdraft Protection Guidance. However, in doing so, the OTS should finally join the other agencies to create a uniform statement of federal depository institution oversight of standard overdraft services. Whatever the policy motivation was for OTS to eschew articulating the legal risks of overdraft protection programs in 2005, there is no longer a valid reason to create separate and different requirements for savings association charters going forward.

Today the same third-party vendors and core processors that facilitate overdraft protection programs for banks perform the same functions for savings associations and credit unions. All insured depositories compete in a common marketplace and offer a comparable variety of standard overdraft protection services options. The rules and supervisory expectations should be consistent across all insured depository institutions.

Neither is the recent enforcement action by OTS with regard to a particular institution's overdraft protection program a sufficient reason for OTS to undertake its sweeping proposed Supplemental Guidance. While ABA supports transparency in supervisory expectations and enforcement policy, such operating guidelines should reinforce industry-wide standards and not be an excuse for failing to coordinate either examinations or enforcement standards across the federal banking regulatory agencies. If enforcement cases do not speak for themselves, then perhaps OTS should return to the enforcement practices that characterized its actions when it spoke plainly in the Notices of Charges for cases it initiated in the early 1990's to clean up after the thrift crisis.

Finally, the OTS should work cooperatively with all of its agency colleagues to achieve a level regulatory playing field. The OTS should support the Board's new rules and respect the line it has drawn about what should be tackled when. OTS's proposal recognizes by its redundancy with the new Board rules that much of the current Overdraft Protection Guidance has been superseded by recent rule-making. It is also evident that OTS's initiative is dependent on both Board and FDIC research, yet OTS has inexplicably proposed its own Supplemental Guidance when those it depends upon seek an interagency solution.

It is contrary to the predominant spirit of regulatory reform that seeks to establish a uniform voice for consumer protection regulation for OTS to be a maverick on a subject with which it has so much common cause with the other Federal Financial Institutions Examination Council agencies. We do not recommend either OTS or the agencies delay action to await the erection of some future bureaucracy, but ABA strongly urges the agencies to coordinate and issue a single interagency guidance update on overdraft protection program practices predicated on experience with the newly implemented Board rules which set the core requirements for standard overdraft protection services going forward.

Disclosures and communications about bank accounts and overdraft protection options should be simple and digestible for consumers.

Any disclosure requirements should be clear as to their meaning and not clutter general disclosures so that customers miss important information**.** In developing updated interagency guidance, the agencies should strive to promote disclosures about bank accounts and overdraft protection options that are simple and digestible. Any disclosure requirements related to overdraft protection services should be clear as to their meaning, limited to overdraft promotional materials, and not clutter general disclosures so that customers miss important information. Moreover, to facilitate compliance and provide more clarify, generally, disclosure requirements should be addressed in Regulations E and DD.

The proposal, as written, makes consumer disclosures and compliance confusing and unclear. In effect, it imposes various new and additional requirements to provide information related to overdraft services, such as information related to payment order, alternatives to overdraft protection services, the impact of fees on the amount available, and demonstrations of when multiple fees will be charged. However, the proposal is unclear about where and when this information should be provided. While this information may be important for those customers who find managing their account challenging and thus may overdraw the account, disclosure rules should be designed and targeted to avoid information overload so that customers do not overlook information that is most important to most customers. Accordingly, overdraft protection disclosures should not be highlighted in general account disclosures or general marketing material, but limited to materials specifically related to the marketing of overdraft protection.

Moreover, any disclosure requirements related to overdraft protection should be addressed in Regulation DD, which already requires that certain information be contained in any overdraft protection promotion. We note that the Board is currently reviewing and intending to address any issues related to payment order, including potential disclosure. Accordingly, the OTS should wait for the Board's review and not create the potential for another inconsistency. If the concern is related to advertisements of "second chance" accounts, the OTS could address it specifically and narrowly.

Future interagency overdraft protection guidance should promote simplicity in disclosures for consumers by itself being succinct and streamlined.

ABA concurs with the banking agencies that there remains value in the current Overdraft Protection Guidance. In its *ADApTing Your Overdraft Program*, an outline for members to follow in implementing the new rules, ABA specifically advised bankers that the Joint Agency Guidance on Overdraft Programs had continued relevance and should be part of their efforts for achieving program revision compliance. Nevertheless, ABA believes that the agencies could promote clarity and reduce confusing redundancy by updating the guidance to summarize the new rules, eliminate the recitation of practices that have been subsumed by those rules, refine existing practices guidance where still appropriate under the new baseline standards, and articulate considerations that institutions should apply where any new compliance gaps are identified.

Comments to the specific provisions.

III. Specific Overdraft Practices

The OTS proposal addresses the content of marketing and consumer communications regarding overdraft protection service. These proposed provisions include adding to the information already required to be provided to consumers, prohibiting the marketing of accounts with overdraft protection as an account that will help avoid future financial challenges, and imposing new restrictions on the use of the term "free." In addition, the proposal "recommends" certain programs features and operational practices:

1. Opt-in for all overdrafts, including checks and automated electronic payments such as ACH;
2. Limits on aggregate fees;
3. Not changing payment order on a customer-by-customer basis to maximize overdraft fees;
4. Monitoring of overdraft protection program usage payment order; and
5. Not reporting negative information to "credit reporting agencies" when overdrafts have been paid as agreed.

In many instances, failure to adopt the specific "recommendation" is deemed to be unfair or deceptive. The OTS is also specifically requesting comment on whether it should adopt standards related to the amount of overdraft fees.

As already noted, we urge the OTS, in conjunction with the other agencies, to ***replace,*** rather than supplement the existing Overdraft Protection Guidance to make the meaning of the Overdraft Protection Guidance clear, consistent with regulations, and manageable. We also suggest that the agencies not be constrained by the existing structure and headings and instead re-structure the Overdraft Protection Guidance and delete, insert, and modify headings as appropriate to reflect the current regulations, practices , and guidance. Final guidance should list and explain separately the overdraft protection-related provisions of Regulation E and Regulation DD, including the specific sections of each regulation sections. It is not necessary, as proposed, to create a separate descriptive heading if the only discussion is a reference to the regulation. This will streamline the guidance and help institutions ensure that they have reviewed all the relevant sections.

A. Marketing and Consumer Communications

Recommendations that are redundant with Regulation DD should not be separately listed practices.

Several of the recommended practices with respect to marketing and consumer communications in the original OTS Overdraft Protection Guidance have been subsumed by amendments to Regulation DD. ABA believes that any new interagency guidance would do better to cover such elements as part of its summary of Regulation DD standards rather than being interspersed as stand-alone recommendations or best practices. Accordingly, ABA recommends that OTS and the agencies not replicate the following former recommended practices under separate headings, but instead cover their substance as reflected in Regulation DD's requirements:

- Clearly explain the discretionary nature of the program
- Clearly disclose program fees
- Illustrate the type of transactions covered
- Disclose account balances to distinguish consumer funds from overdraft funds.

We also recommend that the revised Overdraft Protection Guidance include references and section numbers to overdraft protection services provisions contained in both Regulation DD and Regulation E.

OTS's analysis that the failure to abide by best practices results in UDAP violations as applied in several instances in the proposal is unfounded in law and unwise in policy.

ABA disputes the analysis articulated by OTS in describing the failure to abide by various proposed Best Practices as being deceptive or unfair under Section 5 of the Federal Trade Commission Act and opposes OTS converting aspirational Best Practices into mandatory requirements through such unfounded application of UDAP standards. While we will address specific failures in our discussion of the respective proposals, ABA expresses its opposition to OTS's general approach here.

OTS's history with the recommendations contained in the Overdraft Protection Guidance is different than that of the other banking agencies. In issuing its 2005 Guidance, OTS declined to characterize overdraft protection practices as credit and did not join the other agencies in describing the legal risks to be managed in operating overdraft programs. Accordingly, OTS declined to adopt expressly UDAP as the foundation for, or the authority to enforce, its recommended Best Practices. Nowhere did OTS suggest that failure to follow recommended Best Practices were either violations of UDAP or the OTS advertising rule. OTS's posture was to make the Best Practices aspirational and to apply supervisory oversight accordingly. ABA, having itself articulated a series of industry best practices in 2003 (and been cited in the OTS guidance for doing so), found little difference between the two versions of best practices and supported the OTS and Joint Agency initiatives.

As noted previously, since adoption of the current Overdraft Protection Guidance, the agency, the industry and the marketplace have evolved. Of particular significance in terms of the legal basis for supervising overdraft programs, there was an interagency initiative by the Board, the OTS, and the NCUA to explore that appropriateness of applying UDAP unfairness theories to the regulation of overdraft protection practices. The result after extensive comment by parties on both sides of the discussion was a regulatory decision apparently concurred in by OTS to proceed down a separate regulatory path by having the Board amend Regulations E and DD and to focus on debit card transactions. ABA's comment letter actually recommended this change of course as superior to the pursuit of the unfounded UDAP theories advanced by the agencies. Most of the ABA's analysis of the 2008 UDAP proposal remains relevant and we attach our prior letter as an appendix to this comment, so that it is incorporated into this record and, hopefully, read again by OTS. (See attachment 1.)

ABA continues to believe that the power of either industry articulated best practices or agency recognition of such best practices is to encourage banks to evaluate their markets—both customers and competitors—and to design sustainable products or services that provide value to customers in a responsible manner. There is no single set of features for any product that meets this aspiration, but the process of considering best practices and selecting among various design features yields a range of products for a variety of consumer needs and promotes choice in a competitive market. It is certainly not the purpose of UDAP to dictate or override such diversity of consumer choice. Rather, like the Community Reinvestment Act with its encouragement mission, best practices are intended to encourage banks to aspire to certain conduct, not compel them through an enforcement mechanism.

ABA considers the OTS conclusion that the failure to provide the information recommended by several of the proposed best practices is a deceptive practice is fundamentally flawed for the following reasons:

- First and foremost the standard for deceptive practices requires a representation or omission to be "***likely*** to mislead consumers acting reasonably…." Yet OTS repeatedly and insufficiently asserts that the conduct only "may mislead a consumer." This does not meet the legal threshold for a deceptive practice under Section 5 of the Federal Trade Commission Act (FTC Act).

- Second, the supposed materiality of the alleged deceptive practices to the decision to make a particular transaction is, as under the fairness test, rebutted by the fact that customers have the individual responsibility to manage their finances and are in a superior position to the institution with respect to knowing expected inflows and outflows of funds. Consumers are "acting reasonably" when they act responsibly in managing their accounts.

- Third, the materiality of information to a particular decision cannot be properly evaluated by ignoring the information contained in account disclosures. An advertisement about a product's use cannot be considered deceptive because it omits information disclosed before the product is delivered for use. A customer "acting reasonably under the circumstances" is not free to ignore the information in an account agreement or associated disclosures received after the advertisement, but before use of the product. Selective or partial use by the customer of all the information made available by the institution is not a proper basis for concluding that a material misrepresentation has occurred, especially on the basis of an omission theory.

- Fourth, in the absence of a targeted marketing or communication effort, the reasonable consumer under the circumstances is the typical customer in the usual circumstances, not a particular type of customer in a particular circumstance.

- Fifth, OTS's behavioral assertions are founded on no record evidence. OTS cites no consumer studies conducted by them, nor even a statistically valid sampling of supervisory experience.

With the above, general arguments in mind ABA comments further on the specific OTS proposals not already addressed:

Fairly represent overdraft protection programs.

The OTS presents its concerns about marketing overdraft programs to those who have had difficulty managing accounts in the past and stresses that the "need to review the consequences of overuse of overdraft services is heightened where associations target consumers who have experienced financial difficulties." It advises that institutions "should avoid marketing accounts covered by overdraft protection in a manner that leaves the impression that the accounts are designed to help avoid future financial challenges, especially when contrary information is omitted." The proposal continues,

> For example, it would be a material misrepresentation to market an account as particularly suitable for those with prior credit or bank account problems without informing consumers of significant overdraft fees associated with an account. . . Failing to provide such consumers with fee information appears to significantly impair their ability to determine whether an account meets their needs.

We agree with the concept that institutions marketing ***specifically*** to those who have had trouble managing accounts in the past should ensure that the target audience understands any significant overdraft fees. Moreover, we believe that OTS's enforcement action on this basis sent a strong message to all institutions with regard to this type of marketing. This point should be addressed in any replacement Overdraft Protection Guidance issued jointly with the other agencies (or by the new consumer protection bureau). However, it should be clear that its application is limited to marketing targeted at "second chance" customers and that it does not apply to marketing intended for the general population or other specific groups simply because some within the general or other target group might have mismanaged accounts in the past.

Provide information about alternatives when they are offered.

The proposal suggests that in addition to providing information about alternatives when informing consumers about an overdraft protection program as suggested in the current Overdraft Protection Guidance, institutions should address "how the terms, including fees, for these services or products differ." We agree that interested consumers should obtain complete information so as to make an informed choice. However, in light of the Regulation E opt-in notice, it is not clear the proposal's goal nor how this provision aligns with that new opt-in notice that includes information about alternatives to debit card overdraft protection. In addition, providing automatically such detailed, additional information seems contrary to the Board's attempts to ensure that the disclosures related to debit card overdraft to consumers are brief and simple so that they are easily understood and likely to be read.

The primary concern raised with regard to overdraft fees related to debit card overdraft fees, because some consumers may not expect a debit card transaction to be approved if there are not sufficient funds. Accordingly, the Board amended Regulation E to require customers to opt-in to covered debit card overdrafts and require a short, easy-to-understand disclosure about the option. At the very top of that notice, there must be a statement explaining and listing alternatives to standard overdraft plans, such as a link to an overdraft line of credit or saving account, "which may be less expensive." The notice must invite the customer to inquire about other options. This notice is short, informative, and designed to gain the attention of those who are interested and/or concerned that they may overdraw their account – whether it is by debit card or other means -- without overloading all customers with information that is not of interest to them. Those interested, will then receive additional information. This appears to be an effective way to inform consumers of choices.

The proposal, however, seems to invite more detail, text, and clutter, increasing the likelihood that customers will disregard or discard the detailed information. Moreover, such an open-end requirement in addition to the Regulation E notice makes it unclear what institutions are expected to do. Do they provide the additional information about alternatives on the Regulation E notice or should it be a separate notice? How much information is enough without overwhelming the customer?

While the Regulation E opt-in notice is only provided if the institution offers debit card overdraft services, debit card overdraft fees were the main focus of complaints and concerns and indeed research has shown most people want check and ACH overdrafts paid. Thus, Regulation E's notice with information about less expensive alternatives will reach the target audience. In addition, the notice uses a simple format that will inform those who need more information without distracting those who do not. Before handing to all consumers another layer of notices, we suggest that the OTS allow consumers to respond to the new Regulation E notices and policy changes and then determine if consumers want and need additional paper.

The OTS proposal also suggests that "an affordable small dollar term loan might serve as an alternative to fee based overdraft protection," and references the FDIC's small dollar loan model. However, we note that the FDIC's 2009 report found these programs so far to be unprofitable generally.[8] Virtually all the banks in the FDIC pilot program concede that these loans cost more than the venue they produce. The FDIC's just released 2010 report draws no conclusions about profitability. Rather, it notes that such loans offer a "useful business strategy for developing or retaining long-term relationships."[9]

Distinguish overdraft protection programs from "free" account features.

Regulation DD already prohibits institutions from promoting free accounts and overdraft protection programs in the same advertisement in a way that suggests overdraft protection is free. Specifically, Comment 230l8(a)-10(v) of the Official Staff Commentary provides that institutions may not advertize overdraft services for which there is a charge in an advertisement that uses the word "free" to describe the account unless the advertisement clearly indicates that there is a cost associated with the overdraft service. The proposed guidance goes further, in effect, prohibiting use of the term "free" (for any account feature) if there is an overdraft fee at all, regardless of whether the overdraft service is being promoted in the advertisement. The proposal provides:

> [I]t would be a material misrepresentation to use marketing that focuses on account features that are "free" or inexpensive, but omits information about the cost of each overdraft transaction. This is particularly true when consumers have been automatically enrolled in programs that charge a significant fee for each overdrawn transaction. The net impression of such marketing may be to mislead consumers acting reasonably under the circumstances to believe that the total cost of the account (including overdraft protection) is free or inexpensive and to be unaware that engaging in overdraft transactions will result in the assessment of significant overdraft fees.

The proposal concludes that such circumstances are deceptive and violate UDAP and the OTS advertising rule. In effect, the proposal not only prohibits in advertisements a description of account features as "free" if there is any overdraft fee, but calls into question the ability to advertize any checking account or account feature as free if there are *any* fees at all associated with the account, including overdraft and NSF fees.[10] ABA opposes OTS and the agencies articulating any aspirational recommendation or mandatory standard that goes beyond the pronouncements in Regulation DD.

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8 "The FDIC's Small-Dollar Loan Pilot Program: A Case Study after One Year." (page 33).

9 "A Template for Success: The FDIC's Small-Dollar Loan Pilot Program," p 33.

10 The proposal notes, "This is particularly true when consumers have been automatically enrolled in programs that charge a significant fee for each overdrawn transaction." However, it does not limit the provision to these circumstances nor explain the meaning of "significant."

First, this proposed provision will mislead consumers who will assume that features have a cost when in fact they are free, to their detriment. Second, it will harm consumers by encouraging over-disclosure and advertisement clutter so consumers are more likely to overlook important information. Third, it will discourage institutions from offering free checking accounts. Fourth, the proposal is inconsistent with Regulation DD's acceptance of what is considered a free account. Finally, its application to all overdraft protection services, not just debit card overdraft protection services, is inconsistent with consumer expectations and preferences and with Regulation E.

Under the proposal, it is a material misrepresentation if an institution labels account features as free if the institution charges overdraft fees for any transaction, (whether debit card, check, or ACH). Thus, for example, if an institution advertized that debit cards or online banking are "free," but charged an overdraft fee to pay a mortgage –or a debit card overdraft of a customer who has opted into having such transactions paid -- the advertisement would be misleading under the proposal.

Such an approach may in fact mislead consumers and cause them to miss an opportunity to avoid fees. For example, at one time, many institutions charged fees for debit cards, debit card transactions, and online banking. Under the proposal, an institution that in fact was not charging such a fee, would not have been able to bring this attractive offer to the attention of the public by using the term "free." As such, consumers would reasonably conclude that in fact there is a fee for these features. Not knowing that in fact the feature was free, consumers would have continued to pay at their own institution rather than inquiring into the account with the free feature.

Moreover, the proposed approach will have the impact of providing less valuable information and cluttering the advertisements so that information important to most consumers is completely obscured. Because the proposal calls into question the ability to advertize any checking account or account feature as free if there are any fees at all associated with the account, the only safe approach to satisfy examiners and avoid costly allegations of and liability for deceptive practices, is to not only include overdraft fees in advertisements of "free" features or "free accounts," but also fees for *any* account feature or associated service. It is not clear where the line is and which fees should be disclosed. The likely result is a panoply of all fees, some which may or may not be more important to customers than overdrafts fees such as fees for card replacements, paper checks, stop payment orders, wire transfers, cashier's checks etc. Advertisements for checking accounts would begin to resemble those for pharmaceuticals: pages of warnings and rapid and incomprehensible oral recital of all fees. The obvious alternative is to not offer free accounts or free features, to the detriment of consumers.

The proposal should recognize that it is understood that advertisements, whether for a bank account or any other product, are designed and intended to spark an interest, not provide all the information appropriate for making final decisions. Just as consumers do not make decisions to purchase a car, carpet, phone, or television based solely on an advertisement, consumers should not substitute bank account advertisements for the Regulation DD and other disclosures that list in a clear and conspicuous manner fees associated with the account.

The proposal would also impose additional pressure to discontinue free checking accounts. As noted, the alternative to avoiding the risk of omitting a fee or providing an incomprehensible advertisements is to refrain from offering what in fact are free accounts, which today are widely available, as GAO has found. [11] Pursuant to the Truth in Savings Act, passed in 1991, accounts may not be advertized as "free" if a minimum balance must be maintained to avoid a periodic fee. The Truth in Savings Act and Regulation DD make a reasonable assumption that the accounts will be used in a certain fashion and that "free" does not mean that there may never be a fee for any service connected with the account. For example, there is a reasonable assumption that people will manage the account and monitor and keep track of their transactions and money. There is also a reasonable assumption that fees may be imposed, for example, for the cost of check printing, ATM use, balance inquiries, and stop payment orders.

However, in contrast, under this proposal, an account potentially is not deemed "free" unless customers have access to all account services or related account services without charge. To assert that an account is not really free if there is the potential for an overdraft fee (or any other fee) is like saying that parking isn't really free if there is any time restriction. Such a strict construction means there is little incentive to offer what is, as a practical matter, a valuable, free account. If the institution may not use the term "free," it loses the marketing value of offering a free account, so the institution might as well charge a monthly or other fee. So long as those fees are clearly disclosed, as they must be under Regulation DD and contract law, there is no need to be so prohibitively restrictive about the use of the term "free."

Adopting an approach inconsistent with the Truth in Lending Act and Regulation DD also creates confusion, not only for compliance officers but for examiners. As noted, Regulation DD permits accounts to be described as "free" so long as there is no minimum balance requirement in order to avoid a periodic fee. In addition, it permits describing accounts as free in advertisement promoting overdraft protection services so long as overdraft costs are noted.

[11] "Bank Fees," January 2008. http://www.gao.gov/new.items/d08281.pdf

The proposal calls into question whether institutions may use the term free as permitted under Regulation DD by calling into question the ability to use the term “free” in any account advertisement without disclosing every potential fee the customer might incur. In effect, the proposal would make it impossible, as a practical matter, to use the term “free” to describe any account and not risk an examiner’s citation for a violation.

Furthermore, the proposal notes that it is “particularly true” that marketing that focuses on “free” or “inexpensive” without providing information about overdraft fees is when customers are *automatically enrolled* into overdraft protection. Given that Regulation E now prohibits automatic enrollment for most debit card overdrafts, the provision is clearly targeted at the traditional, historical, and expected practice of paying check and ACH overdrafts on a discretionary basis without specific consent. The proposal’s approach to automatic enrollment into ACH and check overdraft protection seems to ignore studies that indicate people expect and want institutions to pay such overdrafts, particularly those related to important payments, and that they are willing to pay for it. To the extent that OTS asserts that use of “free” in connection with accounts that provided standard overdraft services for checking, ACH and recurring debit should be different when such coverage is opt-in versus when it is opt-out, ABA strongly disagrees and urges OTS and the agencies to conform to the standards applied under Regulation DD in such circumstances.

Finally, OTS improperly applies FTC Act precedent when it suggests that describing certain features as “free” in one bundled account package as opposed to how they are described in another is deceptive based on the “2 for 1” case precedent. Clearly, changing prices of one product to misrepresent the price (not cost) of a combination purchase is entirely different than pricing two separate bundles of features in two different account offerings. Consumers presented with a choice about whether they prefer an account with overdraft fees, but no maintenance fees or an account with maintenance fees, but no per item overdraft fees is not deceived when the second account bundle is described as having “free” overdraft protection and the first is described as “free maintenance.” A consumer acting reasonably under the circumstances has all material information to make a choice—and the institution is the one who suffers from adverse selection by having the chronically overdrawn customer choose the “free” overdraft protection account.

Clarify that fees will reduce the amount of overdraft protection provided.

The proposal restates the current Overdraft Protection Guidance that institutions alert consumers that overdraft fees and overdraft items will be subtracted from the overdraft protection limit disclosed. The proposal deems failure to do so to be deceptive because failure to do so might cause a consumer to proceed with a transaction on the basis that it will be covered by the overdraft protection, when in fact the transaction will be denied or the item returned. It appears that this disclosure is not limited to overdraft promotional materials and must also be contained in all general account disclosures and advertisements.

As noted in our general comments about OTS's deceptive practices analysis, the vagueness of the assertion of where and when the omission occurs for it to be deceptive is a fundamental obstacle to reaching a valid UDAP conclusion that a consumer acting reasonably under the circumstances is deceived. In addition, the OTS performs an incorrect analysis of materiality when it presumes that a consumer is making a conscious choice to overdraw when the reality is that standard overdraft protection services are explicitly disclosed as discretionary and are intended for inadvertent overdrafts or situations of uncertainty about one's balance. OTS provides no evidence that the predominant profile of the reasonable consumer is one who intends to overdraw—clearly the purchaser of the apocryphal cup of coffee is not intending to overdraw. Furthermore, as a general matter, the industry does not promote these plans as designed for those who set out to overdraw knowingly their accounts—and OTS does not prove otherwise. In other words, typical customers overdraw because they mistakenly believe they have money in their account, not because they consciously believe they have not yet exceeded the generally unknown and/or variable discretionary overdraft allowance. Therefore, OTS's deception analysis is predicated on an incorrect view of what constitutes the reasonable consumer acting under ordinary circumstances. There is no UDAP violation.

As noted earlier, the OTS should balance the need to disclose this kind of detail in all account disclosures, including marketing, with the goal of providing account information most important to most consumers in a digestible, meaningful manner. To avoid any suggestion or examiner assertion that the institution is engaged in deceptive activities, the natural and safe response is to over-disclose and include this detail in all materials – which ultimately is not consumer-friendly. Given that the Board has already addressed the core issue associated with overdrafts – debit card overdrafts – and requires that consumers receive a special opt-in notice, it is not necessary to include and highlight this information in every document or advertisement related to checking accounts. Moreover, if it is determined that such information should be contained in overdraft marketing materials, the matter should be addressed under Regulation DD which already contains provisions requiring certain disclosures in overdraft protection promotional materials.

Demonstrate when multiple fees will be charged.

The current Overdraft Protection Guidance recommends that institutions "promoting overdraft protection programs" clearly disclose that more than one overdraft fee may be charged each day. The proposal continues that omitting such information is deceptive, "whether a saving association promotes overdraft protection or not." The provision appears a bit contradictory, appearing initially to apply only to institutions that promote overdraft protection, but then stating that it applies whether or not the institution promotes such programs.

As with our comments to the other provision requiring additional overdraft protection program information, the OTS should balance the effectiveness and value to consumers of providing such detail in any and all general disclosures and marketing. If it is determined it is appropriate to include this information with overdraft protection marketing materials, the matter should be addressed under Regulation DD to facilitate compliance and ensure consistent regulations.

In any case, the failure to omit an explicit multiple fees statement from an advertisement that states a per item fee for overdraft is not actionably deceptive. Customers will receive the account fee disclosure that will state whether the overdraft fee is per item long before they get their debit card and inadvertently incur their first overdraft. The UDAP standards require a consumer to act reasonably under the circumstances which means to act based on information about the costs and benefits of the account provided at account opening. A consumer acting reasonably is not one who selectively relies on marketing information that is subject to interpretation and disregards the terms of use agreement that accompanies the product obtained and that clarifies the incidence of the charge.

Explain the impact of transaction–clearing policies.

The current Overdraft Protection Guidance recommends that institutions must also explain that transactions may not be processed in the order in which they occur and that the order of processing and clearing may affect the total amount of overdraft fees charged. The proposal encourages institutions to clearly disclose their processing and clearing policies and provides that failing to disclose both the processing order and the impact on overdraft fees is deceptive and violates both the FTC Act prohibition against deceptive practices and the OTS's advertising rule.

We agree that disclosing generally that the processing order may impact the total amount of fees should, where applicable, be encouraged as an aspirational practice. However, a provision that makes not accurately disclosing payment order "deceptive," especially when it is not clear exactly when and where it is to be disclosed, ignores the history of legal challenges to both payment order and disclosure of payment order. In effect, it will be virtually impossible for an institution to comply without either violating the Supplemental Guidance or inviting an expensive lawsuit or both. Moreover, while consumers may understand and find useful general information, such lengthy detail in potentially all account information materials simply numbs them and discourages review of any materials.

Satisfying a requirement to disclose "clearly" processing and clearing policies is virtually impossible. As is demonstrated by significant litigation related to payment order descriptions and practices, payment order explanations can be difficult if not impossible to explain completely and accurately without going into excruciating detail. For decades, institutions have been sued for paying one way or the other and for not paying precisely as disclosed. For these reasons, payment order explanations are either very general or incredibly detailed and would not comply with the proposed requirement.

Moreover, the complexities that payment settlement order generates due to the myriad circumstances that can effect presentment, system delivery and technical processing defy the reasonable customer's ability to sensibly act on. In other words, disclosure of a detailed clearing policy will only invite unwarranted reliance by those consumers who think they can game the system in the face of unknown contingencies instead of actually responsibly managing their funds to keep from spending more than they have. The days when people's parents taught them to successfully "play the float" are long gone and suggesting that one can outwit the payment system to spend money that is not there should not be the message inferred from a clearing policy disclosure.[12]

For these reasons, we believe that a general explanation that payment order might affect the number of overdraft fees imposed is sufficient: it alerts the consumer to the consequences without overloading them with complicated information and without subjecting institutions to litigation and violations they will not be able to avoid. Accordingly, ABA urges OTS and the agencies to reconsider the policy value of encouraging institutions to disclose clearly processing order and clearing policies in anything but the most general manner.

Beyond the practical implications of requiring such a detailed disclosure, the OTS's assertion that omitting a clearing policy disclosure constitutes deception is fatally flawed. The analysis assumes a default order for consumers that is not proven and is highly questionable. On what record does OTS assert that omitting a payment order disclosure leads a consumer to believe that "transactions will be processed in the order in which they have occurred?" Can OTS really believe that in the absence of a payment order disclosure consumers think that when they mail a check to the phone company and then walk to the ATM across the street from the mailbox that the check will clear before the ATM

[12] Imagine e.g., "if x then y except when z occurs in relation to w for a debit card transaction larger than a check unless there was a scheduled ACH before 8:00 pm."

withdrawal? ABA believes that calm reflection suggests that in the absence of a clearing policy most people will think that transactions clear when they clear – an order they cannot predict or guess correctly. In the absence of a processing order disclosure, the customer has no basis to think banks will organize in any particular order by size, type, or chronology. Omission does not create a presumptive reliance on any particular clearance c order for UDAP purposes. Consequently, if they do not want to overdraw their accounts, they should not presume to spend more than they are confident has already appeared in their account, given the hold policies that Regulation CC applies to their deposits.

For these reasons, we believe that a general explanation that payment order might affect the number of overdraft fees imposed is all that an aspirational recommendation should require; it alerts consumers to the consequences without overloading them with complicated information and without subjecting institutions to litigation and violations they will not be able to avoid.

Promptly notify consumer of overdraft protection program usage each time used.

The current Overdraft Protection Guidance advises institutions to promptly notify consumers of overdraft protection program usage each time used. The proposed Overdraft Protection Guidance provides that failing to do so, "including failing to provide a consumer with the information necessary to return the account to a positive balance" is deceptive. The rationale is that consumers may be misled into believing that the balance is positive and influence their decision whether to make a deposit or proceed with a transaction that may cause an overdraft and fee. In addition, the proposal adds, "Where technologically feasible to do so, real time notification should be provided." It is not clear whether institution must offer, for example, e-mail alerts, in-person notices, or text or phone messages.

We agree that institutions should notify consumers promptly when an overdraft occurs and believe that the vast majority of institutions currently do so. However, the proposed requirements for avoiding charges of and liability for deceptive practices are dangerously vague, given that making an "incorrect" judgment will draw a charge of deception or unfairness. Yet, providing clarity in the proposal means imposing rigid and inefficient standards and locking in current technology. This provision again illustrates the difficulty and limitations of classifying failure to follow best practices as an unfair or deceptive practice. Institutions need absolute clarity given the consequences, but may end up with inefficient, costly, intractable, and ineffective solutions.

The provision requires that "where technologically feasible to do so, real time notification should be provided." This seems to suggest that email, phone, and/or text message are all required as all are arguably "technologically feasible." Given that all are arguably "technologically feasible," must all institutions now provide multiple options, whether or not they currently communicate using any or all of these channels? If it is "technologically feasible" to notify by email or text message, how must institutions provide notification for customers who do not have or have not agreed to such communication channel? Must they phone those customers? Other issues arise. For example, the Federal Communications Commission is currently considering a proposal that in effect would prohibit entities from calling or texting customers absent a laborious consent form that consumers are unlikely to agree to. (See attachment 2.)

Moreover, the proposed requirement to provide real-time notification by regulation in effect absolves consumers from responsibility for managing their accounts, which is easier and easier to do given the multiple instant-access channels available and sends the inaccurate and harmful message that it is the institution that is responsible for managing its customer's account rather than the customers'. As already noted, overdrafts are easily avoidable and most customers avoid them. And the new Regulation E requirement to opt-in for debit card overdraft protections means that people need do nothing to avoid completely debit card overdraft fees, the source of the concern and complaints about overdraft fees. Requiring that institutions use resources to provide "instant" notification from multiple channels for the relatively small percentage of people who overdraw means imposing the cost of account mismanagement on those who manage their accounts well.

Many institutions will immediately mail a paper notice of an overdraft, which arrives in a timely fashion. Of course, many institutions may choose to provide various real-time options as a matter of customer service, and we agree it should be encouraged. However, encouraging a best practice and providing flexibility is very different from a vague mandate coupled with threats of unfair or deceptive practices charges with significant adverse consequences. For these reasons, we recommend that the Overdraft Protection Guidance focus on best practices rather than unfair or deceptive labels that will lock institutions into existing technologies so as to encourage flexible and effective practices.

Inform consumers when access to overdraft protection services will be or has been reinstated after suspension.

The proposal adds a new provision that it is deceptive to fail to "notify" consumers about the "circumstances" in which overdraft protection may be reinstated after suspension, e.g., when a deposit clears the outstanding overdraft and fee balance. We agree that institutions should generally ***disclose***

to (rather than "notify") their customers when overdraft protection may be reinstated after suspension (e.g., a deposit clears the account) so that they do not mistakenly overdraw their account on the incorrect assumption that sufficient funds are in the account because the transaction was approved. However, the detail and depth of such a notice should be balanced with the length and importance of other required disclosures and the goal of ensuring disclosures are digestible and likely to be read. As we believe that consumers readily understand that the overdraft service is usually automatically available once the account has additional funds, any notice should be brief and general. In addition, any notification must also comply with requirements to ensure that customers understand that the institution's approval is discretionary and not guaranteed. Institutions should not have to disclose what factors they use for individual transaction decisions or in determining a customer's continued eligibility.

As with other proposed provisions, however, our concern is that this notice requirement suffers from the same vagueness that in effect is a trap for unavoidable violations and will lead to information overload. When, how, and what must the institution disclose to avoid a deception allegation? Must institutions explain every conceivable situation when protection may be reinstated? What if the institution's policies or practices change? When the failure to comply is deemed to be deceptive, the only safe route then is to over-disclose in all communications, which is not useful or helpful to consumers.

The draft is also confusing because initially it appears that it envisions a general notice rather an event-triggered disclosure be provided with each reinstatement. However, the proposed language, "Failure to provide this information, particularly when a consumer has been previously notified that overdraft protection has been suspended," suggests a specific notice upon reinstatement, not a general disclosure about practices. Equally, use of the term "notify" rather than "disclose" suggests a notice upon reinstatement.

We also do not believe that notice upon every reinstatement should be required. While many institutions provide notices of formal suspension and reinstatement, for example, based on excessive use or failure to bring balance to positive status, it is only when more formal action is taken, not, for example, simply because overdraft protection is again available because the account has a positive balance due to a deposit. Indeed, consumers readily understand that the overdraft service is again automatically available once the account has funds, and presumably, they are aware of deposits they make. This is what consumers expect. Accordingly, notices are not necessary each time the service again becomes available.

In many cases, requiring a notice of reinstatement logically requires a notice of suspension to avoid confusing consumers. Providing notices each time the service is not available and again when it is available, would create a flurry of unnecessary notices that overwhelm and confuse consumers. Institutions already provide notices of the overdraft, which should be sufficient to alert customers of the status of their accounts and availability of overdraft protection.

In addition, any such notice requirement might make institutions more conservative about formally suspending overdraft protection services for excessive use or abuse, which seems contrary to the intent of the proposed supplemental guidance.

We are also concerned that requiring a notice each time the service is available and not available again reinforces with consumers the notion that they have no responsibility for managing their account or monitoring transactions for spending and other reasons.

B. Program Features and Operation

1. Provide consumer choice.

The proposal notes the new Regulation E requirements that customers obtain the affirmative consent before an institution may impose an overdraft fee for an ATM and one-time debit card overdrafts. The OTS recommends in the proposal that as a best practice, institutions also provide opt-in to transactions outside the scope of Regulation E's requirement, i.e., to check and ACH transactions. The proposed guidance does not state that failure to do so is unfair or deceptive. However, it does relate opt-in to ensuring an informed choice. This premise opens up the possibility that failure to have opt-in for check and ACH overdrafts impairs the consumer's decision and is consequently deceptive or unfair.

As discussed earlier at length, this "suggestion" that institution's offer opt-in for check and ACH overdraft protection seems at odds with consistent consumer research that indicates the vast majority of consumers expect and appreciate having such overdrafts paid because they tend to be important payments. Accordingly, the "default" should be that check and ACH transactions will automatically be covered by overdraft protection, as consumer have come to expect and overwhelmingly welcome.

2. Reasonably limit aggregate overdraft fees.

OTS notes that the 2005 Overdraft Guidance advised institutions to *consider* providing a daily cap on overdraft fees as a best practice. ABA believes that the need for this practice is attenuated as a result of the opt-in and unfettered revocation of opt-in afforded by the new rules. This protected affirmative choice enables consumers to manage their exposure to overdrafts caused by small debit transactions that could trigger multiple daily fees when the customer is being inattentive to their balance status. Customers who do not want to risk paying overdraft fees for small debit transactions or find after incurring such multiple fees that they prefer to avoid such occurrences in the future are perfectly free to opt-out or revoke their opt-in and establish a hard cap against such fees.

Nevertheless, ABA does not oppose an aspirational recommendation that banks "consider a daily cap on overdraft fees." In fact, today many banks have provided for such caps and others are planning on introducing such caps to their programs. While the presence of caps may influence some customers about whether they should opt-in or not, there is no basis under UDAP to conclude that failing to implement a daily cap on overdraft fees is unfair. As we demonstrate in our 2008 comment, overdraft fees are reasonably avoidable by consumers exercising reasonable care in managing their transaction accounts. OTS and the other banking agencies jointly issued and endorsed a consumer brochure that provides a number of easy ways for consumers to avoid overdrafts. ABA believes that such advice remains relevant and has itself updated the interagency brochure to cover the options distinguished in the new rules. (See *Understanding Overdraft Options*, an ABA Bank Stuffer available at http://www.aba.com/Products/StatementStuffers.htm)

OTS's expressed concern for a subset of customers who may have limited options for obtaining alternative overdraft services does not change the unfairness analysis, since the ultimate choice of refusing coverage for overdrafts is readily available and its exercise makes incurring overdraft fees reasonably avoidable. In any case, there is nothing that the institution does to impair the customer's decision about electing coverage or trigger a specific series of multiple overdrafts that meets the established standards for a UDAP violation.

The Interagency UDAP Guidance states in paraphrase of the FTC Act Unfairness Statement, "The agencies will not second-guess the wisdom of particular consumer decisions. Instead, the agencies will consider whether ***a bank's behavior*** unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making." (Emphasis added.) Whether a bank establishes any daily cap—let alone the specific caps proposed by OTS—does not constitute bank behavior impairing the customer's voluntary decision whether to elect overdraft protection coverage or when to use it.

OTS's unfairness analysis is also flawed when it weighs consumer harm against benefits to consumers and competition. When establishing a standard for overdraft programs in general, it is not appropriate to conduct cost benefit analysis by eliminating the benefits to the entire market. The value of providing overdraft protection to all customers of the savings association industry is a function of the value of all the transactions that are processed in accordance with customer payment preferences measured by the full amount of the transaction, not the amount of the overdraft. When homeowners pay their $1000 monthly rent by debit card and overdraw by $30.00, they are getting the full benefit of paying $1,000 on time for their $25.00 fee. These benefits add up over the entire market, even if some customers pay too much for the apocryphal cup of coffee. OTS, as the agency that asserts the unfairness of not implementing its proposed caps, must build the factual record that in the absence of such restrictions, the costs to a few exceed the benefits to the many and are not reasonably avoidable.

Another flaw in OTS's analysis is the strong suggestion that it is influenced by prior public policy. The entire predicate to the discussion of limiting aggregate fees is expressed as OTS' prior history on insisting on "reasonable fees." Yet, it is accepted that public policy should not be the motivating basis for an unfairness conclusion. While OTS may have plenary authority to dictate pricing calculations on savings association products under Home Owners Loan Act, asserting such authority within the UDAP framework does violence to established FTC Act section 5 precedent upon which other agencies depend.

Finally, ABA finds the OTS proposal of particular caps to be vague and arbitrary. We believe that this is due in no small measure to the fact that the agency is working from its experience with a single enforcement case and a handful of supervisory instances arising from facts pre-Regulation E amendment. As we have urged earlier, ABA strongly advocates that OTS base any forward looking overdraft protection guidance on industry experience in implementing the new rules rather than on facts under past prevailing circumstances. The world of overdraft protection programs under opt-in debit promises to look considerably different than it did in the years before.

The proposal specifically highlights two circumstances where the harm outweighs the benefit: where the "consumers' aggregate overdraft fees" exceed:

- the average daily balance of their accounts or
- the overdraft limit on their accounts.

The proposal is not specific, but it appears that the proposal is referring to the "monthly" aggregate overdraft fees."

While we agree that caps can be encouraged, and the trend is the industry is increasingly to adopt them, the proposal suffers from the same shortcoming regarding vagueness when failure to comply is deemed to be unfair or deceptive. It is difficult to see how an institution could be confident of compliance, even with the proposed examples of when harm outweighs the benefit. In effect, an examiner, state attorney general, or other may always challenge any fee under the proposed standard. The “right” fee is a moving, subjective target. The only safe alternative is to charge no fee, that is, pay no overdrafts, even though consumers have consistently indicated that they want important payments paid and are willing to pay for the accommodation, especially those who have expressly asked for the service, which they must now do for debit card overdraft protection.

The vagueness of the proposal is not offset by the specific examples related to average daily balances and amount limits as nothing indicates that they are “safe harbors.” Indeed, the proposal, having suggested them as standards, then curiously notes that the OTS would not expect most institutions to reach such levels. Further, the proposal does not state that caps based on the proposed standards are *not* unfair or deceptive, so they may be challenged.

In addition, there is no indication of why or how these standards were selected. Nor do they present practical solutions. For example, many institutions vary the “limit” on a daily basis based on programs that rely on patterning to inform them about the needs and eligibility of the customer based on “safe and sound” practices. Thus, is will not be feasible to limit the aggregate fees based on the overdraft limit.

Equally, the average daily balance standard is vague and arbitrary. The proposal does not indicate over what period the “average daily balance” is to be calculated. It also appears to assume that those with low average daily balance have low income. It many cases, customers keep low checking account balances because excess funds will usually earn a higher rate of return if placed elsewhere. Many accounts with low average daily balances also have a lot of activity with regard to deposits and payments, suggesting that the account holders are not low income. [13]

Ultimately, ABA believes that any aspirational recommendation to consider applying daily caps may be a component of a future interagency overdraft guidance proposal, but that the OTS should not impose prescriptive

[13] We also question the OTS’s assumption that low income people are more likely to overdraw than others. Moebs Services has found that the only reliable predictor of who will overdraw an account is credit score. (See attachment 3.) This makes some intuitive sense as those who have difficulty managing one financial product may also find challenging managing another finance product. While the FDIC suggested that low income customers are disproportionately impacted, it relied on a geographic surrogate and conducted no apparent account review to confirm the validity of its surrogate. Nor delve deeper into some intuitive inconsistencies with the data.

standards that handicap the savings association charter under either HOLA or UDAP. Nor should a future joint agency guidance piece on fee caps or pricing raise unwarranted unfairness allegations that create undue industry-wide litigation risk when any real offending practices are case specific.

3. Monitor overdraft protection program usage.

Noting the current Overdraft Protection Guidance warning that posting order should not be unfair or manipulated to inflate fees, the proposal explains, “Such a situation would occur, if for example, a savings association varied its transaction-clearing rules on a daily, customer-by-customer basis in order to maximize each customer’s fees.” The OTS adds that “such fee generation not only fails to benefit the market, it suggests a lack of transparency: economically rational consumers would likely move their accounts to other institutions if they understood that their transactions were being posted in an unfair manner.” Accordingly, such practices are “unfair.”

We are not aware of any institution that varies payment order on a customer-by-customer basis. We understand that the Board’s staff is exploring this very issue and urge OTS and the other agencies to coordinate their findings in this area before articulating a supervisory expectation or requirement.

4. Monitor overdraft protection program usage.

The proposal restates the importance of monitoring overdraft protection usage as both a safety and soundness consideration and best practice. We agree that institutions should monitor overdraft protection usage as a matter of safety and soundness and best practices. However, institutions should not be required to suspend overdraft protection services based on an arbitrary, regulatory standard. Different institutions and different customers will have different standards appropriate to their situation and consumers should not be denied services they want, value, and are able to manage.

5. Fairly report program usage.

The proposal notes that the current Overdraft Protection Guidance advises savings associations against furnishing negative information to “credit” reporting agencies. However, in fact, the current guidance refers to “consumer reporting agencies,” which include not only credit reporting agencies, but also, for example, ChexSystems, a negative date base for deposit accounts. The proposal warns institutions of new rules to go into effect July 1, 2010 that will require furnishers to implement written policies and procedures regarding the accuracy and integrity of the information furnished to consumer reporting agencies. The proposal adds, “Furnishing negative information to CRAs when overdrafts are paid under the terms of an overdraft protection program may not be accurate because such information may not reflect the terms of the account or the consumer's performance and other conduct with respect to the account." We agree that institutions should furnish accurate information when reporting to consumer reporting agencies and understand that institutions do not report negative information on customers who have repaid overdrafts as agreed under overdraft protection programs. However, institutions should not be inhibited from reporting accurate, even if negative, information, for example, that an account was closed for failure to pay overdrafts as agreed. Institutions do not seek to find inappropriate reasons to close accounts, and indeed, examiners encourage institutions to take appropriate action when customers do not manage their accounts or repay overdrafts.

ABA believes the OTS's use of UDAP in this proposal is inappropriate for additional reasons.

In addition to the legal shortcomings of OTS's UDAP analysis identified previously, ABA has these additional concerns about the OTS's invocation of UDAP authority in this guidance.

- OTS asserts the deceptive or unfair nature of particular practices in categorical terms that are clearly prescriptive and therefore are essentially rule-makings. OTS has the ability to issue UDAP rules, but it must meet Administrative Procedures Act and other rule-making requirements when doing so. Proceeding in the veiled manner it does here is legally deficient.

- As ABA noted during the 2008 UDAP rule-making, conclusory statements about UDAP vulnerabilities increases private litigation risk and should be appropriately conditioned when applied to the industry in general as opposed to the specific facts of a particular enforcement record.

- ABA has been a supporter of uniform UDAP rule-making where warranted and when conducted in a risk-preventive manner. By the same token, generalized UDAP pronouncements by one agency without the others' contribution and concurrence is disruptive policy-making for an industry whose members should compete on a level regulatory and supervisory playing field as envisioned in Congress' mandate to the FFIEC.

Specific request for comment regarding limits on fees.

The OTS is asking whether it should adopt standards regarding the overdraft fees similar to those adopted by Congress for credit card penalty fees. Congress amended the Truth in Lending Act to require that credit card penalty fees be "reasonable and proportional to such omission or violation." It is not clear what the policy motivation or statutory authority for OTS to adopt a similar standard for overdraft fees nor do we believe it appropriate or necessary.

While institutions have historically paid overdrafts for good customers as an accommodation, and it may be appropriate to do so, the amount of the fee is intended to encourage customers to manage and monitor their accounts and maintain a positive balance. A positive balance is the desired goal of both the institution and the customer. Because the fee is intended as a deterrent, rationally and intuitively, we expect that the amount of a fine does impact behavior, much as parking tickets discourage illegal parking. If parking illegally in rush hour were $10, we would expect many would find commuting times much longer. Indeed, the government and many businesses use penalties in order to influence taxpayer or consumer behavior. The IRS, for example, not only uses potential imprisonment to ensure taxpayers pay taxes and also file their returns on time, it also imposes penalties for filing late or not paying in full. Taxpayers who do not file their returns by the due date usually pay 5 percent of the unpaid taxes for each month or part of a month that a return is late, not to exceed 25% of unpaid taxes.[14]

Moreover, setting the rate too low may actually encourage the behavior the fee is intended to discourage, as studies have demonstrated. For example, a study showed the reaction of parents when a flat $3 fee was imposed on parents arriving more than 10 minutes late to retrieve their children from day care. The result was not fewer late parents, but rather the opposite: more late parents than when there was no charge for late retrieval. The number of parents arriving late actually doubled.[15] The fee in fact became a *license* to arrive late. A more substantial fee was warranted to actually reduce late retrieval behavior.

Measuring the threshold amount when a penalty fee becomes effective is challenging. First, for any test or standard, the deterrence amount will be on a sliding scale. The threshold will not be the same for everyone, and it is not clear where an appropriate cut-off should be. Second, there may be significant shortcomings to any "empirically derived, demonstrably and statistically sound" model or similar model that reasonably estimates the effect of the amount of the fee on the frequency of an overdraft that will make it difficult if not impossible to use.

Thus, if the fee is not set high enough to provide an incentive to monitor an account, customers are less likely to monitor and manage their accounts. However, monitoring a checking account is important not only to avoid

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14 See http://www.irs.gov/newsroom/article/0,,id=205326,00.html

15 Steven .D. Levitt Stephen J. Durner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (HarperCollins, New York 2005) pp 15, 16, 19.

overdrafts, but to avoid over-spending and detect identity theft and other types of fraud. In effect, without a penalty fee, there is less reason to manage the account and spending.

Moreover, if the fee is not sufficient to recover costs, including the potential for a loss, check and ACH transactions will simply be returned, which is not a consumer-friendly result, given that consumer testing has found consumers want such payments paid, given the adverse consequences of returned payments.

Finally, if fees are properly disclosed, understood, and avoidable, they are arguably "reasonable" as the customer is making the choice. Indeed, debit card overdrafts because of Regulation E are by definition "reasonable" if one gives any credit to consumers who are actually agreeing to pay them: the customer, after clear disclosure of the fees and alternatives to avoid overdraft fees, must expressly request the option to pay for debit card overdrafts. Who better to decide than the informed person agreeing to pay the fee?

Conclusion.

ABA appreciates the opportunity to comment on this important matter. We support updating and replacing the original Overdraft Protection Guidance and agree with many of the concepts set forth in the proposed Supplemental Guidance. We strongly recommend, however, that the OTS work with the other agencies to replace rather than supplement existing guidance. Updated guidance should integrate changes to Regulations E and DD rather than add one more, separate layer of overdraft regulations. Moreover, advertisement requirements and disclosures to consumers should be addressed in Regulation DD and should be noticeable, clear and brief so that consumers will be likely to read and understand them. New guidance should also recognize that consumers overwhelmingly want important payments, such as check and ACH transactions, paid, even if it means incurring a fee. Finally, for numerous reasons, UDAP is not the appropriate mechanism to address overdraft protection programs, especially under a document identified as "Guidance." Instead, the Overdraft Protection Guidance should offer best practices that are aspirational rather than mandatory to ensure flexibility and continued consumer understanding and choice.

Regards,

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