ABA Staff Analysis: FDIC Overdraft Payment Supervisory Guidance
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In its introductory statements, the FDIC states that it is “particularly concerned” about the risks posed by automated overdraft payment programs, and that the “focus of the guidance” is not on ad hoc overdraft payments or linked lines of credit.

The Guidance reminds banks that overdraft payment programs will be reviewed at each examination and those found to pose unacceptable safety and soundness or compliance risks will be factored into examination ratings and corrective action will be taken where necessary. The Guidance also states that section 5 of the FTC Act will be used to enforce compliance by banks and third-party service providers.

Finally, the Guidance states that any additional efforts to mitigate risk should be in place by July 1, 2011.

The FDIC articulates the following supervisory and regulatory expectations:

1. Implement effective compliance and risk management systems, policies, and procedures in accordance with Reg. E and the 2005 Joint Guidance on Overdraft Protection Programs, and all applicable laws and regulations.

2. Ensure that customer communications – agreements, correspondence, marketing materials, etc. – present information accurately and are not misleading.

3. Review marketing, disclosure and implementation of programs to minimize potential customer confusion and promote responsible use.

4. Train staff to explain program features and other choices.

5. Distinguish account balance from any available overdraft coverage amounts.

6. Ensure that Boards of Directors provide “appropriate oversight” of programs including an annual review of an overdraft program’s key features. Ensure “ongoing and regular” management oversight of program features and operation.

7. Monitor programs for excessive or chronic use, and if a customer overdraws his or her account on more than six occasions where a fee is charged in a rolling twelve-month period, undertake meaningful and effective follow-up action, including:
   - Contacting the customer (in person or by telephone) to discuss less costly alternatives.
   - Giving the customer a reasonable opportunity to decide whether to continue fee-based overdraft coverage or choose another available alternative.

8. Institute appropriate daily limits on customer costs by:
   - Limiting the number of transactions subject to a fee or
   - Limiting the total fee imposed in one day

9. Consider eliminating overdraft fees for transactions that overdraw an account for a “de minimis” amount. If a fee is charged, the fee should be “reasonable and proportional” to the amount of the original transaction.


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10. Consider providing text message, email, or cell phone alerts to customers when their account balance “is at risk for generating a fee for nonsufficient funds.”

11. Consider providing information to consumers about how to access free or low-cost financial education workshops or individualized counseling.

12. Review check-clearing procedures to ensure they operate in a manner that avoids maximizing customer overdrafts and related fees through the clearing order. The Guidance adds, “examples of appropriate procedures include clearing items in the order received or by check number.”

13. Monitor and, where necessary, mitigate credit, legal, reputational, safety and soundness, and other risks arising under Section 5 of the FTC Act, ECOA, TILA, EFTA and their implementing regulations.

14. Allow customers to opt-out of overdraft coverage for check and ACH transactions.

15. Do not attempt to steer frequent users of fee-based overdraft services to opt in while obscuring the availability of alternatives. The guidance reminds institutions that steering or targeting customers on a prohibited basis raises Equal Credit Opportunity Act (ECOA) concerns.

16. Do not target customers through aggressive advertising or other promotional activities.

17. Remind customers – especially chronic users – that they can revoke their opt-in at any time.

Questions? Contact Virginia O’Neill for more information.

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