ABA Staff Analysis: OCC Guidance on Deposit-Related Consumer Credit Products
June 2011

Relying on its authority to ensure that national banks – and after July 21, 2011, federal savings associations – engage in safe and sound banking practices, the Office of the Comptroller of the Currency has published proposed Guidance on Deposit-Related Credit Products (Guidance). The Guidance describes general “principles” the OCC expects national banks to follow in connection with any deposit-related consumer credit product to address potential operational, reputational, compliance and credit risks,” and two appendices to the Guidance illustrate application of these principles to two specific consumer credit products, automated overdraft protection programs (Appendix A) and deposit advance products (Appendix B).

The OCC states its intention is “to provide a high degree of flexibility for banks to structure and operate their programs in a prudent and safe and sound manner that provides for fair treatment of customers without dictating specific product terms.” In addition, it notes its expectation for “bankers and examiners to use sound judgment and common sense when applying these principles to specific programs and products.” As such, the Guidance is not intended to impose specific, prescriptive requirements for the design and operation of consumer credit-related credit products; however, ABA believes that as proposed, it will impose additional requirements for the operation of overdraft programs beyond those recently implemented in response to the amendments of Regulations E and DD. This staff analysis is intended to help identify those elements or “principles” of the Guidance that will require changes to existing policies and procedures and the operation of automated overdraft programs.

We urge members to consider whether (and how) the following elements will necessitate additional changes to the management and operation of automated overdraft programs:

1. Disclosure—Customers should be provided clear and conspicuous disclosures prior to enrollment, consistent with applicable law, about program costs, terms, and material limitations before they are provided a deposit-related credit product. Customers also should be provided information about alternative deposit-related credit products, if any, offered by the bank.

Appendix A would also require banks to provide customers with “clear disclosure about the order of processing transactions and the fact that the order can affect the total amount of fees incurred by a customer.” The relationship of this disclosure to the Fed’s Model A-9 opt-in notice is unclear, but it should be noted that Federal Reserve engaged in extensive consumer testing of the Model A-9 opt-in notice and provided the public with the opportunity to comment on the model form. Moreover, paragraph 17(d) of the Fed’s Official Staff Interpretations carefully prescribes the content of an institution’s description of its overdraft services, a description that mirrors the content of the Model A-9.

- Other than the Model A-9, does your institution provide consumers with a disclosure of your debit card overdraft program?

Note: the italicized text below recites the general principles applicable to all deposit-related credit products. Beneath each general principle, relevant “guidance” applicable to overdraft programs and deposit advance products is discussed and discussion questions are posed.

2 Although throughout the Guidance the OCC uses the words “consumer” and “customer” interchangeably, ABA understands that the agency intends to apply the Guidance only to consumer deposit-related credit products.
3 ABA’s comment letter will also question the OCC’s predicate for issuing this guidance—its responsibility for ensuring that deposit-related credit products are being administered safely and soundly.

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What changes will be required to comply with the suggestion in Appendix A that banks must clearly disclose the order of processing transactions and the fact that the order can affect the total amount of fees incurred by a customer? Can clarity be achieved? What are the risks that this may invite false reliance by customers?

Appendix B would also require an explanation of “transaction processing policies for repayment of a credit advance including, as applicable, the fact that repayment may take priority over the processing of other items such as checks and could result in overdrafts or returned items and associated fees; how the loan must be repaid if a deposit is insufficient; and any rescission or refund policies, cancellation policies, and cooling off periods.”

Do you currently provide similar disclosures?

2. Affirmative Request— Customers should not be automatically enrolled in programs for deposit-related credit products. Enrollment should occur only after the customer has received appropriate disclosures, has made an affirmative request for the product, and has agreed to abide by product terms, including associated fees. Before approving the customer for the product, the bank should have sufficient information about the customer to evaluate that the customer meets the bank’s eligibility standards, as described below. Account materials and marketing should not mislead customers about the optional nature of the product or otherwise promote routine use or undue reliance on deposit-related credit products.

Appendix A clarifies that the opt-in requirement it imposes for overdraft services for check, ACH and recurring debit transactions only applies prospectively.

Do you currently ask customers to opt-in to overdraft protection for checks, ACH and recurring debits?

How will this affect your account opening procedures?

Appendix B also clarifies that the opt-in requirement only applies prospectively and that customers should be informed of their ability to opt-out at any time.

3. Program availability and prudent eligibility standards—Policies and procedures should set forth the eligibility criteria that must be met by a depositor to obtain the deposit-related credit product. An appropriate degree of analysis should be conducted before the request is approved to determine whether the customer will be able to manage and repay the credit obligations arising from the product appropriately.

Appendix A elaborates on the analysis the OCC expects banks to engage in prior to enrollment of a new customer in an overdraft program, “The scope and rigor of this assessment may vary depending on the credit and deposit profile of the customer and other relevant risk factors, but an objective should be to determine whether the customer poses undue risks as indicated by, for instance, a history of overdrawning an account or information suggesting an ability or unwillingness to re-pay credit.”

What eligibility criteria does your bank currently require?

Is the scope and rigor of the evaluation varied depending on the credit and deposit profile of the customer?

Would the quoted text require changes to existing procedures?

Appendix B states that prudent criteria for enrolling a customer in a deposit advance program “would include an assessment of the customer’s willingness and ability to re-pay … based on information about the customer’s continued employment or other recurrent source(s) of income.”

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Do you currently collect this information?

4. **Prudent limitations on product costs and usage**—Deposit-related credit products should be subject to prudent limitations on credit extensions, customer costs, and usage. Fees should be based on safe and sound banking principles, and take into account other appropriate factors including reputation and strategic risks to the bank. For example, a bank should consider the significance of revenue from a particular product and monitor for any undue reliance on the fees generated by that product for its revenue and earnings.

Appendix A states the OCC’s expectation that banks establish the following “prudent programmatic limitations:”

- the amount of credit that may be extended under an overdraft protection program;
- the number of overdrafts and the total amount of fees that may be imposed per day and per month;
- any transaction amount below which a fee will not be charged; and
- in a footnote, a suggestion that banks offer a grace period of one or more days to allow a customer to return an account to a positive balance before an overdraft fee is imposed.

Have you implemented program limitations?

To what extent will these suggestions for “prudent” limitations require changes to your program?

Have you received either positive or negative feedback from your customers about these program limitations?

Appendix B suggests a requirement for *individualized* limitations that “generally take into account the amount of the customer’s recurring direct deposits; the need for a portion of deposited funds to remain available to the customer for daily expenses; account usage; and credit extended to the customer, including other deposit-based loans.” The limits should include:

- The number of periods that back to back advances may be made before a cooling off period may be triggered;
- The number of months in which advances may be outstanding;
- The total amount or percentage of any deposit that may be advanced in any period; and
- The total amount or percentage of any deposit that may be used for repayment of the advance.

In addition, Appendix B states, “These limits should be adjusted, as appropriate, based on risks identified through account monitoring.”

- Are you currently monitoring “account usage” and credit extended to the customer?
- Is this degree of customization of program limits possible? Will these expectations require program changes?

5. **Monitoring and risk assessments**—The volume of, and revenue from, deposit-related credit products and changes in customer usage should be regularly monitored to identify risks. Appropriate action should be taken to address any risks that are identified including excessive usage and nonperformance, such as reassessing a customer’s creditworthiness; adjusting credit terms, fees, or limits; suspending or terminating the credit feature; or closing accounts.

- Do you currently monitor the volume of, and revenue from, deposit-related credit products and changes in customer usage?
- Do you have systems in place to monitor for “excessive use?”

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Appendix A suggests that banks should review and evaluate accounts under the following circumstances:

- The account has incurred overdrafts in excess of the overdraft credit limit applicable to the account;
- The account has incurred the daily maximum number of overdraft transactions repeatedly during any month, whether or not a fee is imposed;
- The account has incurred the daily maximum number of overdraft fees repeatedly during any month; and
- The accountholder is exhibiting excessive usage of other credit products connected to the account.

In these circumstances, the Guidance suggests that the bank should “determine whether the account continues to be viable or whether credit and aggregate fee limits need to be reduced” by “engaging in a more in-depth analysis of the borrower’s ability to manage and repay overdraft protection.”

- Do you currently engage in an evaluation of an excessive user’s ability to repay?
- How will you implement a requirement for a more “in depth” analysis of the customer’s ability to repay?
- Do you have the ability to make individual account level changes to overdraft program limitations?

Appendix A also states that if after account review and making appropriate changes to account limitations, the account continues to demonstrate “excessive” overdrafts, “overdraft privileges should be terminated and, if appropriate, the account should be closed.”

- Do you read this as overruling customer opt-in decisions?

Appendix B requires “reasonable periodic monitoring to ensure conditions have not changed that adversely affect credit risk and to identify excessive usage.” The OCC expects monitoring of overdraft and returned item activity in the account. “Appropriate follow-up” is expected to discuss use of the account, repayment options, and credit alternatives.

Under a special heading, Repayment Terms, the OCC states its expectation that:

- When program terms allow for “substantial” advances relative to the regular, recurring deposit amount, repayment should be permitted over an extended period of more than one month; and
- Banks should not allow repayments of deposit advances that would overdraw an account.

- Are you currently monitoring these accounts? What are you monitoring – for changed circumstances and/or excessive use?
- When changed circumstance or excessive use is identified, what follow-up action do you take?
- What program changes will be required to comply with the provisions on repayment terms?

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\textsuperscript{4} Id. at 33413.

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6. **Management oversight**—Bank management should exercise appropriate oversight of new products and services, through receipt and review of new products and services, through receipt and review of regular reports on product usage, fee income, and legal compliance, and through periodic audits. Appropriate oversight includes monitoring of third-party vendors that provide services related to the product. Bank management should be vigilant in assuring adherence to these principles and should take immediate steps to address noncompliance and reputation risks.

Appendix A and B state that these reports should include regular reports on overdraft (or deposit advance) volume, profitability, and credit performance. In addition, these reports should segment accounts to identify excessive use and should include information on the status and outcome of internal reviews and evaluations of excessive users.

- Are you currently providing reports on program volume, profitability and credit performance? On the status and outcome of internal reviews and evaluations of excessive users?

7. **Account management and charge-offs**—Applicable guidelines on account management and charge-offs of uncollectible balances also should be followed.

Appendix A adds that overdraft protection should be suspended when the customer no longer meets the eligibility criteria, has declared bankruptcy, or is in default on repayment of an overdraft or any other loan with the bank.

- What additional monitoring responsibilities will this impose? Is the bank informed when a deposit customer declares bankruptcy?
- Other thoughts or concerns?

Comments are due on July 8, 2011.

Questions? Contact Virginia O’Neill for more information.

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